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Judge Advocate General's Department

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CM 249004 to CM 250484

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

SPJGN
CM 249004

12 FEB 1944

UNITED STATES v. Second Lieutenant JOHN S. ELLIOTT (0-1016421), Troop E, and Second Lieutenant WILLIAM K. GIBSON SR. (0-1017697), Troop A, both of the 88th Cavalry Reconnaissance Squadron Mechanized.	)	EIGHTH ARMORED DIVISION Trial by G.C.M., convened at North Camp Polk, Louisiana, 7 January 1944. Dismissal and total forfeitures.

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 officers named above and submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that 2nd Lt John S. Elliott, did, without proper leave, absent himself from his command and from his duties as a XIX Corps Umpire for the 8th Armored Division "D" Series at the 88th Cavalry Reconnaissance Squadron (Mechanized) in bivouac 2½ miles east of Rosevine, Texas, from about 1800, 16 December 1943 to about 20 December 1943 when he reported to the Office of the Provost Marshal, City Hall, Waco, Texas.

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

Specification: In that 2nd Lt. William K. Gibson Sr., did, without proper leave, absent himself from his command and from his duties as a XIX Corps Umpire for the 8th Armored Division "D" Series at the 88th Cavalry Reconnaissance Squadron (Mechanized) in bivouac 2½ miles east of Rosevine, Texas, from about 1800, 16 December 1943 to about 20 December 1943 when he reported to the Office of the Provost Marshal, City Hall, Waco, Texas.

Each accused pleaded guilty to and was found guilty of the respective Charge and Specification applying to him and each 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, appending to his action the recommendation "that the execution of the sentence, insofar as it relates to Second Lieutenant William K. Gibson, Sr., be suspended during the pleasure of The President".

3. The evidence for the prosecution shows that on 15 December 1943, during a break in manuevers in which both the accused were officiating as umpires, they received verbal permission from their respective commanding officers, in bivouac 2½ miles east of Rosevine, Texas, to visit the nearby town of Hemphill, Texas, with instructions to report back to their respective organizations on the following day. Both failed to report on 16 December 1943, remaining absent without leave until 20 December 1943, when they reported of their own accord to the office of the provost marshal in Waco, Texas. Pursuant to written orders issued by the provost marshal, both returned to their ogranizations on or about 23 December 1943 (R. 6-9; Exs. A, B, C).

The accused were accompanied to Hemphill by Lieutenant Clifford F. Thompson, who had also received permission "to clean up and take a bath and to spend the night there", and who testified that all three,

> "* * * were supposed to return the next night or at 6:00 o'clock the following day. We spent the night there in the hotel and had planned on returning the following afternoon. The following afternoon we had a ride back to the bivouac area but Lieutenant Elliott and Lieutenant Gibson decided to stay a little longer and said they would return later that same day. I went on and they said they would be along later. I did not see them again."

None of the three purchased or had in his possession any alcoholic beverage while Lieutenant Thompson was with the accused (R. 10-11).

4. The evidence for the defense, elicited on cross-examination from the prosecution's witnesses, shows that Captain Richard C. Gales, to whose troop the accused Gibson was attached during the maneuvers, had found him to be "very energetic in his work" and "was very surprised when this happened". Lieutenant Thompson, who had known the accused Gibson since April 1943, testified that he would rate him "Excellent" or "Superior" in evaluating his efficiency as an officer during that period (R. 7, 11).

Captain Donald J. Breen, to whose troop the accused Elliott was attached during maneuvers, considered "Excellent" an appropriate rating for his efficiency as an umpire, but, as an officer "would never give Lieutenant Elliott a better rating than 'Satisfactory'". Lieutenant Thompson, who had known the accused Elliott since March 1943 would rate him "Excellent", in evaluating his efficiency as an officer (R. 9, 11).

5. The accused Elliott made an unsworn statement that, on 16 December 1943, he purchased some alcoholic beverage in Hemphill, Texas, which, to the best of his knowledge, is located in a "dry" county. The accused Gibson, in an unsworn statement, agreed with his co-accused's statement "in full" (R. 12-13).

6. The uncontradicted evidence fully corroborates the accused's plea of guilty, establishing beyond a reasonable doubt their commission of the offenses with which they are charged and sustaining the findings of guilty as to each, in violation of Article of War 61.

7. Each accused is 29 years of age. The records of the Office of The Adjutant General show enlisted service for Elliott from 3 June 1941 until temporarily commissioned a second lieutenant, AUS, 27 February 1943; enlisted service for Gibson from 26 March 1942 until temporarily commissioned a second lieutenant, AUS, 17 April 1943.

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

Abner E. Lifscomb, Judge Advocate.

Benjamin R. Shafer, Judge Advocate.

Fabrie H. Golden, Judge Advocate.

(4)

SPJGN
CM 249004

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 S. Elliott (0-1016421), Troop E, and Second Lieutenant William K. Gibson Sr. (0-1017697), Troop A, both of the 88th Cavalry Reconnaissance Squadron Mechanized.

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 as to each accused be confirmed, but that the forfeitures be remitted, and that the sentence as thus modified, be, as to Lieutenant Gibson, suspended during the pleasure of the President, and as to Lieutenant Elliott, ordered executed.

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

Myron C. Cramer

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

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

(Sentence as to each accused confirmed but forfeitures remitted. Execution suspended as to Lieutenant Gibson. G.C.M.O. 159, 7 Apr 1944)

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

SPJGQ
CM 249006

23 FEB 1944

UNITED STATES v. Second Lieutenant JOSEPH VERGARA (O-434821), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Midland Army Air Field, Midland, Texas, 17 January 1944. Dismissal and total forfeitures.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Joseph Vergara, Air Corps, did, at Midland Army Air Field, Midland, Texas, on or about 3 November 1943, with intent to defraud wrongfully and unlawfully make and utter a certain check, in words and figures as follows, to wit:

San Antonio, Texas, Nov 3, 1943 No. 30-65
NATIONAL BANK OF FORT SAM HOUSTON
at San Antonio

Pay To The Order Of Officers Mess $10.00
Ten _____ 00 DOLLARS

Joseph Vergara 0-434821

and by means thereof did fraudulently obtain from Officers Mess, Midland Army Air Field, Midland, Texas, the sum of $10.00, he, the said Second Lieutenant Joseph Vergara, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston at San Antonio, for the payment of said check.

Specifications 2, 3, 4 and 5 are identical with the preceding Specification with the exception of the date, amount and person receiving the check, which details are as follows:

Specification	Date	Amount	Recipient of Check
2	4 November 1943	$10.00	Officers' Mess Midland Army Air Field Midland, Texas
3	4 November 1943	$10.00	Officers' Mess Midland Army Air Field Midland, Texas
4	10 November 1943	$22.88 credit on mess bill	Officers' Mess Midland Army Air Field Midland, Texas
5	10 November 1943	$40.00	First Lieutenant A. M. Carlson

Specification 6: In that Second Lieutenant Joseph Vergara, Air Corps, did, at Midland Army Air Field, Midland, Texas, on or about 1 November 1943, with intent to defraud, wrongfully and unlawfully make and utter a certain check, in words and figures as follows, to wit:

San Antonio, Texas, November 1, 1943 No. 30-65
NATIONAL BANK OF FORT SAM HOUSTON
at San Antonio

Pay To The Order Of Cash $10.00
Ten 00 DOLLARS

Joseph Vergara 0-434821

and by means whereof a holder of such check did secure from Midland Army Air Field Exchange, the sum of $10.00, he, the said Second Lieutenant Joseph Vergara, then well knowing that he did not have and not intending that he should have sufficient funds in National Bank of Fort Sam Houston at San Antonio, for the payment of said check.

Specifications 7, 8, 9 and 10 are identical in form with Specification 6 above with the exception of the amounts, dates, and the organization that cashed the checks, which details are as follows:

Specification	Date	Amount	Cashed by
7	5 Nov 1943	$10.00	Officers' Mess
8	12 Nov 1943	15.00	Officers' Mess
9	3 Nov 1943	10.00	Field Exchange
10	12 Nov 1943	35.00	Field Exchange

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

Specification 1: This Specification is identical in form with Specification 1 of the Charge appearing above, except that the check involved was dated 24 November 1943 and was payable to Elliott Hotel in the sum of $107.11, and the accused was charged with fraudulently obtaining from that Hotel, by means of the check, "the sum of $107.11 as a credit on account".

Specification 2: Identical in form with Specification 6 of the Charge set forth above, but alleging check dated 1 November 1943, payable to the order of cash, made and uttered to Second Lieutenant C. G. Wilshire, at Midland Army Air Field, Midland, Texas, and securing thereby $20.00.

He pleaded not guilty to and was found guilty of all of the Charges and Specifications. There was no evidence of any previous conviction submitted. 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. By voluntary written statements received in evidence without objection, the accused admitted that he made out, signed and negotiated all of the checks forming the Specifications of the Charges. The checks themselves together with the indorsements and attachments were admitted into evidence without objection (Pros. Exs. 1-14, inclusive). These exhibits clearly show that all of the checks were drawn by the accused upon the National Bank of Fort Sam Houston in San Antonio, Texas, and were presented at that bank for payment, but payment thereon was refused because of insufficient funds of the accused on deposit with that bank at the time of presentation. The details concerning each check may be summarized as follows:

Specifications 1, 2, 3 and 4 of the Charge:

During the first few days of November, 1943, the accused made and delivered to the Officers' Mess at Midland Army Air Field three checks in the amount of $10.00 each payable to "Officers' Mess". One was dated 3 November 1943, and the other two were dated 4 November 1943 (Pros. Exs. 3-4-5). He received either cash or merchandise for these checks (R. 21). These three checks form the basis for Specifications 1, 2 and 3, respectively, of the Charge. On 10 November 1943, the accused gave

the Officers' Mess a check for $22.88 in payment of his October Officers' Mess bill (Pros. Ex. 6). This check is the basis for Specification 4 of the Charge. All of these checks were deposited by the Officers' Mess in due course and were all returned by the bank with the notation "Not sufficient funds" (R. 21-22). The Officers' Mess was subsequently reimbursed for all of the checks by the accused (R. 22, 24).

Specification 5 of the Charge:

Sometime previous to 10 November 1943, (exact date not stated in record) the accused had given First Lieutenant Alvin M. Carlson a check for $40.00, which, after he deposited it, was returned unpaid with the notation "Pay check not in" (R. 32). On 10 November 1943, Lieutenant Carlson called the attention of the accused to this fact, and the accused gave him another check, dated 10 November 1943, payable to A. M. Carlson in the amount of $40.00 (R. 31; Pros. Ex. 7). This check forms the basis for Specification 5 of the Charge. On the same day that he received the check, Lieutenant Carlson cashed it at the Post Exchange (R. 28, 31). On 22 November 1943, the check was returned to the Post Exchange unpaid because of insufficient funds, and the Post Exchange Officer called upon Lieutenant Carlson to reimburse the Exchange, which Lieutenant Carlson did (R. 28, 31). The Post Exchange Officer would not give the check to Lieutenant Carlson but instead gave him a receipt (R. 31). The following day Lieutenant Carlson saw the accused at the Officers' Mess, told him about the matter, and the accused gave him a $40.00 check of another officer stationed at Midland Army Air Field, and Lieutenant Carlson gave him the receipt he had obtained from the Post Exchange (R. 31). The check given Lieutenant Carlson by the accused on that occasion was duly paid (R. 32).

Specifications 6 and 9 of the Charge:

On 1 November 1943, the accused issued a check for $10.00 payable to cash, dated 1 November 1943 (Pros. Ex. 8). The check was issued in connection with a poker game and eventually won by Lieutenant Colonel Joseph G. Russell. This check forms the basis of Specification 6 of the Charge. On 3 November 1943, also in connection with a poker game, the accused gave a check bearing that date in the amount of $10.00 payable to Lieutenant Emory B. Brown (R. 36; Pros. Ex. 11). Lieutenant Brown gave the check to Lieutenant Colonel Russell in payment of a debt (R. 37, 58). This check forms the basis for Specification 9 of the Charge. These two checks were cashed by Lieutenant Colonel Russell at the Midland Army Air Field Post Exchange on the morning of 4 November 1943 (R. 26, 58). The two checks came back from the National Bank of Fort Sam Houston on or about 16 November 1943, noted that they were not paid because of "Insufficient funds" (R. 26). Captain Ralph H. Lockwood, the Post Exchange Officer, called the accused, and he came by and paid the checks (R. 26). Captain Lockwood tore up the checks in the presence of the accused and threw them in the waste basket (R. 26). About two hours later,

Lieutenant Colonel Rowden called Captain Lockwood and asked about the checks. In accordance with his instructions, Captain Lockwood took the scraps of paper out of the waste basket, pasted them together, and delivered them to Major Brummund, the Investigating Officer and Trial Judge Advocate (R. 19, 27).

Specification 7 of the Charge:

On 5 November 1943, Second Lieutenant Emory B. Brown acquired a check made by the accused, dated 5 November 1943, in the amount of $10.00, payable to cash, the check being acquired in a poker game (R. 36; Pros. Ex. 9). On about 10 November 1943, Second Lieutenant William Moroz asked Lieutenant Brown for a loan and was given this check (R. 34). Lieutenant Moroz cashed the check at the Officers' Mess (R. 34). This check is the basis for Specification 7 of the Charge. The check was deposited by the Officers' Mess in due course and returned unpaid with the notation "Not sufficient funds" (R. 22). The accused subsequently reimbursed the Officers' Mess (R. 22).

Specification 8 of the Charge:

On 12 November 1943, the accused made and delivered to First Lieutenant Michael F. Feeney, Jr., a check in the amount of $15.00, dated 12 November 1943, payable to cash (Pros. Ex. 10). The check was either given for a preexisting debt or for cash (R. 50). This check forms the basis for Specification 8 of the Charge. Lieutenant Feeney cashed the checks at the Officers' Mess (R. 50). The check was deposited by the Officers' Mess in due course and returned with the notation "Not sufficient funds" (R. 22). The accused subsequently reimbursed the Officers' Mess in the amount of the check(R. 22).

Specification 10 of the Charge:

On the night of 12 November 1943, there was a poker game in progress at the Officers' Mess of Midland Army Air Field, in which both the accused and Lieutenant Colonel Joseph O. Russell were participants (R. 60). Sometime during the course of the game the accused gave Lieutenant Colonel Russell a check in the amount of $35.00, dated 12 November 1943, payable to cash (R. 60; Pros. Ex. 12). Lieutenant Colonel Russell had had possession of two other checks which he had won in a poker game the night before, both being issued by the accused, one being for $15.00 and the other for $10 (R. 60). In the game of 12 November 1943, Lieutenant Colonel Russell won another $10.00 check which the accused had made and which was in the poker game. Lieutenant Colonel Russell asked the accused to make one check for the three checks which he held. The accused complied, issuing the check for $35.00 (R. 60). This check forms the basis for Specification 10 of the Charge. Lieutenant Colonel Russell cashed this check at the Post Exchange (R. 58). That same day the other two checks cashed earlier in the month of November by Lieutenant Colonel Russell (Pros. Exs. 8, 11) were returned unpaid, and the Post Exchange Officer called the accused and asked him if he had enough money in the bank to cover the $35.00 check

(R. 27). The accused replied that he did not know, and Captain Lockwood said that he would hold the check for a day to enable him to make it good (R. 27). The accused did not contact Captain Lockwood the next day so the check was deposited in due course (R. 27). The accused in his voluntary statement said that he attempted to contact Captain Lockwood but was unable to find him in (Pros. Ex. 1). The check was returned by the bank unpaid marked "Not sufficient funds" (R. 27), but before it was returned, in fact, the same day it was presented to the bank, the accused had left $35.00 in cash at the Post Exchange to cover the check in the event it should come back (R. 29, 30; Pros. Ex. 1).

Specification 1 of Additional Charge:

On 24 November 1943, the accused was indebted to the Elliott Hotel of Odessa, Texas, in the amount of $107.11 (R. 39). The accused regularly kept a room at this hotel (R. 41). $45.00 of the $107.11 represented checks of which accused was the maker which the hotel had cashed and which had been returned unpaid because of insufficient funds in the accused's bank account (R. 39). The balance of his indebtedness to the hotel represented his hotel bill for room, valet, laundry and long distance telephone calls (R. 41). On 24 November 1943, the accused gave the hotel a check for $107.11 in payment of his account (Pros. Ex. 13). This check forms the basis for Specification 1 of the Additional Charge. The check was deposited by the hotel in due course and returned unpaid with the notation "Allotment not in" and "Not sufficient funds" (R. 40). The hotel contacted the wife of the accused, and four or five days after the check was returned, the accused redeemed it and paid the hotel (R. 41-42).

Specification 2 of Additional Charge:

Sometime between 1 November and 5 November 1943, First Lieutenant James R. Saunders came into possession of a check issued by the accused, dated 1 November 1943, in the amount of $20.00, and payable to cash (R. 44; Pros. Ex. 14). Lieutenant Saunders could not remember how he got possession of the check but said that it might have been acquired in a game and that he probably parted with $20.00 at the time he acquired it (R. 45). This check forms the basis of Specification 2 of the Additional Charge. Second Lieutenant Carlton G. Wilshere cashed this check for Lieutenant Saunders (R. 47). Lieutenant Wilshere deposited the check in his bank at Odessa, Texas, about 10 November 1943, and the check failed to clear, coming back with the notation "Not sufficient funds" (R. 48). Lieutenant Saunders was never called upon to make the check good (R. 45). Lieutenant Wilshere was reimbursed his $20 (R. 48). By whom and when is not disclosed.

W. L. Bailey, Assistant Cashier of the National Bank of Fort Sam Houston, testified in detail as to the status of the accused's account during the month of November, 1943. The account had originally been opened on 19 August 1942, had been closed briefly during the latter part of December, 1942, but apparently was open during all of 1943 (R.62). At the

beginning of the month of November, 1943, the accused had $30.00 in his account (R. 66; Pros. Ex. 18). During the month he deposited $340.95 (R. 66). Two of his deposits were checks, which, in view of the status of his account and of his previous unbusiness-like handling of the account, the bank treated as collection items, not immediately giving him credit for the amounts of the checks (R. 70). One of these checks was received by the bank on 2 November, and the account was credited with it on 6 November, and the other was received by the bank on 8 November, and credited to his account on 20 November (R. 70-71). During the month of November, the accused's withdrawals represented by checks, amounted to $353.00 (R. 66). In addition, $13.00 was deducted from his account, representing service charges made by the bank (R. 66). $1.00 of this amount represented the bank's charge for permitting his account to go below $200.00, and the balance of $12.00 represented service charges of 50 cents each made by the bank when checks drawn by the customer could not be paid because of insufficient funds (R. 66). Mr. Bailey confirmed the fact that all of the checks which formed the basis of the Specifications (Pros. Exs. 3-14) were returned unpaid because of the insufficiency of funds in the accused's account (R. 67). He also compared the signature on these checks with the signature card of the accused (Pros. Ex. 19), and found the signature to be the same (R. 68). A statement covering the accused's account for the period August 14, 1943, to November 23, 1943, was mailed to the accused in response to a telegram from him on 25 November 1943 (R. 69). On 4 December 1943, the accused visited the bank and discussed his account with Bailey and "appeared to be upset as to the condition of the account" (R. 74).

The prosecution introduced in evidence voluntary sworn statements of the accused, in which he admitted making and uttering the checks and also admitted that they were returned because of insufficient funds (Pros. Exs. 1-2). He said that in October, 1943, he deposited several checks given him by other people, totalling about $115.00, "which came back about the latter part of October and this threw off my balance" (Pros. Ex. 1). He also said that he knew his balance was "pretty low" at the end of October but "didn't have any idea what it was" (Pros. Ex. 1). He also pointed out that he deposited $65.00 in the bank on 2 November and did not receive credit for it until 6 November and $50.00 on 8 November but did not receive credit for $49.75 (the $50.00 minus a 25-cent service charge) until 20 November (Pros. Ex. 1). He said that he would not have written checks against these items had he known that the bank was not going to give him immediate credit for them (Pros. Ex. 1). He admitted withdrawals from the account during the month of November, other than the checks involved in the trial, amounting to over $300.00 (Pros. Ex.1).

It was also established that in addition to checks issued by the accused during the month of November which were paid and in addition to the checks which form the basis of the Charges, the accused made and delivered to Second Lieutenant George E. Van Arsdale, Jr., three checks, one in the amount of $55.00, dated 10 November 1943, one in the amount of

$50.00, dated 15 November 1943, and the third in the amount of $15.00, dated 16 November 1943 (Pros. Exs. 14-17). All of these checks were given in connection with poker games (R. 54). All of them were returned by the bank unpaid because of insufficient funds (R. 57). The accused had reimbursed Lieutenant Van Arsdale to the extent of about one-third of the total amount of the three checks, and Lieutenant Van Arsdale had accepted the accused's word for the payment of the balance (R. 57).

4. The defense's case consisted of a brief oral unsworn statement made by defense counsel in behalf of the accused, in which it was pointed out that the accused is 26 years of age, was a graduate of the City College of New York (1937), had been appointed an Aviation Cadet 15 July 1941, and commissioned a second lieutenant on 16 January 1942 (R. 77). It was also pointed out that checks in the amount of $115.00 deposited by the accused in his account in October had not been paid and that $45.00 of the hotel bill for which the accused gave a worthless check in the amount of $107.11 represented checks given by the accused to another lieutenant as a result of losses in gambling games (R. 77). It was also said that the accused had been unable to obtain the bank statement which was mailed to him although he had tried diligently to locate it (R. 77).

5. The accused was charged with and found guilty of twelve offenses involving the issuance of twelve worthless checks. The evidence of the prosecution and the admission of the accused clearly establish that the accused did make and utter the twelve checks at the times and places alleged in the Specifications and that when they were presented for payment at the National Bank of Fort Sam Houston at San Antonio, the bank upon which they were drawn, payment was refused because the accused did not have sufficient funds on deposit with that bank for payment of the checks.

An examination of the bank's statement of the accused's account during November 1943 (the month during which all of the checks were issued) discloses that except for three days during the month the balance was less than the amount of any one check issued. In fact, it was overdrawn most of the month. While he did deposit in that bank during November $340.95 yet he gave out other checks that were honored so that these deposits were consumed within 24 hours after making them. The validity of the accused's checks depended upon chance and it was a question of whose check got to the bank first. The statement shows 25 instances during the month when a check was dishonored for insufficient funds. The inference is clear and reasonable that he must have known of this condition of his account.

It necessarily follows that all of the elements of the offenses alleged except that of the intent to defraud have clearly been proven.

It is not necessary to show intent to defraud in order to sustain a finding of a violation of Articles of War 95 or 96 in the giving of worthless checks. In CM 224286 (1942) Hightower, a conviction of a

violation of the 96th Article of War was sustained notwithstanding the fact that the findings of the court expressly omitted "intent to defraud". It was held that the negotiation by an officer of worthless checks without the intent to defraud was conduct of a nature to bring discredit upon the military service in violation of AW 96., See also CM 202027, McElroy; CM 208870, Moore; CM 220160, Faulkner.

The court in retaining in its findings the words "intent to defraud" and "fraudulently obtain" convicted him not only of conduct of a nature to bring discredit upon the service but also of the commission of a criminal offense involving moral turpitude, that of passing worthless checks with intent to defraud. The addition of these words also interjects into the findings a moral turpitude that warrants the determination of whether they are supported by the weight of the evidence.

Generally, in the civil courts, in order to prove an offense of this nature evidence is required not only of the passing of the check by the accused and its return for insufficient funds or other similar reason, but also that the accused defrauded or attempted to defraud someone of something of value. The case is usually tried in a manner similar to one of obtaining goods under false pretenses. In order to eliminate the necessity of the proof of intent to defraud many states as well as the District of Columbia have passed statutes which provide that the intent to defraud will be presumed from the act of passing the check which proves to be worthless provided the accused has failed to make good the check within a certain number of days after he is notified that his check has been returned (The District of Columbia Code Title 22-1410 provides for five days).

If the subject case had been tried under the District of Columbia Code the accused probably would have been acquitted because he did make good all of the checks involved within the five days statutory limit after receiving notice of their dishonor. If it had been tried without the aid of such a statute the burden would have been upon the prosecution to show intent to defraud - that is, that the accused intended when he passed the checks to defraud the person to whom he passed them of something of value.

This distinction between the elements of a military offense and a civil offense involving the passing of worthless checks is clearly recognized in CM 202601 (1935) Sperti where it was held:

> "Apart from precedent and the Manual, the Board is of opinion that the view that no offense is committed in passing a bad check unless value be received for it is too strict and would cause unfortunate consequences. A check given in payment of a pre-existing debt or a gambling debt, a check given as a charitable contribution or as a gift,

are all given without valuable consideration in the eye of the law; yet the giving of a bad check by an officer under any of the above circumstances would clearly be discreditable to the military service and would in many cases be conduct unbecoming an officer and a gentleman. The Board and The Judge Advocate General have in many cases passed convictions of giving bad checks in payment of pre-existing debts. Among such are CM 195513, Crose, and CM 199918, Safford.

An examination of the evidence supporting the findings of the Specifications discloses that the accused procured cash in exchange for his checks only in the transactions described in Specifications 1 ($10.00), 2 ($10.00) and 3 ($10.00), of the Charge. With reference to Specifications 6, 7, 8, and 9 of the Charge and Specification 2 of Additional Charge the officers who received the checks were unable to relate the circumstances under which they were issued. Most of the holders came into possession of them in a poker game. With reference to Specifications 4, 5 and 10 of the Charge and Specification 1 of the Additional Charge the checks were given in payment of an antecedent debt. These facts coupled with the immediate payment of the checks after receiving notice of their dishonor destroys any inference of intent to defraud with reference to Specifications 4, 5, 6, 7, 8, 9 and 10 of the Charge and Specifications 1 and 2 of the Additional Charge.

As to the remaining Specifications (1, 2 and 3 of the Charge), in view of their prompt redemption by the accused when notified of their dishonor the weight of the evidence favors the inference that the accused did not intend to defraud the Officers' Mess out of the money he obtained from that source by means of his checks.

For these reasons the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charges and of the Specifications except the words therein "with intent to defraud" and "fraudulently" wherever they appear.

6. The records of the War Department show the accused to be 27 years of age. Born of foreign born parents in Long Island he graduated from Far Rockaway High School (1933) and City College of New York (1937). He is able to speak Italian fluently. His home address is in Bronx, New York. He was employed as a junior accountant for 15 months and for 7 months managed his father's business - the nature of which is not disclosed. He entered the service 14 October 1940, served as a company clerk, an armament and flying student and was commissioned second lieutenant 16 January 1942. He attended Aerial Navigation School for four months in 1943 but did not graduate because of academic deficiencies. He recently married and is accused of failing to adequately provide for his wife.

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 all of the Charges and Specifications except the words "intent to defraud" and "fraudulently" wherever they appear and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of violation of Article of War 96.

William A. Pounds, Judge Advocate

Earle Hepburn, Judge Advocate

Herbert B. Fredricks, Judge Advocate

1st Ind.

War Department, J.A.G.O. 1 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 Joseph Vergara (0-434821), 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 of all of the Charges and Specifications except the words "with intent to defraud" and "fraudulently" wherever they appear therein, and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures remitted. G.C.M.O. 196, 25 May 1944)

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

30 MAR 1944

SPJGH
CM 249009

UNITED STATES v. Second Lieutenant OKEY J. PEMBERTON (0-1300373), Infantry.	SOUTHERN CALIFORNIA SECTOR WESTERN DEFENSE COMMAND Trial by G.C.M., convened at San Diego, California, 24 January 1944. Dismissal and total forfeitures.

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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. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant Okey J. Pemberton, Company G, 140th Infantry, was, at Otay, California, on or about 10 January 1944, drunk while on duty as officer of the day, Company G, 140th Infantry.

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

Specification: In that Second Lieutenant Okey J. Pemberton, Company G, 140th Infantry, while on duty as officer of the day, having received a lawful order, from Colonel O. E. Trechter, to inspect all observation posts during each guard shift, the said Colonel Trechter being in the execution of his office, did, near Otay, California, on or about 9 and 10 January 1944, fail to obey the same.

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

Specification: In that Second Lieutenant Okey J. Pemberton, Company G, 140th Infantry, did, at Chula Vista, California, on or about 10 January 1944, knowingly and willfully apply to his own use and benefit, 1942 ¼-ton Willys truck, Number W-20305138, of a value of about $753.50 property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to and was found guilty of all Specifications and Charges. He was sentenced to dismissal and total forfeitures. The reviewing authority approved only so much of the finding of guilty of the Specification, Charge III as involves application to his own use and benefit of a government vehicle valued at $550 under the circumstances as alleged, 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 from 5:30 p.m. on 9 January to 5:30 p.m. on 10 January 1944, accused, an officer of Company G, 140th Infantry Regiment, was on duty as officer of the day of that company. Captain William R. Carter was company commander and Colonel O. E. Trechter was regimental commander. Four officers of the company, including accused, took turns as officer of the day. It was customary for the officer of the day to be appointed on the day that he was to go on duty and for the appointment to be posted on the board. Standing operating procedure (Ex. A), promulgated on 21 October 1943 by order of Colonel Trechter, was still in force, and had been read by all officers. It required the officer of the day to make at least one complete and thorough inspection of each observation post during each relief. The observation posts to be inspected by the officer of the day of Company G were No. 28 and No. 29. Company G was stationed at Camp Weber, Otay, California. Both observation posts were southwest of Camp Weber and about six and eight miles away respectively. Chula Vista was about three and a half miles north of camp. The officer of the day was also required to visit a coast guard station at Coronado between 10:00 p.m. and 5:00 a.m. A Government jeep, which Captain Carter estimated to be worth about $550, was furnished to the officer of the day for use in the performance of his duties (R. 4-8, 27-29, 31, 44).

Private Bernard Whaley, with jeep No. W-20305138, was assigned as driver for accused while on duty as officer of the day. He went on duty at 6:00 p.m. on 9 January and first saw accused at 8:00 p.m. They proceeded to the Flores Cafe on the way to the observation posts and arrived at about 8:30. Accused instructed Whaley to stop, and entered the cafe. Accused came out in about a half-hour and they proceeded to Imperial Beach (near observation post No. 28). At the suggestion of accused they entered a cafe there, where they remained from about 9:30 p.m. to about midnight. Whaley drank some beer, and accused drank mixed drinks and beer. From the cafe, they returned to camp, where they remained about 15 minutes. No official duties had been performed up to

that time. Upon leaving camp, they proceeded to Chula Vista, where accused left the jeep and entered an apartment at about 12:45 a.m. After about two hours Whaley got cold and knocked at the door of the house accused had entered. Accused came to the door, without any trousers on, and asked Whaley to wait 15 minutes. Accused then instructed Whaley to go check the observation posts. Whaley proceeded to both observation posts in the jeep and then returned to the apartment at Chula Vista. Accused invited Whaley in, and he remained about an hour with accused and a woman. He and accused returned to camp, where they arrived at about 7:00 a.m. At this time the tongue of accused "seemed thicker" and Whaley was of the opinion that he was drunk (R. 6, 17-23).

At about 10:00 a.m. on 10 January accused called the driver and wanted to inspect the observation posts. They went back to the Flores Cafe in the jeep. Each had two beers there and they then "checked OP 28 and 29" at about 11:00 and 11:30 a.m. They returned to camp about noon. About 1:00 p.m. they went back to "this girl's house" at Chula Vista, where accused remained from about 1:30 to about 2:30 or 3:00 p.m. Accused then called Whaley in, and they remained there with the girl until about 5:30 p.m. The three drank about a quart of wine. When they left the house in Chula Vista, accused was, in the opinion of Whaley, drunk. His talk "seemed thick" and his eyes were red, but he "wasn't too noisy". On returning to camp, accused left the jeep in front of the officers' quarters. Captain Carter did not give accused permission to go to Chula Vista while on duty as officer of the day (R. 23-26, 37).

Captain Carter and First Lieutenant Regis R. Limoges saw accused at noon mess on 10 January, and he appeared to be in a normal condition at that time. Later, about 6:00 p.m., Captain Carter, Lieutenant Limoges and First Lieutenant Eugene D. Tyc saw accused at camp. All three were of the opinion that accused was drunk at that time. His "gait was a bit unsteady", his hat was "knocked over on the side of his head", and he had a smear of lipstick on his right cheek. His speech was incoherent, his pupils were dilated, his eyes "bleary" and his face flushed. When Captain Carter asked accused where he had been, he at first claimed he had been "hanging around the quarters and OP's", then stated he had been where he "God-damn pleased", and asked to be let alone. He remarked that he did not want to be an officer, but wanted to be a private. Accused made indecent remarks and was disrespectful in his conversation with Captain Carter. On cross-examination the three officers stated that, when sober, accused was a good officer or "one of the best" (R. 32-48).

Enlisted men on duty at observation posts No. 28 and No. 29, in six hour reliefs, from 6:00 p.m. 9 January to midnight, from midnight to 6:00 a.m. 10 January, and from noon 10 January to 6:00 p.m., testified that accused did not visit the observation posts during their tours of duty (R. 8-17).

4. Accused testified that he had been in the Army almost seven years, was in foreign service most of the time, and did not drink much. After

completing the course in officer candidate school, he was assigned to a colored regiment, was "sort of disgusted" because of prejudice, and began drinking "a little bit". After coming to the 140th Infantry he had some trouble at Barstow, California, and was tried by court-martial. Afterward he tried to get transferred, because in his company he was reminded of his former trouble five or six times a week. He would receive a week's restriction every time he would happen to "step out of line just a little bit". The 140th Infantry is a National Guard "outfit" from Missouri, and the officers are "home-town boys all together". Accused did not get along with them, had his "hands tied", and "got to drinking". He stated: "I am sorry I couldn't get out of the regiment because I know I can soldier. I know I am a good soldier and I can do my duty. I couldn't do my duty here because my superiors would not let me" (R. 49-51).

On Saturday night, 8 January, accused was on pass and was drinking "quite a bit". He returned to camp at about 1:30 p.m. on Sunday, 9 January, and in about 30 minutes obtained permission to go to Chula Vista. He continued drinking on Sunday. When he returned to camp from Chula Vista about 5:00 p.m. he found that he was going on duty as officer of the day, was feeling his drinks, and "just continued on drinking". He entered upon his duties as officer of the day at 5:30 p.m. Accused had been officer of the day before, understood the duties, and knew where the observation posts were located. He knew that as a part of the routine duties of the officer of the day he was supposed to visit each observation post, but must have "skipped " that part of the written order. He visited both outposts at about 11:00 a.m. on 10 January. That was his only visit (R. 50-53).

5. The evidence shows that accused, an officer of Company G, 140th Infantry Regiment, stationed at Camp Weber, California, left the camp on pass on Saturday, 8 January 1944. He returned at about 1:30 p.m. on 9 January, and in about 30 minutes obtained permission to go to Chula Vista, located about three and a half miles north of Camp Weber. Accused was drinking while on pass and also on Sunday. When he returned to camp from Chula Vista about 5:00 p.m. he learned that he was to be on duty as officer of the day of Company G for 24 hours, beginning at 5:30 p.m., 9 January. He entered upon his tour of duty at that time.

The officer of the day was required under standing operating procedure promulgated by order of Colonel O. E. Trechter, the regimental commander, to inspect two observation posts, located respectively about six and eight miles southwest of the camp, during each relief. The men stationed at the observation posts were on duty six hours in each relief. Accused had served as officer of the day on other occasions and understood the duties. There was assigned to accused for his use in performance of his duties, an Army vehicle, a jeep, No. W-20305138, operated by Private Bernard Whaley.

At about 8:00 p.m. on 9 January accused went toward the observation posts in the jeep, stopped at the Flores Cafe for about a half-hour, proceeded to Imperial Beach, near one of the observation posts, and entered

another cafe at about 9:30 p.m. He remained there until about midnight, drinking, and then returned to camp. He then went to Chula Vista in the jeep, arrived there about 12:45 a.m. on 10 January, and entered a woman's apartment, where he remained until nearly 7:00 a.m. While there he instructed Whaley to go check the observation posts, which Whaley did. They returned to camp at about 7:00 a.m., at which time accused was drunk in the opinion of the driver.

At about 10:00 a.m. accused called Private Whaley again and they returned to the Flores Cafe, accused had two beers, and they proceeded to the observation posts, which accused inspected at about 11:00 a.m. They returned to camp, and at about 1:00 p.m. went back to the girl's house at Chula Vista in the jeep. Accused appeared to be in a normal condition at noon mess. Accused remained at the girl's house in Chula Vista from about 1:30 p.m. until nearly 5:30 p.m., when he returned to camp. While in Chula Vista he drank some wine, and when he left there accused was, in Whaley's opinion, drunk. Three officers who observed accused at about 6:00 p.m. were of the opinion that he was drunk, and noted that his "gait was a bit unsteady", his speech was incoherent, his eyes were "bleary" and his face flushed. Accused did not inspect the observation posts except one time, about 11:00 a.m. on 10 January.

The evidence shows beyond reasonable doubt that accused was drunk while on duty as officer of the day, failed to obey a standing order to inspect the observation posts during each relief, and knowingly and willfully applied the jeep to his own use and benefit by going in it to Chula Vista for his personal ends, all as alleged in the three Specifications. The findings of guilty of all Specifications and Charges are sustained.

6. The accused is 29 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service 12 October 1934 to 23 December 1936 and from 1 September 1939; appointed temporary second lieutenant, Army of the United States, from officer candidate school, and active duty, 18 November 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation in time of war of the 85th Article of War and is authorized upon conviction of a violation of the 94th or 96th Article of War.

Samuel W. Driver, Judge Advocate

Robert C. Carter, Judge Advocate

H. Holtzhof, 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 Second Lieutenant Okey J. Pemberton (0-1300373), 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, while on duty as officer of the day, was drunk (Chg. I), failed to obey a standing order to inspect two observation posts during each six hour relief (Chg. II), and wrongfully applied to his own use a Government jeep by using it for a personal trip (Chg. III). One previous conviction by general court-martial of being drunk and disorderly in uniform in a public place on two occasions, in violation of the 96th Article of War, was considered by the court. The Staff Judge Advocate in his review states that Colonel Trechter in his forwarding indorsement stated that accused is not amenable to discipline, that efforts to rehabilitate him have failed because of persistent drinking, and his record with his organization is one of unreliability. I recommend that the sentence to dismissal and total forfeitures be confirmed, that the forfeitures adjudged be remitted, and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 223, 29 May 1944)

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

SPJGN
CM 249015

(23)

24 FEB 1944

UNITED STATES v. Private JAMES FERGUSON, JR. (34640459), Company C, Hampton Roads Port of Embarkation Replacement Pool.	)))))))))	HAMPTON ROADS PORT OF EMBARKATION Trial by G.C.M., convened at Newport News, Virginia, 6 January 1944. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW 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 92nd Article of War.

Specification: In that Private JAMES FERGUSON, JR., Company "C", Hampton Roads Port of Embarkation Replacement Pool, Camp Patrick Henry, Virginia, then Shipment Number 0016-E, Camp Patrick Henry, Virginia, did, at Camp Patrick Henry, Virginia, on or about 10 December 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private JAMES WHIGHAM, Shipment Number 0016-E, Camp Patrick Henry, Virginia, a human being, by shooting him with a rifle.

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 the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisberg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½. At the same time the reviewing authority concurred in the recommendation for clemency which was signed by all members of the court and by both the counsel for the prosecution and the counsel for the defense.

3. The evidence for the prosecution shows that on 2 December 1943, the accused was a member of Company C, 379th Engineers, then stationed at Camp Shelby, Mississippi. The deceased, Private James Whigham, was a member

of the same unit. Up until that date, the accused and the deceased had been good friends. On 2 December 1943, the accused and the deceased became involved in a dispute over some whiskey and the deceased beat the accused in the face with his fists (R. 13, 14).

On the following day, 3 December, the organization to which the accused and the deceased belonged entrained for Camp Patrick Henry, Virginia, arriving there on 5 December 1943. On 9 December 1943, overseas shipment numbers were assigned, and the organization was scheduled to move out the following morning, 10 December, at six o'clock. The accused and the deceased were with the organization, and no further difficulties between them had been observed. They were quartered in the same barracks, T-8-103, the accused's bunk being at the rear end of the barracks and the deceased's being near the front end (R. 14-16).

Between eight and nine o'clock on the night of 9 December 1943, the deceased went to the rear end of the barracks where the accused's bunk was located and renewed the controversy over the whiskey, and then beat the accused severely with his fists, badly lacerating his upper lip. Three men restrained the deceased, who stated his intention of whipping the accused each time that he saw him until the accused paid him five dollars. The deceased was not observed to be armed. No resistance was offered by the accused on either occasion. Immediately following this occurrence, accused reported at a nearby dispensary in a "depressed", "nervous" and "angry" state, seeking medical aid for his lip. Further treatment being necessary, the attendant at the dispensary sent the accused to the Station Hospital where a vertical split in his upper lip was sewed up. Captain Clarence F. Schweigert, the medical officer at the hospital who attended the accused, testified that the accused arrived at the hospital at about 9:45 o'clock and that at that time the accused "was perfectly calm, cool, collected. He expressed no anger, made no threats. His motions were coordinated. He talked sensibly. He answered my questions freely * * * I did not smell any alcohol whatsoever on his breath". The accused returned to the dispensary about ten o'clock, asked the way to his barracks, and left (R. 14-16, 19-21, 23-25).

At about midnight a poker game was started in Barracks T-8-103, in which deceased played. The game was played on a blanket spread on the floor alongside of the deceased's bunk, near the front door of the barracks. There were seven players in the game. The deceased was lying on the floor leaning against his bunk, facing the rear of the barracks. After the game had been in progress about three-quarters of an hour, there was a warning shout "Look out!", a shot was fired and the deceased pitched forward, rolled over twice and came to rest on his back. The accused was observed moving down the hallway toward the back door of the barracks,

dropping a rifle midway of the barracks. Medical aid was summoned. A medical officer from the dispensary arrived, followed closely by a medical officer from the Station Hospital. The latter pronounced the deceased dead. An autopsy was performed the following day, 10 December, and the cause of death was determined to have been a gunshot wound through upper chest and heart. The bullet was recovered from the floor (Pros. Ex. 9), the jacket the deceased was wearing at the time of the shooting was examined, and from the angle of the projectile's entry into the floor and the gas burns and lack of powder burns on the jacket it was stated that the rifle was fired at approximately five feet from the deceased. Immediately following the shooting, the accused went to the orderly room office and there, after being duly advised as to his rights under Article of War 24, made a written statement admitting the shooting. Eight days later, on 18 December, and again after being duly advised as to his rights under Article of War 24, he made a sworn detailed written statement admitting the shooting (R. 4, 5, 7, 9, 17, 22-23, 27, 29-31; Pros. Exs. 7, 8).

4. The accused, after being fully advised as to his rights with respect to testifying, making an unsworn statement or remaining silent, elected to testify in his own behalf. He gave a brief review of his history. He was born at Fair Forest, South Carolina and is thirty-one years of age. He attained the sixth grade in school, and then went to work at the age of "eighteen or nineteen". For six years prior to his induction into the Army on 26 December 1942, he worked for Fair Forest Finishing Company, in his home town. After completing basic training, he was sent in April 1943 to Camp Shelby, Mississippi, where he became a member of Company C, 379th Engineers. The deceased, Whigham, was a member of Company C when the accused joined it. Accused became acquainted with Whigham at that time. On 2 December 1943, accused and Private Missick planned to buy some whiskey from another soldier in the same battalion. Deceased urged accused not to buy the whiskey, stating that he had a quart and saying "Come on up and drink with me". Accused thereupon accompanied deceased to the barracks where they both were billeted, and they drank together, and passed the bottle around to the other soldiers who were present. Deceased left the barracks. While he was out further drinks were taken from the bottle, which was in accused's possession. When deceased returned "he asked me where was his liquor", and upon finding the bottle almost empty "he told me to give him five dollars". Accused replied that he did not owe deceased five dollars, but in an effort to placate the deceased he offered to go out and buy some whiskey. Deceased became enraged and attacked the accused, beating him with his fists. No further trouble ensued between the accused and the deceased until the night of 9 December 1943, when the accused was lying on the floor by his bunk where a dice game was in progress. The deceased came up, demanded five dollars and while the accused was lying on the floor, beat him severely with his fists. Accused offered no resistance. After the beating, accused went to the latrine and washed his face, and was about to

return to the barracks when Private Jennings warned him not to reenter the barracks, saying that the deceased "had a bayonet in there" and was going to kill the accused. Accused then went to the dispensary, and the attendant there sent him to the Station Hospital to have his lip sutured. Accused remained at the hospital about half an hour and then returned to the dispensary to obtain directions to his barracks. Accused was afraid to return to the barracks and so he went instead to the latrine, where he "got a bullet from a boy". He then entered a barracks which he thought was his own, but discovered it was not. He then walked over to his own barracks "and went in there, and shot him". Accused was asked "Why did you shoot Whigham?" to which he replied "He was going to kill me". Accused testified that following the shooting he went to the orderly room "to give myself up". On cross-examination accused was asked why, if he was afraid of Whigham, he did not take the matter up with his company commander, to which he replied "I don't know, sir" (R. 33-38).

Two medical officers from the Station Hospital were called by the defense. One of them testified that he attended the accused at the hospital at about 9:45 on the evening of 9 December, and that he sutured accused's lip, taking three stitches. The other testified that accused was admitted to the hospital on the morning of 11 December and remained in the hospital twelve days under surgical care while his lacerated lip was being treated (R. 39, 40).

First Lieutenant George W. Moorehead, a witness for the defense, identified a written statement by Captain Belote, accused's Commanding Officer, attesting to accused's previous good conduct and character (R. 40; Def. Ex. B).

5. The accused is charged with murder. The Specification alleges that the accused "did * * * with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill * * *" the deceased by shooting him with a rifle. In order to determine the legal sufficiency of the evidence to support the finding of guilty under this Specification, it is necessary that the evidence support the conclusion that the accused killed the deceased with malice aforethought.

Murder is defined as "* * * the unlawful killing of a human being with malice aforethought". The word "unlawful" as used in this definition means "* * * without legal justification or excuse". A justifiable homicide is "A homicide done in the proper performance of a legal duty * * *". Furthermore, an excusable homicide is one "* * * which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense on a sudden affray, * * *". The definition of murder requires that the death of the victim "* * * take place within a year and a day of the act or omission that caused it, * * *" (M.C.M. 1928,

par. 148 a). It is universally recognized that the most distinguishing characteristic of murder is the element of "malice aforethought". The authorities, in explaining this term have stated that the term is a technical one and that it cannot be accepted in the ordinary sense in which the terms may be used by the layman. In the famous Webster case, Chief Justice Shaw explains the meaning of malice aforethought as follows:

> "* * * Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.
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> * * *
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> "* * * It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed; it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought,' in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance" (Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711).

Similarly, the Manual for Courts-Martial defines malice aforethought as follows:

> "Malice aforethought. - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark)
>
> "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause

> the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not by a wish that it may not be caused; intent to commit any felony. * * *"(M.C.M., 1928, par. 148 a).

The uncontradicted evidence shows that the accused shot and killed the deceased at about 12:45 a.m. on 10 December 1943, the deceased dying almost instantly. It is equally clear that this homicide was unlawful in that it was without legal justification or excuse. Further, an analysis of the evidence reveals ample proof to sustain the finding that the killing was done with malice aforethought. It is undisputed that a period of approximately four hours elapsed between the time when the deceased beat the accused on the evening of 9 December and the time when the accused shot the deceased in the early morning of 10 December. Under the controlling authority quoted above there can be no doubt that this was an ample "cooling off" period. That the accused did in fact cool off is indicated by the testimony of Captain Schweigert that when the accused came to the hospital at about 9:45 on the evening of 9 December he "was perfectly calm, cool, collected".

The only defense or excuse asserted by the accused for his act is that he was afraid that the deceased would kill him. That the evidence in the instant case does not support the right of self-defense is quite clear. The principles excusing a killing on the ground of self-defense are stated in the Manual for Courts-Martial, 1928, at paragraph 148a, as follows:

> "* * * To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty; but if after

provoking the fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor" (underscoring supplied).

Under the principles stated in this excerpt it is obvious that the excuse of self-defense is not available in the instant case.

6. No question was raised as to the sanity of the accused. His record in the Army has been good, as evidenced by the highly commendatory letter and request for leniency from his commanding officer. His intelligence appears to be average. His testimony is clear, and his answers to the questions propounded, both on direct and on cross-examination, were responsive.

7. The accused is 31 years of age. He was inducted into the service at Fort Jackson, South Carolina, 26 December 1942 with no prior service.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the finding of guilty and the sentence. A sentence of death or of imprisonment for life is mandatory upon a conviction of murder, in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement under Sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

Abner E. Lipscomb, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

Gabriel H. Golden, Judge Advocate

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

SPJGV
CM 249057

22 FEB 1944

UNITED STATES	ANTIAIRCRAFT ARTILLERY TRAINING CENTER
v.	Trial by G.C.M., convened at Camp Haan, California, 14 and 15 January 1944. Dishonorable discharge and confinement for three (3) years and six (6) months. Disciplinary Barracks.
Private RUSSELL C. GOULD (20901967), Headquarters Battery (Headquarters Battery, Enlisted Cadre Pool), Antiaircraft Artillery Training Center.	

HOLDING by the BOARD OF REVIEW
TAPPY, KIDNER and RIVES, Judge Advocates

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

2. Accused was found guilty of larceny of (a) one Waltham wrist watch, value about $35, the property of Mrs. Earl G. Brown (Spec. 1 of the Charge), (b) one Bulova wrist watch, value about $40, the property of Warren R. Anderson (Spec. 2 of the Charge), (c) one Falcon camera, value about $17.50, the property of Corporal Bernard R. Mazzoni (Spec. 3 of the Charge), and (d) one Royce waterproof wrist watch, value about $50, the property of Private Robin C. Wildey (Spec. 4 of the Charge). The watches and the camera were received in evidence (Exs. 1, 2, 3, 4).

The evidence adduced to support the value alleged in Specification 1 of the Charge is substantially as follows:

Sergeant Earl G. Brown, husband of Mrs. Earl G. Brown, owner of the watch, stated that he bought the watch through the Post Exchange in Alaska, that he paid $27 for it, that it was valued at $35 or $40 regular retail, and that it was not in workable condition at the time it was stolen (R. 12, 14). Mrs. Brown stated that the watch was purchased 30 September 1941 and that it had not been keeping good time for a couple of months prior to the time she missed it (R. 16, 17, 18). It does not appear that Sergeant Brown was qualified as an expert or was otherwise qualified to express an opinion as to the market value of the watch. The proof of the purchase price "over two years" prior to the taking does not afford any accurate basis of determining the market value at the time of the theft. Except as to distinctive articles of Government issue or other chattels which, because of their character do not

have readily determinable market values, the value of personal property to be considered in determining the punishment authorized for larceny is market value (CM 217051, Barton and Boothe; CM 215996, Burton). However, the watch itself was received in evidence and there is sufficient basis for an inference that it was of some substantial value, not in excess of $20.

One year of the total confinement of three years and six months imposed by the court in this case is based upon a conviction of larceny by accused, at the time and place and of the ownership alleged, of the Waltham wrist watch described in Specification 1 of the value of $35, whereas the evidence is legally sufficient to support only so much of the finding as to value under said Specification as involves a finding of some substantial value not in excess of $20. The maximum confinement authorized by paragraph 104c, Manual for Courts-Martial, 1928, for larceny of property of value not more than $20 is confinement at hard labor for six months.

3. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty as to the Charge and Specifications 2, 3 and 4; legally sufficient to support only so much of the finding under Specification 1 as involves a finding of guilty of larceny by accused, at the time and place and of the ownership alleged, of the Waltham wrist watch described in the Specification, of some substantial value not in excess of $20; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three years.

Thomas N. Jaffy, Judge Advocate.

[illegible], Judge Advocate.

(Sick in Quarters), Judge Advocate.

SPJGV
CM 249057

1st Ind.

War Department, J.A.G.O., 23 FEB 1944 - To the Commanding General, Antiaircraft Artillery Training Center, Camp Haan, Riverside County, California.

1. In the case of Private Russell C. Gould (20901967), Headquarters Battery (Headquarters Battery, Enlisted Cadre Pool), I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that only so much of the finding of guilty of Specification 1 of the Charge be approved as involves a finding of guilty of larceny by accused at the time and place and of the ownership alleged, of the Waltham wrist watch described in said Specification, of some substantial value not in excess of $20; and that only so much of the sentence be approved as involves dishonorable discharge, total forfeitures and confinement at hard labor for three years. Thereupon, under the provisions of Article of War 50½, and Executive Order No. 9363, dated July 23, 1943, you will have authority to order the execution of the sentence as thus modified.

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 orders 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 249057).

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.

SPJGN
CM 249115

18 FEB 1944

UNITED STATES	)	90TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Dix, New Jersey, 24 January 1944. Dismissal.
	)	
Second Lieutenant EUGENE STANLEY VAN HORN (0-1310531), Antitank Company, 359th Infantry.	)	

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 95th Article of War.

Specification: In that Second Lieutenant EUGENE STANLEY VAN HORN, Antitank Company, 359th Infantry, did deliberately and with intent to defraud, at Granite Mountain, California, on or about 14 December 1943, cheat at cards.

He pleaded guilty to and was found guilty of the Charge and the Specification and was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that, prior to 14

December 1943, the accused and other officers of his organization played cards frequently "at nights, in the afternoon and breaks" during maneuvers, upon the completion of which, the accused and two fellow officers were quarteredin the same tent at Granite Mountain, California. On the evening of 14 December 1943, these three officers and others played pitch and poker in their tent. The accused furnished the cards and won consistently. One of his tent-mates lost $40. The accused's obvious careful scrutiny of the backs of the cards during play - and his unorthodox but successful playing of several unusual hands - aroused his tent-mates' suspicions to such an extent that, upon the following week-end, in the accused's absence, they sought and found, in the accused's clothes, the deck which the accused had furnished the players, and which they had used in the card games played on the 14th. Examination disclosed that the back of each card was marked in such a manner as to reveal to a player familiar with the code, the suit and denomination of each card. The accused, confronted with his tent-mates' discovery, offered to make restitution to each player who had lost in the games played with the marked cards, protesting, at the same time, that he "didn't realize" what he was doing (R. 7-41; Ex. 1).

The accused's tent-mates delivered the marked cards to the regimental executive, who was thereafter designated to investigate the Charge. With reference to the longhand statement, written in toto by the accused and by him delivered to the investigating officer, the latter testified that before receiving it he advised the accused "of his rights under Article of War 24 wherein he could make a statement, oral or written, sworn to or not"; adding, "I may not have used the words that he was not obligated to do it. I advised him that he could do it". While he did not read the Articles of War to the accused, he "did explain to him his rights under Article of War 24". Over defense counsel's objection, on the ground that the accused's rights had not been fully explained to him, the typewritten confession signed and sworn to by the accused, copied verbatim from his longhand statement, was introduced in evidence. Omitting only signature and jurat, it reads,

> "I, Eugene S. Van Horn, 2nd Lt. 359th Inf, having been fully advised of my rights under AW 24, elect to voluntarily make a sworn statement.
>
> "About two and one-half months ago I was sold a deck of marked playing cards by a peddler in Los Angeles. I had no particular plan for their use, and did not use them until on or about 14 December 1943.

"My friends had been kidding me about my being a poor poker player, so I thought it would be fun to use these cards, which I did for two nights. After I had won some money my conscience bothered me and I did not know what to do. I did not dare to tell the truth and repay the money, so I bought two ordinary decks of cards with the intent of "losing back" the money by by usual poor playing.

"On 20 December 1943 I orally admitted to Lt Howell and Lt Collins that I had used marked cards. These cards are the ones shown to me by the investigating officer this date.

"I realize now the predicament into which I stepped, and if higher authority can arrange a transfer, I would be glad to go to an organization where I can get a new start rather than to remain where officers have doubts as to my integrity that can hardly be overcome" (R. 20, 30, 41-47; Ex. 2).

4. The defense introduced no evidence; and the accused, after being duly advised of his rights as a witness, elected to remain silent (R. 47).

5. The Specification alleges that the accused, deliberately and with intent to defraud, cheated at cards at Granite Mountain, California, on or about 14 December 1943. The uncontradicted evidence, exclusive of the confession, shows that the accused, on the occasion in question, furnished the players with a deck of marked cards, belonging to him, with which he won so consistently and so extraordinarily - and the backs of which he scrutinized so noticeably - that two of the players' suspicions were aroused. Having examined the deck and detected the markings on the back of each card, they confronted the accused with this evidence of his chicanery, whereupon he offered to make restitution to the players whose money he had won, accompanying this offer with the lame assertion that he "didn't realize" what he was doing. The evidence is reasonably susceptible of no other inference than that the accused deliberately cheated with intent to defraud, corroborating, beyond a reasonable doubt, the admission of fraudulent intent involved in his plea of guilty. The admisibility of the statement - in the nature of a confession - furnished by the accused to the investigating officer, is, therefore, an immaterial issue. In view of the plea of guilty and the evidence dehors this confession, no substantial rights of the accused

could have been injuriously affected by its admission, regardless of the investigating officer's uncertainty as to whether or not, in explaining his rights under Article of War 24, he advised the accused that he was not obligated to make a statement. Winthrop lists "acts of fraud" and "cheats" as incidents of conduct unbecoming an officer and a gentleman (P. 716, Winthrop's Military Law and Precedents, 2nd Ed. Reprint 1920). Certainly when an officer playing for stakes with fellow officers, stoops to "ways that are dark and tricks that are vain" as a means of secretly compensating for a lack of skill or a run of bad luck, he betrays criteria of personal conduct measurably short of that "limit of tolerance" below which the individual standards of an officer cannot fall without branding him as "morally unfit to be an officer * * * or to be considered a gentleman" (par. 151, page 186, M.C.M., 1928). The record sustains, beyond a reasonable doubt, the court's findings of guilty in violation of Article of War 95.

6. The accused is about 24 years of age. War Department records show enlisted service from 21 October 1940 until temporarily commissioned second lieutenant, A.U.S., 5 February 1943.

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

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 249115

1st Ind.

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

24 FEB 1944

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Eugene Stanley Van Horn (0-1310531), Antitank Company, 359th 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. 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. 163, 7 Apr 1944)

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

SPJGV
CM 249132

22 MAR 1944

UNITED STATES	65TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Camp Shelby, Mississippi, 6 and 21 January 1944. Dismissal, total forfeitures and confinement for five (5) years.
Second Lieutenant WILLIAM P. SULLIVAN, Jr. (0-1823668), Army of the United States.	

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. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Second Lieutenant William P. Sullivan Jr., 631st Tank Destroyer Battalion, did, at Camp Shelby, Mississippi, on or about 9 December 1943, unlawfully enter a building, namely a hutment, owned by the United States, and occupied as living quarters by Second Lieutenant Virgil A. Postlethwait Jr. and Second Lieutenant Richard L. Hull, with intent to commit a criminal offense to wit, larceny, therein.

Specification 2: (Withdrawn by direction of appointing authority).

Specification 3: In that Second Lieutenant William P. Sullivan Jr., 631st Tank Destroyer Battalion, did, at Camp Shelby, Mississippi, on or about 9 December 1943, feloniously take, steal and carry away one (1) billfold, value about three dollars ($3.00), and the sum of about sixty-five dollars ($65.00) in lawful currency of the United States, property of Second Lieutenant Morton E. Hecht.

Specification 4: (Disapproved by reviewing authority).

Specification 5: In that Second Lieutenant William P. Sullivan Jr., 631st Tank Destroyer Battalion, did, at the Army Air Base, Jackson, Mississippi, on or about 7 December 1943, feloniously

take, steal and carry away a wallet, value about three dollars ($3.00), and about twenty dollars ($20.00) in lawful currency of the United States, property of Second Lieutenant Charles Skranak.

He pleaded not guilty to and was found guilty of the Charge and Specifications 1, 3, 4 and 5 thereof. 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 a period of five years. The reviewing authority disapproved the finding of guilty of Specification 4, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. At the opening of the trial, and prior to arraignment, defense counsel raised the question of accused's sanity (R. 4). The court continued the case and recommended that the appointing authority appoint a board of medical officers to examine the accused. This recommendation was complied with. The board of medical officers found that accused suffered from no mental disease and recommended that he be returned to duty (R. 6; Ex. A). The court thereupon proceeded with the trial.

4. The evidence for the prosecution with respect to Specification 1 (housebreaking) is substantially as follows:

Second Lieutenant Virgil A. Postlethwait, Jr., testified that he shared a hutment in the 631st Tank Destroyer Battalion Officers' Row with Lieutenants Hull and Johnson. He retired at about 2300 hours 9 December 1943 and was awakened between midnight and one o'clock when an unauthorized person entered the hut and turned on a light in the hut. The light was immediately turned out (R. 14). By the light of the moon and an adjacent street light he observed that the person who had entered the hut went through the pockets of Lieutenant Hull's clothing (R. 14, 16). Lieutenant Postlethwait at the trial identified the accused as being the person who entered the hut on the night in question (R. 14).

On cross-examination Lieutenant Postlethwait testified that the man who entered the hut on the night of 9 December 1943 smelled of liquor, stumbled in his walk, and looked and acted intoxicated (R. 15, 16). He believed accused was intoxicated (R. 15).

Lieutenant Hull testified he had never given anyone permission to go through his clothing (R. 17).

With respect to Specifications 3 and 5 (larceny), First Lieutenant Morton E. Hecht testified by deposition that he went to bed in his quarters in Hut 7 at about 2200 hours 9 December 1943, placing his wallet containing identification papers and about $70 in cash on a shelf at the right side of

his bed. On arising the next morning his wallet was missing and after a thorough search of the hutment could not be found. He did not give anyone permission to remove the wallet. The witness identified Prosecution's Exhibit D as being his wallet, and of a value of about $3. This wallet was introduced in evidence as Exhibit D (R. 18). The money in his wallet was in denominations of $10 bills and smaller (Ex. C).

Second Lieutenant Charles Skranak testified that he placed his wallet in his hip pocket and buttoned the pocket at about 0730, 7 December 1943. He did not use the wallet again that day. About 1800 he left his clothes in his room in quarters while he went to take a shower. When he returned and looked for his wallet it was missing. The wallet contained his Army identification card, other papers and about $20 in cash, and the wallet itself was of the value of $3. The wallet later introduced in evidence as Exhibit B was identified by Lieutenant Skranak as his property (R. 11-13).

Captain Charles O. Branyan and Captain James C. Crigler testified substantially that they went to accused's quarters, where he was in arrest, on 13 December 1943. With the consent of the accused, they searched his quarters and found two wallets. One wallet was in the accused's Valapac, and the other was found in the coveralls the accused was wearing (or in his bag, or Valapac). Exhibits B and D were identified as the wallets they found during their search as above set out, Exhibit B being found in accused's Valapac, and Exhibit D being taken either from accused's bag or Valapac or coveralls. They found two $20 bills on the person of accused, and some change but there was no money in the wallets (R. 18-22).

5. For the defense:

The defense offered no witnesses, and the accused, being informed of his rights, elected to remain silent.

6. The evidence thus shows that on the night of 9-10 December 1943, between the hours of midnight and one o'clock, the accused was seen by Lieutenant Postlethwait to enter a hut occupied by Lieutenants Postlethwait, Johnson and Hull, and to go through the pockets of clothing belonging to Lieutenant Hull.

On 7 December 1943 Lieutenant Skranak discovered his wallet was missing from a buttoned pocket in his clothes which he had left in his quarters while taking a shower. At about 2200 9 December 1943, First Lieutenant Morton E. Hecht retired for the night in his quarters in Hut 7, and placed his wallet containing identification papers and about $70 in money on a shelf at the right side of his bed. The next morning his wallet was missing. When accused's quarters and possessions were searched by Captains Branyan and Crigler the wallet belonging to Lieutenant Skranak was found in accused's Valapac and another wallet (Exhibit D) later identified as belonging to Lieutenant Hecht was found in accused's bag, Valapac or coveralls (R. 20, 21).

7. Possession of recently stolen property, if not satisfactorily explained, may raise a presumption that the possessor stole it (MCM, 1928, par. 112). The accused's guilt of the Charge and Specifications 1, 3 and 5 thereof as found by the court and approved by the reviewing authority is established beyond a reasonable doubt. The offenses of which accused was found guilty render him unfit to retain his commission as an officer; nullifies any promise of future usefulness to the Army, and clearly are in violation of the 93rd Article of War.

8. War Department records show that accused is 25 years of age. He graduated from the Newton High School, Newton, Massachusetts, and attended Northeastern University, Boston, Massachusetts for one year. He was inducted into the Army 19 March 1942, and satisfactorily completed the Officer Candidate Course, Tank Destroyer School, Camp Hood, Texas 4 February 1943. On that day he was commissioned second lieutenant, Army of the United States.

9. 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 as approved by the reviewing authority, to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of the 93rd Article of War.

Thomas H. Tappy, Judge Advocate.

Herbert M. McIlduff, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 249132

1st Ind.

War Department, J.A.G.O., 8 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 P. Sullivan, Jr. (0-1823668), 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 as approved by the reviewing authority, to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted, that the period of confinement be reduced to three 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. 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 forfeitures remitted and confinement reduced to one year. G.C.M.O. 277, 10 Jun 1944)

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

(47)

SPJGV
CM 249165

22 MAR 1944

UNITED STATES v. Lieutenant Colonel WILLIAM H. CRAWFORD (0-273860), Corps of Military Police.	SECOND ARMY Trial by G.C.M., convened at Nashville, Tennessee, 13 and 14 January 1944. Dismissal.

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 93rd Article of War.

Specification 1: In that Lieutenant Colonel William H. Crawford, Corps of Military Police, Second Army Headquarters, Lebanon, Tennessee, did, at Manchester, Tennessee, on or about 30 October 1943, with intent to do him bodily harm, commit an assault upon Technical Sergeant Michael A. Casillo, 3528th Ordnance Medium Auto Maintenance Company, by willfully and wrongfully striking him in the face with his hand and grabbing, seizing and holding him around the throat, and forcibly pushing him into an Army Staff car and banging his head against the door thereof.

Specification 2: In that Lieutenant Colonel William H. Crawford, Corps of Military Police, Second Army Headquarters, Lebanon, Tennessee, did, at Manchester, Tennessee, on or about 30 October 1943, with intent to do him bodily harm, commit an assault upon Technical Sergeant Michael A. Casillo, 3528th Ordnance Medium Auto Maintenance Company, by willfully and wrongfully grabbing, seizing and holding him on and about the head, neck, and shoulders, and with great force throwing him into the back of a staff car.

Specification 3: (Finding of not guilty).

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

Specification: In that Lieutenant Colonel William H. Crawford, Corps of Military Police, Second Army Headquarters, Lebanon, Tennessee, on or about 1 December 1943, with intent to deceive Major Horace F. Brown, Assistant Inspector General, Headquarters Second Army, at an official investigation of allegations that he struck and choked Technical Sergeant Michael A. Casillo, 3528th Ordnance Medium Auto Maintenance Company, on or about 30 October 1943, did officially state that "I never struck him at any time"; that "Nobody hit him"; that "I know I didn't choke him to hurt him" or words to that effect, which statements were known by the aforesaid Lieutenant Colonel William H. Crawford, Corps of Military Police, to be untrue.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and Specifications 1 and 2 thereunder, of Charge II and its Specification, and not guilty of Specification 3 of Charge I. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence but recommended that it be commuted to termination of the accused's temporary commission in the Army of the United States, reversion to permanent grade in the National Guard and relief from active duty; and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that, shortly before noon 30 October 1943, twelve enlisted men, riding in a 3/4 ton weapons carrier, were stopped in the business district of Manchester, Tennessee, by a signal from the driver of a staff car, which immediately drew up alongside. Alighting from the staff car, the accused, then Assistant Provost Marshal, Second Army, demanded of Sergeant Charles T. Ferry, driver of the weapons carrier, if he was in charge of the vehicle. Receiving an affirmative reply, the accused inquired if he knew it was overloaded. When the sergeant said, "No, sir", the accused remarked, "Well, you should not have your stripes", asked for the trip ticket, and started writing in a notebook, at the same time informing the sergeant that there were "three men overloaded" in the truck. Then, designating three noncommissioned officers, the accused ordered them to get out and walk (R. 8, 14-18, 33, 36, 47, 65).

Technical Sergeant Michael A. Casillo, senior noncommissioned officer, in charge of the weapons carrier detail, properly and neatly dressed, alighted from the rear of the vehicle, where he had been riding, walked up to the accused and reported, "Sir, I am in charge of this detail." Wheeling, the accused struck Casillo in the mouth with the back of his hand, drawing blood; then grabbed the unresisting sergeant by the throat and forced him into the rear seat of the staff car, banging his head on the door in the process. Casillo

remained there until one of his detail asked, "What shall I tell the captain?" Then he got out and walked to the rear of the weapons carrier, where the accused, observing him, again grabbed him by the throat and thrust him back into the staff car, where he stayed this time, with the blood dripping from his injured mouth. The accused got into the front seat and ordered the driver to move on. Then, turning, he grabbed Casillo's tie and twisted it so tightly that it choked the hapless sergeant, who struggled until partially unconscious. In the course of the struggle, the accused's finger was poked into Casillo's eye, causing a moderate hemorrhage which sent Casillo to the hospital for nine days (R. 8-11, 19-24, 33-44, 47-54, 57-63, 65-72, 85).

Following this last assault, Casillo "broke down and cried". When the staff car had driven about half a mile, the accused hailed a passing jeep driven by a military policeman, whom he ordered to take Casillo back to his organization, informing him that Casillo was under mental stress, was not drunk and was a good boy. At the time he was released Casillo had a split lip, a sore eye and sore throat (R. 11-12, 74-75).

On 1 December 1943 in the course of an official investigation, the accused, after due warning, told Major Horace F. Brown of the Inspector General's Department that he had not assaulted Casillo, stating specifically, in the course of voluminous answers to the inspector's questions, "I never struck him at any time", "nobody hit him", and "I know I didn't choke him to hurt him". All of the accused's statements were official and he and the inspector had no conversation which was not transcribed (R. 77-82).

4. The evidence for the defense shows that the weapons carrier was overloaded, to the extent of three men, in violation of Second Army orders. The driver of the accused's staff car testified that when Casillo first approached the accused his overcoat and blouse were unbuttoned, his shirt collar open and his tie loose. He took hold of the accused's arm, saying that he was in charge of the weapons carrier. The accused "took hold" of Casillo, brought him to the staff car and put him in the back seat, saying that he would talk to him later; then went back to the weapons carrier and finished writing. When Casillo got out of the staff car, the driver dismounted and put Casillo back. When the accused returned to the staff car, Joe Johnson, a civilian friend of the driver, approached, and the driver introduced him to the accused. After the staff car started, Casillo kicked toward the front seat, narrowly missing the driver, whom the accused then ordered to stop the car. Having done so, alighted and opened the back door, the driver observed Casillo seated with his feet drawn up. Casillo told the accused, "I'll kick your God-damned teeth down your throat", whereupon the driver ordered Casillo to put his feet down. Casillo started crying, telling the accused all about his family troubles. The accused managed to calm him; then turned him over to a passing military policeman. The driver did not see anything unusual about Casillo's mouth or face when he first got into the staff car, nor did he, the driver, strike Casillo as he got in. There was no struggle, at any time, between Casillo and the accused, and the accused

put the sergeant in the staff car only once. It was the driver and not the accused who put him in the second time (R. 88-100, 112).

Colonel Lawrence H. Caruthers, Maneuver Director Headquarters, testified that he had known the accused for two and one-half years; that he had a reputation of being a very satisfactory officer and that his reputation for truth and veracity was excellent. Other character witnesses offered on behalf of the accused were Lieutenant Colonel Ward W. Conquest, Headquarters Second Army, Captain Haskell L. Aikman, Headquarters Second Army and First Sergeant Harold F. Jury, Headquarters Company, Second Army Special Troops (R. 112-116).

5. The accused, having had his rights explained to him, elected to appear as a sworn witness in his own behalf. He testified in substance that on 30 October 1943 while on duty in Manchester, Tennessee, he noticed that a weapons carrier was overloaded; he stopped the weapons carrier and asked the driver who was in charge of the vehicle; the driver replied that he was; the accused informed the driver that the weapons carrier was overloaded and ordered three noncommissioned officers to dismount, took the trip ticket for the weapons carrier and went up to the left front fender of the vehicle to write his report. As he was writing a soldier grabbed him by the arm and said, "I am in charge and they are trying to cover up for me"; the accused took the soldier by the arm and put him in the staff car, telling him at the time that he was under arrest, then turned around, completed his report, and began talking to the driver of the vehicle. Casillo got out of the sedan and walked around to the weapons carrier; Sergeant England, the accused's driver, put Casillo back in the car. The accused got into the front seat of the car and ordered Sergeant England to drive away. Casillo talked for a minute or two and then appeared to go to pieces; he kicked the back of the seat, one kick coming up over the front seat. The accused instructed the driver to stop the car and Casillo tried to climb into the front seat, whereupon the accused shoved him back. Sergeant England talked to Casillo and told him to quiet down. Casillo then started crying and telling accused about his domestic troubles; when he appeared to have gotten over his emotional disturbance, accused flagged a passing military policeman and ordered Casillo taken back to his organization. Casillo promised to behave and shook accused's hand, stating at the time that he was sorry for the way he had acted. Accused told the military policeman that Casillo was not drunk. Casillo was dressed in an O.D. uniform with his blouse unbuttoned, without a cap, with his collar open and with the knot in his tie pulled down about six inches below his neck. He had the odor of alcohol about him and was placed under arrest because he was untidy, because he put his hand on accused's arm, and because he didn't act like a normal man. Immediately before the car left the point where the weapons carrier was parked, a civilian approached Sergeant England and was introduced to the accused (R. 102-104).

On cross-examination the accused admitted that he had made no report of the incident. On examination by the court, accused testified that Casillo was the only one of the group of enlisted men who was unsoldierly, and that at the time of making the arrest he did not realize that Casillo was in charge of

the weapons carrier. The accused specifically denied having struck Casillo or having seized him at any time by the throat or necktie. When Casillo got out of the staff car, Sergeant England put him back and the accused did not touch him. In answer to a question as to how Casillo's lip might have been injured, the accused stated that his elbow or arm might have struck Casillo when he first turned around from the fender of the weapons carrier, although he had no sensation of having hit or struck anyone at all. Casillo did not strike his head against the door jam or other portions of the staff car (R. 105-110).

6. In rebuttal, Mr. M. W. Summers, a farmer living in the vicinity of Manchester, Tennessee, called as a witness by the court, testified that he saw the accused on or about 30 October 1943, standing beside a car and an Army truck, both parked near a filling station with a crowd around. He went up to the scene and noticed a young man approach the accused and speak to him; the accused first gave the man a shove and then punched him with his left hand; the young man partially lost his balance, and the accused grabbed him by the neck, shook him and shoved him into the car. On cross-examination, the witness stated that he was not close enough to hear what was said, but did notice that the young man was a soldier. The military policeman who was driving the car helped accused put the soldier in the car. The witness had never seen the accused except for that time in Manchester and did not pay much attention to him then, but he did recognize the accused in the hall just before he was called in to testify (R. 119-122).

7. In rebuttal for the defense, it was stipulated that if Joe Johnson, a civilian, were present he would testify under oath that he observed the weapons carrier and Army passenger car parked in Manchester; that he saw Colonel Crawford writing; that he saw a soldier dismount from the weapons carrier, approach Colonel Crawford and take him by the arm; that he saw Colonel Crawford take the soldier by the arm and put him in the staff car; that the soldier got out of the staff car and was ordered back by Sergeant England; and that no violence was committed by anyone during the whole incident (R. 124).

8. Specifications 1 and 2, Charge I, allege two assaults with intent to do bodily harm, in violation of Article of War 93. Five unimpeached witnesses, including one disinterested civilian, corroborated the victim's testimony as to both assaults, convincingly supporting the conclusion implicit in the court's findings of guilty, that the testimony of the accused and his driver, and the stipulated testimony of Joe Johnson, were not strictly in accordance with the truth. However, "An assault with intent to do bodily harm is a felony only when committed with a dangerous weapon, instrument, or other thing, and a fist does not fall within this class, within the meaning of the statute" (Dig. Op. JAG, 1912-40, sec. 451 (7)). The Specification does not allege nor does the evidence establish any acts by the accused which would warrant the legal inference that, beyond a reasonable doubt, he intended to do bodily harm. Assault and battery are shown (CM 229366, Long). In the opinion of the Board, the evidence is legally insufficient to sustain the conviction

of felonious assault in violation of Article of War 93, but legally sufficient to support a finding of guilty of the lesser included offense of assault and battery in violation of Article of War 96.

9. The Specification, Charge II, alleges false official statements to the investigating officer, denying the commission by the accused of the offenses alleged in the Specifications under Charge I. While the false statements alleged and proved might logically be regarded as detailed reiteration of representations involved in the accused's pleas of not guilty to Charge I and its Specifications, The Judge Advocate General has held in a recent case - analogous except that the offense was charged under Article of War 95 instead of 96 - that false testimony to an investigating officer is a false official statement in violation of Article of War 95 (CM 230829, Mayers). In the light of the cited authority, the Board of Review is of the opinion that the record supports the findings of guilty of Charge II and its Specification.

10. The accused is about 48 years o' age. War Department records show enlisted service from 5 September 1917 to 22 April 1919; induction from the Tennessee National Guard into Federal service and entry on active duty as major, Field Artillery, 7 February 1941; detailed in the Corps of Military Police 24 November 1941; temporary promotion to grade of lieutenant colonel, Army of the United States 18 May 1942.

11. Four of the nine members of the court joined in a plea for clemency for the accused, recommending suspension of the sentence adjudged because of his "long service in the army including one year served overseas during the last World War"; the good reputation he has enjoyed "as an officer throughout his service"; and, particularly in view of the war and the existing "severe manpower shortage", his capacity for continued useful service to the Army. In approving the sentence the reviewing authority recommended that it "be commuted to vacation and termination of the appointment, temporary Lieutenant Colonel, Army of the United States; that he thereupon revert to his permanent grade, Major, National Guard; and, that he thereupon be relieved from active duty."

12. 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 only so much of the findings of guilty of Charge I and Specifications 1 and 2 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 Charge II and its Specification; legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas N. Tappy, Judge Advocate.

Herbert M. Riedner, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 249165

1st Ind.

War Department, J.A.G.O., 8 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 Lieutenant Colonel William H. Crawford (0-273860), 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 only so much of the findings of guilty of Charge I and Specifications 1 and 2 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 Charge II and its Specification; 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 good behavior.

3. Consideration has been given to an oral request from the Honorable Kenneth D. McKellar, United States Senate, from Tennessee, that careful consideration be given this case and to the attached letters written by the Honorable Cordell Hull, Secretary of State, and the Honorable Baxter Key, District Attorney General, 5th Judicial Circuit of Tennessee, forwarded to the War Department by the Honorable Albert Gore, Member of Congress from Tennessee.

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

Myron C. Cramer

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

5 Incls.
Incl.1-Record of trial.
Incl.2-Ltr. from
Hon. Cordell Hull.
Incl.3-Ltr. from
Hon. Baxter Key.
Incl.4-Dft. ltr. for sig.
Sec. of War.
Incl.5-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. 224, 29 May 1944)

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

SPJGK
CM 249211

16 FEB 1944

UNITED STATES v. Second Lieutenant ALAN J. STONE (O-745536), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Luke Field, Arizona, 14 January 1944. Dismissal and total forfeitures.

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

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

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

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

Specification 1: In that 2nd Lt. Alan J. Stone, Headquarters and Headquarters Squadron, 305th Single Engine Flying Training Group, Luke Field, Arizona, did, on or about 8 December 1943, on a public street, to wit, 4th Street, Phoenix, Arizona, wrongfully molest and annoy a female person, Lucille Phillips.

Specification 2: (Finding of not guilty).

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

Specification: In that 2nd Lt. Alan J. Stone, Headquarters and Headquarters Squadron, 305th Single Engine Flying Training Group, Luke Field, Arizona, did, on 4th Street at or near St. Joseph's Hospital, Phoenix, Arizona, on or about 8 December 1943, while in an automobile, willfully and wrongfully expose his private parts in an indecent manner to Lucille Phillips.

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

Specification 1: In that 2nd Lt. Alan J. Stone, Headquarters and Headquarters Squadron, 305th Single Engine Flying Training

Group, Luke Field, Arizona, did, on or about 27 November 1943, on E. McKinley St. in Phoenix, Arizona, wrongfully molest and annoy a female person, Winifred Wessels.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

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

Specification: In that 2nd Lt. Alan J. Stone, Headquarters and Headquarters Squadron, 305th Single Engine Flying Training Group, Luke Field, Arizona, did, on or about 27 November 1943, on E. McKinley St. in Phoenix, Arizona, willfully and wrongfully expose his private parts in an indecent manner to Winifred Wessels.

He pleaded not guilty to all the Charges and Specifications. He was found guilty of Specification 1 of Charge I, not guilty of Specification 2, and guilty of Charge I; guilty of Charge II and its Specification; guilty of Specification 1 of Additional Charge I and of Additional Charge I; not guilty of Specifications 2 and 3 of Additional Charge I, and guilty of Additional Charge II and its 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. Summary of evidence.

a. Specification 1, Charge I, and Specification of Charge II.

Mrs. Lucille Phillips, whose husband is stationed with the Navy in the South Pacific, was walking to her work in a drug store in Phoenix, Arizona, on the morning of 7 December 1943. As she stopped and turned around at Fillmore and 4th Streets, to see if a street car was coming, accused drove down 4th Street in a black Buick automobile and pulled up near her. He was driving alone, and asked her, "Would you like to ride, Miss?" (R.9-11). She testified that she replied, "No thanks, I'll walk"; that she stood there a moment hoping a street car would come; and that she then started to walk rapidly, south on 4th Street. Some distance down 4th Street, she started to cross to the other side, and then noticed that accused's car had made a right-hand turn at the corner. The car again came to a stop in front of her, blocking her path across the street, and accused again said, "Would you like to ride, Miss?". Again she replied, "No thanks, I'll walk" (R.11,14,21).

Mrs. Phillips testified that she was standing on the right-hand side of the car, about two feet from it, opposite the driver's seat and steering wheel. When she declined to ride, accused opened the door nearest to her. She stated his trousers were open and his private parts exposed. She had not seen him unfastening any part of his clothing. He remained behind the wheel at all times, and had one hand on the steering wheel. She got back on the sidewalk as quickly as she could and started to walk away rapidly. Accused, who had said, "What is the matter?" two or three times, drove off (R.11-16). At all times accused's language and tone of voice were polite (R.19).

b. Specification 1, Additional Charge I, and Specification of Additional Charge II.

Miss Winifred Wessels testified that at approximately 2:30 in the afternoon of 27 November 1943, she was walking home from her work at the Hotel Westward Ho, Phoenix, Arizona. At the intersection of East McKinley and 3rd Streets she noticed an automobile driven by accused stop within three feet of her. Accused, who was alone in the car, asked her whether he might drive her home, to which she replied, "No, thanks". Accused then drove to the intersection of McKinley and 5th Streets and stopped his car, blocking the intersection so that she had to walk around the back of it (R.22,23,29).

A few minutes later, at the middle of the block between 5th and 6th Streets, witness saw that accused had parked his car heading south on 6th Street, and was walking towards her. He approached and said, "If you won't ride with me, I'll walk with you", to which she replied, "I prefer to walk by myself" (R.23).

Accused then asked her where she lived, and she replied, "Quite a distance from here". Accused asked her whether she had lived "here" (presumably meaning, in Phoenix) long, and she told him that she had lived there approximately a month. She asked him "whether he was stationed at a nearby field", and he told her, "No", that he was vacationing on leave or furlough. By this time they had almost reached 7th Street. Witness testified that accused told her that "he thought I was attractive and he would like to play", and that he then stepped directly in front of her, about an arm's length from her, pulled open his trousers, and exposed his private parts. She "sidestepped him" and went on to her home, and did not see what he did thereafter (R.23,24).

Accused's rights were explained to him and he declined to testify or make an unsworn statement. The defense offered no evidence.

4. The evidence, which needs no recapitulation, is sufficient to prove accused guilty of the Charges and Specifications beyond any reasonable doubt. Both witnesses testified definitely that upon separate

occasions accused attempted to force his attentions upon them after they had politely told him that they wished to be left alone. While his conduct in these respects was neither insulting nor violent, it was nevertheless such as to bring discredit upon the military service. The evidence is also undisputed that separately from his unwanted advances, he committed acts of indecent exposure, which acts were clearly conduct unbecoming an officer and a gentleman.

5. One minor error requires comment. Although the Specifications under Charges I and II alleged the acts of molestation and indecent exposure to have taken place on 8 December 1943, Miss Phillip's testimony shows them to have occurred on 7 December. The place and the other circumstances were as alleged. It does not appear that accused was misled or prejudiced in his defense thereby, and the variance was immaterial.

6. War Department records show that accused is 23-3/12 years of age and single. He attended the College of the City of New York for one year, but did not graduate. He served from 18 August 1942 to 19 May 1943 as an Aviation Cadet, and was commissioned a Second Lieutenant, Air Corps, Army of the United States, on 20 May 1943.

7. 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 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.

Thos Wannwell, 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 Alan J. Stone (0-745536), Air Corps.

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

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 155, 4 Apr 1944)

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

SPJGV
CM 249220

(61)

9 MAR 1944

UNITED STATES v. Captain WILLIAM T. HART (0-293226), Infantry.	70TH INFANTRY DIVISION Trial by G.C.M., convened at Camp Adair, Oregon, 20 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 95th Article of War.

Specifications 1 and 2: (Findings of not guilty).

Specification 3: In that Captain William T. Hart, 276th Infantry, did on or about 5 November 1943, use the following insulting language toward Mr. H. B. Martin, a Pullman car conductor on a southbound train in the State of California, "You son of a bitch" or words to that effect.

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

Specification: In that Captain William T. Hart, 276th Infantry, was, on or about 5 November 1943, in a public place, to wit, a Pullman car on a southbound train in the State of California, disorderly while in uniform, under such circumstances as to bring discredit upon the Military Service.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specifications 1 and 2 of Charge I; guilty of Specification 3 of Charge I and Charge I and guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

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

Homer B. Martin of 4146 Garden Avenue, Los Angeles, California, was the Pullman conductor, and Alfred Crockett was the Pullman porter on a Southern Pacific Railroad train running between Portland, Oregon and Los Angeles, California which left Portland at 7:15 p.m., 4 November 1943. Accused boarded this train at Albany, Oregon in company with a "Major Cary".

Major Cary had lower berth 3 and accused had lower berth 5 in Pullman car number 60 (R. 7, 9). While the conductor was collecting Major Cary's ticket, accused brushed by him in the aisle and he asked accused if he had a ticket. Accused replied, "You are damn right I have. What do you want to know?" He took up the ticket and went on his business. The next day, 5 November, he was through Car 60 ten or twelve times in attendance of his duties, and observed accused sitting and talking with Joe Hernandez, a radio announcer, who was occupying lower 9 (R. 14), and a lady, "Mrs. Davis", who was occupying upper 9 (R. 11, 17, 18). They were all having a good time and enjoying themselves. He noticed a bottle, but had no reason to say anything to them, as everything was in good shape. He did not see accused take a drink and had no cause to speak to him. He received no complaints of accused's conduct during that day (R. 13, 14). The Pullman porter, Alfred Crockett, on duty in Car 60, had seen the accused drinking during the day but did not know whether he was drinking whiskey or rum. He did not know the brand of liquor he was drinking. On one occasion during the day he asked accused not to smoke in the car. That was the only occasion he had to speak to him (R. 6-8). The train arrived in Sacramento, California at 6:00 p.m. on the evening of 5 November 1943. As the train lays over there for an hour and fifteen minutes, the passengers were told they could get off. At about 6:45 p.m. the gates at the railway station in Sacramento were opened to permit the passengers to re-enter the train, and accused was observed coming up the ramp toward the train. He was dressed in proper uniform. He had every indication of being unsteady on his feet and was being supported by two people, one on either side of him (R. 15). One of the persons was Mrs. Davis (R. 17). "Without a doubt he was intoxicated." Two special officers of the railroad were standing at the head of the ramp with Mr. Martin, the Pullman conductor, and also observed accused's condition.

About ten minutes later, and before the train pulled out, the Pullman porter on duty in Car 60 made a report to Mr. Martin, the Pullman conductor, that the lady in lower 10 berth was complaining about accused's action with a bottle of whiskey. He instructed the porter to return to Car 60 and then asked the two special officers of the railroad to go to Car 60 and take the bottle away from accused (R. 10). These two officers went back to Car 60 and returned shortly with the information that the disturbance had been quelled and everything was quiet again. The lady occupying lower 10, and who had made the complaint, was an elderly lady and suffering from either asthma or fainting spells. By the time the Pullman conductor reached Car 60, this elderly lady had retired and he was unable to talk to her.

Shortly after the train left Sacramento, the accused told the Pullman conductor he wanted to talk to him. He wanted to move his berth. The conductor said, "If you wish to move your berth and you have a good reason I think that could be arranged. I will be surely glad to help you, but if you want to have a party with this woman in upper nine, you had better go to bed and go to sleep. Tomorrow morning you will thank me for it, but if you get in bed with that woman we will put you off the train."

Accused said, "Conductor, you are a good man." The conductor went about his duties, when about 30 to 40 minutes later the Pullman porter who saw accused climb into upper 9 (R. 7), which was occupied by a lady, came forward about four cars in the train where the conductor was working, and said, "That Captain is in bed with that woman in upper nine." The conductor and Corporal Raymond L. Lauderbaugh, Military Police, Southern Security District, Los Angeles, California, who was on the train as a train guard, went to Car 60 and found the curtains buttoned in upper berth 9. The conductor unbuttoned the curtains and pulled them back. Mrs. Davis, the lady occupant of the berth, was facing the car wall. The accused was lying full length with a Pullman blanket over him. The conductor pulled the blanket back and ordered accused out of the berth. He came down fully dressed, with his trousers open at the top and part of his penis exposed (R. 11, 13). Accused, the conductor and Corporal Lauderbaugh went to the smoking room where the corporal began questioning accused. While the corporal was getting accused's name and asking a few questions, accused said, "I think you are a son-of-a-bitch." The corporal looked up at accused and said, "Do you mean me?" and accused said, "No, I mean this Conductor." Immediately preceding this remark, the conductor had told accused he was drunk and had better go to bed and stay out of "that woman's" berth (R. 12).

The berths were all made down at the time and no one saw this incident except the conductor and Corporal Lauderbaugh (R. 15, 18-19), and no commotion or noise was made sufficient to attract the attention of others. There were men in the smoking room when accused was taken there for questioning.

It was stipulated that if Corporal Raymond L. Lauderbaugh were present in court and sworn as a witness, he would testify that he was on duty as a train guard on Southern Pacific Train #2/60.

> "That on 5 November 1943 a passenger, Mrs. M. J. Harper, of Junction City, Oregon complained to me that an officer was making a disturbance in Pullman Car #60. That the officer identified himself to me as the accused in this case, Captain William T. Hart, 0-293226, 276th Infantry, Camp Adair, Oregon. Captain Hart was taken into the vestibule by Railroad Special Agent Scott and myself and told to go back to his car and go to bed. He agreed. Capt. Hart was dressed in the uniform of a U. S. Army officer. From the odor of his breath and his actions at this time, I knew that he had been drinking. At 10:50 P.M. on the same day, Porter A. Crockett told the conductor, H. B. Martin, and myself that Captain Hart was in a berth with a woman. The conductor and I went to the berth and asked the accused to get out and he did. The woman in the berth was undressed. The accused had on an officer's trousers and shirt but when he got out of the berth, his penis was exposed. The conductor and I took the accused to the men's room and I started making out my report. During this time I heard the accused call someone a son of a bitch and I asked him if he meant me. The accused said that he was referring to the conductor, not to me."

It was also stipulated that if First Lieutenant Fred M. Barker, Corps of Military Police, were present in court and sworn as a witness he would testify that

"on 6 November 1943 at Los Angeles, California while conducting an investigation into alleged misconduct which occurred on 5 November 1943 on Southern Pacific train #2/60 between Albany, Oregon and Los Angeles, California, I questioned Captain William T. Hart, 0-293226, 276th Infantry, Camp Adair, Oregon, the accused in this case, first advising him of his rights. That I identified the officer as Captain William T. Hart, the accused, by his identification tags and papers and by his own admission. That the attached exhibit marked for identification Prosecution Exhibit C was signed by the accused in my presence after being warned of his rights and of the fact that the exhibit might be used against him, that the exhibit was sworn to and subscribed before me as an officer duly authorized to administer oaths. That my signature appears on the exhibit, being placed thereon in the presence of the accused."

Exhibit C in pertinent part is as follows:

"I had had a few drinks before I boarded the train at Albany, and I took a quart of rum aboard the train with me. I met up with some civilians and we were having a very quiet and pleasant time until just before we neared Sacramento when an old lady who had had her birth made down in the middle of the afternoon, made some kind of a complaint about us. After we left Sacramento and after the births were made down, a lady friend whom I had met on the train, but whose name I don't care to reveal, went to bed in upper birth, #9. With her approval I climbed up in her birth with her. About fifteen or twenty minutes later, the Pullman conductor opened the curtains and tried to pull me out. I climbed down. The Military Policeman present requested me to come to the Men's Room where he started making up his report. During the conversation that followed I admit that I did call the conductor a son of a bitch. He had made me mad when I first got on at Albany by the manner in which he asked for my tickets. A retired Major Shumaker, Major Kirkpatrick, and his First Lieutenant friend were present at the time. While I admit that I had been drinking, I was not drunk."

4. For the defense: After his rights were explained by the law member, accused, at his own request, was sworn and testified that he got on the train in Albany, Oregon, and the following day met a Major Shumaker, retired, a Mrs. Davis and another lady whose name he did not remember. They had a few drinks and were enjoying themselves. When the train stopped at Sacramento, California, he, the two ladies and Major Shumaker got off and had something to eat. He did not have anything to drink during the stop and

these same people accompanied him back to the train. When they got back on the train all the berths had been made down, and he noticed a special agent and a military policeman were standing by number 9 berth. He walked up to them and asked what the trouble was. He was told that someone had been making too much noise in number 9. Accused told the special agent and military policeman that it would not happen again, and that he would assume all responsibility.

Later that night, when the conductor ordered him out of upper 9 berth he requested the conductor to wait a minute and did his best to zip up his trousers. He found it very difficult to zip them all the way up while in an upper berth. When he got down in the aisle, he zipped them all the way up and accompanied the conductor and military policeman into the smoker. He was resentful and humiliated because they brought him into the smoker in the presence of a major, a lieutenant and a civilian to question him. While the military policeman was making out his report the conductor made a couple of remarks, and accused said, "As far as I am concerned you are a son-of-a-bitch." When they finished questioning him he retired to his berth.

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

a. The conduct shown in support of Specification 3 of Charge I alleging the use of insulting language toward the Pullman conductor, was not, in the opinion of the Board of Review, of a sufficiently serious and disgraceful nature to warrant a finding of guilty under the 95th Article of War. The evidence indicates that the insulting remark was provoked by the conductor's statement, in the presence of several occupants of the men's smoker, that accused was drunk, and the further fact that accused was humiliated as a result of being questioned in their presence. As a result of these circumstances, he acted impetuously and in sudden anger. His conduct did not demonstrate moral unfitness to be an officer (MCM, 1928, par. 151). In any event Specification 3 of Charge I is, in substance, a component part of the offense of disorderly conduct alleged under Charge II and its Specification in violation of the 96th Article of War.

6. Accused is 33 years of age and is married. He graduated from

high school and in 1933 received a degree of Bachelor of Science from Louisiana State University. He pursued a post graduate course in Economics for one year at the same university but did not graduate. He was appointed second lieutenant, Infantry Reserve, 20 May 1932, promoted to first lieutenant, 2 January 1941, and ordered to active duty 25 March 1942. He was promoted to captain in the Army of the United States, 19 August 1943.

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 only so much of the findings of guilty of Charge I and Specification 3 thereof as involves findings of guilty of the Specification in violation of Article of War 96; legally sufficient to support the findings of guilty of Charge II and its Specification; legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas N. Tappey, Judge Advocate.

Curtis M. Kiedier, Judge Advocate.

Benjamin R. Cooper, Judge Advocate.

SPJGV
CM 249220

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 William T. Hart (0-293226), 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 I and Specification 3 thereof as involves findings of guilty of the Specification in violation of Article of War 96; legally sufficient to support the findings of guilty of Charge II and its Specification; legally sufficient to support the sentence and to warrant confirmation thereof. In view of the previous good record of accused and his valuable military training, I recommend that the sentence be confirmed, but that the execution thereof be suspended during good behavior.

3. Consideration has been given to the attached letters from the Honorable Henry D. Larcade, Jr. and Mr. Thomas S. Plunket, both of whom urge clemency in behalf of 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 designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

5 Incls.
Incl.1-Record of trial.
Incl.2-Ltr. fr. Hon. Henry D. Larcade, Jr.
Incl.3-Ltr. fr. Mr. Thomas S. Plunket.
Incl.4-Dft. ltr. for sig. Sec. of War.
Incl.5-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. 165, 11 Apr 1944)

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

SPJGQ
CM 249224

26 FEB 1944

UNITED STATES	)	SECOND AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Army Air Base, Casper, Wyoming, 7 - 8 January 1944. Confinement for life. Dishonorable discharge, Penitentiary.
	)	
Private CHARLIE J. HOPE (34319083), 351st Base Headquarters and Air Base Squadron.	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Charlie J. Hope, 351st Base Headquarters and Air Base Squadron, did, at Casper, Wyoming, on or about 7 December 1943, forcibly and feloniously, without her consent, have carnal knowledge of Mrs. Donnie Pinson.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction for striking a non commissioned officer on the head in violation of Article of War 93 was introduced at the trial. Upon his conviction accused had been sentenced to confinement at hard labor for three months and forfeiture of $33 per month for a like period. In the instant case he was sentenced to be dishonorably discharged from 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 life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, withheld the order directing execution of the sentence, and forwarded the record of trial for action under Article of War 50½.

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

On the evening of 7 December 1943, Mrs. Tom Pinson, also known as Mrs. Donnie Pinson (R. 46), was in the Texas Lunch in the "Sand-bar District" of Casper, Wyoming. She had suffered an accident a number of years previous and doctors had variously prescribed drugs and sedatives for her condition so that for a period of 8 years she had been accustomed to the use of narcotics. On the night in question she had taken three nembutal capsules. She had, on other occasions, taken more than that number at one time without losing consciousness but on this evening, though she had not had any intoxicating liquors and had merely drank a bottle of beer and a cup of coffee in the Texas Lunch, she completely lost consciousness and could remember nothing that happened to her until she "woke up" in a hospital at about 2 or 2:30 a.m. on the following morning. She believed that someone had placed a drug in her cup of coffee which she had placed on a cabinet in a back room of the Texas Lunch while she momentarily turned away to play a nickelodian (R. 41-44).

At the same time James Kelly Davis was at the Texas Lunch in company with the accused who took a seat on a counter-stool next to Mrs. Donnie Pinson. Mrs. Pinson was leaning on the counter with her head resting on her arm. (R. 22-23) Though Davis did not pay much attention to them at the time he later saw the accused lift Mrs. Pinson from the stool and take her toward a lavatory in the rear (R. 23). The woman staggered, appeared to be in an unconscious condition, and the accused assisted and steadied her (R. 27). Davis later went back to the lavatory and, peering through a crack in the door about six inches in length (R. 24-26), saw the accused lying on top of the woman who was on the floor. Davis "guessed" he was having sexual intercourse with her because his body was in motion. Thereupon Davis asked the accused to let him come in. Inside the lavatory he first saw accused "was still on the girl for the time being" (R. 24), with his head near her head (R. 24); he then saw the accused on one hand and one knee (R. 26) getting off of the woman and when he arose Davis saw that the trousers which the woman was wearing were opened at the fly and were drawn down to a little above her knees though he failed to notice the condition of the accused's clothing (R. 24). During all of the time Davis was observing the woman in the lavatory she was motionless, her arms were by her side and she made no sound except a "mumble" (R. 27, 28).

After the accused got up he and his companions prepared to leave (R. 25) but before going, there was an altercation between the proprietor, who wanted the soldiers to leave, and the accused who wanted to fight with the proprietor. When the accused refused to come along at Davis' request and "swung at him", Davis hit him in the face with his fist (R. 36), after which Davis, another man by the name of Williams and the accused left and proceeded to go to the Radio Bar. On the way, however, the accused left them (R. 25).

After the accused and his companions had left the Texas Lunch Mrs. Pinson, who was known generally as "Jean" in the "Sand-bar District" (R. 7, 9, 14, 22), was discovered by Lyle O. Newlin, a resident of Casper, Wyoming, lying on the floor of the lavatory at the Texas Lunch in an unconscious condition. Her trousers which she was wearing were unbuttoned at the fly and were drawn below her knees (R. 12). She was taken to a bench in the dance hall of the cafe and after efforts had been made to revive her by the use of ice and camphor, she opened her eyes and tried to converse but as she merely mumbled she could not be understood (R. 9, 10, 13, 16, 18-21).

Though no one saw how or when the woman left the Texas Lunch she disappeared (R. 15).

Meanwhile the military police had been informed of the suspicious conduct in the lavatory of the Texas Lunch and Privates first class J. B. Morren and Eugene Eastburn, members of the Military Police Detachment, Army Air Base, Casper, Wyoming, proceeded to that cafe at about 7 p.m. the same evening to make an investigation (R. 30, 31, 37). Following tracks in the snow (R. 10, 34, 35, 39) the two military police, accompanied by three civilians, Thomas Haydon, Lyle O. Newlin and Major (a name, not a military title of rank) Alfred Estes, went to an outhouse or shower room near the Texas Lunch where, by the light of a flashlight, they discovered the accused inside, lying on top of Mrs. Pinson, who was on the floor.

Private first class Morren testified that accused was "on top of this white woman", "in motion" and although he told him to get up "he kept on going" until prodded in the back with the policeman's club whereupon he arose. Accused's trousers were open and his privates exposed (R. 30, 31) and there was blood on his blouse (R. 32, 33, 34). The woman's trousers were "pulled down on the left ankle" and she was motionless (R. 36). Regarding actual penetration the following colloquy took place:

"Q. Who pulled the accused off the woman?
A. I did.

Q. Undoubtedly you were offered a clear vision of contact. Is there any doubt in your mind that this accomplished or obtained penetration of the woman. This is not your opinion but actual observation.
A. I should say he had, sir.

Q. May I ask you to clarify that answer, either you are positive or you are not positive.
A. I am positive, sir."

had been given to the accused prior to the examination (R. 31, 32). Morren also admitted that he had slapped the accused once during the examination because, as he said, "when I said 'yes, sir, this is the man' he (accused) called me a damn liar and got me by the shirt collar and I slapped him across the face * * *" "* * * I slapped him when he (accused) jumped at me * * *" (R. 32). According to Morren, two "colored" civilian men were also present at one time or another at the police station, one of them, Major Alfred Estes, coming in after accused had been examined (R. 34).

Major Frederick H. Haigler, Medical Corps, on duty at the Station Hospital at the Casper Army Air Base, was called to the police station on the night of 7 December 1943. He testified that he was present when Lieutenant Davidson and "an M.P." were questioning the accused. The record contains the following testimony regarding the incident:

"Q. Did you hear the accused make any statement?
A. Yes.

Q. What statement did he make?
A. He stated 'All right, I'll tell you everything, we all three did it.' He was asked who did it, and he said 'Davis, Williams and myself.' And he was asked if he would make a signed statement, he said 'yes', and went over to the bench to make the statement.
Q. Do you, of your own knowledge, know what this investigation was about?
A. Yes.

Q. What was it about?
A. About a charge of rape.

Q. In this statement that Hope made, that you heard, did it concern the investigation of rape that was being conducted?
A. That's right."

Major Haigler saw no one slap the accused while he was present. Later, after the accused had been taken to a cell, he attempted to make an examination of accused but was unable to arouse him. He was of the opinion that the accused had been drinking for he had vomited and the expelled substance had an alcoholic odor (R. 46, 47).

4. The defense called as witnesses for the defense four of the witnesses who had previously testified for the prosecution. Their testimony may be summarized as follows:

James Kelly Davis had been convicted of "taking" a gun from his employer in Frankfort, Kentucky for which, he said, "they gave me a

year". In Des Moines, Iowa he had been convicted of, and served six months for, breaking and entering. In Mason City, Iowa, he had served 15 days for conviction of assault and battery, and seven years for obtaining money under false pretenses (R. 48, 49).

Privates first class Eastburn and Morren, in the main, reiterated what they had stated as witnesses for the prosecution. Eastburn stated that when he and Morren came to the outhouse (which he designated in his testimony either as a "bathroom" or as a "shower room") after making a search, they found "the accused and the lady in the case" whose name he did not recall. He saw the accused on top of the woman but, since the accused was covered by an overcoat, he could not see his privates until he stood up (R. 50). Morren first said he saw accused's privates "in the privates of the woman" and then, under further examination, said that, because accused's back was toward him he could not see his privates when he was on the woman, but that he did see them when he stood up and that "it was in a bent position" (R. 52, 53).

The civilian, Major Alfred Estes, testified that when he was present at the police station while "the Lieutenant" was questioning the accused he saw a military policeman strike the accused. At first he said he saw him struck "several times" (R. 54) and later, when examined by the court, he said "three or four times. I would say several" (R. 56). He heard no confession by the accused at any time. He had seen the accused in the Texas Lunch on the evening of 7 December 1943 prior to his being found in the outhouse (R. 54). He did not then see accused touch the woman involved (R. 54) but both accused and the woman were in the lunch room at the same time (R. 55).

5. The accused, after being advised of his rights, elected to make an unsworn statement as follows:

> "* * * On December 7, me and Private Williams got the bus at 1:10 and went to town. I don't know exactly what time it was when we got there, but it was some time between 1:30 and 2:00. When we got off the bus we go straight into town and bought a pint of whiskey and then went to the Radio Bar. We didn't drink the whiskey then, but got a bottle of beer and drank it. We left the Radio Bar and went to the Texas Lunch. We drank the whiskey in the bathroom. This fellow Davis was there and all during the time we talked to him, about ten minutes, and we left and go back to the Radio Bar and got another glass of beer and came back to the Victory Cafe, or West "B" Cafe and spent the evening there until night. We met Hussey and while we was there Private Williams wanted to go uptown. He said, 'Lets go to town,' and I said, 'O.K.' We were on the way uptown and I told Private Williams we ought to get a room before it was too late. I go back and pay the lady for the room, and they are walking along steady. I started out again and thought maybe they had gone to the Texas Lunch. I went in the front part and they weren't there. An MP snatched on my coat and said, 'Don't give me no argument.' I came outside and want to go

my way and the one Private Morren hit me across the face with his fist before I could get my mouth covered up. The next thing they put in a car and came down town. They sit me in a chair and questioned me again. I told them, 'I ain't goin' to tell a lie on anything. I ain't tellin' no lie', and the MP hit me again. They was working on me when Lt. Davison came in and asked me and I told him I didn't. They beat me again, and I was unconscious. Then I signed a paper and came upstairs. I don't remember nothing until the next morning."

When asked whether he saw any woman present when he was in the Texas Lunch on this occasion he answered: "I didn't pay much attention. There were several women there". He did, however, deny ever seeing Mrs. Pinson before the day of trial (R. 56, 57).

6. According to the Manual for Courts-Martial rape is the unlawful carnal knowledge of a woman by force and without her consent. Both the force and the want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent. (MCM, 1928, par. 148b).

In this case we have an unusual situation in which the victim of the assault was shown, by undisputed testimony, to have been in an almost wholly unconscious state at the time the alleged crime was committed. Whether this state was self induced or not, and whether it was a stupefaction because of liquor, or drugs, or both, are alike uncertain from the recorded testimony. But, whatever may have been the reasons or the cause, the mental condition of the woman assailed prevented her from giving any competent or material testimony of an affirmative nature other than that touching her condition and the surrounding circumstances so far as she can remember.

The crime of rape may be committed upon the body of a woman who is, at the time, insensible from drugs, (Wharton's Criminal Law (12 Ed), sec. 695) and that such insensibility was self induced would in no wise alter the responsibility of her assailant (Winthrop's Military Law and Precedents, (2d Ed.) Reprint 1920, p. 678, foot note 86).

The first inquiry to be made is whether the woman, from whose body the accused was forcibly removed on the date alleged, was the woman named in and intended by the Specification as the victim of the rape. This involves a matter of identity and while the testimony adduced on this point leaves much to be desired, there is no doubt that the two were identical.

The woman testified that her name was Mrs. Tom Pinson but that she was also known as Mrs. Donnie Pinson. She said that she was in the Texas Lunch on the evening of 7 December 1943 after having taken 3

nembutal capsules. Thereafter she had a bottle of beer and a cup of coffee, after which she became wholly insensible of her surroundings and condition, until she awoke in a hospital at 2:30 a.m. on the following morning.

During the early evening the accused was also present in the Texas Lunch. Three witnesses saw him there and, although the accused testified that there were several women present, he is not corroborated in that statement by any other witness. Four witnesses stated that they did see a stupefied or unconscious woman in the cafe at that time and one of them saw accused lying on top of her as she lay motionless and apparently unconscious, on the floor of the lavatory in the Texas Lunch. Three of these witnesses saw the accused again lying upon the same woman, in an outhouse adjacent to the cafe, about a half an hour later, and each testified that she still appeared to be unconscious.

While none of these witnesses positively identified Mrs. Donnie Pinson by name, and several stated that she was known to them by the name of "Jean" (a name which Mrs. Pinson denied using herself) direct and positive testimony proves conclusively that Mrs. Donnie Pinson was in the Texas Lunch in a stupefied and unconscious condition on the early evening of 7 December 1943. It is also established by uncontradicted testimony that a woman known to some as "Jean", was in the Texas Lunch at about the same time and that this woman was later found in the same condition, in an adjacent outhouse, under circumstances which resulted in the arrest of the accused, and his trial for rape in the instant case. No one questioned the identity of the victim, who testified in the trial, and, although the accused denied ever seeing the woman before the trial, it is an inescapable conclusion that the woman referred to by all of the witnesses in their testimony was the identical woman named in the Specification of the Charge.

The indispensable element of the crime of rape is penetration, but the slightest penetration will constitute the crime if accomplished by force and without consent. If there is an actual entrance of the male organ within the labia of the pudendum of the female organ, and such penetration be accomplished without consent and by force, or under such circumstances that proof of any force other than that which is an ordinary incident of the act of coition is unnecessary, the crime of rape has been committed. In cases where the victim of the assault is in a state of stupefaction lack of consent is obviously apparent. Proof thereof is unnecessary and proof of force, other than the act of penetration itself, is not requisite under such circumstances (Wharton's Criminal Law (12 Ed) sec. 682, p. 914). Proof of penetration, beyond every reasonable doubt is, of course, essential; but such proof need not be direct nor is it necessary that it be shown by testimony of the outraged female.

Proof by circumstantial evidence may be made and it is sufficient if facts be proven from which penetration may be inferred (Wharton's Criminal Law (12 Ed.) sec. 697, p. 936, and cited cases).

In Word vs. State, 12 Texas Appeals 174, there had been no testimony of the prosecutrix regarding the penetration because the assailant had beaten her into insensibility. The court sustained the conviction upon evidence of facts and circumstances from which the penetration was inferred and stated:

> "It would be a monstrous doctrine that villians who had rendered their victims insensible in order to effect their purpose should be freed from punishment because the victim could not swear positively to the act of penetration accomplished upon her during her state of insensibility."

This doctrine applies equally to a case where the victim is in any state of insensibility, however induced.

In the instant case, Mrs. Pinson testified that she had no recollection whatever of the accused's having touched her and although Privates first class Morren and Eastburn, Tom Hayden, Lyle Newlin, Major Estes and James Davis all saw the accused lying on top of an unconscious woman under circumstances which indicated that he was having sexual intercourse, no one was able to say positively that he actually saw a penetration of the private parts of this woman by the privates of the accused.

When the evidence of the attendant circumstances and conditions is examined, however, it appears evident, beyond all reasonable doubt that the only design the accused could have had in mind was sexual intercourse with the woman. He was first seen approaching the woman as she sat in stupefaction on a stool at the counter of the cafe. He then took her to the lavatory of the cafe and was seen on top of her while she was lying in an unconscious condition upon the floor with the trousers she was wearing open and drawn down to her knees and the accused was, by his motions, indicating to an eye-witness that he was having sexual intercourse with her.

The accused then left the cafe in company with others from whom he almost immediately parted, while bystanders in the cafe discovered the woman in the lavatory and removed her to a bench in the front part of the cafe where unsuccessful efforts to arouse her were made.

The woman then disappeared but, within a half hour, was discovered lying on her back in an outhouse or shower room adjacent to the cafe with her trousers down and one leg of the trousers completely removed from her leg. She was still wholly unconscious. Accused was again discovered on top of her with his trousers open and his privates exposed. He was

lying, facing her, upon her body so that his stomach was upon hers and their heads were together. According to some of the witnesses he was again in motion suggesting sexual intercourse. He was so intent upon his purpose that he failed to heed the orders of the military policeman to get up, but continued his motions until he was prodded in the back with the policeman's club and he had to be pulled from the woman's body. An overcoat he was wearing prevented the witnesses from observing an actual sexual connection between the accused and the woman but one of the military police testified to conditions of the accused's privates immediately after he was taken from the woman and from which alone it could reasonably be inferred that the accused had penetrated the woman's private parts with his penis.

It is not consistent with reason to believe that any male would associate with a female under such circumstances and on two separate occasions, for the sole purpose of fondling her person or gratifying his own desires or passions by merely lying in close proximity to her body and it requires no exceptional credulity to draw the sensible inference that, the accused, having complete control over a partially disrobed and totally unconscious victim did, as evidenced by his unmistakable position and motions, and the condition of his penis, penetrate the private parts of the woman to some degree, however slight.

It is evident from the testimony regarding the situation which confronted the accused at the time he was interrogated at the military police station that any statements he may have made were inadmissible as confessions. He had not been warned of his rights and he was struck by one of the police while the investigation was in progress. While the statements allegedly made by the accused were not sufficiently detailed to connect him positively with the crime with which he stood charged so that they may be treated as confessions in the legal sense, they did constitute damaging admissions and as such were legally competent and admissible irrespective of the rule barring their introduction as a confession. Moreover, ruling out entirely such statements, there is abundant, legally competent and admissible evidence elsewhere in the record to sustain the finding of guilt. Consequently such evidence touching the matter as was thus received did not injuriously affect any substantial right of the accused.

7. Attached to the record of trial is a petition for clemency signed by all the members of the court in which it is stated,

> "Although the evidence presented proved beyond a reasonable doubt that subject enlisted man violated Article of War 92, and the sentence imposed by the court was the minimum authorized for such offense, we feel that such sentence is too severe taking into consideration the age of the accused, the limited facilities for recreation afforded to men of his race, and particularly the character of the woman of whom he had unlawful carnal knowledge.

"We do hereby recommend that only so much of the sentence as provides for dishonorable discharge, confinement at hard labor for ten years and forfeiture of all pay and allowances due or to become due and owing, be ordered executed."

8. The record shows that the accused is 23 years of age and that he was inducted at Fort Bragg, North Carolina on 29 August 1942. He had no prior service.

9. The court was legally constituted and had jurisdiction of the accused and the offense charged. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. A sentence of death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 2801, Title 22, Code of the District of Columbia.

William A. Power, Judge Advocate.

Earle Stephens, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

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

15 MAY 1944

SPJGH
CM 249227

UNITED STATES	)	SECOND AIR FORCE
v.	)	Trial by G.C.M., convened at Army Air Base, Kearney, Nebraska, 14 January 1944. Dismissal.
Second Lieutenant HAROLD GREENBERG (0-577747), Air Corps.	)	

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

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

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

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

Specification 1: In that SECOND LIEUTENANT HAROLD GREENBERG, 485th Base Headquarters and Air Base Squadron, did, at Reno, Nevada, on or about 16 November 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Reno Army Air Base Exchange, a certain check, in words and figures as follows; to-wit:

94-1 MAIN OFFICE 94-1
NO.
FIRST NATIONAL BANK OF NEVADA

Reno, Nevada, Nov. 16 1943

PAY TO THE ORDER OF Cash $ 25.00

Twenty-five -00 DOLLARS

/s/ Lt. Harold Greenberg
0577747

and by means, thereof, did fraudulently obtain from the Reno Army Air Base Exchange, $25.00, lawful money of the United States, he, the said Second Lieutenant Harold Greenberg, then well knowing that he did not have and not intending that he should have any account with the First National Bank of Nevada, for the payment of such check.

Specification 2: In that SECOND LIEUTENANT HAROLD GREENBERG, 485th Base Headquarters and Air Base Squadron, did, at Reno, Nevada, on or about 18 November 1943, with intent to defraud, wrongfully and unlawfully make and utter to Harold's Club, a certain check in words and figures as follows, to-wit:

KEARNEY, NEBR., Nov. 18 1943 NO.___

FORT KEARNEY STATE BANK
76-43-10

PAY TO THE ORDER OF Cash $ 25.00

Twenty-five - 00/xx DOLLARS

FOR _____ /s/ Harold Greenberg
0577747

366 Avn. Sqdn

and by means, thereof, did fraudulently obtain from Harold's Club $25.00, lawful money of the United States, he, the said Second Lieutenant Harold Greenberg, then well knowing that he did not have and not intending that he should have any account with the Fort Kearney State Bank for the payment of said check.

Specification 3: Similar to Specification 2, except that it alleges the check was made and uttered to the "Silver Dollar".

Specification 4: Similar to Specification 2, except that it alleges the check was made and uttered to the Colombo Cafe.

Specification 5: Similar to Specification 2, except that it alleges the check was made and uttered to the Colombo Cafe, and was in the amount of $30.

Specification 6: Similar to Specification 2, except that it alleges the check was made and uttered on or about 19 November 1943, to the Colombo Cafe.

Specification 7: Similar to Specification 2, except that it alleges the check was made and uttered on or about 19 November 1943, to Colbrandt's.

Specification 8: Similar to Specification 2, except that it alleges the check was made and uttered on or about 20 November 1943, to the Hotel El Cortez.

Specification 9: Similar to Specification 2, except that it alleges the check was made and uttered on or about 20 November 1943, to the Club Fortune.

Specification 10: Similar to Specification 2, except that it alleges the check was made and uttered on or about 20 November 1943, to Colbrandt's.

Specification 11: Similar to Specification 2, except that it alleges the check was made and uttered at Kearney, Nebraska, on or about 22 November 1943, to the Fort Kearney Hotel, and in the amount of $15.

Specification 12: Similar to Specification 2, except that it alleges the check was made and uttered on or about 5 December 1943, to the Colombo Cafe, and in the amount of $100.

Specification 13: Similar to Specification 2, except that it alleges the check was made and uttered on or about 5 December 1943, to the Colombo Cafe, and in the amount of $100.

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

Specification: In that SECOND LIEUTENANT HAROLD GREENBERG, 485th Base Headquarters and Air Base Squadron, did, without proper leave, absent himself from his organization and duties at Army Air Base, Kearney, Nebraska, from about 24 November 1943 to 6 December 1943.

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

Specification: (Finding of not guilty).

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

Specification 1: Similar to Specification 2, Charge I, except that it alleges the check was made and uttered to the Union Federal Savings and Loan Association, and in the sum of $10.

Specification 2: Similar to Specification 2, Charge I, except that it alleges the check was made and uttered on or about 19 November 1943, to the Club Fortune.

Specification 3: Similar to Specification 2, Charge I, except that it alleges the check was made and uttered at Omaha, Nebraska, on or about 25 November 1943, to the Hotel Fontenelle.

Specification 4: Similar to Specification 2, Charge I, except that it alleges the check was made and uttered at Omaha, Nebraska, on or about 25 November 1943, to the Hotel Fontenelle.

Specification 5: Similar to Specification 2, Charge I, except that it alleges the check was made and uttered at Omaha, Nebraska, on or about 26 November 1943, to the Hotel Fontenelle, in the sum of $40, and that accused thereby fraudulently obtained $24.70 in money and $15.30 in services.

Specification 6: Similar to Specification 2, Charge I, except that it alleges that the check was made and uttered at Army Air Base, Kearney, Nebraska, on or about 22 November 1943, to the Officers' Mess.

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

Specification 1: Similar to Specification 2, Charge I, except that it alleges the check was made and uttered at Omaha, Nebraska, on or about 24 November 1943, to Charles J. Assman Company, and in the sum of $34.

Specification 2: Similar to Specification 2, Charge I, except that it alleges the check was made and uttered at Lincoln, Nebraska, on or about 29 November 1943, to the Cornhusker Hotel.

Specification 3: Similar to Specification 2, Charge I, except that it alleges the check was made and uttered at Denver, Colorado, on or about 30 November 1943, to the Cosmopolitan Hotel, and in the sum of $50.

Specification 4: Similar to Specification 2, Charge I, except that it alleges the check was made and uttered at Denver, Colorado, on or about 30 November 1943, to the Cosmopolitan Hotel.

Specification 5: Similar to Specification 2, Charge I, except that it alleges the check was made and uttered at Denver, Colorado, on or about 30 November 1943, to the Brown Palace Hotel, and in the sum of $50.

Specification 6: Similar to Specification 2, Charge I, except that it alleges the check was made and uttered at Denver, Colorado, on or about 30 November 1943, to the Brown Palace Hotel, and in the sum of $50.

Specification 7: Similar to Specification 2, Charge I, except that it alleges the check was made and uttered on or about 3 December 1943, to Paul A. Walters, Inc.

Specification 8: Similar to Specification 2, Charge I, except that it alleges the check was made and uttered on or about 5 December 1943, to Riverside Buffet, and in the sum of $20.

Specification 9: Similar to Specification 2, Charge I, except that it alleges the check was made and uttered on 5 December 1943, to La Hacienda Enterprises, Inc., and in the sum of $10.

The accused pleaded guilty to the Specification, Charge II, and Charge II; and not guilty to all other Specifications and Charges. He was found not guilty of the Specification, Charge III, and Charge III; and guilty of all other Specifications and Charges. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 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 the 48th Article of War.

3. Evidence for the prosecution:

a. Specification, Charge II: Extract copy (Ex. 1) of the morning report of 336th Aviation Squadron, for 25 November 1943, at Army Air Base, Kearney, Nebraska, shows accused from duty to absent without leave 24 November 1943. Extract copy (Ex. 2) of morning report of 485th Base Headquarters and Air Base Squadron, for 2 January 1944, at Army Air Base, Kearney, Nebraska, shows accused from absent without leave to confinement in hospital at Reno, Nevada, 6 December 1943 (R. 28).

b. Specification 11, Charge I: Mr. C. P. Lueck testified that in "the latter part of November", accused came into the Fort Kearney Hotel in Kearney, Nebraska, and presented his check (Ex. 16) to be cashed. The check dated 22 November 1943, in the sum of $15 drawn on the Fort Kearney State Bank and payable to the Fort Kearney Hotel, was signed by accused in his presence and Mr. Lueck gave him the cash after examining his credentials. The check was returned by the bank and never paid (R. 50-53).

c. Specification 6, Additional Charge I: Corporal Jack I. Daly, administrative clerk, Officers' Mess, Kearney, Nebraska, testified that he cashed a check (Ex. 9) which accused made out and signed in his presence. The check was dated 22 November 1943, drawn by accused on the Fort Kearney State Bank, payable to "Cash", and in the sum of $25. The check was returned with a slip (Ex. 10) attached showing it had not been paid (R.44-48).

d. Specification 1, Additional Charge II: Mr. Harold Haas, credit manager, Assmann Clothing Company, Omaha, Nebraska, testified that accused purchased merchandise on 24 November 1943 and paid by check (Ex. 6) drawn on the Fort Kearney State Bank in the amount of $34 and made payable to Charles J. Assmann Co. Accused made out and signed the check in the presence of Mr. Haas and identified himself by his "A.G.O. pass". The check was returned marked "no account" and never paid (R. 40-43).

e. Specification 3, Additional Charge I: Mr. Albert Brooks, cashier, Hotel Fontenelle, Omaha, Nebraska, testified by deposition (Ex. 14),

that accused presented his check (Ex. 15) to be cashed. The check, dated 25 November 1943, in the sum of $25 payable to "Cash" and drawn on the Fort Kearney State Bank, was signed by accused in the presence of Mr. Brooks. Accused identified himself with his "AGO card" and Mr. Brooks gave him the cash. The check was presented for payment and returned with an attached slip showing "No Account". The check was never paid (R. 49).

f. Specification 4, Additional Charge I: Mr. Harold Saalfeld, formerly day clerk, Hotel Fontenelle, Omaha, Nebraska, testified by deposition (Ex. 17) that a check (Ex. 18), dated 25 November 1943, payable to "Cash", in the sum of $25, signed "Harold Greenberg" and drawn on the Fort Kearney State Bank, "must have been presented" to him (Mr. Saalfeld) because his initials were on the check, indicating that he "OK'd" it. However, he could not recall the matter. He could tell from entries on the back of the check that cash was paid "to the accused". He did not know whether or not the check was returned except that "no account" was written on the face of the check (R. 53-54).

g. Specification 5, Additional Charge I: Mr. Percy H. Adams, night clerk, Hotel Fontenelle, Omaha, Nebraska, testified by deposition (Ex. 19) that he had no recollection of cashing a check (Ex. 20) dated 26 November 1943, payable to "Cash" in the amount of $40, drawn on the Fort Kearney State Bank and signed "Harold Greenberg", except that his (Mr. Adams') handwriting was on the reverse side. His writing indicated that he cashed it and that "accused" was given $24.70 in cash and that the balance of $15.30 was applied in payment of his hotel bill. Accused "must have" identified himself by his "A.G.O." pass or his check would not have been cashed. The check was deposited in an Omaha bank and was returned with a slip attached reading "Has no Account" (R. 54-55).

h. Specification 2, Additional Charge II: Mr. Allan L. Lew, resident manager, Hotel Cornhusker, Lincoln, Nebraska, testified that accused was a guest at the hotel from 27 November to 29 November 1943, and on the latter date presented his check (Ex. 5) to be cashed. The check in the sum of $25 drawn on the Fort Kearney State Bank, dated 29 November 1943, and payable to "Cash", was signed by accused in his presence. Mr. Lew gave accused $25 in cash after examining his "AGO pass". The check was later returned marked "no account". The money was never repaid (R. 37-40).

i. Specifications 3 and 4, Additional Charge II: Mr. Ray E. Baker, assistant manager, Cosmopolitan Hotel, Denver, Colorado, testified by deposition (Ex. 11) that on 30 November 1943, he cashed a check (Ex. 12) in the sum of $50, and another (Ex. 13) in the sum of $25 for accused. Both checks were dated 30 November 1943, payable to "Cash "

and drawn on the Fort Kearney State Bank. Accused made out and signed the checks in the presence of Mr. Baker, identified himself by his "AGO Pass and picture" and received the cash. The checks were presented for payment and returned unpaid, marked "no account", and have never been paid (R. 48-49).

j. Specification 5, Additional Charge II: Mr. Clarence S. Bromstead, assistant manager, Brown Palace Hotel, Denver, Colorado, testified that accused registered at the hotel on 30 November 1943 and presented his check (Ex. 3) to be cashed, drawn on the Fort Kearney State Bank in the sum of $50 and payable to Brown Palace Hotel. Accused signed the check in the presence of Mr. Bromstead, identified himself with his "AGO pass" and received $50 in cash. The check was deposited, was returned with the notation "no account" and never paid. Mr. Bromstead could not identify accused in the courtroom (R. 28-36).

k. Specification 6, Additional Charge II: Miss Betty Gold, cashier, Brown Palace Hotel, Denver, Colorado, testified by deposition (Ex. 7) that on 30 November 1943, accused presented his check (Ex. 8) to be cashed. The check dated 30 November 1943, in the sum of $50, drawn on the Fort Kearney State Bank, was signed by accused in the presence of Miss Gold, who gave him the amount in cash after examining his "A.G.O. pass, picture, and signature". The check was presented for payment and returned because of "no account" (R. 43-44).

l. It was admitted by accused and his counsel in open court that accused wrote and signed "each and every check that is mentioned in the Specifications and Charges in this case" (R. 62).

Accused, after being advised "of his rights", signed a written statement (Ex. 21) at Reno, Nevada, on or about 13 December 1943, in which he admitted that he "went A.W.O.L." from duty at Kearney, Nebraska, on or about 23 November 1943, and that "during this period" he "issued and negotiated" the following checks: a $25 check to the "PX, RAAB"; a $25 or $30 check, three $25 checks and two $100 checks to "Colombo"; a $25 check to "Harold's Club"; and a $20 check to the "Riverside Bar" (all the foregoing checks being cashed at Reno, Nevada); a $25 check to the Officers' Club and a $15 check to the Kearney Hotel, both at Kearney, Nebraska; a $75 check to the Fontenelle Hotel at Omaha; a $75 check to the Cosmopolitan at Denver; and "six more in different night clubs in Reno", each in the amount of $25 (R. 55-63).

Photographic copies of the checks described in Specifications 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12 and 13, Charge I; Specifications 1 and 2, Additional Charge I; and Specifications 7, 8 and 9, Additional Charge II, were received in evidence without objection as Exhibits 25 to 41, respectively. In connection with the introduction of Exhibits 25, 26, 27

and 28 the trial judge advocate stated the originals had been sent "to Reno" and not returned (R. 70-73).

Mr. John M. Spear, cashier, Fort Kearney State Bank, testified that accused opened an account at the bank on 1 October 1943, with a deposit of $40 which was withdrawn by check on 2 October. He made a deposit of $50 on 14 October which was withdrawn by check on 15 October. No further deposits were made in the account. An account is closed by the withdrawal of the entire amount in it but a further deposit will generally reopen the account if "the sheets" are still available. Mr. Spear identified Exhibits 3, 5, 6, 7, 9, 12, 13, 15, 18, and 20 as checks presented for payment to the bank and refused. The lack of any perforation of the checks shown in Exhibits 26 to 41 indicated that they had not been paid. He could not say whether the checks shown in Exhibits 35 and 36 were ever presented to the bank. They definitely were not paid as there was no money in the account (R. 63-70, 73-4).

4. Evidence for the defense:

Accused testified that he was single and his home was in Baltimore, Maryland. He had been in the service 22 months, and since 10 September was stationed at Kearney where he was assigned to the 336th Aviation Squadron as mess, supply and transportation officer and police and prisons officer (R. 76-77).

He left Kearney on leave of absence, 10 November 1943, went to San Francisco and from there to Reno, arriving on 15 or 16 November. While in Reno he met a woman who told him that her name was Valerie Jepson and that she lived at 1007 Manor Drive. She took accused to her home, and "during the course of our relations" he told her he was leaving because he did not have any money. She told him not to leave, that she wanted him to have "a good time", that she would make arrangements for him to cash checks in a number of night clubs in which she and her husband owned stock, and that she would take care of them. In the presence of accused, she telephoned Harold's Club, the Colombo Cafe and several other clubs and instructed them to allow accused to cash checks, but not to send them through for collection, and that she would take care of them. She also called the district attorney of Reno and asked him to make similar arrangements with other places. Accused testified that ordinarily he would have taken such a proposal "with a grain of salt" but because of her fine appearance, Cadillac automobile, beautiful home and the manner in which she talked to these people, he thought she was telling the truth and accordingly he wrote "four or five hundred dollars worth of checks". In cashing the checks he told them who he was and produced his "WD AGO" pass. He returned to Kearney, 22 November, and attempted to telephone Mrs. Jepson at the address she had given, but was told there was no such person at that address. It was a "great shock", accused "knew what

the consequences were" for passing worthless checks, and his first impulse was to tell his story to his "CO". However, when he got to the base he found he was already in difficulty because of the fact that during his absence the base had not been able to get in touch with him at the San Francisco address he had given as his address while on leave. He felt then that he would not be able to obtain emergency leave "to straighten out this business", so he returned to Reno by way of Omaha, Lincoln and Denver. Before leaving Kearney he cashed a check at the officers' club. He stayed three days in Omaha, overnight in Lincoln, and two days in Denver. In Denver he stayed one day at the Cosmopolitan Hotel and one day at the Brown Palace, cashing a $50 check at the latter place. When he arrived in Reno, on 3 December, he got in touch with a Mrs. Eleanor Roland and asked her to find out for him if his checks had been dishonored. He was told that they had not been returned and therefore thought Mrs. Jepson had made them good. Upon further inquiry he found out Mrs. Jepson's correct name was "Moss" and that she had just married and was "honeymooning" in Palm Springs, California. He cashed a $100 check at the Colombo Cafe, intending to go to Palm Springs to find her but was arrested the next day before leaving town. He asked Mrs. Roland to call various hotels in Palm Springs to locate Mrs. Jepson-Moss but did not hear from her as he was placed in confinement and not allowed to have any contact with outsiders. Accused testified: "The reason I pleaded not guilty to the checks was simply because of the way the Article of War is worded. I did write those checks, I knew I did not have money in the bank, but in my heart I know I never intended to defraud anybody" (R. 77-82, 89; Cert. of Corr.).

On cross-examination accused said he never attempted to verify the statements of Mrs. Jepson at the clubs where he cashed the checks. He had no reason to believe she would honor the checks he cashed in Kearney or Denver. Accused admitted that prior to meeting Mrs. Jepson, he wrote and cashed, on 16 November 1943, a $25 check, drawn on First National Bank of Reno, of which Exhibit 25 was a "photostatic copy", and that he had no account or money in that bank. He also admitted that he wrote and cashed at Harold's Club the $25 check shown in the photograph, Exhibit 26; at the Silver Dollar Club the $25 check shown in the photograph, Exhibit 27; at the Colombo Cafe the $25 check shown in the photograph, Exhibit 28; the $30 check shown in the photograph, Exhibit 29; the $25 check shown in the photograph, Exhibit 30; the $25 check shown in the photograph, Exhibit 31; the $25 check shown in the photograph, Exhibit 32; the various checks shown in the photographs, Exhibits 33, 34, 35, 36, 37, 38, 39, 40 and 41; and that he received the amounts shown on the face of each check. Accused also admitted cashing Exhibits 12 and 13 at the Cosmopolitan Hotel; Exhibits 3 and 8 at the Brown Palace Hotel; and Exhibits 18 and 20. Mrs. Jepson told him to write the checks for "around $25" (R. 82-90).

On examination by the court accused testified that he had believed Mrs. Jepson would take care of his checks because of her phone calls to the clubs and because of her statements that she owned stock in them. She also said her brother-in-law was governor of the state and her brother district attorney. She had asked him to be reasonable in writing checks and keep them under a thousand dollars. He had no reason to believe she would make good the checks he wrote outside of Reno but he hoped to find her and ask her to make them good. He wrote two $100 checks in Reno on his return there and gambled with the proceeds because he was "desperate" and thought he might win sufficient money in that manner. Mrs. Jepson never gave him any cash and wrote no checks because her account was a joint account with her husband, who also had to sign the checks. Accused went to Omaha to "straighten out" his appearance and to Denver to get the money to tide him over at Reno (R. 90-93).

5. The evidence establishes that between 16 and 20 November 1943, while accused was on leave of absence from his station at Army Air Base, Kearney, Nebraska, he wrote and cashed at a post exchange, night clubs, and other establishments in Reno, Nevada, twelve checks in the aggregate amount of $290 (Specs. 1 to 10, Chg. I; Specs. 1 and 2, Add. Chg. I). One of the checks was drawn on the First National Bank of Nevada, Reno, Nevada, and the remaining checks (and all checks hereinafter mentioned) were drawn on the Fort Kearney State Bank, Kearney, Nebraska. Accused never had an account at the former bank and his account in the latter had been closed by withdrawals on 15 October 1943 and never reopened.

Accused returned to his station at Kearney and on 22 November wrote and cashed a $15 check at the Fort Kearney Hotel and a $25 check at the officers' mess at the base (Spec. 11, Chg. I; Spec. 6, Add. Chg. I). He absented himself without leave from his station on 24 November (Spec., Chg. II), and went to Omaha, Nebraska, where, between 24 and 26 November, he cashed three checks at a hotel in the total amount of $90 and gave a $34 check to a clothing house in payment for merchandise (Specs. 3 to 5, Add. Chg. I; Spec. 1, Add. Chg. II). From Omaha he went to Lincoln, Nebraska, cashing a $25 check at a hotel there on 29 November (Spec. 2, Add. Chg. II), and then to Denver, Colorado, where he cashed at hotels on 30 November four checks in the aggregate amount of $175 (Specs. 3 to 6, Add. Chg. II). He arrived back in Reno on 3 December and on that date cashed a $25 check (Spec. 7, Add. Chg. II). On 5 December he wrote and cashed four more checks, totaling $230 (Specs. 12 and 13, Chg. I; Specs. 8 and 9, Add. Chg. II). He was arrested the following day and returned to military control.

The prosecution offered competent evidence to prove the making and uttering of only part of the checks involved in the case. However, during the presentation of the prosecution's case accused and his counsel admitted that accused wrote and signed all of the checks described in the Specifications, and on cross-examination accused admitted uttering and receiving face value

for all of those checks concerning which adequate proof had not been offered by the prosecution. Accused testified, "The reason I pleaded not guilty to the checks was simply because of the way the Article of War is worded. I did write those checks, I knew I did not have money in the bank, but in my heart I know I never intended to defraud anybody".

In support of his contention that he had no intent to defraud, accused testified that in Reno he met a woman of "fine appearance", with a Cadillac automobile and a beautiful home, who said the governor was her brother-in-law and the district attorney her brother. This woman, according to accused, said she wanted him to have a good time in Reno and as he was in need of money she phoned several night clubs, in which she said she and her husband owned stock, and instructed them to cash the checks of accused and not to forward them for collection as she would take care of them. Accepting her representations as true accused cashed a number of checks before he returned to his station. Upon his arrival at Kearney accused attempted to telephone this lady at the address she had given him and was told there was no such person at that address. He was alarmed and, to "straighten out this business", returned to Reno, en route cashing checks at Kearney, Omaha, Lincoln and Denver in order to have money to present a good appearance and to tide him over until he located the woman. When he arrived in Reno he made inquiry through a friend, learned that his previous checks had not been returned and that his credit was still good, so, thinking that perhaps this woman had actually made the checks good as she promised, he proceeded to cash several more.

The foregoing testimony of accused in denial of any intent to defraud has application only to checks uttered in Reno and even as to these checks accused testified that one was uttered before he met the woman. He offered no testimony denying fraudulent intent in connection with the checks cashed elsewhere than Reno, other than his statement that he hoped to find the woman and ask her to make them good. The Board does not believe his explanations worthy of serious consideration. The evidence is sufficient to show that accused made and uttered for their face value with intent to defraud all of the checks described in the Specifications, knowing that he did not have and not intending that he should have any account in the banks upon which they were drawn. The Manual for Courts-Martial (par. 151) includes as an instance of a violation of Article of War 95: "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".

The evidence also establishes, and accused admitted by his pleas of guilty, that he was absent without leave as alleged.

6. Accused is 21 years of age. The records of the Office of The Adjutant General show his service as follows: Aviation cadet from 14 March 1942;

enlisted service from 1 July 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 16 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 approved sentence, and to warrant confirmation of the approved sentence. Dismissal is authorized upon conviction of a violation of Article of War 61 and mandatory upon conviction of a violation of Article of War 95.

Samuel M. Driver, Judge Advocate.

Robert O'Connor, Judge Advocate.

F J Lotthus, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 20 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 Second Lieutenant Harold Greenberg (0-577747), 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 approved sentence and to warrant confirmation of the approved sentence. The accused, with intent to defraud, made and uttered between 16 November and 5 December 1943, twenty-eight checks in the total sum of $909, all drawn on banks in which he had no account. The checks were cashed at night clubs, hotels and other business establishments in Reno, Nevada; Kearney, Lincoln and Omaha, Nebraska; and Denver, Colorado. He was also absent without leave from his station from 24 November to 6 December 1943. I recommend that the sentence to dismissal be confirmed and carried into execution.

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

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

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

(Sentence confirmed. G.C.M.O. 353, 15 Jul 1944)

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

SPJGK
CM 249232

21 MAR 1944

UNITED STATES	)	THE INFANTRY SCHOOL
	)	
v.	)	Trial by G.C.M., convened at Fort Benning, Georgia, 11 January 1944. Dismissal, total forfeitures, and confinement for two (2) years.
	)	
Captain WADSWORTH A. NORREN (0-1283299), Infantry.	)	
	)	

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

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

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

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

Specification 1: In that Captain Wadsworth A. Norren, Infantry, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, was, at Columbus, Georgia, on or about 4 December 1943, in a public place, to wit, Charlie's Place, drunk while in uniform.

Specification 2: In that Captain Wadsworth A. Norren, Infantry, in a public place, to wit, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, did, at Charlie's Place, Columbus, Georgia, on or about 4 December 1943, wrongfully drink intoxicating liquor with an enlisted man, Tec 5 Charles (NMN) Pavnick, 11th Company, 4th Training Regiment, Army Specialized Training Program, Basic Training Center.

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

Specification 1: In that Captain Wadsworth A. Norren, Infantry, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, having been restricted to the limits of the area of the 4th Training Regiment, did, at Fort Benning, Georgia, on or about 19 November 1943, break said restriction by going to the Harmony Church Branch of the Officers' Mess.

Specification 2: In that Captain Wadsworth A. Norren, Infantry, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, having been restricted to the limits of the area of the 4th Training Regiment, did, at Fort Benning, Georgia, on or about 3 December 1943, break said restriction by going to Columbus, Georgia.

Specification 3: In that Captain Wadsworth A. Norren, Infantry, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, did, at Columbus, Georgia, on or about 9 October 1943, make and utter to Mr. Louis W. Phillips, a certain check, in words and figures as follows, to wit:

COUNTER CHECK

10th Street Branch
COLUMBUS BANK and TRUST COMPANY 64-60

Columbis, Georgia, October 9th 1943 $10.00

Pay to Cash or bearer

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

/s/ Wadsworth A Norren
Capt. Inf. 0-1283299

and by means thereof did obtain from Mr. Louis W. Phillips ten dollars ($10.00) lawful currency of the United States and did wrongfully fail to maintain sufficient balance in the Columbus Bank and Trust Company, Columbus, Georgia, to meet payment of said check when presented for payment through the normal banking process for checks.

Specification 4: In that Captain Wadsworth A. Norren, Infantry, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, did, at Fort Benning, Georgia, on or about 3 December 1943, wrongfully borrow money, to wit, the sum of ten dollars ($10.00) from an enlisted man, Technician 5th Grade Charles (NMI) Pavnick, 11th Company, 4th Training Regiment, Army Specialized Training Program, Basic Training Center.

Specification 5: In that Captain Wadsworth A. Norren, Infantry, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, did, at Fort Benning, Georgia, on or about 3 December 1943, wrongfully borrow money, to wit, the sum of five dollars ($5.00) from an enlisted man, Corporal Francis E. Lawrence, 11th Company, 4th Training Regiment,

Army Specialized Training Program, Basic Training Center.

Specification 6: In that Captain Wadsworth A. Norren, Infantry, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, did, at Fort Benning, Georgia, on or about 28 November 1943, wrongfully borrow money, to wit, the sum of two dollars ($2.00) from an enlisted man, Corporal Paul A. Hetto, 11th Company, 4th Training Regiment, Army Specialized Training Program, Basic Training Center.

Specification 7: In that Captain Wadsworth A. Norren, Infantry, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, did, at Fort Benning, Georgia, on or about 3 December 1943, wrongfully borrow money, to wit, the sum of twenty dollars ($20.00) from an enlisted man, Technician 5th Grade Clement W. Mezera, 11th Company, 4th Training Regiment, Army Specialized Training Program, Basic Training Center.

Specification 8: In that Captain Wadsworth A. Norren, Infantry, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, did, at Fort Benning, Georgia, on or about 23 November 1943, wrongfully borrow money, to wit, the sum of one dollar ($1.00) from an enlisted man, Technician 4th Grade Eugene W. Connolly, 11th Company, 4th Training Regiment, Army Specialized Training Program, Basic Training Center.

Specification 9: (Motion for finding of not guilty sustained).

Specification 10: In that Captain Wadsworth A. Norren, Infantry, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, did, at Fort Benning, Georgia, on or about 25 October 1943, wrongfully borrow money, to wit, the sum of three dollars ($3.00) from an enlisted man, Technician 5th Grade Harvey L. Sams, Jr., 11th Company, 4th Training Regiment, Army Specialized Training Program, Basic Training Center.

Specification 11: In that Captain Wadsworth A. Norren, Infantry, 4th Training Regiment, Army Specialized Training Program,

Basic Training Center, did, at Fort Benning, Georgia, on or about 15 November 1943, wrongfully borrow money, to wit, the sum of thirteen dollars and fifty cents ($13.50) from an enlisted man, Private, First Class Waldo W. Adams, 11th Company, 4th Training Regiment, Army Specialized Training Program, Basic Training Center.

Specification 12: In that Captain Wadsworth A. Norren, Infantry, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, did, at Fort Benning, Georgia, on or about 3 December 1943, wrongfully borrow money, to wit, the sum of ten dollars ($10.00) from an enlisted man, Private Oscar C. Anderson, 11th Company, 4th Training Regiment, Army Specialized Training Program, Basic Training Center.

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

Specification: In that Captain Wadsworth A. Norren, Infantry, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, did, at Fort Benning, Georgia, on or about 13 November 1943, feloniously embezzle by fraudulently converting to his own use money of the value of twenty-three dollars and forty cents ($23.40), the property of the Company Fund, 11th Company, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, entrusted to him for safe-keeping by Captain Robert H. Starr, Infantry, Commanding, 11th Company, 4th Training Regiment, Army Specialized Training Program, Basic Training Center.

He pleaded guilty to Specification 2 of Charge II and not guilty to the remaining Charges and Specifications. Defendant's motion for a finding of not guilty of Specification 9 of Charge II was sustained and he was found guilty of the remaining Specifications and of the Charges. 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 finding of guilty of Specification 1 of Charge I as involves a finding of guilty of being drunk in uniform in a public place in violation of Article of War 96, approved the sentence, but remitted eight years of the confinement and forwarded the record of trial for action under Article of War 48.

3. Summary of evidence.

a. As to the Specifications of Charge I and Specifications 1 and 2 of Charge II:

Witnesses for the prosecution were Colonel Vincent S. Burton, 4th Training Regiment, Army Specialized Training Program, Fort Benning, Georgia (R. 19), Technician Fifth Grade Charles Pavnick, 3rd Battalion, 4th Training Regiment (R. 38), and Sergeant Charles C. Edwards and Private B. F. McCoy of the Corps of Military Police, Fort Benning (R. 25, 33,34).

Accused, a captain of infantry, was attached to the 4th Training Regiment, Fort Benning, Georgia, commanded by Colonel Burton. On 3 November 1943, he was restricted by Colonel Burton to the regimental area and told that he should not leave that area except in response to duty. This restriction was "administrative - as compared to disciplinary". This restriction was never removed by Colonel Burton (R. 19-22). On the evening of 19 November 1943, accused went to the Harmony Church Officers' Club, about a mile beyond the regimental area, "for something to eat" (R. 21,23). He was seen there at about 7:30 by Colonel Burton. About 6:45 accused had called Colonel Burton from the main post, out of the regimental area, where he had been present as the accused before a general court-martial. He told Colonel Burton that he had been tried and convicted and asked if the restriction to the regimental area would "under the circumstances", be removed. He was informed that the restriction would not be removed. When Colonel Burton saw accused at the Harmony Church Officers' "Mess", the latter told him that he had arrived back in the regimental area too late to be fed and that he had taken it "upon himself to go to the Harmony Church Officers' Club". Colonel Burton told accused that "as soon as he finished supper he should get back where he belonged" (R. 21-24).

On the night of 3 December 1943, Sergeant Pavnick and accused went "into town", Columbus, Georgia (R. 11,39,40,44). They stopped in at the "Beacon", first, and then at the "Winsel Castle", and had a few drinks of whiskey (R. 39,44). Accused spent the night in a hotel. The two parted at about 11:30, met the next afternoon at the hotel, between one and two o'clock, and went to "Charlie's Place" where they remained until about two or two-thirty, "when the M.P. came in". At "Charlie's Place", accused and Pavnick, and two or three others, were drinking from a pint bottle of whiskey which belonged to accused. Accused had "one or two or possibly three drinks" each of an ounce or a little less. According to Pavnick he and accused were "mingling right there with a few other fellows" (R.40-42, 44-47). In the opinion of Pavnick, accused was not drunk at "Charlie's Place". His speech was coherent and clear; he was perfectly normal and natural. "The M.P. took him to the side", but did not have "to help him" (R. 43,44). Accused and Pavnick were members of the 11th Company (R.42). Private McCoy saw accused in "Charlie's Place" that afternoon. According to McCoy accused was drinking. With him were "a T/5 and another enlisted man", the former being Pavnick. Accused was "drunk". McCoy took accused to the Provost Marshal's Office without any difficulty other than that he

"seemed to want to hang back a little". Accused's eye seemed to be swollen. He could talk all right when McCoy first saw him, but he staggered and needed help in getting off the truck when they arrived at the Provost Marshal's Office, at which place accused "couldn't hardly speak". Accused was in uniform with the insignia of his office when McCoy saw him (R. 25-32). Sergeant Edwards was desk sergeant at the Provost Marshal's office when accused was brought in. In his opinion accused was drunk at that time. He had a small bruise over one eye; he was staggering and "could have fell down"; there was whiskey on his breath and his eyes were "glazed"; but, his speech was coherent and clear (R. 33-38).

b. As to Specification 3 of Charge II:

Louis W. Phillips, on 9 October 1943, cashed for accused the latter's check, bearing the same date, made payable to cash and drawn on Columbus Bank and Trust Company, of Columbus, Georgia, for ten dollars, which sum accused received. This check was presented for payment on 15 October and was "returned because his account had insufficient funds" (R. 11-14, 16, 16½; Ex. A). Accused had a balance of $6.18 at the close of business on 9 October 1943. On 8 October, accused had a balance of $69.18. There was no deposit made after 9 October until the 13th when accused deposited $50. The indebtedness thus created was subsequently paid (R. 13,16-19).

c. As to Specifications 4,5,6,7,8,10,11 and 12 of Charge II:

Each of the enlisted men mentioned in these Specifications testified that he loaned to accused the amount of money at the time and place alleged in the respective Specifications. Each of these loans was repaid (R. 38-60).

d. As to the Specification of Charge III:

Captain Robert H. Starr, 11th Company, 4th Training Regiment, Army Specialized Training Program, identified the accused and testified that he (witness) was commanding officer of the 11th Company during the month of November 1943; that the accused was administrative officer from the 20th of October to about the 24th of December; that the accused was second in command in the company; that during the month of November he (witness) entered the Station Hospital between Saturday, 13 November and the morning of Friday, 19 November; that he gave the accused no instructions because the accused was in command and in the field when he was marked quarters; that the company maintains a Government issued safe which does not have a combination lock but has two keys issued with it; that he had one key and the accused the other; that this situation existed prior to the time he entered the hospital; that when he left to go to the hospital there was $23.40 which was entirely company funds; that this money was in two envelopes and was the property of the company; that after he returned to duty on 19 November, he did not examine the contents of the safe but that the accused advised him of the purchase of 70 dozen doughnuts at $15.75; that toward the end of the month, in seeking to make a purchase, he noticed that the balance of the money in the safe was not there; that the accused informed

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NAVY DEPARTMENT

him that he (the accused) had used the money; that the shortage of $7.65 was covered by the witness and replaced in the safe from his personal funds; that at the end of the month it came to his attention that the bill for the doughnuts had not been paid; that the accused informed him that he had used all the money; that the $23.40 was carried on the council book during November as cash on hand; that in addition to the $7.65 of his own money which he put in the safe, he also put in $15.75 out of his own funds; that later Colonel Burton, the regimental commander, as the accused's agent, repaid the $23.40 to him; that the accused did not tell him that the $23.40 had been borrowed when he returned from the hospital; that it was not until later that the accused stated that he had used the money; that the accused stated, without making a direct statement, that he had purchased some doughnuts from "our cash"; that it was a week later and toward the end of November when the accused told him that he had borrowed this money; that the accused did not tell him until after he found that the money was gone from the safe (R. 60-72).

4. There were no witnesses for the defense. Accused, after being duly advised as to his rights, made an unsworn statement. As to the alleged breach of restriction on 19 November, accused stated that he believed his restriction was lifted until he returned from the general court-martial, which he attended as the accused and which adjourned at 6:33 p.m., to the regimental area. He said that on his way back he stopped at the Branch Officers' Mess for his supper. While there he saw and talked to Colonel Burton. The next day he explained to Colonel Burton that he had no intention of breaking restriction (R. 76,77). With respect to his breach of restriction on 3 December and drinking with an enlisted man, he said that he went to town with Pavnick. He had been on restriction since 3 November 1943, during which time he had continued work on the company books, had suffered from mental worry, and had had a feeling of uselessness. At town he paid a bill for groceries and had a few drinks. Accused and Pavnick separated, accused telling Pavnick he would go back in the morning and would look him up. He slept late the next morning then got a taxi and went to Charlie's Place to pick up Pavnick and take him back to camp. At Charlie's Place he bought some drinks and talked to the proprietor's wife and at the same time passed the bottle around among three or four soldiers. Then the military policeman came in and took him to the Post Stockade (R. 75,76,91,92).

Accused ascribed the difficulty which arose out of his check transaction with Phillips to domestic difficulties. He stated that he and his wife had a joint account and he inferred that his wife would draw checks without his knowledge so that he did not know the amount of his bank balance (R. 77).

With respect to his having borrowed money from enlisted men, accused said that he and his wife had become reconciled after a period of domestic infelicity and that everything was fine except that they were low on money.

He sold his automobile and furniture but still needed money to straighten out various things that kept coming up. Accordingly he approached the officers in his company to negotiate a loan until the following pay day. Enlisted, administrative personnel, present at the time, heard the situation and offered to help. He borrowed the money to tide him over for a few days (R. 77,78).

As to his use of the $23.40, accused said that the $23.40 was a slush fund and as far as he was concerned was not money of the company fund; that because his own obligations came up he used some of this slush fund but had no intention of using any part of the company fund; that when he first used some of this money he opened the safe and showed what he was doing to another officer (R. 78,79).

5. The alleged conduct of accused at Columbus, Georgia, on 4 December 1943 (drinking intoxicating liquor with an enlisted man in a public place, Specification 2 of Charge I) was proved. However, the evidence completely fails to show that accused's drinking with an enlisted man was accompanied by such conduct as to constitute a violation of Article of War 95. In the opinion of the Board of Review, accused was guilty of the Specification in violation of Article of War 96 only.

With respect to Specification 1 of Charge II, breach of restriction on 19 November 1943, accused was under restriction to the regimental area on that date. This restriction was "lifted", so to speak, in order that he might be present at his trial before a general court-martial. He knew or should have known that it was his duty to return to the restricted area as expeditiously as possible after his presence was no longer required by the court. The fact that the court adjourned too late for accused to obtain supper in the restricted area did not justify him in stopping off for supper before returning where he belonged.

With respect to Specification 3 of Charge II, it is alleged that accused cashed a check for $10 with one Phillips, and that accused wrongfully failed to maintain a sufficient balance in his bank to meet the check when it was presented for payment. The proof shows that accused had a checking account in the bank on which the check was drawn. The check was cashed 9 October 1943. At the close of business on that day accused's balance was $6.18. The day before his balance had been $69.18. The check was presented for payment on 15 October and was dishonored. On 13 October accused deposited $50 in his account. This deposit was insufficient to take care of the check in question, evidently because of other checks.

A member of the military establishment is under a particular duty not to issue a check without maintaining a bank balance or credit sufficient to meet it. Such conduct is not only a reflection on the individual and a violation of civil law if committed with wrongful intent, but

is service-discrediting as well. Frequently checks are cashed not because of the assurance derived from the implied representation attached to the check so much as the faith created by the uniform. The individual may be satisfied by the exculpation which flows from an explanation rooted in carelessness or neglect. The hurt to the credit and reputation of the Army is not so easily removed.

By statute many states provide that the return of a check for insufficient funds creates a presumption of guilty knowledge in the drawee. The burden, in such cases, is then on the accused to explain.

It is the opinion of the Board of Review that proof that a check given for value by a member of the military establishment is returned for insufficient funds imposes on the drawer of the check, when charged with service-discrediting conduct, the burden of showing that his action was the result of an honest mistake not caused by his own carelessness or neglect.

In the present case accused said in an unsworn statement that the "insufficient" condition of his bank account was caused by checks made on this account by his wife and without his knowledge. He stated that this was a joint account. Aside from the fact that such an account is likely to require extra caution on the part of the husband, accused failed to support his contention by producing one of the troublesome checks or any corroborating evidence. The Board of Review is of the opinion that the court was justified in rejecting this explanation and of finding accused guilty as charged.

With respect to Charge III and its Specification, embezzlement of company funds, there is no question that accused was acting company commander and that while acting in such capacity he used for his own private purpose the sum of $23.40, which was in the company safe and to which he had access. $22 of this money appears to have been a 10% commission on the sale of $220 worth of stationary sold to the enlisted men of the company. This money was paid over to the company first sergeant by the vendor as the company's commission. The money belonged to the company. Although it may not have been "Company Funds" within the strict meaning of the words from the standpoint of bookkeeping or of accounting under Army Regulation 210-50, and was kept separate from the regular company funds, it was the property of the company, and was in the custody of the accused within the meaning of Article of War 93 and the common law offense of embezzlement which that Article of War condemns.

With respect to the remaining Specifications and Charges, the evidence was uncontradicted in material respects and was legally sufficient to support the findings of guilty as approved by the reviewing authority thereunder.

6. The record of trial of this officer upon other offenses (CM 245696) now before the Board of Review should be considered in connection with action upon this record.

7. Accused is 28 years old. He is a high school graduate. He enlisted in the regular Army and served in Company G, 33rd Infantry from 31 May 1935 to 30 May 1938. Enlisted service continued until 4 May 1942. After having attended Officers Candidate School, accused was appointed second lieutenant, Infantry, on 5 May 1942. He was promoted to first lieutenant 20 May 1943, and to captain 21 October 1943.

8. The court was legally constituted and had jurisdiction of the person and the offenses. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 2 of Charge I as involves a finding of guilty of that Specification in violation of Article of War 96, legally sufficient to support the findings of guilty of the remaining Specifications and of the Charges, as approved by the reviewing authority, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized under Articles of War 93 and 96.

Jerry A. Ryan, Judge Advocate.
John Rosenbaum, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

1st Ind.
31 MAR 1944

(105)

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 Wadsworth A. Norren (O-1283299), 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 finding of guilty of Specification 2 of Charge I as involves a finding of guilty of that Specification in violation of Article of War 96, legally sufficient to support the findings of guilty of the remaining Specifications and of the Charges, as approved by the reviewing authority, and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures and confinement be remitted, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to a letter from accused addressed to The Judge Advocate General, dated 13 January 1944, on the subject of "Clemency and Restoration", which letter is attached to the record.

4. The sentence in the instant case (CM 249232) was adjudged 11 January 1944. Accused was previously tried (19 November 1943) by general court-martial and found guilty of absenting himself without leave from his place of duty for seven hours on one occasion and for ten hours on a second occasion, in violation of Article of War 61; of rendering himself unfit for duty by the use of intoxicants on one of the occasions mentioned above; and of failing to obey an order of the Commanding General to report to him, in violation of Article of War 96. He was sentenced to dismissal. The record of trial in that case (CM 245696) has been examined by the Board of Review and the Board has submitted its opinion that the record of trial is legally sufficient to support the findings of guilty, and legally sufficient to support the sentence and to warrant confirmation thereof. I concur in that opinion. Action by the President upon both records of trial is unnecessary. Provided the sentence in the instant case is confirmed and carried into execution, I shall cause the record of the other trial (CM 245696) to be filed in my office without further action thereon.

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

Myron C. Cramer

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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 270, 8 Jun 1944)

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

SPJGK
CM 249335

16 FEB 1944

UNITED STATES	)	FIELD ARTILLERY REPLACEMENT TRAINING CENTER
v.	)	Trial by G.C.M., convened at Camp Roberts, California, 20 January 1944. Dismissal.
Second Lieutenant DEWEY H. SMITHE (O-1180723), Field Artillery.	)	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Dewey H. Smithe, Field Artillery Officers Replacement Pool, detailed to Battery "B", 55th Field Artillery Training Battalion, Camp Roberts, California, did at Camp Roberts, California on or about 25 December 1943 wrongfully strike Master Sergeant Harold O. Melander, Headquarters Detachment 19th Infantry Training Regiment in the face with his fist.

Specification 2: In that Second Lieutenant Dewey H. Smithe, Field Artillery Officers Replacement Pool, detailed to Battery "B", 55th Field Artillery Training Battalion, Camp Roberts, California, was at Camp Roberts, California, on or about 25 December 1943, drunk and disorderly in uniform while in the company of enlisted men, in the Non-Commissioned Officers' Club, Camp Roberts, California.

He pleaded not guilty to and was found guilty of the Charge and both its Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the findings as involved findings of guilty of the Specifications in violation of Article of War 96, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

a. Specification 1.

Testimony concerning this offense was given by Master Sergeant Harold O. Melander, Headquarters Detachment, 19th Infantry Training Regiment; by First Sergeant Raymond H. Lasater, Battery B, 55th Field Artillery Training Regiment; and by Sergeant George W. Bjorkman, Battery B, 55th Field Artillery Training Regiment. It was also stipulated between the trial judge advocate and accused and his counsel that if present in court First Sergeants Harry Frank and James J. Delahanty, both of Headquarters Company, Infantry Replacement Training Center, would testify to the same effect as their sworn statements offered as prosecution's Exhibits 1 and 2, respectively (R.27.28).

A dance took place at the Non-Commissioned Officers' Club at Camp Roberts on Christmas Night, 1943. Accused, though a commissioned officer, was present, having arrived between 7 and 8 o'clock. He joined a party of about ten persons, including Sergeants Bjorkman and Lasater, at a table adjoining the dance floor. He remained there at the table until about 9 o'clock, apparently without any objection or incident (R.6,8, 12-14,18,21,23). Bjorkman and Lasater had gone from their table to the bar and played a slot machine. Returning from the bar they approached a group of seven or eight non-commissioned officers who stood, talking, about three or four feet from their table. There was no loud argument among them, but the congregating of the group caused Sergeant Melander, who was the secretary and treasurer of the club, and "Sergeant Crooks", the floor manager, to go over "to see what it was about, * * * with a view to avoid any such thing". Melander had been sitting about four or five tables from that at which accused had sat and near which the group gathered, and had not been at accused's table during the evening (R.7,8,13,14,18,19,23).

Melander stood at the edge of the group, talking to Bjorkman. He testified that accused, to whom he had not spoken and to whom he had offered neither disrespect nor any threat whatsoever, came up "alongside" of him, and said, "Sergeant, I don't like you -- I don't like anything about you". Melander turned his head, glanced at accused, and said, in a respectful tone of voice, "Lieutenant, stay out of this", and continued his conversation with Bjorkman. In "a second or two", and without any further word, accused struck Melander a single blow on the nose with his fist, causing profuse bleeding, but no permanent physical injury (R.7-11).

All other witnesses corroborated Melander's testimony in every respect, except that none heard the statement by accused that he did not like Melander, or Melander's reply thereto, due probably to the noise of the dance orchestra and the buzz of conversation in the club. Sergeant Frank stated that accused elbowed his way into the group to reach Melander, while Bjorkman and Lasater were both definite in their testimony that the act

was unprovoked (R.13-17,19-21; Pros. Ex. 1).

b. Specification 2.

Miss Earleen Deaton, of San Miguel, California, a civilian employed at Camp Roberts, testified that she was a guest at the dance, was at accused's table during the evening, and danced with him. The party drank whiskey, mixed with "Upper Ten", a sort of soda water. Witness stated that accused "probably did" drink whiskey at the table, but said that she was "not sure". Of her dancing with him she said that he was not "absolutely sober"; "he had been drinking some -- he was tight, but not drunk" (R.24-27).

Sergeant Frank stated that shortly prior to accused's striking Melander, he had come up behind Frank while Frank was on the dance floor, put his hands on Frank's shoulders, spun Frank around and said, "excuse me" (Pros. Ex. 1). Lasater saw accused drink "a beer" at the table, while Bjorkman and Melander "couldn't say" that accused was drunk (R.11, 16,23).

Accused was advised of his rights and elected to remain silent (R.28).

4. The evidence in the record is sufficient to establish accused's guilt of both Specifications beyond a reasonable doubt. That he committed an unprovoked and unjustified assault upon Sergeant Melander is undisputed. There is less evidence in the record concerning Specification 2, but the testimony of Miss Deaton that he was under the influence of liquor while dancing with her, and the statement of Sergeant Frank concerning accused's singular conduct on the dance floor, together with the assault upon Melander justify the court's finding upon the Specification. His actions were those of a man under the influence of liquor.

5. War Department records show that accused is 25-2/12 years of age, and divorced from his wife. He finished the third year of high school, but did not graduate. He worked as a coal miner for three years, entering the Army some time in December of 1941. He was graduated from the Field Artillery School, Fort Sill, Oklahoma, as a Second Lieutenant, Army of the United States, on 15 April 1943. In recommending him for attendance at this school, First Lieutenant William D. Wittel, 902nd Field Artillery Battalion, his commanding officer stated that his character was "very good" and that he had "demonstrated outstanding qualities of leadership". Upon his graduation from Officers' Communication Course Number 25, at the Field Artillery School, on 1 August 1943, he received the academic rating, "Excellent".

6. The court was legally constituted, and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial

rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

(On Leave), Judge Advocate.

Wm Rosenstiel, Judge Advocate.

Esther R. Andrews, Judge Advocate.

1st Ind.

25 FEB 1944

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 Dewey H. Smithe (O-1180723), 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 as approved by the reviewing authority and the sentence and to warrant confirmation thereof. In view of the previous good record of accused and his rating of "Excellent" in an officers' communication course, I believe that he may be of value to the service, and I recommend that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the President.

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

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 150, 4 Apr 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General

SPJGN
CM 249424

26 FEB 1944

UNITED STATES	)	CARIBBEAN WING AIR TRANSPORT COMMAND
v.	)	Trial by G.C.M., convened at Morrison Field, West Palm Beach, Florida, 18 January 1944. Dismissal and confinement for one (1) year.
First Lieutenant BILL M. SELLARS (0-570171), Air Corps.	)	

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 Charges and Specifications:

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

Specification 1: In that First Lieutenant Bill M. Sellars, Station #8, CAR-ATC, Homestead Army Air Field, Homestead, Florida, did, at Station #8, CAR-ATC, Homestead Army Air Field, Homestead, Florida, between 6 October 1943 and 29 December 1943, feloniously embezzle, by fraudulently converting to his own use the sum of two hundred seventy-five ($275.00) dollars, lawful money of the United States, the property of Private First Class Michael Myerson, Headquarters & Headquarters Squadron, 2d OTU, Homestead Army Air Field, Homestead, Florida, entrusted to him by the said Private First Class Michael Myerson for the purchase of War Savings Bonds.

Specification 2: Same form as Specification 1, but alleging embezzlement, between 6 December 1943 and 28 December 1943,

of $260, the property of the First National Bank, Homestead, Florida, and fraudulently converted such sum to his own use.

Specification 3: Same form as Specification 1, but alleging embezzlement, on 6 November 1943, of $40, the property of Army Emergency Relief, and fraudulently converted such sum to his own use.

Specification 4: Same form as Specification 1, but alleging embezzlement, on 1 December 1943, of $50, the property of Army Emergency Relief, and fraudulently converted such sum to his own use.

Specification 5: Same form as Specification 1, but alleging embezzlement, between 31 October 1943 and 1 December 1943, of $25, the property of Army Emergency Relief, and fraudulently converted such sum to his own use.

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

Specification: In that First Lieutenant Bill M. Sellars, Station #8, CAR-ATC, Homestead Army Air Field, Homestead, Florida, did, on or about 7 October 1943, wrongfully and dishonorably cause Aviation Student Frank J. McDonald, Jr. (then Staff Sergeant), to borrow from Army Emergency Relief the sum of two hundred thirty-five ($235.00) dollars to enable said First Lieutenant Sellars to obtain therefrom the sum of two hundred ($200.00) dollars, said First Lieutenant Sellars knowing that Aviation Student McDonald had requested for himself only the sum of thirty-five ($35.00) dollars as a loan from Army Emergency Relief.

He pleaded guilty to Charge I and its Specifications, not guilty to Charge II but guilty of a violation of Article of War 96, guilty of the Specification, Charge II, except the words "and dishonorably", to which excepted words he pleaded not guilty, and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for a period of one year. The reviewing authority approved only so much of the sentence as provides for dismissal and confinement at

hard labor for one year, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, supplementing the accused's pleas of guilty, consists of two stipulations and documentary evidence supporting items referred to therein. According to the first stipulation, the accused at all material times involved, was the War Bonds Officer and Army Relief Officer at his station where between 6 October 1943 and 29 December 1943 Private First Class Michael Myerson had entrusted him with various sums of money, ultimately amounting to $275, for the purpose of purchasing War Bonds for Private Myerson. During the same period the accused converted such sum to his own use without the owner's authorization so to do. On 6 December 1943 the First National Bank, Homestead, Florida, consigned to the accused, as trustee for the bank, War Bonds in the aggregate face value of $2375 for resale from the proceeds of which by 28 December 1943, when the accused accounted to the bank, he had converted to his own use without authority the sum of $260. On 6 November 1943 the accused as Army Emergency Relief Officer received from Staff Sergeant Paul E. Zane the sum of $40 in repayment of a loan theretofore extended to him by the Army Emergency Relief for which the accused issued to him a receipt but on the same date, without authority, converted to his own use. A copy of the receipt was admitted into evidence. On 1 December 1943, Technician Fifth Grade Matthew J. Domowich repaid a similar loan in the sum of $50 for which the accused issued a receipt, a copy of which was also admitted into evidence, and under even date converted such repayment to his own use without authority. On 1 November 1943 and 30 November 1943, Sergeant Enos F. Stilgenbauer repaid in two $15 installments a similar loan in the sum of $30 for which the accused issued two receipts, copies of which were admitted into evidence, and between 31 October 1943 and 1 December 1943 the accused credited such loan with only a $5 payment converting $25 to his own use without authority. It was in the same stipulation agreed that, if Aviation Student Frank J. McDonald, Jr., were present, he would testify that on 7 October 1943 he applied for an Army Emergency Relief loan of $35 through the accused, that the accused stated that he could use $200, asserting that such sum could be added to the original application for the $35 loan which was done, that he refused to sign the application but that the accused "to the best of my knowledge" signed applicant's name to the application, that through pretext the accused secured the applicant's endorsement upon the $235 relief check but gave to applicant only $35 thereof when the check was cashed and "kept the remaining two hundred dollars ($200.00)

for his own use". The cancelled $235 check was admitted into evidence. By the second stipulation it was shown that the cash book for the Army Emergency Relief concerning the loans above mentioned reflected only one repayment which was in the sum of $5 by Sergeant Stilgenbauer on 1 November 1943 (R. 7-12; Exs. 1-5).

4. The accused, after explanation of his rights as a witness and the entrance of a stipulation that full restitution for his peculations had been made prior to the trial, testified as follows:

> "Gentlemen, I have made a very serious mistake - one I am fully cognizant of. I enlisted in the Army as a Private in 1939; went on foreign duty; returned as a Staff Sergeant in 1942 to enter Air Corps Administration OCS, Miami Beach. I was given the commission of 1st Lieutenant on December 29, 1943. I have never in my life done such a thing as I am accused of, and admit my guilt. I have done all in my power to make complete restitution. My people were the ones called on as I did not have the money to make restitution; and they are suffering for my mistakes, but that probably does not interest the court. I still have them to think about. If and when I have paid my debt I still have a debt to think of to them in more ways than one. Once again, gentlemen, I realize how serious my mistake was. I apparently, at the time, did not realize how serious it was. I have used the money for my personal use; yet, I like a good time and a lot was spent on liquor and quite a bit on gambling. I am not a good gambler and lost. The further I got in the hole the harder it was to get out. I always had hopes of making a 'killing' and returning all this money before it was discovered, but that chance never came. That, gentlemen, is my story" (R. 12-15).

5. The five Specifications, Charge I, allege that the accused at a designated place within or on specified dates feloniously embezzled by "fraudulently converting to his own use" five certain sums of money entrusted to him by a named person, a bank and the Army Emergency Relief. The offense of embezzlement is defined as follows:

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or

into whose hands it has lawfully come (Moore v. U.S., 160 U.S. 268).

"The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship" (M.C.M., 1928, par. 149h).

The evidence for the prosecution abundantly supplements the accused's pleas of guilty to the five Specifications because by the stipulated testimony all of the elements of the offense of embezzlement are conclusively established. The accused by his testimony, likewise, fully admits his commission thereof. All of the evidence, therefore, shows beyond a reasonable doubt his guilt as charged and amply supports the findings of guilty of Charge I and its Specifications.

6. The Specification, Charge II, alleges that on or about 7 October 1943 at Homestead, Florida, the accused "wrongfully and dishonorably" caused a named aviation student to borrow from Army Emergency Relief the sum of $235 to enable the accused to obtain therefrom $200 when the accused knew that the aviation student had requested for himself a loan of only $35. "Committing or attempting to commit a crime involving moral turpitude" is violative of Article of War 95 (M.C.M., 1928, par. 157).

The prosecution's evidence shows that the accused by trick and fraud wrongfully abstracted the sum of $200 from the Army Emergency Relief for which he was agent or trustee. This the accused admitted but by his plea attempted to disclaim "dishonorably" doing so. Whether the abstraction was larceny or embezzlement is immaterial because in either event his acts amounted to the commission of a crime involving moral turpitude in which dishonor is implicit. The evidence, therefore, conclusively established the accused's guilt as alleged and fully supports the findings of guilty of Charge II and its Specification.

7. The accused is about 23 years old. The War Department records show that he had prior enlisted service from 16 November 1939, including service at Hickam Field, T.H., between 22 December 1939 and 17 August 1942,

until 9 December 1942 when he was appointed a second lieutenant upon completion of Officers' Candidate School and that he was promoted to first lieutenant on 29 September 1943.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93 and is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 249424

1st Ind.

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

3 MAR 1944

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Bill M. Sellars (0-570171), Air Corps.

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

(Sentence confirmed. G.C.M.O. 214, 26 May 1944)

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

(121)

13 APR 1944

SPJGH
CM 249444

UNITED STATES	)	BARRAGE BALLOON TRAINING CENTER
	)	
v.	)	Trial by G.C.M., convened at Camp Tyson, Tennessee, 1 February 1944. Dismissal.
	)	
Second Lieutenant LEWIS M. GOODWIN (O-1048374), Coast Artillery.	)	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Lewis M. Goodwin, Coast Artillery Corps, Battery B, 318th Antiaircraft Balloon Battalion, Very Low Altitude, Camp Tyson, Tennessee, did, at Camp Tyson, Tennessee, on or about 4 January 1944, with intent to deceive Major Albert B. Stevens, Commanding Officer, 318th Antiaircraft Balloon Battalion, Very Low Altitude, Camp Tyson, Tennessee, officially report to the said Major Albert B. Stevens, Commanding Officer, 318th Antiaircraft Balloon Battalion, Very Low Altitude, Camp Tyson, Tennessee, that his indebtedness to Officers Mess Number 2, Barrage Balloon Training Center, Camp Tyson, Tennessee, in the amount of $47.87, for the month of November 1943, had been paid, which report was known by the said Second Lieutenant Lewis M. Goodwin to be untrue in that at the time of making said report such indebtedness had not been paid.

Specification 2: In that Second Lieutenant Lewis M. Goodwin, Coast Artillery Corps, Battery B, 318th Antiaircraft Balloon Battalion, Very Low Altitude, Camp Tyson, Tennessee, did, at Camp Tyson, Tennessee, on or about 20 January 1944, with intent to deceive Major Albert B. Stevens, Commanding Officer, 318th Antiaircraft Balloon Battalion, Very Low Altitude, Camp Tyson, Tennessee, officially report to the said Major Albert B. Stevens, Commanding Officer, 318th Antiaircraft Balloon Battalion, Very Low Altitude, Camp Tyson, Tennessee, that his indebtedness to Officers Mess Number 2, Barrage Balloon Training

Center, Camp Tyson, Tennessee, in the amount of $23.21, for the month of December 1943 had been paid, which report was known by the said Second Lieutenant Lewis M. Goodwin to be untrue in that at the time of making said report such indebtedness had not been paid.

He pleaded guilty to Specification 1; not guilty to Specification 2; and not guilty to the Charge, but guilty of a violation of the 96th Article of War. He was found guilty of both Specifications and the Charge and sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution:

a. Specification 1: By letter (Ex. 1), dated 1 January 1944, addressed to accused through Major Albert B. Stevens, Commanding Officer, 318th Antiaircraft Balloon Battalion, Very Low Altitude, the organization to which accused was assigned, the Commanding Officer, Barrage Balloon Training Center, Camp Tyson, Tennessee, requested an explanation by accused of his failure to pay his November, 1943, bill to the officers' mess, in the amount of $47.87. Major Stevens indorsed the letter to accused "for compliance". Accused replied by second indorsement (Ex. 1) to Major Stevens, dated 4 January 1944, stating the reasons for delay in payment and concluding with the statement, "This bill has been paid". Accused gave his check in payment of the bill on 8 January and the account was finally closed 31 January (R. 1-2, 5-6).

Accused made a voluntary statement (Ex. 3) to Second Lieutenant Frederick W. Katterjohn, investigating officer in the case, in which he said he had received a severe financial set-back in November which made it difficult to meet his obligations in December and January; it was "generally understood" that extension of time to pay officers' mess bills could be obtained under such circumstances; in the past other officers had made indorsements that bills had been paid when in fact they had not and no disciplinary action was taken against them, which resulted in such indorsements not being treated with proper regard to their seriousness; he "did not intend to deliberately defraud or mislead anyone" by his indorsements since it was his intention to see his bills paid (R. 7-9).

b. Specification 2: By letter (Ex. 2), dated 17 January 1944, addressed through Major Stevens to accused, the Commanding Officer, Barrage Balloon Training Center, Camp Tyson, Tennessee, requested an explanation by accused of his failure to pay his December 1943 bill to the officers' mess in the sum of $23.21. By order of Major Stevens, the letter was indorsed on 18 January to accused "for compliance". Accused replied by second indorsement (Ex. 2) to Major Stevens, dated 20 January

1944, which stated his reasons for not paying the bill and concluded, "This account has been paid". This indorsement came to the attention of Major Stevens about 10:00 a.m. on 21 January. Upon receipt of the indorsement Major Stevens went to Second Lieutenant Eddie L. Shaver, secretary-treasurer of the officers' mess, about eleven o'clock on the morning of 21 January and ascertained that the bill had not been paid. Lieutenant Shaver testified that accused paid his bill by check "between eleven and twelve o'clock", "closer to twelve", on 21 January. He recalled the payment because on the same date accused "got that check and he gave another check" (R. 2-7).

4. Accused testified that he received the letter concerning his December bill at about 9:00 p.m. on 18 January. The organization returned to camp from maneuvers on the morning of 19 January, and accused was very busy that day. On the evening of 20 January Major Stevens' adjutant asked accused whether he had complied with the indorsement. Accused was unable to obtain the use of a typewriter. On the morning of 21 January, "between 7:30 - 7:45", he wrote a check for the bill and gave it to his roommate, Second Lieutenant John H. Kitzmiller, to leave with Lieutenant Shaver on his way to work. Between nine-thirty and ten o'clock the battalion adjutant told accused they were waiting for his indorsement, so he borrowed a typewriter from Lieutenant Shaver and typed the second indorsement to the letter, by mistake dating it 20 January. He gave the letter and indorsement to the battalion adjutant and around eleven o'clock Major Stevens came to his battery and asked if he believed the indorsement to be a true statement. Accused said he did and feeling that something was wrong, returned to his barracks, meeting Lieutenant Kitzmiller on the way. In response to his question Lieutenant Kitzmiller told accused that he had gone by the club but as Lieutenant Shaver was not there he had retained the check. Accused, accompanied by Lieutenant Kitzmiller, then went to Lieutenant Shaver and gave him the check around twelve o'clock (R. 9-11, 13).

On cross-examination accused testified that after giving Lieutenant Shaver his check around twelve o'clock, he went back at about three o'clock "to make positive that I was giving a good check" and gave Lieutenant Shaver another check for the same amount, signed by "Lieutenant Ricks". Lieutenant Shaver then gave the check signed by accused to Lieutenant Ricks to hold as security for the loan to accused (R. 11-13).

Lieutenant Kitzmiller testified that around 7:30 on the morning of 21 January he received a check from accused to deliver to Lieutenant Shaver but that the latter was not in so he kept it. Accused inquired about it around 11:45 a.m. and he then returned it to accused who gave it to Lieutenant Shaver. Lieutenant Shaver testified that accused borrowed a typewriter from him on the morning of 21 January, stating that he

"wanted to reply about an indorsement or something". Accused did not say anything at that time about his bill. He came in later in the morning and paid it (R. 14-18).

Second Lieutenant Ryan A. Seabrook, Battery A, 318th AA Balloon Battalion, VLA, testified that he had known accused for 18 months and that his general reputation among his fellow officers was "very satisfactory". Second Lieutenant W. F. Harvey, Battery C, 318th AA Balloon Battalion, VLA, had known accused "since July 1942" and was of the opinion that he had a "good reputation". Lieutenant Kitzmiller had been associated with accused "since September 25, 1942" and "would say" his reputation was "good" (R. 18-23).

5. Major Stevens, recalled as a rebuttal witness, testified he assumed command of the organization on 17 July 1942, had known accused since then and "with regard to truth and veracity" he "could not be depended upon" (R. 23-24).

6. a. Specification 1: The evidence shows and the plea of guilty admits that accused on 4 January 1944, in making a reply by indorsement to a letter directing an explanation of his failure to pay his bill of $47.87 to the officers' mess at Camp Tyson for November 1943, falsely reported to Major Albert B. Stevens, his commanding officer, that the bill had been paid. It was not until 8 January that accused gave his check in payment and the account was not finally closed until 31 January. The indorsement which accused executed on 4 January was an official report and was obviously intended to deceive Major Stevens and to cause him to believe that the bill had in fact been paid at that time, despite the statement made by accused to the investigating officer and offered in evidence by the prosecution that he "did not intend to deliberately defraud or mislead anyone" because he intended to see his bills paid. Although this statement is somewhat inconsistent with the plea of guilty to the Specification, considered as a whole the record does not show that the plea was improvidently entered. Aside from the plea there is sufficient evidence to sustain all the allegations of the Specification including the intent to deceive. The making of a false official report of this character under the circumstances shown was clearly a violation of Article of War 95.

b. Specification 2: The evidence for the prosecution shows that a letter directing an explanation by accused of his failure to pay his December mess bill of $23.21 was indorsed to accused "for compliance" on 18 January by Major Stevens. Accused replied by second indorsement to Major Stevens, dated 20 January 1944, stating, "This account has been paid". The indorsement came to the attention of Major Stevens about 10:00 a.m. on 21 January and he found upon inquiry about 11:00 a.m. that the bill had not been paid. Just before noon accused delivered his check in payment of

the bill to Second Lieutenant Eddie L. Shaver, secretary-treasurer of the officers' mess.

The evidence for the defense shows that about 7:30 a.m. on 21 January, accused drew a check for his mess bill and delivered it to his roommate, Second Lieutenant John H. Kitzmiller, who agreed to deliver it to Lieutenant Shaver on his way to work. Not finding Lieutenant Shaver in, Lieutenant Kitzmiller kept the check in his pocket. Between 9:30 and 10:00 a.m. the battalion adjutant told accused that they were waiting for his indorsement. Accused borrowed a typewriter from Lieutenant Shaver, wrote the second indorsement, erroneously dating it 20 January, and delivered it to the adjutant. At the time he borrowed the typewriter from Lieutenant Shaver he made no inquiry concerning the bill. Major Stevens brought the indorsement to accused around 11:00 a.m. and asked if it was a true statement. Accused realized something was wrong, talked to Lieutenant Kitzmiller, learned that he still had the check, obtained the check and delivered it to Lieutenant Shaver about noon. He went back around 3 p.m. and "to make positive that I was giving a good check" substituted a check for the same amount drawn by "Lieutenant Ricks" in place of his own.

The testimony of the accused, corroborated by Lieutenants Shaver and Kitzmiller, is not in conflict, essentially, with the evidence for the prosecution. Although the indorsement was dated 20 January, the evidence for the prosecution does not show its existence prior to 10 a.m. on 21 January, and accused testified that he delivered it to the adjutant about that time. It appears that when accused executed the indorsement, the bill had not in fact been paid but accused had drawn a check for it and given the check to his roommate for delivery to Lieutenant Shaver. The evidence therefore sustains the allegations of the Specification that accused officially reported to Major Stevens that his December indebtedness to the officers' mess had been paid and that the report was untrue in that at the time of the report the indebtedness had not in fact been paid.

The evidence further shows that accused made the report without knowledge whether it was, in fact, true. He had only to inquire of Lieutenant Shaver whether he had received the check at the time he borrowed the typewriter, in order to ascertain the true situation but he failed to do so. It is held that certifying as true things not known to be true is legally equivalent to making the certificate knowing it to be untrue (CM 220269, 1 Bull. JAG 23; Dig. Ops. JAG 1912-40, sec. 454 (50)). Accordingly, accused may be said to have known that the report was untrue. However, the evidence is insufficient to show that accused intended, in making this report, to deceive Major Stevens. The testimony for the defense tends to show that

accused believed the account had been paid and that as soon as he had information to the contrary he immediately attended to the delivery of the check. The evidence indicates that the check which accused delivered to Lieutenant Shaver was of doubtful worth because later in the day he replaced it with the check of another officer. In the absence of any other competent evidence on this point the substitution is believed to have insufficient probative value to show accused guilty of deceitful behavior in connection with the giving of the check. The Board of Review is of the opinion that under the circumstances of the case and in the absence of any competent evidence to show accused had the intent to deceive Major Stevens a violation of the 96th Article of War only is proven (CM 231445, 2 Bull. JAG 192).

7. The accused is 31 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 18 June 1942; appointed temporary second lieutenant, Army of the United States, and active duty, 17 December 1942.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specification 1, and of the Charge; legally sufficient to support the finding of guilty of Specification 2, except the words "with intent to deceive Major Albert B. Stevens, Commanding Officer, 318th Antiaircraft Balloon Battalion, Very Low Altitude, Camp Tyson, Tennessee", substituting therefor the word "wrongfully", in violation of the 96th Article of War; and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of the 96th Article of War and mandatory upon a conviction of a violation of the 95th Article of War.

Samuel M. Driver, Judge Advocate

T. Gerr Carmor, Judge Advocate

H. Lotthuhos, Judge Advocate

1st Ind.
5 - MAY 1944

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 Lewis M. Goodwin (0-1048374), Coast 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 Specification 1, and of the Charge; legally sufficient to support the finding of guilty of Specification 2 except the words "with intent to deceive Major Albert B. Stevens, Commanding Officer, 318th Antiaircraft Balloon Battalion, Very Low Altitude, Camp Tyson, Tennessee" substituting therefor the word "wrongfully", in violation of the 96th Article of War, and legally sufficient to support the sentence and to warrant confirmation thereof. The accused, with intent to deceive, made to Major Albert B. Stevens, his commanding officer, a false official report that his indebtedness to the officers' mess for the month of November 1943 in the amount of $47.87 had been paid (Spec. 1) and wrongfully made to the same commanding officer a false official report that his indebtedness to the officers mess for the month of December 1943 in the amount of $23.21 had been paid (Spec. 2). The Staff Judge Advocate in his review states that on 27 July 1943 the accused was restricted to his post for one week under the 104th Article of War for being absent from duty as battery duty officer, that from time to time he has had checks returned marked "insufficient" or "no funds" and that in one instance an overdue indebtedness of accused was brought to the attention of his commanding officer. I recommend that the sentence to dismissal be confirmed and carried into execution.

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

Myron C. Cramer.

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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 310, 17 Jun 1944)

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

SPJGN
CM 249525

3 MAR 1944

UNITED STATES v. First Lieutenant EDWARD M. BROOKS (O-212228), Air Corps.	ARMY AIR FORCES TACTICAL CENTER Trial by G.C.M., convened at Orlando, Florida, 30 December 1943. Dismissal.

OPINION of the BOARD OF REVIEW
LIPSCOMB, GAMBRELL 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 I: Violation of the 85th Article of War.

Specification: In that First Lieutenant Edward N. Brooks, Air Corps, Headquarters and Headquarters Squadron, Army Air Forces School of Applied Tactics, Army Air Forces Tactical Center, was, at Army Air Forces Tactical Center, Orange County, Florida, on or about 12 December 1943, found drunk while on duty as Officer of the Day.

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

Specification: In that First Lieutenant Edward N. Brooks, Air Corps, Headquarters and Headquarters Squadron, Army Air Forces School of Applied Tactics, Army Air Forces Tactical Center, was, at Army Air Forces Tactical Center, Orange County, Florida, on or about 12 December 1943, in a public place, to wit, the Officers' Club, drunk and disorderly while in uniform.

He pleaded not guilty to and was found guilty of all Charges and Specifications, and was sentenced to be dismissed the service. The reviewing authority approved the sentence, but approved only so much of the

findings of guilty of Charge II and its Specification as involves a finding of guilty of said Specification in violation of the 96th Article of War. The record of trial was forwarded for action under Article of War 48.

3. The evidence for the prosecution shows that at or about noon on Sunday, 12 December 1943, the accused entered upon the duties of Officer of the Day of the Army Air Forces School of Applied Tactics, Army Air Forces Tactical Center, Orlando, Florida, for a tour of duty to end at noon on 13 December 1943. Also, it was stipulated (on the record by counsel for the prosecution and counsel for the defense) that the accused was detailed by proper authority to serve as Officer of the Day for the period stated. The accused appeared to be intoxicated at the time he entered upon his duties as Officer of the Day. He had spent the preceding Saturday evening, 11 December 1943, "down town", where, during the evening, he had "six or seven highballs" (R. 11, 12, 65, 104, 117, 127).

Half an hour after coming on duty the accused entered the jeep, which had been assigned to him as Officer of the Day, and was conveyed to the Officers' Club on the post, where he chatted with a WAC officer, First Lieutenant Margaret A. Clarke, approximately half of an hour, and drank two or three glasses of beer. Also, while at the Club on this occasion he walked into the business office of the Club and engaged in conversation with a young woman employee of the Club, Miss Hilda Fay Van Deinse, with whom he was not previously acquainted. He inquired of her where her boy friend was, and then asked "What do you do? Sit around here all day on your ass waiting for him?" Believing that she must have misunderstood him, Miss Van Deinse asked him to repeat his question, which he did, in the same words. She thereupon left the room and did not return until he had left. Ten minutes after she returned to her desk, the accused walked up to her again and said "You're a beautiful little bitch". Again she left the room and did not return until the accused had departed (R. 12, 35-37, 112-113).

Following the above episodes, the accused re-entered the jeep and went on a tour of inspection about the post. It was noticed by the driver of the jeep, Private First Class James H. Manning, that at this time (about 1 p.m.) the accused "had a little more in him". Completing the tour of inspection, the accused returned to the quarters provided for the Officer of the Day at the guardhouse, arriving there at about 2 p.m. He immediately went to bed and slept until 4 p.m., except for two interruptions to answer the telephone. On each of the two occasions that he was called to the telephone the accused was difficult to arouse, and he bore strong evidence of being under the influence of alcohol (R. 14-18, 43-44).

The accused arose at 4 p.m. and again went on a tour about the post in the jeep, proceeding afterwards to the Officers' Club where he remained approximately one hour. Leaving the Club at about 6 p.m., the accused re-entered the jeep and was conveyed to the Air Base Officers' Club, at a point outside of the area over which he was the Officer of the Day. He remained there approximately one hour, returned to the guardhouse for five minutes and then proceeded again to the Officers' Club first mentioned, arriving there at about 8 p.m. Between that hour and 10:30 p.m., the accused drank four glasses of beer, conversed with friends and joined with others present who were singing service songs, to the accompaniment of a piano (R. 18-20, 122, 132-134).

Lieutenant Colonel Charles W. Stark, entering the cocktail lounge of the Club about 10:30 p.m., had his attention attracted to the accused by reason of the fact that the latter was wearing his cap. Upon looking more closely, he observed that the accused was also wearing his side arms and he was reminded that the Officer of the Day is entitled to wear his cap when he is under arms. Colonel Stark was "impressed with the befuddled appearance" of the accused, and "upon looking a little bit further noted a freshly spilled drink of some type which appeared to be beer, as there was considerable foam, at his feet." At this point Colonel Stark summoned the accused to an anteroom and there asked him a number of questions. The accused instead of answering "Yes, sir" or "No, sir", frequently answered with such expressions as "Roger" and "Righto". It was Colonel Stark's "definite opinion that this officer was drunk". He, accordingly, after telephoning Colonel McCulloch and checking with him on the policy of such a move, promptly relieved the accused of his side arms and sent him to his quarters in arrest. At the time the accused was called from the cocktail lounge there were approximately one hundred people in the room, including several civilians. On questions put by the court, Colonel Stark testified that the accused was not only drunk but was also "disorderly" (R. 74-77, 79).

4. The accused, after being fully advised by the court as to his rights, elected to testify. He briefly reviewed his history, testifying that after graduating from Georgetown University, Washington, D. C., he taught for five years at the Georgetown Preparatory School. During the next twelve years and up until the time he received his commission in the Army of the United States in September 1942, he taught in a high school in his home town, his principal subject being American history. He, also, was athletic coach. The main points of difference between his version of what happened on 12 December 1943, and the version adduced by the testimony for the prosecution are the following: (1) the accused vigorously asserts that he was "entirely sober" when he entered upon his duties as Officer of the Day at noon on 12 December; (2) he states that he drank only one glass of beer on his visit to the Officers' Club in the early afternoon; (3) he denies that he addressed any remarks whatever to Miss Van Deinse, and denies further that he had ever seen her prior to the trial; (4) he denies that he drank any alcoholic beverage whatever between noon on 12 December and 10:30 p.m. of the same day,

except five glasses of beer (one of such glasses he drank, he says, in the early afternoon and the other four between 7 p.m. and 10:30 p.m.); and (5) he denies that he was drunk at any time between noon on 12 December 1943, and the time he was relieved at 10:30 p.m. (R. 117, 119, 122-125, 127, 132-133).

Lieutenant Colonel Ernest S. Holmes, a witness for the defense, testified that he saw the accused in the anteroom of the Club in the presence of Colonel Stark at about 10:30 p.m. on 12 December 1943; that he stood within two feet of the accused; and that he observed the accused for about one and one-half minutes at that time. Colonel Holmes further testified that he saw the accused in the cocktail lounge of the Club for about 30 seconds at or near 9:30 p.m. on the same evening. He was asked the following question "Colonel, sir, from your observation of the demeanor of the accused on the two occasions which you saw him on the night of the 12th of December, 1943, did you form an opinion that he was so intoxicated as to sensibly impair the rational and full exercise of the mental and physical faculties of the accused?" to which he replied "No" (R. 87-89, 97).

Second Lieutenant William H. Jordan, a witness for the defense, testified that he saw and talked with the accused about five minutes, in the cocktail lounge of the Club, shortly after noon on 12 December 1943, and that, in his opinion, the accused was, at that time, sober (R. 99, 100).

Second Lieutenant A. W. Corbitt, a witness for the defense, testified that he was relieved by the accused as Officer of the Day at 12:10 p.m. on 12 December 1943, and that, in his opinion, the accused was, at that time, "more sober than drunk" (R. 104, 106).

First Lieutenant Margaret A. Clarke, a witness for the defense, testified that she saw and talked with the accused approximately fifteen minutes at the Officers' Club at or near noon on 12 December, 1943, and that during their talk the accused was drinking beer. When asked how many beers the accused drank during their talk, she replied that she thought that he drank two, but admitted that it could have been three. She further testified that, in her opinion, the accused was not intoxicated. She stated that she and the accused "were good acquaintances" and that she had seen him frequently at the Club, but she denied that she had ever had any dates with him (R. 109-110, 112-113).

On examination by the court, the accused testified that he did not eat any supper on 12 December 1943, and that all that he ate for lunch was one chocolate bar (which he had in his clothes), with the result that, according to his testimony, he had had five beers and one chocolate bar (and nothing else to eat or drink) between breakfast and the time he was relieved at 10:30 p.m. He also testified that the beers were given to him by the Club rather than sold to him, since he was Officer of the Day (R. 118, 136-137).

5. The Specification of Charge I alleges that the accused "was, at Army Air Forces Tactical Center, Orange County, Florida, on or about 12 December 1943, found drunk while on duty as Officer of the Day". The elements of the offense are being found drunk on duty. It was not disputed that the accused was on duty during the afternoon and evening of 12 December 1943. On the question, however, as to whether he was drunk during that period, the evidence is squarely contradictory. Several witnesses for the prosecution testified flatly that he was drunk. To support their conclusions that he was drunk they described, in some detail, his appearance, his speech, his manner of walking and his general demeanor. On the other hand, several witnesses for the defense testified, in a seemingly less convincing way, that the accused was not drunk or did not appear to be drunk. It is to be observed, however, that of the four witnesses who testified for the accused, only one, namely, Colonel Holmes, testified as to the condition of the accused between 7 p.m. and 10:30 p.m. on the day in question. It is also to be noted that Colonel Holmes' observation of the accused was rather brief - two minutes altogether; and his testimony when considered in full seems to be somewhat equivocal.

The testimony of none of the witnesses was impeached, except for such impeachment as was inherent in the contradictory testimony of witnesses for the opposition. The court had the right to accept or reject the testimony of any witness, and it is evident, from the findings of guilty of Charge I and its Specification, that the court accepted the testimony of the witnesses for the prosecution.

Drunkenness is defined in the Manual for Courts-Martial, 1928, as follows:

> "* * * any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article" (85) (par. 145).

Plainly, the evidence was sufficient to support the court in finding that, beyond a reasonable doubt, the accused was drunk on duty.

6. The Specification of Charge II alleges that the accused "was * * * on or about 12 December 1943, in a public place * * * drunk and disorderly while in uniform". As previously stated, the reviewing authority approved only so much of the findings of guilty of Charge II and its Specification as involves a finding of guilty of said Specification in violation of Article of War 96. It is unnecessary, therefore, to consider whether the evidence is sufficient to sustain a finding of guilty of a violation of Article of War 95. That it <u>is</u> sufficient to sustain a finding of guilty of the Specification in violation of Article of War 96 there can be no doubt. There is an abundance of evidence that the accused was not only drunk, but also disorderly, at the Officers' Club

on the afternoon and evening of 12 December 1943. Several witnesses testified categorically that he was drunk; and that he was also disorderly is plainly shown by (1) his insulting remarks (quoted above) to the woman employee of the Club, (Miss Van Deinse) with whom he was not acquainted; (2) the fact that he was content to sit at a table and drink while a broken glass of beer lay at his feet; (3) his impertinent and insubordinate replies to his superior officer, Colonel Stark; and (4) his drinking and carousing in the cocktail lounge of the Officers' Club while acting as Officer of the Day. Such conduct is clearly prejudicial to good order and military discipline and of a nature to bring discredit upon the military service, and is, accordingly, a violation of the 96th Article of War.

7. The accused is 39 years old. The records of the Office of The Adjutant General show that the accused, having taken R.O.T.C. training at Georgetown University, was, on 5 February 1925, commissioned a second lieutenant, of Infantry, in the Officers' Reserve Corps; that such commission was for a five year period; that he was commissioned a first lieutenant in the Air Corps, Army of the United States, on 13 September 1942; and that he entered upon active duty in the Air Corps on 1 October 1942.

The records of the Office of The Adjutant General also show that the middle name of the accused is MacIntyre. The use in the Charge Sheet of "N" as the middle initial was, therefore, incorrect; the letter "M" should have been used. Appropriate corrective action should be taken.

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 and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of Article of War 96 and is mandatory upon a conviction in time of war of a violation of Article of War 85.

Abner E. Lipscomb, Judge Advocate

William H. Trambrell, Judge Advocate

Gabriel H. Golden, Judge Advocate

SPJGN
CM 249525

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 Edward M. Brooks (0-212228), Air Corps.

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

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 249, 30 May 1944)

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

SPJGK
CM 249613

24 FEB 1944

UNITED STATES	)	SECOND AIR FORCE
v.	)	Trial by G.C.M., convened at Army Air Base, Alamogordo, New Mexico, 25 January 1944. Dismissal, total forfeitures, and confinement for one (1) year.
Second Lieutenant RAYMOND KALLISH (O-676489), Air Corps.	)	

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

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

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

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

Specification: In that Second Lieutenant Raymond (NMI) Kallish, Air Corps, 359th Base Headquarters and Air Base Squadron did, at Army Air Base, Alamogordo, New Mexico, on or about 10 January 1944, unlawfully sell to Private Edward G. Levine, 359th Base Headquarters and Air Base Squadron, one B-6 medium weight flying jacket of the value of approximately Nineteen Dollars and Eighty-One Cents ($19.81), issued for use in the Military Service of the United States.

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

Specification: In that Second Lieutenant Raymond (NMI) Kallish, Air Corps, 359th Base Headquarters and Air Base Squadron did, at Army Air Base, Alamogordo, New Mexico, on or about 13 January 1944, wrongfully and knowingly draw certain items of flying equipment of the value of more than Fifty Dollars ($50.00), with the intent to defraud the United States Government.

He pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specification. He 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 one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

Charge I and Specification.

Testimony concerning the unlawful sale by accused of property issued for use in the military service of the United States was offered by Private Edward G. Levine, 359th Base Headquarters and Air Base Squadron, Army Air Base, Alamogordo, New Mexico, the buyer of the property, and Private First Class Roland J. Kirsch, of the same organization. Kirsch was chief clerk in the squadron supply room, and accused was supply officer.

On 10 January 1944, Kirsch was working at his desk in the supply room when Levine came in to see accused about some clothing which Levine had lost in Salt Lake City. Levine testified that accused said "in a joking manner, not directed to anybody", that he "would have some (flying equipment) to sell after the war" (R.5,6,12,13-15). Although he had never mentioned the subject before, Levine asked accused if he wanted to sell a new "B-6 flying jacket" which was hanging on a wall in the supply room. Levine said he would give accused $15 for it, and accused agreed. The jacket was not part of the equipment lost by Levine at Salt Lake City, nor was he authorized to have flying equipment in his possession, inasmuch as he was not on flying status (R.13-16).

Kirsch testified that Levine went out, saying that "he was going to see how many friends he had", and that when he (Levine) came back he handed accused $14. Levine did not mention his leaving the room, but corroborated Kirsch's testimony concerning the passage of the money. He stated that a day or two later he gave $1 to "Sergeant Bryan", one of the personnel in the supply room, telling Bryan to give it to accused. Accused counted the $14, put it in his pocket, took the jacket from the wall, and gave it to Levine (R.6,10,12,13-15).

Captain Arthur Boyd, Air Corps, 359th Base Headquarters and Air Base Squadron, testified that he was sub-depot supply officer and familiar with the prices of Air Corps equipment, and that the price of the flying jacket was $19.81 (R.16,17).

Charge II and Specification.

Private Kirsch testified that he was on duty in the squadron supply room on 13 January 1944, and that he saw accused make out a "Class 13" shipping ticket and requisition. Accused typed on the requisition the name "Roland J. Kolbash, 2nd Lt. A.C. O-765423 359th", and signed the

paper using the same name, rank, branch, number and organization. Accused then asked Kirsch to take it to the Sub-Depot, Air Corps Supply, but witness was unable to go. Finally a "Corporal King" took the requisition to the sub-depot and returned to the squadron supply room with a B-6 jacket, a pair of flying boots, a summer and a winter flying helmet, a pair of cover-alls, a "flying sweater", and a pair of flying gloves (R.8,13; Ex.1).

Accused's actions were apparently brought to the attention of his superiors, for First Lieutenant Delbert A. Witty, 359th Base Headquarters and Air Base Squadron, came to the supply room and "identified" the supplies which accused had obtained and left there. Unknown to accused, marks were made on the equipment, which accused took to his bachelor officer quarters a few days thereafter. Witness positively identified in court all equipment thus requisitioned and received by accused, except for the pair of flying gloves, which were not produced. The equipment thus identified corresponded generally in description to that described in Exhibit 1 (R.8-10; Ex. 1).

Witness also testified that "within the past six months" he had moved all of accused's personal equipment from one set of quarters to another, and that when he did so he had noticed three or four "B-4 bags" among the equipment moved. A "B-4 bag" is used as a suitcase for carrying clothing. All bore accused's name on the side of them. He also testified that on one occasion during January 1944 he had placed on a "truck that took the baggage out" a box "marked with Government specifications" of a B-4 bag, the label on which box accused had addressed to his brother in Philadelphia. The box was sealed with gummed paper, and witness did not know what its contents were (R.18-20).

Kirsch also stated that at some date prior to the signing of a fictitious name by accused, he had heard accused say that "he would like to have a complete set of equipment after the war was over" (R.8).

Captain Boyd testified that the price of a winter flying vest (sweater) was $2.49, of a B-6 flying jacket, $19.81, of a flying helmet, $1.25, of winter flying boots, $10, of an A-4 flying suit (cover-alls), $10 (R.16,17). By mathematical computation the total price of the articles requisitioned and received by accused on 13 January was $44.80, excluding the gloves which were not introduced and priced. There was also testimony that a B-4 bag (which was not among the articles received by accused on his requisition) was worth $8 to $10 (R.17).

Evidence for defense.

Accused was properly informed concerning his rights in open court and testified in his own behalf. He stated that he was on flying status at the time of the trial. It is not clear whether he was on flying status on 10 or 13 January 1944. He denied sending a B-4 bag home to his brother, and

stated that he had sent clothing -- "some things I picked up down in Juarez". He procured a box from "Sergeant Bryan" at "Tech Supply", brought it to the squadron supply room already packed, and tied with rope. He denied sealing it, but admitted that the gummed paper on it might have been of the self-sealing type. He did not request Kirsch to tie and address the box for him. He admitted possession of two B-4 bags when he was authorized only one.

4. Accused's guilt of the Specification of Charge I is proved beyond all doubt by the testimony of Kirsch and Levine, and by accused's plea thereto. With respect to the Specification of Charge II, the Board of Review is of the opinion that the signing by accused of a clearly fictitious name to the Class 13 shipping and requisition ticket is in itself sufficient evidence of his intent to defraud. The failure to prove whether he was or was not on flying status at the time, as certified in the requisition, becomes unimportant in the face of the subterfuge adopted by him. It was not shown, however, when the unauthorized bags were drawn, and it is clear that none of them was drawn on the requisition dated 13 January. The price of the gloves was not proved. The Board of Review is of the opinion, therefore, that the record is sufficient only to show accused's guilt of wrongfully and knowingly drawing certain items of flying equipment of the value of $44.80, with the intent to defraud the United States Government. The variance is immaterial, since it does not affect the sentence and was not shown to have prejudiced accused in any manner in his defense. He did not in his testimony deny making the requisition, using a fictitious name, or receiving the property.

The testimony of Kirsch and the examination of accused with respect to the shipment of a box to accused's brother, which was not alleged in either Specification, was improper, but does not appear to have prejudiced him, for the evidence in other respects was ample to support the court's finding.

5. War Department records show that accused is 24 years of age and single. He attended Drexel Institute for two and one-half years, but did not graduate. He was inducted into the Army on 13 February 1942, was appointed an Aviation Cadet on 1 September 1942, and was commissioned a Second Lieutenant, Air Corps, Army of the United States, on 1 April 1943.

6. 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 and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 84 and Article of War 96.

Jimmy E. Gore, Judge Advocate.

Wm Tannenbaum, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 1 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 Raymond Kallish (O-676489), 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 believe that under the circumstances of this case dismissal would be adequate punishment for the offenses committed. I recommend that the sentence be confirmed but that the confinement and forfeitures be remitted and that the sentence as thus modified be carried into execution.

3. 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 confinement and forfeitures remitted. G.C.M.O. 209, 26 May 1944)

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

N. D.

13 APR 1944

(143)

SPJGH
CM 249636

UNITED STATES	)	30TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Atterbury, Indiana, 24 January 1944. Dishonorable discharge and confinement for thirty (30) years. Disciplinary Barracks.
Private L. B. WILLIAMS (34384773), Anti-Tank Company, 120th Infantry.	)	

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

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

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

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

Specification: In that Private L. B. Williams, Anti-Tank Company, 120th Infantry, did, without proper leave, absent himself from his organization at APO #30, Camp Atterbury, Indiana from about 13 January 1944 to about 14 January 1944.

CHARGE II: Violation of the 96th Article of War.
(Motion to strike sustained by court).

Specification: (Motion to strike sustained by court).

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

Specification: In that Private L. B. Williams, Anti-Tank Company, 120th Infantry, having received a lawful command from First Lieutenant Harold D. Fayette, his superior officer, to fall in to run the infiltration course, did at the Post Stockade, Camp Atterbury, Indiana, on or about December 28, 1943, willfully disobey the same.

CHARGE IV: Violation of the 66th Article of War.

Specification: In that Private L. B. Williams, Anti-Tank Company, 120th Infantry, did at Camp Atterbury, Indiana, on or about December 28, 1943, voluntarily join in a mutiny which had begun in the Post Stockade, against the lawful military authority of First Lieutenant Harold D. Fayette, the Commanding Officer thereof, and did with intent to usurp and over-ride for the time being, in concert with sundry other members of the 30th Division assembled in the Post Stockade, refuse to fall in to run the infiltration course.

CHARGE V: Violation of the 67th Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded guilty to the Specification, Charge I, and to Charge I; and not guilty to all other Charges and Specifications. The court sustained a motion to strike the Specification, Charge II and Charge II. He was found not guilty of the Specification, Charge V and Charge V; and guilty of all other Charges and Specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for thirty years. Evidence of a previous conviction by a summary court-martial for being absent without leave for about 5 days and breaking restriction, in violation of the 61st and 96th Articles of War (Ex. 2), and of a conviction by a special court-martial for being absent without leave for about 13 days in violation of the 61st Article of War (Ex. 3), was introduced. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the prosecution:

a. Charge III and Charge IV: First Lieutenant Harold D. Fayette, 30th Infantry Division Prison Officer in charge of training the prisoners of the 30th Division, scheduled as part of the training program the running of the night infiltration course for the evening of 28 December 1943. At about 6:25 that evening he ordered Staff Sergeant Belton R. Loftis to call out the prisoners. Sergeant Loftis entered the two barracks occupied by the 30th Division prisoners, in the Camp Atterbury Stockade, and gave the order to "fall out". Observing that only a few of the prisoners were leaving the barracks Lieutenant Fayette entered both barracks and gave the command for all 30th Division prisoners to fall out to run the night infiltration course. A "scattered" few obeyed and twenty-three prisoners assembled outside the barracks to run the course. Fifty-three prisoners, including the accused, refused

to obey the orders and remained in the barracks. On cross-examination Lieutenant Fayette testified that it was snowing during the day and the accused had been out with the other prisoners "digging holes". The prisoners were equipped with topcoats, shoe galoshes, coveralls, and "whatever they had", but Lieutenant Fayette did not know whether the accused had a pair of galoshes. When the men failed to fall out that evening he gave a "direct order" to the accused "personally" and "gave one order to him alone". He told the prisoners that he would bring in enough "M.P.s" with clubs to run them out and stated: "You know you are disobeying a direct order of an officer". The accused did not give Lieutenant Fayette any reason for his refusal to obey the orders, but he did run the course the following evening. On being recalled for further cross-examination, Lieutenant Fayette testified that when the prisoners failed to obey his command he asked some of the men their reasons for refusing to run the course. "Private Stewart" replied that "he wouldn't if the rest didn't go". Lieutenant Fayette asked "Private Marshall" if he was the spokesman for the group, and on receiving an affirmative reply said; "Speak your piece". Marshall replied, "We are not going out tonight". Lieutenant Fayette then gave the prisoners a direct order "to fall in in the middle of the floor" and said "That was a direct order and the last one I will give". He further testified that he saw the accused on the top floor of the middle barracks that night but did not give him a direct order nor did he speak to him. He was aware that snow was falling outside and that some of the men did not have full "T/E" equipment but none of them complained of having wet clothing (R. 8-15, 35-37).

Staff Sergeant John E. Whisnant, chief instructor of the 30th Division Prison Training Unit, told the prisoners at their return from work on 28 December to be ready to "fall out", to run the infiltration course and the only comment he heard was "What, on a night like this?" On his return from supper he told the men who remained in the barracks after the order to fall out had been given that "it was foolish and there would be trouble from now on, and those that were ready to come out could come". Sergeant Henry J. Bouchard, assistant instructor in training, observed that most of the men were "very sullen" that evening. They knew they were to run the infiltration course before the order was given and he told the men if they did not do so "it would get them into a lot of trouble". Some of the prisoners replied: "If the rest of them want to run it, it is all right, we won't run it" (R. 15-20).

During the afternoon of 28 December 1943, a large number of the prisoners learned they were to run the infiltration course that night. It was "common talk" among those gathered around a fire on the "transition" course. Private George Henry, a prisoner, heard a number of the men say they would not "fall out" and the statement was made by several that those who were not going on the infiltration course "were to come to the last barracks". Henry lived upstairs in the last barracks and that evening a number of the men, including the accused,

from the other barracks gathered upstairs in the last barracks. The general conversation was about "not running the infiltration course that night". The accused was present when the order to fall out was given by the sergeant and by Lieutenant Fayette but he did not leave the barracks. Sergeant Whisnant "almost pleaded with the boys to go out but they still wouldn't go". Private Henry stayed in the barracks "because the rest of them did" (R. 21-25).

Private Floyd Marshall, who had spent the day at the hospital, at 5:00 p.m. on 28 December heard that the prisoners were to run the infiltration course. He made up his mind not to go out because his clothes were wet and heard the other men say they were not going out. On cross-examination Private Marshall testified that when the men assembled in the barracks they said: "If we are going out, let's go out, and if we are not going out, let's stay in". He had not been tried for mutiny and as far as he knew no charges had been preferred against him (R. 25-28).

When Private Paul L. Duke returned from the range on the afternoon of the 28th "word was already out" about running the infiltration course. During "chow" somebody mentioned at the table that he would not run the course. After dinner when a number of men from the other barracks were gathered in Duke's barracks the statement was made that "We are not going on the infiltration course". When Lieutenant Fayette entered the barracks after Sergeant Loftis had given the order to "fall out" he asked "who was going with him and crawl the infiltration course". Duke did not fall out because he was under the doctor's care and excused from field duty (R. 28-30).

Private Freddie O. Pendleton testified that at the time the orders were given to fall out the accused was sitting on a "bunk" in the "middle" barracks next to him and did not "fall out". Pendleton did not go out because he had worked all day until dark. It was "raining, snowing and sleeting", and he did not have any dry clothes to put on. Lieutenant Fayette on entering the barracks said "Let's run the infiltration course", but did not say that it was a "direct order" (R. 31-33).

b. Charge I: An extract copy (Ex. 1) of the morning report of the Anti-Tank Company, 120th Infantry Division, showed accused from duty to absent without leave 13 January 1944, and from absent without leave to absent in confinement, 14 January 1944 (R. 6).

4. The accused elected to remain silent with reference to the Charges and Specifications under consideration (R. 33).

5. a. Charge III and Charge IV: The evidence shows that at about 6:30 p.m. on 28 December 1943, Staff Sergeant Belton R. Loftis, acting on instructions from First Lieutenant Harold D. Fayette, 30th

Infantry Division Prison officer, entered the two barracks occupied by 30th Division prisoners within the Camp Atterbury Stockade, and gave the order to "fall out". As only a few of the prisoners came out of their barracks Lieutenant Fayette entered both barracks and ordered the remaining prisoners to fall out to run the infiltration course. Twenty-three of the prisoners obeyed the command and fifty-three stayed in the barracks, refusing to leave. During the afternoon of the same day it had been "common talk" among the prisoners working on the transition course that they were supposed to run the infiltration course that evening. A number of the men were overheard remarking that they would not "fall out" and the statement was made by several that those who were not going to run the course were to gather in the last barracks. A number of the men, including accused, who lived in another barracks gathered upstairs in the middle or last barracks that evening and the general conversation was about "not running the infiltration course that night". Most of the men were "very sullen" and in response to questions by Lieutenant Fayette as to the reasons for refusing to run the infiltration course, one of the assembled prisoners stated "he wouldn't if the rest didn't go" and another prisoner acting as spokesman for the group stated "We are not going out to-night". Lieutenant Fayette told the prisoners they were disobeying a direct order of an officer and then ordered them to assemble in the middle of the floor. When they did not fall in he stated "That was a direct order and the last one I will give". The accused was present when the orders were given but did not say anything and did not leave the barracks.

Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority. The concert of insubordination contemplated in mutiny need not be preconceived, nor is it necessary that the act of insubordination be active or violent. It may consist simply in a persistent and concerted refusal or omission to obey orders or to do duty with an insubordinate intent (MCM, 1928, par. 136a). It is clearly established by the evidence that on 28 December a mutiny existed when fifty-three 30th Division prisoners, acting collectively, disobeyed the order to fall out to run the night infiltration course. The accused voluntarily joined the mutiny when acting in concert with the others he refused to obey the order, and by the same act of persistent refusal, willfully disobeyed a lawful command of his superior officer.

b. Specification, Charge I: The evidence shows and the pleas of guilty admit that the accused was absent without leave from 13 January 1944 to 14 January 1944 as alleged.

6. The accused is charged in the Specification, Charge III with refusing to obey a lawful command of his superior officer, and in the Specification, Charge IV with voluntarily joining in a mutiny against lawful authority by failing to obey the same command. The one act should not be made the basis for a multiplication of charges (MCM, 1928, par. 27). Though the pleading is improper, the error is not prejudicial to accused as the sentence imposed is sustained by any one of the charges of which the accused was found guilty (Dig. Ops.

JAG 1912-40, Sec. 428 (5)).

7. The charge sheet shows that the accused is 22 years of age and that he was inducted into Federal Service 4 September 1942.

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

Samuel M. Driver, Judge Advocate.

[illegible], Judge Advocate.

H. Fottuhos, Judge Advocate.

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

SPJGN
CM 249667

26 FEB 1944

UNITED STATES v. Private ELWOOD SHIELDS (18085264), Attached unassigned, Headquarters Detachment Station Complement, Atlanta Ordnance Depot.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Atlanta, Georgia, 21 January 1944. Dishonorable discharge and confinement for one and one-half (1½) years. Disciplinary Barracks, Greenhaven, New York.

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 Charges and Specifications:

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

Specification: In that Private Elwood (NMI) Shields, attached unassigned to Headquarters Detachment, Station Complement, Atlanta Ordnance Depot, Atlanta, Georgia, did, without proper leave, absent himself from his organization and station at Atlanta Ordnance Depot, Atlanta, Georgia from about 2 January 1944 to about 4 January 1944.

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

Specification 1: In that Private Elwood Shields, attached

unassigned to Headquarters Detachment, Station Complement, Atlanta Ordnance Depot, Atlanta, Georgia, did, at Atlanta Ordnance Depot, Atlanta, Georgia, on or about 4 January 1944, behave himself with disrespect toward First Lieutenant Frank J. Degnan, his superior officer, by saying to him, "You will wait a minute", or words to that effect, and contemptiously turning from him to continue his own personal affairs while Lieutenant Degnan was talking to him, the said Private Shields.

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

Specification: In that Private Elwood Shields, attached unassigned to Headquarters Detachment Station Complement, Atlanta Ordnance Depot, Atlanta, Georgia, having received a lawful command from First Lieutenant Degnan, his superior officer, to "Come back here immediately", did at Atlanta Ordnance Depot, Atlanta, Georgia, on or about 31 December 1943, wrongfully fail to obey the same.

He pleaded guilty to Charge I and its Specification, not guilty to the remaining Charges and Specifications. He was found guilty of all Charges and Specifications. Evidence was introduced of one previous conviction, adjudged 22 February 1943, for a violation of Article of War 58. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for a period of eighteen months. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The only problem in this case requiring discussion is the legal sufficiency of the record to support the findings of guilty of Charge III and its Specification, concerning which the evidence may be summarized as follows:

Several weeks prior to 31 December 1943 - the date of the alleged offense - the accused had been relieved from his company duties and assigned, as a voluntary employee, to the Officers' Mess, receiving, from the mess, compensation to the extent of about $8 per

month in addition to his regular soldier's pay, for duties performed in the course of his employment, consisting largely of washing and cleaning equipment under the direction and supervision of First Lieutenant Frank J. Degnan, Mess Billeting Officer. On the evening in question, the regular dinner at the Officers' Mess was suspended to permit preparations for a large buffet supper, which was served from 8:00 to 9:30 o'clock to some four or five hundred persons attending an open house for all post and student officers, their families and guests. In connection with this affair, highballs were also served from 7:30 to 9:30 o'clock in an adjoining building, known as the old Officers' Mess, to which the accused was assigned to assist in washing and keeping glasses clean for the bartenders. There, at about ten minutes after eight, Lieutenant Degnan noticed the accused with a glass in his hand. Assuming that it contained whiskey, he shouted across the room, "You men are not to get drunk this evening". The accused emptied the glass into the sink and started walking toward the door, ignoring the officer's direction to return to his duties. As the accused left the building, Lieutenant Degnan said to him, "Shields, I am giving you a direct order, come back here and continue to wash glasses". The accused replied, "I will be damned if I will", and walked out across the street, apparently to the other mess hall. Lieutenant Degnan "repeated that order twice". The accused did not return to the mess hall where the drinks were being served (R. 10-11, 17, 30-31, 82; Ex. 1).

No extra compensation - over and above the regular additional stipend paid to him for the routine duties involved in his employment by the Officers' Mess - was promised the accused for his services in connection with the open house, nor was he given the option of working or not working on that particular night. The men assigned, as was the accused, to special duties in the Officers' Mess, had the "privilege" of quitting, if they wished. The procedure followed in such cases was for the employee to notify the mess billeting officer, who would thereupon request the employee's company commander to relieve the employee from his duties at the Officers' Mess and assign him back to his company, a request with which the company commander invariably complied (R. 7-8, 16, 17-20).

4. The Specification, Charge III alleges the accused's wrongful failure to obey the lawful command of a superior officer. The evidence shows that, by official sufferance, the accused had been permitted to be relieved of company duties to become an employee of the Officers' Mess. His relationship with the mess officer, in so far as the duties of his employment were concerned, were purely contractual. Lieutenant

Degnan, in ordering him to continue to wash highball glasses, was speaking as the accused's employer rather than as his superior officer. Indeed, The Judge Advocate General has heretofore held that,

> "An order by a superior officer to an enlisted man to wait on tables at an officers' mess is in contravention of R.S. 1232, which provides that 'no officer shall use an enlisted man as a servant in any case whatsoever.' Such an order, is, therefore, illegal and cannot be made the basis for a conviction of willful disobedience under A.W. 64. C.M. 146727 (1921)" (par. 422 (6), p. 286, Dig. Ops. JAG, 1912-40).

Since the evidence goes no further than to show that the accused breached his contract of employment with the Officers' Mess, it is legally insufficient to sustain his conviction for wrongfully failing to obey the command of his superior officer, in violation of Article of War 96.

5. The offenses alleged in the other Specifications occurred at a later date and are wholly unrelated to the offense alleged in the Specification, Charge III. The record supports the findings of guilty of Charges I and II and their Specifications.

6. The accused is about 23 years of age. The record shows that, with no prior service, he enlisted at Oklahoma City, Oklahoma, 20 January 1942.

7. The court was legally constituted. For the reasons stated, the Board of Review holds the record of trial not legally sufficient to support the findings of guilty of Charge III and its Specification, legally sufficient to support the remaining findings of guilty and the sentence.

Abner E. Lefcourt, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

1st Ind.
11 MAR 1944

War Department, J.A.G.O., - To the Commanding General, Fourth Service Command, Army Service Forces, Atlanta, Georgia.

1. In the case of Private Elwood Shields (18085264), Attached unassigned, Headquarters Detachment Station Complement, Atlanta Ordnance Depot, I concur in the holding of the Board of Review and for the reasons therein stated recommend that the findings of guilty of Charge III and the Specification thereunder be disapproved. Upon compliance with the foregoing recommendation, under the provisions of Article of War 50½, and Executive Order No. 9363, dated 23 July 1943, you now have authority to order the execution of the sentence.

2. Upon the disapproval of the findings of guilty of Charge III and its Specification, the accused will then stand convicted of absence without leave for two days in violation of Article of War 61, and of disrespect towards a commissioned officer in violation of Article of War 63. The officer involved is the same officer who had previously given the accused an illegal order, and it is difficult to separate the attitude and conduct of the accused in his disrespect towards Lieutenant Degnan on 4 January 1944 from his disobedience of the illegal order by this same officer on 31 December 1943.

In the first instance it is clear that the officer gave an illegal order and, under the circumstances, including the fact that the incident occurred while the accused was engaged in work connected with serving drinks to officers of which the accused, himself, was partaking, it likewise appears that Lieutenant Degnan was lacking in leadership.

The original act of disrespect alleged was not gross in that the accused merely said in response to an order, "Wait a minute" whereupon Lieutenant Degnan immediately ordered the accused to come with him at once. It is conceded that the subsequent misconduct of the accused was disrespectful and reprehensive but, under all of the circumstances, it is suggested that the conduct of accused does not necessarily require his immediate dishonorable discharge from the service.

It is accordingly suggested that in view of the foregoing, the disapproval of the finding of guilty of Charge III and its Specification, and the erroneous introduction of an outlawed previous conviction, consideration be given to some reduction in the period of confinement, including the remission or at least suspension of that portion involving dishonorable discharge.

MAR 1 1944

DISPATCHED
WAR DEPARTMENT
SERVICES OF SUPPLY

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

(CM 249667).

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.

SPJGK
CM 249703

(155)

5 APR 1944

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Army Air Field, Thermal, California, 5 January 1944. Dismissal.
Second Lieutenant ELBERT J. TILLMAN (O-797744), 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. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Elbert J. Tillman, 23d Tactical Reconnaissance Squadron, 76th Tactical Reconnaissance Group, did, on or about 29 November 1943, at or near Palm Springs, California, wrongfully violate Section II, Paragraph 16 a (1) (d), Army Air Forces Regulations No. 60-16, dated 9 September 1942, by flying a military airplane at an altitude less than five hundred feet above the ground.

Specification 2: In that Second Lieutenant Elbert J. Tillman, 23d Tactical Reconnaissance Squadron, 76th Tactical Reconnaissance Group, did, on or about 29 November 1943, at Army Air Field, Palm Springs, California, wrongfully violate Section II, Paragraph 16 (a), (1), (d) Army Air Forces Regulations No. 60-16, dated 9 September 1942, by flying a military airplane across a runway at an altitude of less than five hundred feet.

Specification 3: In that Second Lieutenant Elbert J. Tillman, 23d Tactical Reconnaissance Squadron, 76th Tactical Reconnaissance Group, did, on or about 29 November 1943, at Army Air Field, Palm Springs, California, wrongfully violate Section I, Paragraph 1, Army Air Forces Regulations No. 60-16,

dated 9 September 1942, by operating a military airplane in such a careless manner as to endanger friendly aircraft in the air.

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

3. Summary of evidence.

The offenses with which accused were charged took place over the city of Palm Springs, California, and at the Army Air Field nearby. A brief description of local geography and terrain will help explain the sequence of events. Reference to a standard atlas will show that the city of Palm Springs is located in a comparatively wide valley between two ranges of mountains, which run, roughly, from northwest to southeast in a broad arc, curving southward some miles below the city and widening out. Through the valley run the tracks of the Southern Pacific Railway, and United States Highways 60, 70, and 90. The town of Indio is about 25 miles southeast of Palm Springs on the railroad, and the town of Thermal (near which was accused's base) about seven miles southeast of Indio. Palm Springs Airport is about two and one-half miles southeast of that town, and due south of the railroad and highway.

It was shown by the testimony of Staff Sergeant Clarence C. Curley, 23rd Tactical Reconnaissance Squadron, 76th Tactical Reconnaissance Group, and by an extract copy of an Operations Order of that squadron, that accused took off in a "P-39" type airplane, bearing number 42-18936, from Thermal Army Air Field at 1010 or 1015 on 29 November 1943. Accused returned to Thermal in this ship at about 1115 the same morning (R. 11-13; Pros. Ex. 1).

The prosecution introduced into the record as its Exhibit 2 the portions of Army Air Forces Regulations 60-16 which accused allegedly violated. Paragraph 1, Section I, thereof prohibits operation of aircraft "in a reckless or careless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, persons or property on the ground". Paragraph 16 (a)(1)(d)) thereof prescribes as a minimum altitude of flight, except during take-off and landing, 500 feet above the ground (R. 9,10; Pros. Ex. 2).

a. Specification 1, Charge.

Between 1000 and 1100 on that morning, Captain Harold Williams, Air Corps, and First Lieutenant Roland E. Sturtevant, Air Corps, both

of the 21st Ferrying Group, were on duty as instructors at the Palm Springs Army Air Field. Mr. Jack C. Warner of Palm Springs, California, was on duty as Civil Aeronautics Administration controller, in the control tower of the airport. Captain Williams and Lieutenant Sturtevant were standing near the south end of the field's diagonal, northwest-southeast runway, which, Captain Williams stated, was "the only runway we had that is usable most of the time", and which, he implied, was the only one usable at that time (R. 16,30,39,40,41,42,44).

All three witnesses testified that they observed two P-39's flying at a low altitude from the southeast. The planes passed south of witnesses' field, "skirting along the hills", and continued on to the town of Palm Springs. They were always in witnesses' view, and no other similar planes were seen (R. 16,30,32,39,44). The planes "buzzed" the city; while no witness described what was meant by this term, it appears that they flew low, motors roaring, and then gained altitude again (R. 17). One plane was estimated by Mr. Warner to have flown at an altitude of about 60 or 70 feet above the ground, the other at 100 or 150 feet (R. 16,26,30,31). Captain Williams testified that it was "pretty hard to distinguish them from the trees, right down at them" (R. 39).

Mrs. Nellie B. Parker, an apartment house owner in Palm Springs, testified that she was in her apartment at about 1030 on 29 November, when -

> "* * * all at once I heard this roar overhead. I rushed out into the yard, * * * and the leaves were still coming down from the cottonwood tree and the tree swaying. I turned and looked to the north and the Tamarack trees to the north of the road were swaying. I could just see the plane skipping along, low. I don't know just how far away it was. It was quite a little distance by that time" (R. 13,14).

There was no breeze or other factor which would have caused the leaves to blow at that time. Mrs. Parker could not estimate the plane's height above the ground, nor identify its type. It was flying north when she saw it. She did not at this time see any other planes in the air above Palm Springs (R. 14,15).

b. Specification 2, Charge.

The planes may have circled about over Palm Springs (the evidence is not definite on this) (R. 16,17,31), but they eventually continued beyond the city in a northwesterly direction, gaining some altitude (R. 16,20,26). Accused's plane continued north or northwest for "perhaps five miles", then "pulled out", turned eastward and headed for Palm Springs Army Air Field, from an altitude of approximately 800 or 1000 feet, in a shallow dive (R.17,

31). The other plane was seen by Warner to proceed eastward, passing perhaps three or four miles north of the airport, until it became lost to sight against the mountains northeast of the field (R. 17,25). Lieutenant Sturtevant was not sure that he ever saw this plane again (R. 36, 38).

Captain Williams and Lieutenant Sturtevant both testified that accused's plane remained constantly within their sight during these maneuvers, while Warner stated that though he took his eyes from it for "two or three seconds", he had no trouble finding it again when he looked a second time (R. 17,21,27,35,39,41). Warner called accused's plane by radio, telling him to "pull up", and not to go over the field at a low altitude, but received no response. The plane continued its approach to the field, and flew right above and almost directly parallel to the diagonal, northwest-southeast runway, in a southeasterly direction, which was against the flow of traffic at the time. As it passed Warner's control tower, which is 52 feet high, he was able to look down upon it. It flew past Captain Williams and Lieutenant Sturtevant as they stood at the edge of the runway. The former estimated its altitude at "less than 50 feet" and the latter at "about thirty or forty feet" (R. 17,18,22,31,32,40,41). Toward the southern end of the runway the plane pulled up and bore off to the east (its left), rising eventually to an altitude of approximately 800 feet near Cathedral City, which is about three miles southeast of the airport (R. 18, 24-26, 33).

Meanwhile, at Lieutenant Sturtevant's suggestion, Captain Williams had climbed into a P-47 type plane which was warming up nearby on the field. Although it was not possible for him to keep the plane which had "buzzed" the field in sight as he took off, and although he did not, because of the direction of traffic on the field, take off in the same direction in which accused's plane was flying, he gained altitude quickly, made almost a 180° turn, and perceived a P-39 coming nearly directly toward him, in the east. He followed this plane for some miles, finally caught up with it near Indio, above the railroad tracks, and obtained its number (R. 42-45). After first catching sight of it he kept it in view at all times, and saw no other planes while in pursuit. Lieutenant Sturtevant testified that the plane which Captain Williams pursued was the same one which flew over the runway (R. 33,34,37,38,43). The number, taken down by Captain Williams, was that on the stabilizer of accused's plane as shown from the operations order and from Sergeant Curley's testimony (R. 12,43,44; Pros. Ex. 1).

o. Specification 3.

The acts alleged to constitute this offense were the same as those which constituted Specification 2 of the Charge, that is to say, the flight along and above the only usable runway at an altitude of from 30 to 50 feet in opposition to the then prevailing direction for traffic. It appears

that the "traffic pattern" of the field called for a circular or rectangular flight about the field's perimeter in a clock-wise direction, and landings upon this runway in a southeast to northwest direction (R. 18,19,36,40,41). Students were in training in pursuit ships at the field, and some were practicing landings in P-47's (R. 30). At least four, and possibly six or eight PC-1's and P-47's were above the field at an altitude of approximately 1000 feet, in the "traffic pattern". Coming from the southeast, one student in a P-47 was on the "final approach" to the runway at a distance of about 2500 feet and at an altitude of 800 feet. This P-47 already had its flaps down, when accused's plane came over the runway in the wrong direction (R. 18,20, 29,32,33,36). Warner feared that if the student in this plane were forced to "pull up" to avoid accused's ship, after the flaps had been lowered, it would stall, and so ordered it by radio to maintain its approach. The P-39 eventually pulled up and bore off to its left, and the P-47 turned to its left and proceeded to land without incident (R. 19,28,31,36). Warner stated: "It was not actually close; * * *. * * * If I had radio contact with both aircraft I could have directed the pull-up and it would not have been -- It was close, but it would not have been dangerous" (R. 29). As safety officer of the Palm Springs Army Air Field, Lieutenant Sturtevant testified that he "would say definitely" that the planes then engaged in the traffic plan "were endangered by the performance of the P-39" (R. 33). Captain Williams stated that -

> "We have only the one runway. Our traffic is always a problem. We have students there making their first pursuit landing, and * * * there is a bit of mental strain when you come face to face with an airplane in the other direction. It is not conducive of safety" (R. 44).

Evidence for defense.

Captain Harvey E. Henderson, Air Corps, 23d Tactical Reconnaissance Squadron, 76th Reconnaissance Group, testified from the records of accused's field at Thermal that two P-40's and four P-39's were "airborne" from that field between 1000 and 1100 on 29 November, accused having flown one of the P-39's. Their mission was instrument formation flying, but witness could not say of his own knowledge where they had flown, except in "our maneuver area, anywhere this side of Highway 60-70 and over toward the mountains here". Palm Springs Airport was not in that area, but was not forbidden territory (R. 54-57). Flight Officer Arthur Steier, of the same organization, testified that he flew a P-40 that morning between 1015 and 1115, accompanied by another P-40 and "another" P-39. They spent "the biggest portion of the time" in a "rat race" between Thermal Field and Palm Springs, but he did not fly over the city, and did not recall having flown over the field there. They did not fly in formation, and remained at an altitude of from 1000 and 5000 feet. They "may have come" within two miles of Palm Springs Airport, but witness did not observe any of the

activity there (R. 63-65).

First Lieutenant William W. Gruber, 97th Tactical Reconnaissance Squadron, 76th Reconnaissance Group, the Assistant Operations Officer at Thermal Army Air Field, testified that their records showed that four P-39's from the 97th Squadron were in the air between 1015 and 1115 on 29 November, on an instrument flight mission. The numbers of none of them corresponded to that on accused's plane (R. 61-62). An official certificate from Captain Robert H. Smith, Air Corps, Assistant Operations Officer of the 339th Fighter Bomber Group, showed that nine of its P-39 type planes were in the air from Desert Center, California, between 1000 and 1130 on 29 November. None, however, bore the number taken by Captain Williams from accused's plane (R. 59,60).

Defense counsel stated that accused's rights as a witness had been explained to him, and that he had elected to remain silent (R. 66).

Upon objections by the prosecution the court refused to allow defense counsel to question Lieutenant Sturtevant, who had been called as a defense witness, as to whether he had stated over the telephone a few days before the trial took place that there were two P-39's in the southeastern portion of the field (R. 52,53). Upon a direct question by the court, however, witness stated that he had not observed any other P-39 at the time Captain Williams was pursuing the offending plane (R. 54), and also stated upon his examination as a witness for the prosecution that defense counsel had misunderstood him in the previous telephone conversation concerning whether there was more than one P-39 engaged in Captain Williams' pursuit (R. 37,38). The court also sustained objections to an attempt to examine defense counsel Captain James S. McNamara, Air Corps, concerning this telephone conversation (R. 50,51).

4. There is no reasonable doubt that the plane flown by accused from Thermal Army Air Field on the morning of 29 November violated Army Air Forces regulations by flying low over the city of Palm Springs, California, as alleged in Specification 1 of the Charge, and later, as alleged in Specification 2 of the Charge, by flying low over the only usable runway at the nearby Palm Springs Airport, then in use by the Army as a training field. It does not appear that its actions were caused by any mechanical failure or difficulties, but rather by the whims of its pilot. While there is nothing to show that accused's plane was the one which flew so low over the city of Palm Springs as to cause the disturbance to which Mrs. Parker was a witness, the evidence is clear from the testimony of witnesses Warner, Captain Williams, and Lieutenant Sturtevant that both planes which flew over the city were below the minimum altitude required by regulations. Mrs. Parker's testimony may be completely disregarded and the finding of accused's guilt of Specification 2 yet be sustained.

It is also clear that one of these same planes then flew low over the Palm Springs Airport, and, by a logical and reasonable combination of the testimony of Warner, Captain Williams and Lieutenant Sturtevant, that Captain Williams succeeded in obtaining the number of the exact plane which thus offended. At all times, from the "buzzing" of Palm Springs to the completion of the successful pursuit, at least one of the three witnesses had that particular plane within sight. No doubt exists that accused was responsible and guilty of Specification 2 of the Charge.

With respect to Specification 3 of the Charge: Accused is charged with such careless operation of his plane as to endanger friendly aircraft in the air in violation of Section I, paragraph 2, of Army Air Forces Regulations 60-16, which in express language forbids such conduct. This refers to his conduct at the Palm Springs Airport where, as shown, he flew at an altitude of less than 50 feet from the ground, parallel to and above the runway of a landing field, in a direction opposite to that required to be used at that time by planes making landings. Since he was not making a landing, his low flying violated Section II, paragraph 16a,(1),(d), Army Air Forces Regulations No. 60-16 and he was properly found guilty of Specification 2 of the Charge. His guilt of that offense,in the absence of other factors, could not be made the basis of a charge of reckless or careless operation of an airplane. Mere speeding of an automobile in violation of a law against speeding is not alone sufficient to sustain a charge of a violation of another law against reckless driving (People v. Grogan, 260 N.Y. 138, 83 N.E. 273; People v. Higgins, 2 N.Y.S. 2d 347; People v. Aldrich, 191 N.Y.S. 899; State v. McNabb (S.D.),246 N.W. 291; People v. McGrath (Del.),271 p. 549; State v. Andrews (Conn.), 142 Atl. 340).

The question of what constitutes reckless or careless driving is to be determined by all the surrounding circumstances when the statute denouncing the offense does not specifically declare what particular acts shall constitute the offense (86 A.L.R. 1275; 5 Am. Jur.,p. 932; 42 C.J., p. 1322). In this case there were present circumstances and factors which rendered his low flying dangerous to friendly aircraft in the air. At the time in question, other planes piloted by student flyers were circling the field preparatory to making practice landings, all in an established pattern of flight. Accused flew his plane, head on, into and through this pattern. In effect, he speeded against actual traffic in a one-way street. That he hit no machine, that he cleared the "street" before a plane from the next "block" entered the passage from the opposite direction was purely fortuitous. Accused actually cleared another plane while it was preparing to land by only a minute or so. Webster defines "careless": "Not taking ordinary or proper care; negligent; heedless". There is no doubt that accused was negligent in this present situation, with planes circling the landing runway, in flying so close to the ground and in a direction

opposed to that used for landings. The test under this Specification is whether any one of the other planes, concededly friendly, was endangered. In deciding this issue, there is to be considered the testimony of two experienced officers who were on the scene, who saw what transpired, and who said that accused's conduct did endanger these other planes. Furthermore, it is apparent that no matter how experienced a pilot accused may have been, he entered into the midst of a situation where he could not rely with safety on his own experience or judgment inasmuch as it was impossible for him to know how long a plane in this landing pattern would delay or how soon it would commence its descent, or how long or how short a time that descent would take. Time of descent is a variable matter, depending on distance, pilot technique and plane. Timing in the present case was all the more unpredictable since the pilots of the landing planes were students. An act does not have to result in a collision in order to be careless or dangerous. The statement "A miss is as good as a mile" is usually one of relief rather than exculpation.

Another aspect of the situation created by accused involved an additional hazard to the landing craft, other than of actual collision with accused. Flying into the midst of this pattern as accused did, from a direction and at a level most unexpected, was an operation most likely to upset the calculations and poise of a landing pilot, thereby endangering the plane. Under these circumstances, it is the opinion of the Board of Review that the operation by accused of his plane in the manner described was careless so as to endanger friendly aircraft in the air, as alleged.

5. The refusal of the court to permit defense counsel to examine Captain McNamara and Lieutenant Sturtevant concerning their telephone conversation of 1 January was error in that the object of such examination was clearly to impeach Lieutenant Sturtevant's credibility as a witness by showing contrary statements out of court concerning the number of P-39's present in the air about the field at that time. A witness' credibility is always subject to such impeachment, and the issue of hearsay evidence was erroneously injected into the contention. In view, however, of the fact that Lieutenant Sturtevant had previously stated under cross-examination as a witness for the prosecution that Captain McNamara had misunderstood him over the telephone, and had clarified his testimony in this respect (R. 37,38), it is obvious that this issue was before the court. And since the court had the right to believe one statement of a witness and to disbelieve another, unless other circumstances pointed obviously to the correctness of the latter, it cannot be said that error occurred in this matter. It appears from a careful analysis of all witnesses' testimony that there was only one P-39 over the field at the time of the incident.

6. Attached to the record are a letter from Captain McNamara to the Staff Judge Advocate, Third Air Force, dated 19 January 1944, and

another of the same date from assistant defense counsel, Second Lieutenant Ben M. Caldwell, Air Corps, also to the Staff Judge Advocate, in which the circumstances of their telephone conversations with Lieutenant Sturtevant and Mr. Warner, respectively, are set forth. Following them is a letter from the trial judge advocate, Captain Ledlie A. DeBow, Air Corps, to the Staff Judge Advocate, dated 26 January 1944 in reply thereto. Nothing in the letters throws any additional light upon this dispute, and the Board of Review is satisfied that the evidence as set forth in the record is correct in this respect.

7. War Department records show that accused is 27 years of age and single. He was graduated from high school, enlisted in the Army as an aviation cadet on 7 June 1942, and was honorably discharged therefrom to accept appointment as second lieutenant, Air Corps, Army of the United States, entering upon active duty on 16 February 1943.

8. Attached to the record are letters from Captain Bernhard H. Hartman, Medical Corps, Captain Harvey E. Henderson, Air Corps, and Captain Robert R. Cooke, Jr., Air Corps, flight surgeon, commanding officer, and operations officer, respectively, of the 23rd Tactical Reconnaissance Squadron, addressed to the Commanding General, Third Air Force, in which they say that accused has shown himself to be a superior pilot, an excellent officer, devoted to duty, and above average physically and mentally, and in whihh they express the opinion that his dismissal would be a great loss to the Army Air Forces.

9. 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 legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Jury G. Eaton, Judge Advocate.

Thos Wannenthell, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 19 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 Elbert J. Tillman (0-797744), Air Corps.

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

3. Consideration has been given to a memorandum dated 23 March 1944 from the Commanding General, Army Air Forces. The memorandum is attached hereto.

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

Myron C. Cramer

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Memo. fr. CG,AAF, 23 Mar. 1944.

(Sentence confirmed. G.C.M.O. 239, 30 May 1944)

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

SPJGN
CM 249704

26 FEB 1944

UNITED STATES v. Second Lieutenant ROBERT M. FREUDEN (0-804144), Air Corps, 499th Fighter Bomber Squadron.	THIRD AIR FORCE Trial by G.C.M., convened at Drew Field, Florida, 25 January 1944. Dismissal.

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 Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Robert M. Freuden, 499th Fighter Bomber Squadron, 85th Fighter Bomber Group, did, on or about 14, November, 1943, at or near Page Field, Parris Island, South Carolina wrongfully violate Paragraph 16 a (1) (d) of Army Air Forces Regulation Number 60-16 dated 9, September, 1942 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 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 Operations Order Number 303, 14 November 1943, of the 499th Fighter Bomber Squadron, Harris Neck Army Air Field, Townsend, Georgia, the accused was directed to engage in a training flight from the Harris Neck Army Air Field for an hour and a half commencing at 1330 o'clock on 14 November 1943 using a P-39 Q-10 fighter plane. The order was admitted into evidence and it was stipulated

that the plane piloted by the accused on the flight was of the type specified and bore Squadron No. V-10. About 1400 o'clock on the same day three enlisted men in the control tower at Page Field, Parris Island, South Carolina, observed, as they so testified, two P-39Q-10 fighter planes, one of which bore Squadron No. V-10, approaching Page Field. The two planes "buzzed" the field by "zooming" within about 100 feet of runway 27 thereof and after gaining an altitude of about 300 feet executing a "slow roll" before disappearing to the southwest. No other planes were either on the field or attempting to land thereon. Army Air Forces Regulation No. 60-16, dated 9 September 1942, prescribes "Air Traffic Rules" and prohibits the operation of military aircraft at an altitude of less than 500 feet above the ground except during take-off and landing. Pertinent extracts of the regulation were admitted into evidence (R. 4-9, Exs."A" and "B").

4. The accused, after explanation of his rights as a witness, elected to remain silent.

5. The Specification alleges that the accused on or about 14 November 1943 at or near Page Field, Parris Island, South Carolina, wrongfully violated a specified provision of Army Air Forces Regulation Number 60-16, dated 9 September 1942, by flying a military aircraft at an altitude of less than 500 feet above the ground. "Disobedience 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 regulation prohibiting the act alleged in the Specification. The regulation is one 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, through the testimony of three eyewitnesses who identified the number of the plane as being the one which the accused was operating, is equally conclusive that the accused violated the specified provision of the regulation as alleged. Although neither damage to property nor injury to person resulted, such attendant good fortune does not obliterate the offense. The evidence, therefore, beyond a reasonable doubt establishes the accused's guilt as alleged and amply supports the findings of guilty of the Charge and its Specification.

6. The accused is about 23 years of age. The War Department records show that he had enlisted service from 1 March 1942 until 28 May 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.

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 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 96.

Abner E. Lipscomb, Judge Advocate

Benjamin R. Shepherd, Judge Advocate

Gabriel H. Golden, Judge Advocate

SPJGN
CM 249704

1st Ind.

War Department, J.A.G.O., 12 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 Robert M. Freuden (0-804144), Air Corps, 499th Fighter Bomber Squadron.

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. 204, 26 May 1944)

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

6 MAR 1944

SPJGH
CM 249726

UNITED STATES	)	SIXTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
First Lieutenant MORRIS F. HANSON (O-277540), Cavalry.	)	Trial by G.C.M., convened at Fort Sheridan, Illinois, 21 January 1944. Dismissal.

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

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

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

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

Specification 1: In that 1st Lt. Morris F. Hanson, Cav.-AUS, was at Beloit, Wisconsin, on or about 20 October 1943, at the Naval Officers' Club, drunk while in uniform, under such circumstances as to bring discredit on the military service.

Specification 2: (Finding of not guilty).

Specification 3: In that 1st Lt. Morris F. Hanson, Cav.-AUS, was at Beloit, Wisconsin, on or about 21 October 1943, drunk and disorderly while in uniform, under such circumstances as to cause his arrest by George Hendee, Patrolman, Beloit Police Department, Beloit, Wisconsin.

Specification 4: In that 1st Lt. Morris F. Hanson, Cav.-AUS, was at Beloit, Wisconsin, on or about 9 November 1943, in a public place, to-wit: The Hilton Hotel, drunk while in uniform, under such circumstances as to bring discredit on the military service.

Specification 5: (Finding of not guilty).

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

Specifications 1 and 2: (Findings of not guilty).

He pleaded not guilty to all Specifications and Charges. He was found not guilty of Specifications 2 and 5, Charge I, of Specifications 1 and 2, Charge II, and of Charge II; guilty of Specification 1, Charge I, in violation of the 96th Article of War; guilty of Specification 3, Charge I, except the words "and disorderly", in violation of the 96th Article of War; and guilty of Specification 4, Charge I and of Charge I. He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution in pertinent part is as follows:

a. Specification 1, Charge I: From about 7 September 1943, accused was assigned to duty as instructor of the ROTC unit at Beloit High School, Beloit, Wisconsin. At about 4:00 p.m. on 20 October 1943, Lieutenant Frederick P. Bushman, USNR, and another naval officer, entered the lounge of the Naval Officers' Club at Beloit. Lieutenant Bushman observed accused (the only other person present) "slumped down" in a chair, in a "very deep sleep", in uniform with his coat open. Lieutenant Bushman called and spoke to accused, but accused did not wake up. A cab stopped in front of the club, the driver came in and asked for accused. The driver shook acoused, slapped his face with both hands, and accused woke up. Accused stood up, buttoned his coat, the taxi driver took his arm, and they walked to the door. Just as accused was leaving, several other persons entered. After accused awakened, he and Lieutenant Bushman talked for about a minute. Lieutenant Bushman observed that accused did not "snap up and stand up straight" but was "kind of wobbly on his feet", did not walk "too straight", talked all right, caused no commotion, used no objectionable language, and was not conspicuous. When asked his opinion of the condition of accused, Lieutenant Bushman stated that he "would say he appeared to be intoxicated, and acted like certain men do when they are intoxicated". Lieutenant Bushman was an official of the club, but made no official report on the action or condition of accused (R. 7-15, 48-49).

b. Specification 3, Charge I: At about 1:00 a.m. on 21 October 1943, Police Officer George Hendee saw accused at a street corner in Beloit, arguing with a civilian. When Hendee approached, accused walked away, "his speech was incoherent, and he walked as though he was under the influence of intoxicating liquors". The police officer talked a minute with accused, who would not answer questions, and asked him to come to the station. Accused staggered and refused assistance. Hendee detected the odor of liquor, and was of the opinion that accused was under the influence of intoxicating liquor. Accused "apparently was unable to care for his own safety while on the streets". The policeman took accused to the station for "safekeeping" because he was "drunk", and did not arrest him for being drunk and disorderly. Accused was in an "ugly mood" but was

not disorderly. On the way to the police station, no force was required, but accused alternately walked slow and fast. Accused did not use any vulgar language. He was in uniform and his appearance was "very neat". At the station he objected to being searched and placed in a cell. Hendee and another police officer had to use force, hold him during the search, and bodily carry him to the cell. Accused was "booked for safekeeping" (R. 26-34).

c. Specification 4, Charge I: On 9 November 1943, Major Edward Millot, Provost Marshal, 2nd District, Sixth Service Command, who was making an investigation of accused, asked the wife of accused to have accused meet him at the Hilton Hotel in Beloit. About an hour later, 6:30 p.m., Major Millot was in the lobby of the hotel, and saw accused come out of the men's washroom, "staggering". Accused was in uniform and his appearance was neat. Major Millot approached accused and introduced himself. Accused began to talk, and Major Millot observed that he had been drinking, "as his tongue was heavy". As there were 8 or 10 people in the lobby and they were attracting attention, Major Millot asked accused to step outside. They went to another building and arranged for a desk and table there. Major Millot advised accused that he was making a "pretrial investigation inasmuch as he has been carrying on for some time", and stated to accused: "I am not going to ask you to make a written statement. You do not have to make any statements, and I am making no promises or threats. You should be ashamed of yourself. Look at your condition. Where have you been?" Accused stated that he had been to a funeral about 2:00 p.m. When asked how many drinks he had had since two o'clock, accused replied that he had taken 25, 30 or 100 and then smiled. When asked for a more accurate answer he stated that he did not remember, but admitted he had been drinking. He staggered when they were "coming down" the street and it was the opinion of Major Millot that accused was drunk. From what he observed, he would not have assigned accused to any official duties at that time. When Major Millot asked accused why he was "carrying on in that way", accused replied that he was "not mentally receptive to the assignment of teaching high school students" (R. 34-40).

d. One of the students at the high school, who had been under the instruction of accused, testified that accused "was a very capable leader. He taught me a lot of things that no other P.M.S. & T. at the high school did, and he was respected by the cadets at the high school, and he treated all the cadets fairly" (R. 48-49).

4. Accused elected to remain silent (R. 61).

5. a. Specification 1, Charge I: The evidence shows that on 20 October 1943, at about 4:00 p.m., accused, an instructor of the ROTC unit at Beloit High School, Beloit, Wisconsin, was in a deep sleep in a chair in the lobby of the Naval Officers' Club at Beloit. No one else was

present. When two naval officers entered, one of them called to accused and spoke to him, but accused did not wake up. A taxi driver then entered the club, shook and slapped accused, and awakened him. Accused stood up, buttoned his coat, talked to one of the naval officers about a minute, and left the club with the taxi driver, who took his arm. This naval officer observed that accused did not "snap up and stand up straight", was "kind of wobbly on his feet", did not walk "too straight", but talked all right, caused no commotion, used no objectionable language, and was not conspicuous. When asked his opinion of the condition of accused he stated that he "would say" that accused appeared to be intoxicated, and acted like "certain men" do when they are intoxicated.

Although the naval officer expressed the view that accused "appeared to be intoxicated" and there was no other opinion testimony to the contrary, yet, when consideration is given to the actual facts as observed and stated by this officer, the Board is unable to say that it was proved beyond a reasonable doubt that accused was drunk. His condition, observed for only a few minutes, may have in fact resulted from his just having awakened from a deep sleep, which was not shown to have been a drunken sleep.

b. Specification 3, Charge I: At about 1:00 a.m. on 21 October 1943, a police officer saw accused in uniform on a street corner in Beloit, arguing with a civilian. The policeman took accused to the station for "safekeeping", as he was "apparently" unable to care for his own safety on the streets. He observed that accused was incoherent in his speech, staggered, smelled of liquor, and was in an "ugly mood", but was "very neat" and used no vulgar language. When they reached the station, accused objected to being searched and placed in a cell, so that force was required. The policeman was of the opinion that accused was under the influence of intoxicating liquor and drunk, but not disorderly. The court found accused guilty of the lesser included offense of being drunk (not disorderly), in violation of the 96th Article of War, which is sustained by the evidence.

c. Specification 4, Charge I: At about 6:30 p.m. on 9 November 1943, Major Edward Millot, Provost Marshal, 2nd District, Sixth Service Command, who was making an investigation of accused, met him up in the lobby of the Hilton Hotel in Beloit. Accused was in uniform and staggering as he came out of the men's washroom. Major Millot introduced himself, observed that accused had been drinking, as his "tongue was heavy", and that they were attracting attention in the lobby, so asked accused to step outside. They went to another building and accused staggered on the way there. During an interview at the building to which they went, accused admitted that he had been drinking that afternoon. Although the appearance of accused was neat, Major Millot was of the opinion that he was drunk.

When Major Millot asked why he had been "carrying on in that way", accused replied that he was "not mentally receptive to the assignment of teaching high school students".

There is no contradiction of the opinion of Major Millot that accused was drunk, and it was shown that accused, who admittedly had been drinking, was staggering both in the hotel lobby and on the street. The Board is of the opinion that the evidence sustains a finding that accused was drunk at the time and place alleged. However, the question arises whether his conduct was such as to constitute a violation of the 95th Article of War. The Manual for Courts-Martial includes, among instances of violations of the 95th Article of War, being grossly drunk and conspicuously disorderly in a public place (MCM, 1928, par. 151). In numerous cases, many of them quite recent, it has been held that mere drunkenness is not a violation of the 95th Article of War (for example, CM 234558, Field, and CM 235295, Anderson). Accused was not shown to have been either grossly drunk or disorderly. The Board of Review is of the opinion that the record of trial sustains a finding of guilty, but only in violation of the 96th Article of War.

6. The accused is 36 years of age. The records of the Office of The Adjutant General show his service as follows: Second lieutenant, Cavalry, Iowa National Guard, federally recognized, 16 July 1930 to 7 July 1933; second lieutenant, Cavalry reserve, Army of the United States, 29 September 1930 to 7 July 1933; first lieutenant, Cavalry, Iowa National Guard, federally recognized, 8 July 1933 to 30 November 1938; first lieutenant, Cavalry, National Guard of the United States, 4 April 1934 to 30 November 1938; enlisted service from 27 November 1942; temporarily appointed first lieutenant, Cavalry, Army of the United States, 20 March 1943; accepted 27 March 1943; active duty 8 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 insufficient to support the findings of guilty of Specification 1, Charge I, and of Charge I; legally sufficient to support the findings of guilty of Specification 3, Charge I, and of the substituted Charge; legally sufficient to support only so much of the finding of guilty of Specification 4, Charge I, as involves a violation of the 96th Article of War; and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of the 96th Article of War.

(Dissent), Judge Advocate

[illegible], Judge Advocate

[illegible], Judge Advocate

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

(174)

SPJGH
CM 249726

6 MAR 1944

UNITED STATES v. First Lieutenant MORRIS F. HANSON (0-277540), Cavalry.	SIXTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Sheridan, Illinois, 21 January 1944. Dismissal.

DISSENTING OPINION by Driver, Judge Advocate

I concur in the foregoing opinion except as to Specification 1, Charge I. According to the undisputed evidence, at 4 p.m. the accused was found slumped down in a chair with his service coat unbuttoned, in the lounge of a Naval Officers' Club where intoxicating liquor was sold. Lieutenant Frederick P. Bushman, a naval officer and an official of the club spoke to accused but did not arouse him. A taxicab driver came in, asked for accused "shook him at first and then he slapped his face with both hands on each side". When accused stood up he did not "snap up and stand up straight but was kind of wobbly on his feet". The cab driver took accused by the arm "and took him to the door". Accused did not walk straight. When asked his opinion as to the condition of accused Lieutenant Bushman replied, "Well, I would say he appeared to be intoxicated, and acted like certain men do when they are intoxicated" (R. 7-14).

The statement of Lieutenant Bushman, which in practical effect amounted to the expression of an opinion that accused was drunk, is amply supported by the circumstances related above. In the absence of any explanation, it is the only inference that reasonably could be drawn from the conduct of accused. Ordinarily an Army officer does not sleep with his coat open in a chair in the lounge of a Naval Officers' Club at 4 o'clock in the afternoon. Should he do so he would not sleep so soundly that it would be necessary for a taxicab driver first to shake him and then to slap him in the face with both hands in order to awaken him. The stuperous condition of accused may have been caused by illness, drugs, extreme fatigue or the like, it is true, but there is not a shred of evidence in the record to support a conjecture that it was due to any such cause. The mere possibility, unsupported by evidence, that accused conceivably may be innocent is not a proper basis for a reasonable doubt as to his guilt. It seems to me that the evidence shows beyond reasonable doubt that accused was drunk to such an extent as to bring discredit upon the military service in violation of the 96th Article of War as alleged in Specification 1, Charge I, and I therefore dissent.

Samuel M. Driver, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 6 - APR 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Morris F. Hanson (0-277540), Cavalry.

2. I do not concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 1, Charge I as it is my view that the evidence shows beyond any reasonable doubt that the accused was, at the time and place therein alleged, drunk to such an extent as to bring discredit upon the military service in violation of the 96th Article of War. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings of guilty of Specification 3, Charge I, and of the substituted Charge; legally sufficient to support only so much of the finding of guilty of Specification 4, Charge I, as involves a violation of the 96th Article of War; and legally sufficient to support the sentence and to warrant confirmation thereof. The accused was drunk at about 4:00 p.m. on 20 October 1943 (Spec. 1, Chg. I), at about 1:00 a.m. on 21 October 1943 (Spec. 3, Chg. I) and at about 6:30 p.m. on 9 November 1943 (Spec. 4, Chg. I). He was found not guilty of Specifications 2 and 5, Charge I, of Specifications 1 and 2, Charge II, and of Charge II. It appears from papers attached to the record that accused, an instructor of the ROTC unit at a high school, habitually drank intoxicating liquor to excess, and that on 17 November 1943, reclassification board action and relief of accused from active duty were recommended by his Commanding Officer, Colonel William H. McCarty. I recommend that the sentence to dismissal be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 278, 10 Jun 1944)

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

SPJGK
CM 249731

(177)

24 APR 1944

UNITED STATES	)	30TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Myles Standish, Massachusetts, 7 February 1944. Dishonorable discharge and confinement for twenty-eight (28) years. Disciplinary Barracks.
Private JAMES F. MARLIN (20413561), 4614-C.	)	

HOLDING by 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 soldier named above.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private James F. Marlin, 4614-C, did, at the former station of 4614C, on or about 24 January 1944, desert the service of the United States, and did remain absent in desertion until he was apprehended at Nashville, Tennessee on 29 January 1944.

He pleaded not guilty to and was found guilty of the Specification and Charge. Evidence of three previous convictions was introduced: (a) absence without leave for seven days, in violation of Article of War 61; (b) absence without leave for nine days, in violation of Article of War 61; (c) absence without leave (number of days not stated), drunk and disorderly, and failure to obey the order of a commissioned officer, in violation of Articles of War 61 and 96, respectively. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 28 years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that at the time of the alleged desertion, the organization to which accused belonged was stationed at Camp Atterbury, Indiana (Pros. Ex. 1). First Sergeant William H. Young, of accused's company, testified in substance as follows: On 22 December 1943, Second

Lieutenant Sumner T. Bernstein, of the same company, read Article of War 28 to the company and "fully" explained it, including an explanation of what was meant by intent to desert or to shirk hazardous duty. Accused was present at the time (R. 6-8).

Captain Edward C. Miller, commanding officer of accused's company, testified that accused was in the stockade on 22 January 1944 (R. 9). The evidence of previous convictions shows that he was serving a sentence of 30 days' confinement at hard labor. On 22 January, Captain Miller had accused released "on an alert order for moving". Witness called accused into his office and told accused that he would be given a furlough "if he had the money to get back on time". Captain Miller testified that the furlough was granted in order that accused might see his family. He explained to accused the effect of Article of War 28, and accused "indicated" that he understood the explanation. Witness warned accused that if he did not return on time, he would be charged with desertion. Witness explained to accused that his furlough "was up" at midnight of 24 January, and the furlough papers, which were given to accused, stated that he was "due back" at that time. However, in order to enable accused to have a full day at home and still make his return travel connections, witness told accused that he could be absent until reveille on 25 January. Accused said to witness: "'I will be back'". Witness also informed accused that the division's policy was to give additional furlough time if possible, and that if accused wanted an extension and the division policy permitted it, witness would grant it. Accused signified that he understood witness (R. 9-10).

After midnight of 24 January, Sergeant Young made a search "of the area" to see whether accused had returned. He was unable to find accused anywhere in the area (R. 6). The company morning report showed accused from furlough to absent without leave at 2400, 24 January 1944 (Pros. Ex.1).

Captain Miller testified that he received no communication from accused, but that on 25 January he received a telegram signed by accused's wife, asking whether accused had returned on time (R. 9,11).

On 29 January, an officer of the Nashville, Tennessee, police department apprehended accused on a street in Nashville (R. 10).

Accused elected to make an unsworn statement through counsel. In substance the statement is as follows: When accused left his station, he intended to return. Accused's train was scheduled to leave Nashville at about 8:02 p.m. At 7:30 p.m. he arrived at the railroad station and checked his baggage. His cousin then arrived and told accused that accused's wife wanted to see him. Accused wanted to see her again and, believing that he had time to get back to catch his train, he went home. It took him ten minutes by bus to reach home. After remaining at home

for ten minutes, he called for a cab to take him to the station and was informed that it would take three quarters of an hour to get one. He then left home, took a bus to the railroad station, and missed his train "by about five minutes or so". The statement continues:

> "The accused at that time believed that having missed his train he was late and unable to reach his former station in order to return on time, and thinking that, and believing the offense he feared would be committed had already been committed he felt he might as well stay where he was for a little longer period, and during that time he was picked up. Therefore he stayed over, thinking it wouldn't hurt because the offense had already been committed" (R. 11).

It was stipulated that accused had a return ticket from Nashville to the then station of his organization and that he had two baggage checks from Nashville thereto. Apparently these documents were before the court but they were not introduced in evidence (R. 11).

4. Although the Specification alleged desertion in general terms, the conviction must be supported if there is sufficient proof of an intent not to return or an intent to avoid hazardous duty or to shirk important service (CM 245568, Clancy). There being no evidence to show the nature of the duty or service contemplated, the conviction cannot be based upon either of the last two types of desertion (Bull, JAG, July 1942, p. 103; id., Oct. 1942, p. 269; id., Nov. 1942, p. 323). And we think that the prosecution failed to prove an intention not to return. When apprehended, accused had been absent without leave only four days. He had overstayed a furlough. He had purchased a return ticket and checked his baggage. So far as appears, he was in uniform. He was still in his home city. This office has held:

> "Mere absence for a short period, however, is not desertion in the absence of other circumstances indicating an intent to remain away permanently. While such circumstances occur more frequently during war than peace, the mere fact that it is time of war does not make a short absence desertion" (Bull, JAG, 1942, sec. 416(9), p. 325).

As stated in CM 212505, Tipton:

> "The Board of Review, in scrutinizing proof and the bases of inferences does not weigh evidence or usurp the functions of courts and reviewing authorities in determining controverted questions of fact. In its capacity of an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty (A.W. 50½). If any part of a finding of guilty rests on an

inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for that inference. (CM 150828, Robles; CM 150100, Bruch; CM 150295, Johnson; CM 151502, Gage; CM 152797, Viens; CM 154854, Wilson; CM 156009, Green; CM 206522, Young; CM 207591, Nash et al.)".

In our opinion there was no reasonable basis for the inference that accused did not intend to return. Consequently, the record does not support the finding of guilty of desertion. However, it is clear that accused was absent without leave, although in view of Captain Miller's testimony, the unauthorized absence did not commence until 25 January 1944.

5. The Charge Sheet shows that accused is 22 years old and enlisted on 14 September 1940.

6. The court was legally constituted and had jurisdiction of the person and subject matter. Except as noted, no errors injuriously affecting the substantial rights of 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 only so much of the findings of guilty of the Specification and Charge as involves a finding of guilty of absence without leave from 25 January 1944 to 29 January 1944, in violation of Article of War 61; and legally sufficient to support the sentence.

Irving C. Rose, Judge Advocate.

Wm Trammell, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 1 JUN 1944 - To the Secretary of War.

1. In the case of Private James F. Marlin (20413561), 4614-C, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that so much of the findings of guilty of the Specification and Charge be vacated as involves findings of guilty of an offense other than absence without leave from 25 January 1944 to 29 January 1944 in violation of Article of War 61.

2. Although the sentence is legal, it is recommended that the execution of that portion thereof adjudging dishonorable discharge be suspended until the soldier's release from confinement; that the period of confinement be reduced to five years, and that a rehabilitation center be designated as the place of confinement.

3. This case is submitted for the action of the Secretary of War in order to avoid the delay which would be involved in transmitting the approved holding overseas for the action of the reviewing authority.

4. Inclosed is a form of action designed to carry into effect the recommendation hereinbefore made should such action meet with approval.

Myron C. Cramer

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

2 Incls.
Incl.1-Record of trial.
Incl.2-Form of Action.

(So much of findings of guilty vacated as involves findings of guilty of an offense other than absence without leave from 25 January 1944 to 29 January 1944, in violation of Article of War 61. Sentence approved but confinement reduced to five years. Execution of dishonorable discharge suspended until release from confinement. G.C.M.O. 291, 17 Jun 1944)

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

SPJGV
CM 249802

19 MAY 1944

UNITED STATES	)	42ND INFANTRY DIVISION
v.	)	Trial by G. C. M., convened at Camp Gruber, Oklahoma, 23, 24, 29 and 30 November and 1 and 2 December 1943. Dishonorable discharge and confinement for life. Penitentiary.
Staff Sergeant HUGHIE C. MAY (6246426), Headquarters Battery, 42d Infantry Division Artillery.	)	

REVIEW by the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, 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: Violation of the 92d Article of War.

Specification: In that Staff Sergeant Hughie C. May, Headquarters Battery, 42d Infantry Division Artillery did at or near Muskogee, Oklahoma, on or about 26 September, 1943 forcibly and feloniously, against her will, have carnal knowledge of Lorene Marie Hancock, a female person, not the wife of said Staff Sergeant Hughie C. May.

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

Specification 1: In that Staff Sergeant Hughie C. May, Headquarters Battery, 42d Infantry Division Artillery did, at Muskogee, Oklahoma, on or about 26 September 1943 unlawfully enter the dwelling of Curtis Conley, 1618 East Okmulgee Street, Muskogee, Oklahoma, with intent to commit a criminal offense, to wit, larceny therein.

Specification 2: In that Staff Sergeant Hughie C. May, Headquarters Battery, 42d Infantry Division Artillery did, at Muskogee, Oklahoma, on or about

26 September 1943, feloniously take, steal, and carry away one Westfield wristwatch, value about Twenty-five dollars ($25.00), the property of Curtis Conley, 1618 East Okmulgee Street, Muskogee, Oklahoma.

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

Specification: In that Staff Sergeant Hughie C. May, Headquarters Battery, 42d Infantry Division Artillery, did, at or near Muskogee, Oklahoma, on or about 26 September, 1943, wrongfully, unlawfully, feloniously, and against the will of Lorene Marie Hancock, commit an act against the order of nature by applying his lips and tongue to the vulva of the said Lorene Marie Hancock, thereby committing the crime of sodomy.

He pleaded not guilty to all Charges and Specifications. He was found guilty of all Charges and Specifications except Specification 2, Charge II, of which he was found guilty excepting the words "Twenty-five dollars ($25.00)", substituting therefor the words "seventeen dollars and fifty cents ($17.50)", of the excepted words, not guilty, and of the substituted words, guilty. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the 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 in pertinent part is substantially as follows:

a. Specifications 1 and 2, Charge II (housebreaking and larceny).

Staff Sergeant Roy T. Cavnar and his wife rented a room with kitchen and living room privileges in the home of Mr. and Mrs. Curtis Conley, 1618 East Okmulgee Street, Muskogee, Oklahoma. Sergeant Cavnar received a medical discharge from the Army and they left these quarters on 25 September 1943 (R. 9). The accused rode to and from camp with Sergeant Cavnar, and on several occasions had visited with the Cavnars in the Conley home but had never been granted permission by the Conleys to enter the bedroom they occupied, nor had he ever

been invited to eat any meals with them (R. 14, 22). About 4 o'clock on the afternoon of 26 September 1943 Mr. Conley and his brother-in-law, Ted McCasling, drove away from the Conley home (R. 12) and about five minutes later Mrs. Conley and her sister-in-law and two children left (R. 24). Both Conley and McCasling testified that when they were between Second and Third Streets on Okmulgee accused was waiting at a stop light and they drove up beside him, the cars being about three or four feet apart (R. 12, 182). Conley testified he waved to accused and called "The Cavnars got away", and accused replied "Yeh" (R. 12, 17, 19, 20).

When the Conleys returned to their home around 7 o'clock that evening they found the front door open, the bed and drawers in a chest in their bedroom in disarray (R. 13, 25). Investigation disclosed that a wrist watch belonging to Mr. Conley had been taken from a drawer in a chest in their bedroom, and some potatoes and meat were missing from the refrigerator in the dining room (R. 13, 26). When the accused was arrested by military police in his home in Muskogee at about 0100 on 27 September 1943 this watch was found in his shirt pocket (R. 38). The watch was received in evidence as Exhibit A (R. 38). Lester S. Davidson, a jeweler, testified that the market value of the watch was $17.50 (R. 36).

For the defense.

Accused testified that he went to the Conley home about twenty minutes after having seen Mr. Conley at the intersections of Third and Okmulgee Streets, for the purpose of talking with Mrs. Cavnar. He opened the front door and entered the house. Getting no answer when he knocked on the door of the room used by the Cavnars he entered the room and looked into one of the bureau drawers to see if it was still being used by the Cavnars. He then went into the living room, read a paper for about five minutes and then went to the refrigerator where he took some "nice things" therefrom and ate them. He then went to the bathroom and washed his face and hands, and then went into the Conley bedroom, opened a drawer to a dresser where he found some powder and perfume which he used. On returning the powder he noticed a wrist watch in the drawer and while he was in the act of winding the watch the telephone rang. Accused told the lady calling that Mrs. Conley was not home, then returned to the Conley bedroom where he completed "making up" his face. He took a box of powder, a bottle of perfume and a flashlight from the dresser and left the house.

On cross-examination accused denied he had heard Conley say anything to him at the intersection other than "Hello" (R. 320).

All of the elements necessary to establish housebreaking and larceny as charged were made out even by the testimony of the accused himself except the specific intent, and the court was fully justified in inferring the existence of the required intent from the acts of the accused.

b. Specification, Charge I (rape), and Specification, Additional Charge (sodomy).

For the prosecution.

Lorene Marie Hancock, a beauty parlor operator of Joplin, Missouri, who was in Muskogee the weekend of 26 September 1943 for the purpose of seeing her fiance, testified that she left her fiance's hotel room in anger because of his drinking (R. 90a). She was walking along a street in downtown Muskogee thereafter on the night of 26 September 1943 when she heard a car honk and it then pulled alongside the curb and the person in the car asked her where she was going. As soon as she stepped to the car she said, "I don't believe I know you", and accused who was the only occupant replied, "I am Sergeant May. Get in and we will go get something to eat". Accused had the car door open, caught her by the hand and pulled her into the car. Not wishing to attract attention she sat in the car and told accused she had to catch a bus for Joplin. Accused said he was lonely and wanted someone to eat with him, and started the car. The accused was "suave and friendly" at this time and she did not become frightened until he headed the car out of town. When she realized the situation she was in she said, "Fellow, you don't want to take me out" and told him she had syphilis (R. 60). She did not have such disease but thought if anything would stop him this would. Accused replied, "I don't care what you've got, I am going to have some of that cock of yours". They passed several night clubs along the highway; and she screamed as loud as possible and several times tried to jump from the car but it was then going about fifty miles an hour (R. 60) and accused held her in the car. About five miles out accused turned off on a little traveled road, and after a short drive stopped the car. He immediately got out of the car, ran around to her side, opened the door and pulled her out. The car being near a ditch both fell into the ditch and there accused first tried to attack her. Because of the little room in the ditch and the fighting, scratching and other efforts by witness to protect

herself, accused was unable to succeed in his attack (R. 61). Accused got out of the ditch and pulled the witness out. Holding her by the wrist accused got to the back of the car, raised the back and took out an Army blanket, a sheet and a pillow which he threw on the ground and kicked out. Witness fought accused at this time, kicking him in his privates several times and threatened him with reporting him. He pulled her down on the ground and shoved her to her right side and shoulder. He then pulled off her pants and threw them over into the weeds. At this time, near midnight, witness was beginning to get weak, the struggle having continued from about nine o'clock, and the witness having had dysentery and anemia during the summer from which she was recovering. However, she continued to fight and scratch accused. While still holding her he took off his trousers. Accused was in a sitting position and said, "Let's have a French party", to which witness replied, "Oh no, not that", and she never had to do "that". However, accused

> "proceeded to put his lips to my vulva and his tongue into it and bite and chew around. While in this position, his privates were hanging in front of me and I reached up and grabbed hold of the things, thinking perhaps if I could crush them hard enough I could surely knock him out".

However, accused told her to "Do it some more, that feels good. I love it" (R. 63). He took hold of her hand and made her play and work with him but he could not get an erection. About this time car lights were seen and accused covered her body with his and put his hand over her mouth, but the car did not turn down the side road. Accused then resumed his attack, and

> "Finally, by several times by placing my hand on his penis and helping me or having me help him to force it in ***. I still fought, Sir, trying to get out of it, but it was useless. Finally he made penetration. Then there was the ten minutes or so of his trying to get a job done until finally I guess he did. He stopped and got off me. That is the only time he ever released me" (R. 64).

Witness then returned to the car, took a lighter from her purse and went to the front of the car and got the license number. She went back to the car, got a pen out of her purse and started to write the license down on a piece of gum wrapper, but accused, who had been

urinating in back of the car, came to where she was before she could complete the writing (R. 65). Thinking she could get him away long enough to obtain further identification she asked accused to find her pants. Accused said they would turn the car around and look for the pants with the lights of the car. They drove a short distance up the road where accused turned the car. He then stopped the car, got out a quart bottle of beer and "drank down a lot of it". When they returned to the place where the attack had taken place accused, at the insistence of the witness, got out of the car and looked for her pants, which he could not find, but did find her pin in the dust (R. 66). This pin was received in evidence as Exhibit M (R. 75; Ex. M). When accused returned to the car he said, "That's right, you don't have any pants on. I am going to have some more of that". Witness fought back but he pushed her down on the seat and again had sexual intercourse with her (R. 67). After this second attack he got into the car and started driving toward town. Near town he slowed down and told witness, "Let's you and I get married ***. I feel like I have done you an injustice and I like what you have got and we are going to get married" (R. 67). The witness became hysterical as she feared another attack, and begged him not to take her out again. After reaching the outskirts of town accused stopped the car, reached for witness' purse and said he wanted her lipstick. At this time witness slipped out of the car. She screamed for her purse, but each time she reached for it accused would try to grab her. She was hysterical and started running for a nearby house, yelling for them to let her in. She was admitted by a man. The accused had arrived at the house by this time and "stood there talking nice" and said, "Come on Dear, I will take you to the bus", but the man replied, "Go on soldier, she doesn't want anything to do with you". The accused then left. There being no telephone in this house witness was sent to a house across the street where she was admitted and the police summoned by telephone (R. 69). She was taken to the police station and in about thirty minutes accused was brought in (having been arrested in connection with the Conley larceny complaint). When accused first entered the lobby of the police station witness recognized him and exclaimed, "That is the son-of-a-bitch" (R. 70). Witness then gave the military police a statement of the occurrence, and thereafter went with two civilian policemen to the scene of the attack (R. 72).

Bernard King, to whose house Miss Hancock first fled after leaving accused's car, Ernest Hohimer, from whose house the police were telephoned, Harley Huggins and Felix Duncan, the civilian police who answered the call placed from Hohimer's house, fully

corroborated Miss Hancock's testimony as to her actions after approaching King's house and at the police station.

After giving a statement to the military police Miss Hancock was taken by two civilian police, Stanley Huggins and Felix Duncan, to the scene of the attack. There the police found "the road had been tramped around all over" and the ditch nearby looked "like somebody had been in it" (R. 142). Searching the area of the attack with flashlights the police found some shell beads, matching the remaining beads on Miss Hancock's string, a U. S. Army whistle, with chain attached, two combs and two ear bobs. All these articles were received in evidence (R. 72-77; Exs. I, J. K, L, N and O).

After the visit to the scene of the attack Miss Hancock was then taken by the police to a hospital where she was examined by Dr. D. Evelyn Miller. At the time of the examination Miss Hancock was nervous, her eyes were red from crying and she complained of being sore all over. Dr. Miller found recent bruises on her body, thighs, legs and arms, especially the right wrist which was considerably bruised. Vaginal examination disclosed moderate irritation, but no evidence of venereal infection (R. 172, 173).

On the morning of 28 September 1943 accused was examined by Captain Owen M. Wheeler, Medical Corps, who found a one-inch abrasion at the corner of accused's right eye, and abrasions along the right jaw, on the forehead three-fourths of an inch long, on the left side of the neck a half inch long, six smaller abrasions on the left side of the trachea, an abrasion on the back of the right hand, abrasions on the right leg three inches below the kneecap, and abrasions on the lower third of the inside thigh, and abrasions on the penis. In the opinion of the witness the abrasions were caused by fingernail scratches (R. 259-261).

For the defense.

The accused, after instructions as to his rights as a witness, elected to testify under oath (R. 293). The accused's account of his meeting with Miss Hancock does not differ materially from the version of the meeting as given by Miss Hancock, except that he said that her entry into his car was entirely voluntary. On the drive out of town one stop was made at a drug store, but as Miss Hancock insisted she was not hungry they drove off without obtaining curb service (R. 300). On the drive out to the country road she was "friendly" and the "courtship was getting along very well". Accused suggested, "Let's get

married", which he told Miss Hancock "was a modest way of asking her for some" (R. 302). She replied, "If you knew something about me you would not want to kiss me or have anything else to do with me", and told accused that she had syphilis. Accused replied he could take a prophylactic when he got back to town.

After parking on the country road they talked for fifteen or twenty minutes, accused fondling her during this time. She registered no objections, and was "yielding", and "just as sweet as anyone could have been". Accused suggested they get a bedroll out of the back of the car. When he walked around and opened the door on her side he fell into the ditch by the side of the road, and Miss Hancock did the same as she stepped out of the car. He made no effort to have intercourse with her in the ditch and they had considerable difficulty in getting out and at one time in his efforts he felt a weed or other sharp thing cut his leg. He knelt on his right knee and extended his left leg so as to form a step, and in this way attempted to get Miss Hancock out of the ditch. Her heel cut his leg during this effort. Finally accused got out of the ditch and pulled Miss Hancock out. After both were out of the ditch he got a pair of pliers out of the car, opened the rear end and got the bedroll. They lay on the bedroll and Miss Hancock fondled his penis until he got an erection and they had intercourse, she cooperating at all times. After completing the intercourse accused got a bottle of beer out of the car and used it in washing himself off. They then got in the car and drove to the top of the hill and returned to search for Miss Hancock's pants. Accused could not find the pants but did find a pin belonging to Miss Hancock. She also mentioned losing some beads and an ear bob. They sat in the car a while and accused drank some beer. He then walked around to her side of the car and began fondling her legs. She reminded him he had not found her pants. She lay back on the seat and he again had sexual intercourse with her. He then returned to the driver's seat and started back to town. Miss Hancock complained that she had lost her pants, broken her beads and soiled her hat. When he turned into a side street in town, in order to avoid the military police as the hour was late, Miss Hancock began protesting he was not taking her to the bus station. She began screaming and "attacked me like a panther". He held her by the wrists and struggled to keep her in the car, but finally was compelled to stop the car. She jumped out of the car, but he grabbed her purse, whereupon Miss Hancock accused him of trying to rob her. She then ran to the porch of a nearby house (R. 306-310). He followed her and told the man who opened the door he was only trying to get her to the bus station, but the man replied, "She is not going with you", "you may as well go on" (R. 310). Accused testified he did not have any struggle

with Miss Hancock during the night prior to her efforts to get out of the car as they returned to town, did not receive any scratches, and at no time did he touch her private parts with his mouth (R. 311, 337).

During cross-examination accused testified that before the first act of sexual intercourse he had told Miss Hancock, "We could do better having a french date". When asked what he meant by those words he protested that to explain would "incriminate me". However, the law member instructed the witness to answer the question, whereupon he said the words meant for Miss Hancock to take his penis in her mouth (R. 332). Since Miss Hancock in her testimony had said that accused, during their struggle, had said, "Let's have a French party", it was proper to ask accused if he had made such a remark. Having admitted he did make such a suggestion it was further proper to require him to explain the meaning of the words in which his suggestion was framed. During examination by a member of the court accused had accounted for the scratches on his legs by saying they were made by weeds, whereupon he was asked, "How do you account for the abrasions on your penis?". Objection was interposed to this question on the ground that it would be self-incriminating in that it might tend to incriminate accused in a crime with which he was not charged. The objection was overruled and accused said they were made by the teeth of Miss Hancock (R. 361, 362). She took his penis in her mouth after his suggestion that they have a French party, in an effort by her to help him get an erection prior to the first act of intercourse (R. 364). Pertaining to the above testimony which the defense alleged was self-incriminating there is included in the record immediately following the action by the reviewing authority an undated paper purporting to be a "Motion for Mistrial" based on grounds that accused had been compelled to incriminate himself as set out above. It is not revealed whether this paper was filed with the court while it was in session, or with the reviewing authority after trial.

Accused testified that due to a defect in the lock it is necessary to open the turtle shell to the rear of the car by means of inserting a pair of pliers and that it will not stay up unless both hands are used in bracing it up (R. 345). Technician Fifth Grade Ardis J. Hightower also testified as to this manner of opening the rear end of accused's car (R. 271, 273).

After accused left Miss Hancock on the porch to which she had fled he drove to a residence in Muskogee where his wife lived with Sergeant and Mrs. Scrimsher. He rapped on a window of his wife's

room and she was not going to admit him when Mrs. Scrimsher turned on the lights in the house and let him in (R. 342). Mrs. Scrimsher then made a telephone call and accused thought she was calling the "law" so he then went into his wife's room and lay on her bed fully clothed to see what would develop, rather than go to a prophylactic station as he had planned (R. 368). The military police arrived in about thirty minutes and placed him under arrest, then carried him to the police station in Muskogee where he was seen by Miss Hancock as before set out.

Fred Andrews and his wife, Dora, who live "near" the place where the alleged attack took place, testified that on the night in question they did not hear any woman scream, or any other unusual noises, nor did their dogs bark at any noises that night. On cross-examination both witnesses testified they did not hear any car drive up the road leading by their house that night (R. 277-285).

Captain Newt B. McCammon, accused's commanding officer, testified that accused's reputation in his organization for truth and veracity was good. On cross-examination Captain McCammon testified he had talked to only one soldier concerning accused's reputation for truth and veracity (R. 290).

There was received in evidence a registration card showing that "H P Walker & wife" were registered at the Hotel Baltimore in Muskogee on 25 September 1943. It was stipulated that if R. C. Bentley were present he would testify that "H. P. Walker" who signed this card was the same person as Martin Walker (R. 292; Def. Ex. 2). In this connection it should be noted that Martin Walker, also known as H. P. Walker, testified he had obtained this room in contemplation of marrying Miss Hancock during her visit to Muskogee. Both he and Miss Hancock testified they were not intimate during this weekend (R. 90a, 224), although it appears Miss Hancock was in the room in the Baltimore Hotel with Walker, or in his room in the Severs Hotel in Muskogee several times during her weekend in Muskogee.

There was also received in evidence and read to the court, for the purpose of impeachment, a written sworn statement given by Marie Haddock, or Miss Lorene Marie Hancock, to Colonel John W. Hammond, Investigating Officer, on 8 October 1943 (R. 293; Def. Ex. 3). In this statement, among other things, Miss Hancock says:

> "Before I go any further with this I would like to get something straight. I have lied about my name. Legally, I am Lorene Marie Hancock. My married name was McCrea. I have been divorced since June, 1941, but I was known when I came here, and

> everyone met me as McCrea here. My business cards are McCrea. I have found that the less people here or anywhere know about you in business the better off you are. Though people here still know me as McCray, my friends still know me as Hancock. Hancock is my real name and it has been restored to me by my divorce, but I never use it around here. All my business customers and associates know me as McCrea. I think that it makes no difference. What's in a name anyway?".

Other than the above, the Board is of the opinion that this statement by Miss Hancock corroborates rather than impeaches her testimony given from the witness stand.

c. Prosecution rebuttal evidence.

Captain Wheeler, Medical Corps, testified that the abrasions on accused's penis were not, in his opinion, caused by teeth, but were superficial abrasions and had the appearance of having been caused by fingernails (R. 379, 380).

Mr. Huggins testified he had lifted the shell on the rear end of accused's car shortly after he was arrested on 27 September, and while he could not remember specifically as to whether he used two hands in doing so, if there had been anything unusual or out of the ordinary required to open it he would have remembered it. It was not necessary to prop the back up after it was opened, but it stayed up by itself (R. 372, 373).

4. Numerous objections were interposed by the defense to questions propounded to witnesses by the prosecution. The Board of Review is of the opinion that the rulings made by the law member as to these objections were correct and that no discussion is indicated concerning these rulings other than the rulings of the court as to objections interposed to the questions addressed to the accused concerning the abrasions on his penis (R. 362, 363, 375-379). In response to questions by the court the accused had said that the scratches on his legs had been caused by weeds in the area where he had intercourse with Miss Hancock. He was then asked:

> "Q. How do you account for the abrasions on your penis?
> "A. That is self-incriminating, sir" (R. 362).

Defense counsel requested that accused be instructed as to his constitutional rights against self-incrimination. After accused had been compelled to answer the question, his answer being to the effect that the abrasions were caused by the teeth of Miss Hancock when she committed an act of sodomy on him, the defense counsel moved to strike the questions and answers on the grounds that accused had been compelled to answer self-incriminating questions (R. 378). The motion was overruled, the law member expressing the opinion that since accused was charged with sodomy the questions were proper. The reason assigned by the court for its ruling was not sound, though the ruling itself was correct. The reason for the ruling was not correct as the accused was charged with an offense in the nature of sodomy committed by "applying his lips and tongue to the vulva of said Lorene Marie Hancock", and the answer elicited involved an act of sodomy committed in a manner different than as alleged, which would constitute a different offense (par. 451 (64), Dig. Op. JAG 1912-40; CM 121216 (1916)). The ruling was correct in result, however, for since the accused had sought to account for the scratches on his body by saying they were caused by weeds rather than by scratches made by Miss Hancock in defending herself as she had testified, it was proper for a member of the court to ask him how he received the abrasions on his penis. The question was pertinent and relevant to the issue of rape and having taken the stand and testified accused had waived his privilege against self-incrimination so far as such pertinent and relevant questions to the issue were concerned. When an accused testifies in denial or explanation of any offense, the cross-examination may cover the whole subject of his guilt or innocence of that offense. Any fact relevant to the issue of his guilt of such offense or relevant to his credibility as a witness is properly the subject of cross-examination. The accused cannot avail himself of his privilege against self-incrimination to escape proper cross-examination (MCM, 1928, par. 121b). Accused having thus disclosed a part of a criminal transaction in which he was concerned, by his answer as to how he received the abrasions on his penis, it was proper for the court to compel the accused to complete the narrative (Wharton's Criminal Evidence, 11th ed., par. 1146).

The record does not reveal whether the undated paper included in the record and purporting to be a "Motion for Mistrial" was filed with the court during the trial. Assuming that it was timely made and refused and treating this motion as tantamount to a motion for a finding of not guilty, the action of the court in overruling the motion was correct and the discussion above is equally applicable to the legal principles involved in the refusal of such motion.

5. The evidence conclusively shows that on 26 September 1943 the accused entered the home of Mr. and Mrs. Conley in Muskogee, Oklahoma, and without authority went into the bedroom occupied by the Conleys and took from a drawer in a chest in the room a watch of the value of $17.50, the property of Mr. Conley. Accused at this time also took a flashlight, some face powder and perfume, and ate some meat and potatoes which he got from a refrigerator in the Conley dining room. Accused was not charged, however, with the theft of these articles.

As to the Specification charging rape and sodomy (Specification, Charge I, and Specification, Additional Charge), the Board is of the opinion that the court was fully justified in accepting Miss Hancock's version as to the accused's conduct toward and with her on 26 September 1943. Miss Hancock's testimony shows that on the night of 26 September 1943, while she was walking on a street in Muskogee, Oklahoma, the accused called her to his car. When she told him she did not know him accused caught her by the hand and pulled her into the car. He then drove to a country road about five miles out of Muskogee where, after considerable effort, he overpowered her and twice had sexual intercourse with her. The struggle out on the country road extended over several hours, and during its course, while accused and Miss Hancock were on a blanket accused had put on the ground, the accused suggested that they have a "French party", and proceeded to "put his lips to my [her] vulva and his tongue into it and bite and chew around". When accused finally drove her back to town Miss Hancock jumped from the car and fled to a nearby house. She was sent to another house across the street, from where the police were called.

A doctor who examined Miss Hancock found her highly nervous, with recent bruises on her body, thighs, legs and arms, with considerable swelling of the right wrist. There was also evidence of recent sexual intercourse.

The accused bore numerous scratches on his face, neck and legs and also there were several abrasions on his penis. These, accused contended, were made by the teeth of Miss Hancock when she performed an act of sodomy on him following his suggestion of a "French party". It should be noted, however, that Captain Miller, who had examined accused's abrasions on 29 September 1943, two days after the alleged attack, testified that in his opinion the abrasions on the penis of the accused were not made by teeth, but had the appearance of having been made by fingernails.

6. The charge sheet shows that accused is 35 years of age and that he enlisted in the Army 27 June 1930 and has served continuously since that date.

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 of all Charges and Specifications and legally sufficient to support the sentence. A sentence of either death or life imprisonment is mandatory upon conviction of rape in violation of the 92nd Article of War. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of rape, recognized as an offense of a civil nature and punishable by penitentiary confinement for more than one year by section 22-2807 of the District of Columbia Code.

Thomas H. Tappy, Judge Advocate.
Lawrence W. Fiedler, Judge Advocate.
Robert B. Harwood, Judge Advocate.

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

SPJGH
CM 249810

12 APR 1944

(197)

UNITED STATES	)	NEW YORK PORT OF EMBARKATION
v.	)	Trial by G.C.M., convened at New York Port of Embarkation, Brooklyn, New York, 7 February 1944. Dismissal and total forfeitures.
Captain GAYLORD H. COX (0-280285), Infantry.	)	

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 85th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that Captain Gaylord H. Cox, 8828-L, Camp Shanks, New York, was, at Camp Shanks, New York, on or about 3 February 1944, found drunk while on duty as Company Commander.

Specification 3: In that Captain Gaylord H. Cox, 8828-L, Camp Shanks, New York, was, enroute from Camp Cooke, California, to Camp Shanks, New York, on or about 31 January 1944, found drunk while on duty as Company Commander.

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 Captain Gaylord H. Cox, 8828-L, Camp Shanks, New York, did, at Camp Cooke, California, on or about 10 September 1943, wrongfully borrow the sum of ten ($10.00) Dollars from 1st/Sergeant Robert L. Lacey, an enlisted man of his organization.

Specification 2: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 1, Charge I, of the Specification, Charge II, and of Charge II, and of Specification 2, Charge III, and guilty of all other Charges and Specifications. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. Evidence was considered of two previous convictions by general court-martial of making a false official certificate, in violation of the 95th Article of War (Ex. 1), and of being drunk and discharging a pistol while in a drunken condition, in violation of the 96th Article of War (Ex. 2). The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution:

a. Specification 1, Charge III: On 10 September 1943, the accused was commanding officer of Maintenance Company, 69th Armored Regiment, stationed at Camp Cooke, California. On leaving the company orderly room that day, he met First Sergeant Robert L. Lacey entering the building and requested of him the loan of a $10 bill to place in a letter he was mailing. Sergeant Lacey gave him the $10 and accused said he would return the money as soon as he cashed a check. On 5 February 1944, the $10 loan was repaid. Prior to that time Lacey never requested the money of accused nor reminded him of the debt (R. 27-31).

b. Specifications 2 and 3, Charge I: On 28 January 1944, the company commanded by accused left Camp Cooke, California, via troop train for Camp Shanks, New York. Prior to departure, the train commander, Major Paul C. Root, assembled the company commanders and advised them that no liquor was to be carried aboard the troop train. This information was conveyed to accused by his first sergeant who represented accused at the meeting. Accused was on duty on the train from the time the organization left Camp Cooke until it arrived at Camp Shanks. As company commander he was charged with supervising the efficient conduct of his company, to see that the men were properly taken care of, to keep them from becoming restless, and to provide them with exercise and recreation. On cross-examination Major Root testified that he did not observe that the accused was intoxicated during the train trip and found no fault with the conduct of the company accused commanded (R. 32, 34, 44-53, 122-124).

On the morning of 1 February 1944, after a stop for exercise, accused returned to the train compartment occupied by himself and Warrant Officer Junior Grade William A. Roschy carrying two bottles of whiskey. After the train started the accused opened one of the bottles and took a drink. He continued to drink at intervals during the day, and when he entered the mess car at about 5:30 p.m. he appeared to be drunk. His speech was "rather thick", his eyes were "bloodshot" and "dilated", and his face was

flushed. When eating he appeared "unmannerly" and "shoveled" the food into his mouth. His walk was "rather unsteady" but that might have been caused from the swaying of the train. In the opinion of First Lieutenant Graydon F. Fredrikson, accused was drunk. Sometime after eleven o'clock the same evening the accused awakened Mr. Roschy and offered him a drink from the "other" bottle of whiskey. The accused had trouble entering the compartment. He was "pretty well polluted", had "a pretty good jag on", his eyes were "glassy" and he was "unsteady" on his feet. After doing some drinking the accused "wandered" out of the compartment. On awakening the following morning Mr. Roschy observed accused lying on top of the bunk, apparently without having undressed the previous evening. On cross-examination Mr. Roschy testified that he was not with the accused all of the time on 1 February, did not know whether the accused drank all of the whiskey or disposed of it in some other manner, and did not know whether the accused arose early the following morning and dressed before Roschy awakened (R. 34-37, 55-59, 66-68a).

Upon arriving at Camp Shanks, New York, accused was charged with the duty of billeting his men, their initial processing, and making proper disposition of their weapons. On 2 February 1944, about an hour and a half before the troop train arrived at Camp Shanks Mr. Roschy assisted in packing the luggage of accused as he considered accused drunk and incapable of performing the task by himself. The train arrived at Camp Shanks at about 11:15 p.m. (R. 47, 59-61, 69-71).

Major Hugh H. Johnston, battalion executive officer, met the company commanders at the station when the troop train arrived. He said "hello" to accused, who was standing apart from the other officers. The accused, holding equipment in both hands, did not salute and said nothing, but nodded his head in recognition. Accused had considerable difficulty getting into the vehicle that transported the officers to camp and though normally "jovial" did not utter a word during the trip to camp. Major Johnston observed a strong odor of alcohol. Accused was "extremely awkward" in getting in and out of the car. There was no light at the entrance to battalion headquarters where the company commanders were to receive instructions as to their immediate duties and on entering the accused stumbled on a small step. This was at about 11:30 p.m. on 2 February. He "reeled" from side to side and walked into the room holding a carbine and a cleaning rod straight out in front of him with his arms parallel to the floor. He stopped in the center of the room, braced his feet apart and "sort of swayed from side to side". Accused "seemed quite lethargic". He did not "seem to know where he was"; his face was "florid, more so than usual"; his eyes were "glassy"; they were not "focused together" but "seemed to roll", and in the opinion of three witnesses present, the accused was drunk. Major Johnston upon observing his "unusual" actions walked toward accused, who faced away from him. Major Johnston took accused into an adjoining room and told him of the work to be done that demanded

immediate action and clear thinking. The accused admitted he had been drinking but declared that he was able to perform his duties. When they returned to the meeting, the accused "slumped" down in a chair, and received his copy of the written instructions issued to the company commanders. He "gazed blankly" at the paper and read the second part first. When the company commanders were released to go about their duties the accused walked "diagonally" from the room, made "erratic" turns, hit both door jams on leaving the building, and again stumbled on the step at the entrance (R. 73-89, 91-99, 102-103).

After leaving battalion headquarters accused proceeded to "Ordnance Inspection", turned in his equipment and went to the barracks assigned to the enlisted men of his company. He handed the instructions received at battalion headquarters to his first sergeant and attempted to explain them. Sergeant Lacey could not understand accused "Due to his drinking". His words were "blurred", he smelled of alcohol and his walk was "wobbly". In Sergeant Lacey's opinion accused was drunk. Captain Emanuel Sprei entered the barracks and observed that accused "seemed to be confused". His instructions to the noncommissioned officer were "hazy" and he was not "quite sure" what weapons were to be turned in (R. 88-91, 99, 124-127).

About 20 minutes after accused turned in his equipment, Major Johnston notified him that the battalion commander, Lieutenant Colonel Arnold R. Wall, wanted to see him at once. Accused accompanied Major Johnston to the quarters of Colonel Wall at about 12:30 or 1:00 a.m. on 3 February, and on entering the room he "just stood there". Major Johnston told accused to report to the colonel and reminded him that it was customary to salute. Accused gave a "very unmilitary and sloppy" salute and was asked by Colonel Wall to explain his intoxicated condition. Accused replied that he was not "intoshicated". Colonel Wall ordered accused to bed and informed him that he was in arrest in quarters. Major Johnston advised the next in command to take over the duties of accused and when he returned to quarters the accused was sleeping on top of the bed with his shoes and overcoat on. Colonel Wall had told accused to get his bedding roll which was outside the building but he failed to do so. He was given a comforter by Major Johnston, and then took off his shoes and overcoat and went to bed. Colonel Wall was of the opinion that accused was drunk and not fit for duty. Colonel Wall testified that accused was on duty and had duties to perform from the time he arrived at Camp Shanks. Written instructions had been published to company commanders as to duties on arrival at Camp Shanks (R. 99-103, 106-114).

4. Evidence for the defense:

The accused testified that upon graduating from the University of Oregon in 1931 he became a mechanical engineer and had been employed by two or three large tractor concerns. He had held a reserve commission as a

second lieutenant since 1931 and entered on active duty as a first lieutenant in 1940. He served with the Second and Third Armored Regiments and was assigned to the 69th Armored Regiment, his present organization, on 25 May 1942. He further testified that in December 1941, he was given one day to take an inventory of over a million dollars worth of property assigned to the unit he commanded. He certified to the correctness of the inventory, and later discovered he had certified to an incorrect inventory, which resulted in his conviction by a court-martial in February 1942. He was placed back on duty with the same organization. Arrangements had been made several times for his promotion to captain, but the "Division" interfered. He became "disgusted" because the promotion was held up, got drunk, and was again court-martialed. He was subsequently promoted to captain through his same regimental commander (R. 133-141).

With reference to the $10 borrowed from Sergeant Lacey (Spec. 1, Chg. III) the accused did not remember the loan but recalled the circumstances leading up to the alleged borrowing. He wanted to place some money in a letter he was mailing and inquired if anybody in the orderly room had a $10 bill. Sergeant Lacey gave him the bill, which he placed in a letter, and he immediately left to place it in the mail. He intended to give some silver he had on his person in exchange for the bill but was in a hurry to mailthe letter. He would have repaid the money before if the matter had been called to his attention. He forgot about it (R. 142-144).

Regarding being found drunk on duty (Specs. 2 and 3, Chg. I) the accused testified that on the train trip from Camp Cooke, California, he was not assigned any specific duties other than to see that the men fell out for calisthenics and were taken care of on the train. He had no liquor on the train until 1 February when another person purchased "Two fifths" for him while the train was stopped for calisthenics. Accused could not tell how many drinks he had during that day and evening, as a "great many" officers helped him consume the liquor. In his opinion he was not drunk, he attended to his duties and knew what was going on all of the time (R. 149-150).

The accused further testified that during the twelve hour period preceding his arrival at Camp Shanks on 2 February he had three drinks of gin. He had a musette bag, a binocular, a dispatch case, carbine and cleaning rod when he left the train and held the carbine and rod in front of him to protect them. He attributed his difficulty in getting in and out of the vehicle in which he rode to Camp Shanks to the seventy-five pounds of equipment he was carrying. On his arrival at battalion headquarters Major Johnston accused him of being drunk. He denied that he was intoxicated. He attended the conference where the company commanders received instructions regarding the disposition of ordnance equipment. Guides had been furnished to show the enlisted men their billets, and all that remained to be done was to turn in the ordnance equipment. On leaving battalion headquarters accused turned in his own equipment, went to the building

assigned to the men of his company and advised the first sergeant what ordnance equipment was to be turned in. He was turning in some of the equipment when Major Johnston told him to report to Colonel Wall. Colonel Wall was in bed when he reported and he did not salute as he was holding equipment in both hands. He dropped the equipment when Major Johnston told him to salute the colonel. When Colonel Wall placed him under arrest he went to his room and sat on the bunk. He did not remove his clothes when he went to sleep as it was cold and the bunk was bare. He did not go out to search for his bedding roll as he was under arrest. The accused felt at all times that he was fit to continue in the performance of his duties (R. 150-153).

On cross-examination accused testified that he did not repay Sergeant Lacey the $10 until 5 February 1944, as that was the first time the debt had been called to his attention, and then he "remembered back" as to what had happened (R. 163).

Accused did not recall a conversation with Sergeant Lacey prior to leaving Camp Cooke with reference to having liquor on the train. He knew there was some regulation prohibiting enlisted men from having it in their coaches but did not think the same rule applied to officers. When the troop movement started from Camp Cooke accused was under the "impression" that he was on duty twenty-four hours a day, but that "impression was soon stricken" from his mind when he observed the other officers. He considered that his tour of duty on the train ended at 6:00 p.m. each day, when the officer of the day went on duty, except in case of an emergency. After he obtained the liquor on 1 February accused believed he had about three drinks during the afternoon, and by the end of the day the liquor was gone except for two or three drinks in both bottles. He knew he was on duty when he entered the mess car at about 5:30 p.m. the same evening. He did not understand he was on duty when he detrained at Camp Shanks on 2 February, until he arrived at battalion headquarters and received instructions with reference to the personnel of his company. He had been performing his duties for a full half hour from the time he turned in his carbine until he was called before Colonel Wall (R. 157-162).

5. a. Specification 1, Charge III: It is shown by the evidence and admitted in the testimony of accused that on or about 10 September 1943 he borrowed $10 in currency from Sergeant Robert L. Lacey, an enlisted man in his organization, and placed the money in a letter he was in a hurry to mail. The fact that accused may have intended to repay the money and would have done so, had the matter been called to his attention, and the fact that the loan was repaid on 5 February 1944, do not excuse the offense. The mere act of an officer borrowing money from an enlisted man is normally an offense under the 96th Article of War (Dig. Ops. JAG 1912-40, sec. 453(5)).

b. Specifications 2 and 3, Charge I: The evidence shows that from 28 January to 2 February 1944 the company commanded by accused was part of a troop movement en route from Camp Cooke, California to Camp Shanks, New York. As commanding officer accused was on duty twenty-four hours a day. On 1 February 1944, during a stopover for the purpose of exercising the troops, accused obtained two bottles of liquor. He had some drinks from one of the bottles during the afternoon and was observed to be in a drunken condition in the mess car at 5:30 p.m. Sometime after 11:00 p.m. the same evening the accused entered his compartment and offered a drink to Warrant Officer Junior Grade William A. Roschy, who shared the compartment. Accused had trouble entering the compartment, was "unsteady" on his feet, his eyes were "glassy" and in the opinion of Mr. Roschy he was drunk. He was observed the following morning lying on top of his berth fully clothed, as though he had not undressed the previous evening.

On 2 February 1944 at about 10:00 p.m. Mr. Roschy assisted accused in packing the latter's luggage as he considered accused too intoxicated to do it himself. After the train arrived at Camp Shanks at about 11:15 p.m. the accused attended a meeting of company commanders who were receiving instructions on duties demanding immediate attention. It was obvious to those who observed accused that he was intoxicated. His eyes would not focus, but "seemed to roll", his face was "florid" and he "reeled" when he walked. He attended to his work for a short period of time but was "confused" and was unable to instruct his first sergeant in an intelligible manner regarding the disposition of ordnance equipment. It became apparent to his superiors that he was unfit for duty and about 1:00 a.m. on 3 February 1944, he was relieved and placed in arrest.

Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the 85th Article of War (MCM, 1928, par. 145).

The evidence shows that on 1 February and 3 February 1944 accused, on account of his intoxication, was incapable of performing his duties as commander of a company of men and of meeting any emergency that might arise in connection with his work. The Board of Review is of the opinion that the evidence establishes beyond any reasonable doubt that the accused was found drunk on duty as alleged.

6. The accused is 37 years of age. The records of the Office of The Adjutant General show his service as follows: Appointed second lieutenant, Infantry Reserve, Army of the United States, and accepted 19 March 1931; active duty 21 July 1935 to 3 August 1935; promoted to first lieutenant, Army of the United States, 30 November 1935; active duty 4 July 1937 to 17 July 1937, 16 June 1940 to 29 June 1940, 11 July 1940 to 31 July 1940, and from 29 August 1940; reappointed first lieutenant, Army of the United States, 30 November 1940; temporarily promoted to captain, Army of the United States, 17 August 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation in time of war of the 85th Article of War and authorized upon conviction of a violation of the 96th Article of War.

Samuel M. Driver, Judge Advocate

Robert Gannon, Judge Advocate

F J Letterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 22 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 Gaylord H. Cox (0-280285), 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 wrongfully borrowed $10 from an enlisted man (Spec. 1, Chg. III) and was found drunk while on duty as company commander on two occasions (Specs. 2 and 3, Chg. I). He was found not guilty of Specification 1, Charge I; the Specification, Charge II and Charge II; and Specification 2, Charge III. The court considered evidence of two previous convictions by general court-martial, one of making a false official certificate, in violation of the 95th Article of War, and the other of being drunk and discharging a pistol while in a drunken condition, in violation of the 96th Article of War. The sentence in the first instance, dismissal, was confirmed, execution thereof was suspended, and the sentence was subsequently remitted. The sentence in the second case was to forfeit eighty dollars per month for four months and to be restricted to the limits of his post for three months. I recommend that the sentence to dismissal and total forfeitures be confirmed, that the forfeitures adjudged be remitted, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to a letter from accused requesting clemency, dated 21 February 1944.

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- Drft. ltr. for sig. S/W.
Incl.3- Form of Action.
Incl.4- Ltr. fr. Capt. Cox, 21 Feb. 1944.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 311, 17 Jun 1944)

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

SPJGQ
CM 249824

26 FEB 1944

UNITED STATES	FIRST AIR FORCE
v.	Trial by G.C.M., convened at Army Air Base, Richmond, Virginia, 2 February 1944. Dismissal.
Second Lieutenant JACK E. GRAVES (0678034), Air Corps.	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 2nd Lieutenant Jack E. Graves, Air Corps, 443rd Fighter Squadron, 327th Fighter Group, did, at Army Air Base, Richmond, Virginia, between 27 August 1943 and 18 November 1943, with intent to deceive Captain Napoleon J. Gingras, Medical Corps, Squadron Surgeon of the 443rd Fighter Squadron, officially state to the said Captain Napoleon J. Gingras that he, the said 2nd Lieutenant Jack E. Graves, had on several occasions suffered periods of unconsciousness both while piloting an airplane and while on the ground, which statements were known by the said 2nd Lieutenant Jack E. Graves to be untrue in that he had not suffered such periods of unconsciousness.

Specification 2: In that 2nd Lieutenant Jack E. Graves, Air Corps, 443rd Fighter Squadron, 327th Fighter Group, did, at Army Air Base, Richmond, Virginia, on or about 28 October 1943, with intent to deceive Captain Henry E. Morelli, Medical Corps, Ward Officer of the Station Hospital, Army Air Base, Richmond, Virginia, officially state to the said Captain Henry E. Morelli that in August 1943 he had suffered a nervous breakdown due to flying fatigue, and that since that time he had had repeated attacks of unconsciousness or fainting spells while flying at high

altitudes, which statements were known by the said 2nd Lieutenant Jack E. Graves to be untrue in that he had not had repeated attacks of unconsciousness or fainting spells while flying at high altitudes.

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

Specification: In that 2nd Lieutenant Jack E. Graves, Air Corps, 443rd Fighter Squadron, 327th Fighter Group, having been duly placed in arrest at Army Air Base, Richmond, Virginia, on or about 14 December 1943, did, at Army Air Base, Richmond, Virginia, on or about 24 December 1943, break said arrest before he was set at liberty by proper authority.

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

Specification: In that Second Lieutenant Jack E. Graves, Air Corps, 443rd Fighter Squadron, 327th Fighter Group, did, without proper leave, absent himself from his organization at Army Air Base, Richmond, Virginia, from about 1100 hours, 24 December 1943 to about 1200 hours, 29 December 1943.

He pleaded not guilty to and was found guilty of all of the Charges and Specifications. There was no evidence of any previous convictions 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 evidence for the prosecution may be summarized as follows:

Specification 1 of the Charge:

On 27 August 1943, accused returned from detached service at Dayton, Ohio, and reported to Captain Napoleon J. Gingras, Surgeon of the 443rd Fighter Squadron, Richmond Army Air Base, for the usual physical examination prior to clearance for flying. He looked disturbed and upset so the Surgeon could not clear him for flying. During the course of the examination, the accused complained about having had fainting spells. When questioned by the Surgeon about these spells accused stated to Captain Gingras that in June of 1943, "he passed out at 3,000 feet and woke up with the trees right under him"; that while at Wright Field in July "once at 35,000 feet he also passed out and lost 5,000 feet altitude before he regained consciousness". Captain Gingras then questioned accused about anoxia and accused replied that it was not due to that, and said that "being a test pilot he knew what anoxia was; that when he is anoxic, he feels elated, but at the time he didn't feel elated"; that in August while

in Dayton, he was on the street when he "passed out" on the sidewalk (R. 10-12). Because of the statements made by the accused, Captain Gingras did not clear him and suggested a sick leave. Accused was pleased with the suggestion, applied for, and was granted, sick leave for 21 days (which was extended 6 or 7 days). Upon return from about 27 days' sick leave, accused again reported to Captain Gingras and stated that while on leave and attending a funeral of a pilot friend he (accused) "passed out" (R. 12-14). On 18 November 1943, accused came to Captain Gingras and handed him a written statement (Ex. 1) which contained the following:

> "I, second Lt. Jack E. Graves, do hereby certify that information given by myself to the Medical Dept. on this Base was a willful misrepresentation of facts.
>
> "Unaware of the seriousness of my statements in regard to flying, I exaggerated the facts to obtain a transfer to the Ferry Command. In so doing realize now that I have jeopardized my whole Army career.
>
> "This unpleasant experience has taught me a very serious lesson. I would gladly submit myself to any kind of punishment in order to maintain my present status as a pilot and an officer." (R. 15)

The accused stated that his reason for denying his previous statements was to prevent the Medical Corps from disqualifying him as a flier because of fainting (R. 17).

Specification 2 of the Charge:

On 28 October 1943, accused was admitted as a patient at the Station Hospital, Army Air Base, Richmond, Virginia. On the following morning (29 October), Captain Henry E. Morelli, Medical Corps, saw him as a patient and took accused's case history. In the course of taking the case history, accused stated to Captain Morelli that for several months he had attacks of unconsciousness or fainting spells; that these attacks occurred at high altitudes; and that on one occasion it occurred when he was not flying. Accused also stated that he had a nervous breakdown (R. 18-19). After completing the physical and laboratory examination, no organic basis for these attacks could be found and Captain Morelli diagnosed accused as "psychoneurosis, anxiety state with fear of flying" and discharged him as a patient on 13 November (R. 19-21).

On 7 December 1943, accused was called before Colonel N.P. Jackson, Major H.E. Garrison, Major T.J. Keating, Jr. and Captain N.J. Gingras, the Group Commander, the Squadron Commander, Group Intelligence Officer, and Squadron Surgeon, respectively. After being duly warned, accused voluntarily admitted that his claims of

unconsciousness referred to (Specifications 1 and 2 of the Charge) were willful misrepresentations of facts; that he misrepresented facts out of a desire to get transferred from a P-47 outfit to the Ferrying Command; that when he came out of the flying school, he wanted to be a fighter pilot, but after about 12 hours in a fighter, he decided he did not like to fly it; that he did not like high altitude flying; that he knew it was difficult to get out of flying P-47's except for medical reasons; that he thought he could get transferred to the Ferrying Command if he made up the stories about fainting spells; that the reason he picked the specific instances of fainting spells was that he was not feeling particularly well at those times and it gave him something to hang a date on (R. 23-24; 26-27; 29-30). "His attitude was most straightforward and he explained the whole thing * * * He was full of remorse * * * He didn't want to be taken off flying" (R. 23, 24).

Specification under Additional Charge I:

On 14 December 1943 Major Hugh E. Garrison, Commander of the 443rd Fighter Squadron preferred charges against the accused and, going to the accused's quarters, placed him in arrest of quarters and informed him that he was not to leave his quarters except to go to the latrine, take a shower, or to go to the mess hall (R. 30). On 24 December 1943 while accused was still under the arrest described he absented himself without leave and could not be found within the limits specified (R. 32, 48, 50).

Specification under Additional Charge II:

The morning report of the 443rd Fighter Squadron (Ex. 2) shows accused from "arrest in quarters" to "AWOL" as of 1100 24 December 1943 until 1200 29 December 1943. During this period of time the Squadron Commander (R. 31) and the Squadron Executive Officer (R. 48) searched for him upon numerous occasions in the accused's quarters but were unable to find him. When he appeared on 29 December 1943 he told the Executive Officer that he had "been around" and "had never been more than twenty miles away" (R. 49). Hurley N. Spivey, Chief Clerk of Richmond Hotel, Richmond, Virginia, testified that on 28 December 1943 a Lieutenant Jack E. Graves registered and checked out at 2:25 p.m. 29 December 1943. At 5:32 p.m. on 28 December 1943 a telephone call to the Air Base was charged to the person who registered as Lieutenant Graves (R. 34, 35). The witness could not identify the accused as the person who registered. A copy of the hotel registration and the charges made for the room and telephone call were admitted in evidence (Ex. 3, 4, 5).

4. Major David B. Davis, Medical Corps, Chief Psychiatrist, Station Hospital, Army Air Base, Richmond, Virginia, testified on behalf of the accused that he first saw the accused 3 or 4 times as an out-patient and later, about 28 October, as a patient in the

hospital; that accused was suffering from anxiety and apprehension with a fear of flying at high altitude; was a very tense individual; was non-cooperative in the ward in the sense that he disturbed other people in the ward without feeling much responsibility to the group; was a chronic fingernail biter; always irritable; anxious and apprehensive; had difficulty in getting to sleep and kept others awake; told many stories which checking always showed that they did not fit and "frequently was caught in the office in manufacturing his own stories". A number of times accused told things where it would have been easier to tell the truth. Witness's diagnosis of accused was "suffering from an anxiety state and had a constitutional psychopathic personality. Type: pathological liar." (R. 37).

When cross-examined by the prosecution, the witness stated that the accused is sane and understands the difference between right and wrong (R. 38-39).

The court received in evidence for the defense an affidavit executed by Sergeant E. H. Taylor (Ex. A), to the effect that accused had been in the habit of coming to the 443rd Fighter Squadron Mess Hall about midnight for a cup of coffee; that accused's visits were regular and affiant remembered "specifically immediately after Christmas having a conversation with Lieutenant Graves in the mess hall about the Christmas dinner and I remember further that during this period of time both before and after this conversation he came into the mess hall nightly and passed the time of day."

5. It was clearly established by the prosecution's evidence, and by the admissions made by the accused both in writing and in the presence of three officers, that at the times and places alleged in Specifications 1 and 2 of the Charge he did, with intent to deceive, make statements to two medical officers, who were officially engaged within the scope of their professional duties, regarding repeated attacks of unconsciousness or fainting spells while flying and on the ground; that extensive and thorough examinations disclosed no organic reason for such spells; and that the statements were untrue and were deliberately falsified by the accused in an effort to get himself transferred from flying P-47 planes to the "Ferrying Command."

A false statement by an officer to another officer in the performance of his official duties constitutes an offense and a violation of Article of War 95. C.M. 153703 (1922). The evidence was amply sufficient to sustain the findings of guilty of the Charge and its Specifications. This conviction alone is sufficient to support the sentence of dismissal.

The findings of guilty of Additional Charge I and its Specification cannot be sustained for the reason that the officer who

attempted to place the accused in arrest had no authority to make the arrest. He was the Squadron Commander, and the Squadron, which he commanded and of which accused was a member, was a part of and stationed with the 327th Fighter Group commanded by Colonel Nelson P. Jackson. Whether this Group was a part of a larger command does not appear. For the purpose of administering military discipline a squadron is considered a battalion, a group is considered a regiment, and a wing is considered a brigade. AR 95-10, Cl.

However, it appears from the record that the arrest was initiated and put into effect by the Squadron Commander who apparently acted only upon his own authority and not for the Group Commander or anyone of higher authority. Officers may properly be placed in arrest

> "By commanding officers only, in person, through other officers, or by oral or written orders or communications. The authority to place such persons in arrest or confinement will not be delegated. Subject to such limitations as may be imposed by superior competent authority the term 'commanding officer' includes the commanding officer of a garrison, fort, camp, or other place where troops are on duty and the commanding officer of a regiment, detached battalion, detached company, or other detachment, and their superiors."

The burden of proving that the accused was duly placed in arrest is upon the prosecution. The presumption of legality of arrest referred to in the Manual for Courts-Martial, paragraph 139a, p. 154, extends only to the grounds for the arrest and not to the authority to arrest. The latter must be proven. Dig. Op. JAG 1912-40, sec. 427 (3), 250.413, 29 April 1938; CM 245309 (1943); CM 226282 (1942); MCM (1928) par. 20, p. 14.

The findings of guilty of Additional Charge II and its Specification were well supported by the morning report and the testimony of two officers who made a reasonable search for the accused during the period he was alleged to have been absent without leave. The testimony of the hotel clerk and the Exhibits 3, 4 and 5 to the effect that someone registered at the Richmond Hotel under the accused's name on 28 December 1943 should have been excluded as irrelevant for the reason that there was no evidence that the person was the accused. However, in view of the clear evidence that supports the findings of this Charge and its Specification without the improperly admitted evidence, the Board of Review is of the opinion that the error did not injuriously affect the substantial rights of the accused.

6. The records of the War Department show the accused was born in El Paso, Texas, 22 October 1920 of native parents. He graduated from high school and during 1940-1942 attended Wesleyan University,

Illinois. He then enlisted as an aviation cadet and graduated from AAFGCTC as a pilot 21 April 1943, on which date he was discharged as an aviation cadet and was commissioned on 22 April 1943 a second lieutenant, Air Corps, and assigned to duty with the First Fighter Command.

7. The court was legally constituted. In the opinion of the Board of Review the record of trial is not legally sufficient to support the findings of guilty of Additional Charge I and its Specification, but is legally sufficient to support the findings of guilty of the remaining Charges and Specifications and the sentence, and to warrant confirmation thereof. 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 Article of War 61.

William A. Rounds, Judge Advocate.

Paul Stephen, Judge Advocate.

Herbert B. Fredericks, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 3 - 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 Jack E. Graves (0678034), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Additional Charge I and its Specification but is legally sufficient to support the findings of guilty of the remaining Charges and Specifications and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and carried into execution.

2. 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 Additional Charge I and its Specification disapproved. Sentence confirmed. G.C.M.O. 192, 25 May 1944)

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

SPJGQ
CM 249887

1 MAR 1944

UNITED STATES	)	ARMY AIR FORCES TACTICAL CENTER
	)	
v.	)	Trial by G.C.M., convened at Army Air Forces Tactical Center, Orange County, Florida, 7 January 1944. Dishonorable discharge and confinement for ten (10) years. Disciplinary Barracks, Eastern Branch.
Private FRANCIS W. SHEA (31050180), 1521st Quartermaster Refrigeration Company (Mobile).	)	

HOLDING by 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 soldier named above.

2. The Board is of the opinion that the evidence of record is legally sufficient to sustain the findings of guilty as to Charge I and its Specification (A.W. 62, publicly use contemptuous and disrespectful words against the President); Specification 3, Charge II (A.W. 96, drunk and disorderly in uniform in a public place) and Charge III and its Specification (A.W. 61, absence without leave for a period of one day), and that the sentence, dishonorable discharge, total forfeitures and confinement at hard labor for ten (10) years, is legal.

The Board is further of the opinion that the competent legal evidence of record is not sufficient to sustain the findings of guilty of Specifications 1 and 2 of Charge II, A.W. 96, alleging "attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military forces of the United States by using, with the intent so to do, orally and publicly," (underscoring supplied), disloyal language, in the presence of a sergeant of Ordnance (in Specification 1) and in the presence of certain enlisted men (in Specification 2).

3. The evidence discloses that accused made the statement alleged in Specification 1 of Charge II at 11:00 p.m. 3 October 1943, in the orderly room of building T-40 at the Orlando Air Base, during the course of a private conversation (R. 11-15) with Sergeant Coons, one of his instructors in the Small Arms Ordnance School, which accused was then and there attending (R. 14). No one else except Sergeant Coons was present. Accused had been away from his post on a pass and came by

to check in (R. 14). Sergeant Coons testified that accused did not attempt to advise him "as to any action to be taken or not to be taken" (R. 15). Accused was, in Sergeant Coons' opinion, drunk at the time. He smelled of liquor, his face was flushed and his eyes so indicated (R. 17).

Specification 2 refers to an occasion happening on 19 September 1943 (about two weeks prior to the incident described in Specification 1), wherein accused spoke the words alleged to the bartender, an enlisted man (R. 22), in the base beer garden, where he stood drinking from 7:00 p.m. to 9:30 p.m., at which later hour he was drunk (R. 24). The soldiers named in the Specification were present, as well as several others (R. 26), and his remarks created a spirit of resentment against the speaker followed by such disorder, verging on a brawl, that the Officer of the Day had to be called to quiet the disturbance (R. 26-27). The words were used in a private conversation, were not addressed to but were overheard by others present, and accused did not advise the bartender to take any action (R. 30). During this same period, and as showing his mental attitude, accused called one of the noncommissioned officers there present "a chicken-shit T-model corporal" (R. 35). Corporal Zachary, who was present in the bar room, believed that accused was simply expressing an opinion and that he said nothing to him or to anyone else present that would have encouraged insubordination, disloyalty, or refusal to perform military duties (R. 39).

4. As to Specifications 1 and 2 of Charge II, accused was found guilty of having, "with intent so to do", violated Article of War 96 in four different modes. Although a specific intent is alleged as to each, it was not sustained by the proof as to any one of them, and a presumptive intent is not sufficient to support a conviction. One of the methods alleged by each of these two Specifications is an "attempt to cause * * * mutiny." This particular offense is specifically embraced in Article of War 66. It is a serious military offense which may be punished by the death penalty. There is also in force a Federal penal act, known as the Espionage Act, of June 15, 1917 as amended, which provides a penalty of imprisonment for not more than 20 years, for the willful use of seditions or disloyal acts or words in time of war. (Sec. 33, Title 50, U.S.C.). Why this particular offense was not pleaded, either as a direct violation of Article of War 66, or as a violation of the Federal penal statute as such and charged as a violation of Article of War 96, is not clear. Since accused is here charged with an <u>attempt</u> to cause mutiny, the proof required for this allegation must disclose some overt act on the part of accused performed with the specific intent of influencing someone else to mutiny and proximately tending to, but falling short of, such a consummation. Also, in an attempt there must be an apparent possibility to commit the crime in the manner specified. Applying these tests to the evidence adduced in this record in support of the two Specifications in question, together with the ever present rule of reasonable doubt as to every element of the offense alleged, leads to the

inescapable conclusion that accused was either drunk or in some undetermined state of intoxication on both occasions, and that on each of them neither Sergeant Coons, nor the other soldiers who heard his remarks, were in the least responsive to or influenced by his words to the extent of collective insubordination, disloyalty or refusal to perform military duties. Where, as in the instant case, words spoken by accused are alone relied upon as constituting an attempt to cause insubordination or mutiny in the military forces, not only must the circumstances under which they were spoken be considered in determining whether the words were of such a nature as to violate the article of war under which charged, but it must be further proved beyond a reasonable doubt that accused willfully spoke these words with the intent of causing a mutiny, or insubordination, or disloyalty, or refusal of duty in the military service, and that this intent was carried into effect by language adopted to produce these results. The language uttered as alleged under all the circumstances could not in the opinion of a reasonable man be said to insure one or more of the results denounced. Rather than having the effect denounced, the affirmative evidence of record shows that the reaction of his listeners was diametrically opposite--his speech actually created opposition and resentment to the sentiments expressed therein.

5. The Board of Review holds that the record of trial is legally insufficient to support the findings of guilty of Specifications 1 and 2 of Charge II, legally sufficient to support the findings of guilty of Charge I and its Specification, Charge II and Specification 3 thereof, Charge III and its Specification, and legally sufficient to support the sentence.

William A. Pounds, Judge Advocate.

Earle Hepburn, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

23 MAR 1944

War Department, J.A.G.O., - To the Commanding General, Army Air Forces Tactical Center, Orlando, Florida.

1. I concur in the foregoing holding of the Board of Review in the case of Private Francis W. Shea (31050180), 1521st Quartermaster Refrigeration Company (Mobile), and for the reasons stated therein recommend that the findings of guilty of Specifications 1 and 2 of Charge II be disapproved. Upon compliance with this recommendation, under the provisions of Article of War 50½, and Executive Order No. 9363, dated July 23, 1943, you will have authority to order the execution of the sentence.

2. In view of the holding that findings of guilty of Specifications 1 and 2 of Charge II are not sufficiently supported by the evidence, and the fact that the sentence appears to be excessive in view of the circumstances and environment in which the offenses were committed, it is recommended that consideration be given to a reduction in the period of confinement.

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

(CM 249887).

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 249892

15 MAR 1944

(219)

UNITED STATES v. Second Lieutenant HARRY I. ZIMMER (0-484896), Signal Corps.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Murphy, Florida, 7 February 1944. Dismissal.

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 Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Harry I. Zimmer, Officers Signal Corps Replacement Pool, Camp Murphy, Florida, having been restricted to the limits of Camp Murphy, Florida, did, at Camp Murphy, on or about 1 February 1944, break said restriction by going to West Palm Beach, Florida.

He pleaded guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by general court-martial for wrongfully signing certain receipts for meals at the Officers' Mess, Camp Murphy, Florida (4 Specs) in violation of the 96th Article of War and for making a false official statement in relation to these offenses in violation of the 96th Article of War. 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. General Court-Martial Orders No. 25 showing accused's one prior conviction was received in evidence (R. 7; Ex. A). The sentence as shown by this order provided for restriction to the limits of Camp Murphy, Florida for three months and to forfeit $50 of his pay per month for six months. By deposition Second Lieutenant Everett Holmes Stepp testified that he saw accused driving a car between the Officers' Club and the south gate on 1 February 1944, going in the direction of West Palm Beach, Florida. Accused was outside of the area of Camp Murphy on the occasion. Second Lieutenant Dean Shankland

also saw accused 1 February 1944, as he and Lieutenant Stepp were walking out the road to catch a bus to West Palm Beach. Accused drove by and offered to pick them up. They got in and rode with accused to the gate. Accused told them he was going to 24th Street. They got out of his car at the gate and accused proceeded south, which was outside the area of Camp Murphy, Florida.

4. For the defense: The only evidence for the defense was the accused's testimony, given under oath after his rights as a witness had been explained. He had been told by Major R. E. Kimball some time prior to 31 January 1944 that he would be transferred to another station when he completed his course of instruction at Camp Murphy, Florida, and relying upon this information, had asked his wife to notify their landlord that they would give up the apartment they were occupying in West Palm Beach, Florida. He again talked with Major Kimball on 31 January 1944, and contrary to his previous statement Major Kimball told accused that he would not be permitted to leave Camp Murphy for quite some time, and possibly not until the full sentence theretofore imposed by the court had been executed. Upon learning he was not to be transferred he realized the importance of getting this information to his wife so that she would not relinquish the apartment. Housing conditions in West Palm Beach were extremely difficult, and there was a waiting list of people desiring to get into that particular apartment house. As soon as one is available the landlord accepts a deposit for the rental of it. There was no telephone in the apartment building where his wife lived. He was not acquainted with any officer living close enough through whom he might relay the message. He knew of no officer going to West Palm Beach, whom he would ask to stop by his wife's apartment at one o'clock in the morning. In her condition he did not wish to have his wife going around in West Palm Beach with all their baggage, trying to find another place to stay. He did not know what to do but finally decided, on the evening of 31 January 1944, after his last class in the Airborne Equipment Division, that the only way he could get a message to his wife was to go home long enough to tell her not to give up the apartment. At 12:30 on the morning of 1 February 1944 when classes were over, he started out the gate of Camp Murphy and saw Lieutenants Stepp and Shankland running down the road to catch a bus. He stopped and picked them up. As he drove through the gate they inquired how far he was going. He replied he was going as far as 24th Street if that would help them. As they lived beyond 24th Street they got out of his car at the gate and he proceeded on to his home in West Palm Beach. He went directly to his apartment, stayed there half an hour and drove back to Camp Murphy, arriving about 3 o'clock in the morning. He was gone about three hours including driving time.

5. The uncontradicted evidence, including accused's own testimony, clearly establishes the commission of the offense charged and fully sustains the findings of the court.

6. No doubt accused's prearranged plans for relinquishing his apartment were upset when he learned that he was not to be transferred from Camp Murphy, upon completion of his course of instruction, as he had anticipated. Too, it is highly probable that living quarters in West Palm Beach, Florida were extremely difficult to obtain, as accused testified. Still, the disruption of accused's personal plans, by unforeseen events or happenings, did not justify his disobedience of the restriction order. By leaving Camp Murphy, in violation of this order, for purely personal reasons, accused, in effect, placed his personal interest above that of public service. In this he erred, as he well knew, or should have known. The accused's statement, "I had no desire, without making an issue of the fact, that she, in her condition, should be going around in West Palm Beach with a bunch of baggage trying to find another place to stay", indicated that his wife may have been ill or pregnant. If true, this may have been one of the impelling factors for committing the offense, but obviously did not justify it.

7. Accused is 26 years of age. He is a high school graduate and holds a B.S. Degree from the University of Texas. He was commissioned a second lieutenant, Signal Corps, in the Army of the United States 27 July 1942 and entered upon active duty 28 July 1942. Since entering upon active duty he has completed the following training courses:

a. Company Officer's Course, Fort Monmouth, New Jersey.
b. Radio Specialty Course, Fort Monmouth, New Jersey.
c. Radar Officer's Training, Hq. ETG, APO 640, New York, New York.
d. Radar Officer's Training, Airborne Equipment Division, Camp Murphy, Florida.

8. Accompanying the record of trial is a letter from accused addressed to the President setting forth the various courses of training which he has completed, and in which he requests that the sentence of dismissal be suspended and he be ordered to an overseas theater of operations.

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 the 96th Article of War.

Thomas N. Tappy, Judge Advocate.

Herbert M. Kidner, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 249892

1st Ind.

War Department, J.A.G.O., 23 MAR 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Harry I. Zimmer (0-484896), 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, to support the sentence, and to warrant confirmation of the sentence. However, as accused was motivated in committing the offense by a desire to prevent his wife's immediate eviction from her living quarters, I recommend that the sentence 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

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 execution suspended. G.C.M.O. 170, 11 Apr 1944)

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

31 MAR 1944

SPJGH
CM 249909

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Barksdale Field, Louisiana, 22 January 1944. Dismissal.
Second Lieutenants HENRY W. LONG (0-540378) and DUANE J. WRIGHT (0-689290), Air Corps.	)	

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 officers 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 were tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant Henry W. Long and Second Lieutenant Duane J. Wright, both of the 476th Bombardment Squadron, 335th Bombardment Group (M) AAF, acting jointly and in pursuance of a common intent, did, on or about 17 December 1943, at or near a point half-way between Barksdale Field, Louisiana, and Lake Charles, Louisiana, on a course of approximately 160 degrees, knowingly violate section II, paragraph 16 a (1) (d), AAF Regulation No. 60-16, dated 9 September 1942, by flying a B-26 military airplane at an altitude of less than 500 feet.

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

Specification: In that Second Lieutenant Henry W. Long and Second Lieutenant Duane J. Wright, both of the 476th Bombardment Squadron, 335th Bombardment Group (M) AAF, acting jointly and in pursuance of a common intent, did, on or about 17 December 1943, at or near a point half-way between Barksdale Field, Louisiana, and Lake Charles, Louisiana, on a course of approximately 160 degrees, through neglect, suffer a B-26 military airplane, property of the United States, of the approximate value of $250,000.00, to be damaged by striking a tree.

Each of the accused pleaded guilty to and was found guilty of all Charges and Specifications and was sentenced to be dismissed the service. The reviewing authority approved the sentences and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution: Section II, paragraph 16a (1) (d), Army Air Forces Regulation No. 60-16, 9 September 1942 (Ex. G) provides that except during take-off and landing "aircraft will not be operated" below "500 feet above the ground" elsewhere than where higher altitudes are required. Both accused executed certificates (Exs. A and B) in September 1943 that they had read and thoroughly understood the contents of the "FLYING SAFETY FILE" as required by "III Air Force Memorandum 62-24, dated 26 August 1943". On 17 December 1943 both accused were in the 476th Bombardment Squadron, stationed at Barksdale Field, Louisiana. Accused Long was pilot and accused Wright co-pilot of a crew which was ready to go overseas (R. 4-5, 11-12).

On the morning of 17 December at 0840 accused Long, as pilot, and accused Wright, as co-pilot, with the crew, left Barksdale Field in a B-26 type military airplane, No. 2022, property of the United States, of a stipulated value of $250,000, on a "local transition mission" to Lake Charles, Louisiana and return. Second Lieutenant George R. Learned, bombardier-navigator, Staff Sergeant Bernard A. Bielinski, engineer-gunner, and two other enlisted men were members of the crew (R. 4-5, 7, 15; Exs. C, D, E and F).

Accused Long piloted the plane from Barksdale Field and en route to Lake Charles turned over the controls to accused Wright. They were practicing "low altitude procedure" in a desolate, wooded area, open in spots, with no buildings or people around. While accused Wright was flying the plane at an altitude of about 50 feet over some trees about 30 feet high, the plane struck the top of a tree which was about 20 feet taller than the others. Some damage was observed, but the engines were functioning perfectly and the plane "handled all right". They completed the mission. While servicing the plane on its return to Barksdale Field the crew chief observed that one of the cuffs on the propeller on the right engine was bent, the push rod covers on "No. 10 and 12 cylinders" were "bent in", and brush and sticks were in the cowling, which was "bent up". About four hours work was required on the plane before it was marked "in commission". It was stipulated that the damage was "negligible". When he learned what had occurred Major John Augustine, commanding the squadron to which accused belonged, gave accused Long a "bawling out". About 23 December, both accused, after being informed of their rights, admitted to Major Charles H. Seawell, the investigating officer, that accused Long allowed accused Wright to fly the airplane and that while accused Wright was flying it "they flew low enough to hit a tree and did hit a tree" (R. 5-15).

On cross-examination of the witnesses for the prosecution it was brought out that accused Long and his crew had completed their training and were scheduled to depart for overseas duty on 20 December 1943. The flight commander desired that they take this particular flight. It was customary for crews to be given a low altitude mission prior to being sent overseas but this crew had not received one. Lieutenant Learned testified that accused Long was an excellent pilot, "better than any I have ever had on bombing missions", and that both accused were excellent officers and "on the ball". Sergeant Bielinski considered accused Long a "very good pilot" and "above average". Major Augustine was of the opinion that the accused were "above average" officers, he "could say nothing at all against them along that line", and as pilots he had "heard good things" about both of them. Major Seawell stated that in his report of investigation he had noted his belief that both accused were "high in value to the service" (R. 6-7, 8, 12-15).

4. The accused elected to remain silent (R. 15).

5. The evidence shows and the pleas of guilty admit that on 17 December 1943, accused Long and Wright, pilot and co-pilot, respectively, of a B-26 military airplane, property of the United States, valued at $250,000; jointly engaged in practicing "low flying procedure" over desolate, wooded, unpopulated areas in the course of a "local transition mission" from Barksdale Field, Louisiana to Lake Charles, Louisiana. The plane was flown at altitudes as low as 50 feet above the ground, in violation of Army Air Force Regulations which provide for a minimum flying altitude of 500 feet above the ground in such areas, and as a result the plane struck a tree and was slightly damaged.

The accused and crew were shown to have completed their training and were scheduled to leave for overseas duty three days after the incident. It was customary for such crews to have one low altitude mission before departure but no such flight had been scheduled for the accused. Both accused were stated to have had excellent records as officers and pilots previously.

6. Accused Long is 21 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 22 September 1941; appointed temporary flight officer, Army of the United States, from Army Flying School, and active duty 13 December 1942; appointed temporary second lieutenant, Army of the United States and active duty, 15 November 1943.

Accused Wright is 20 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 21 October 1942; appointed temporary second lieutenant, Army of the United States and active duty, 30 August 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentences, and to warrant confirmation of the sentences. Dismissal is authorized upon conviction of a violation of the 96th or the 83rd Article of War.

Samuel W. Driver, Judge Advocate

Albert Clemmer, Judge Advocate

F J Lotterhos, Judge Advocate

War Department, J.A.G.O., 22 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 Lieutenants Henry W. Long (0-540378) and Duane J. Wright (0-689290), 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 sentences and to warrant confirmation of the sentences. The accused Long and Wright, pilot and co-pilot respectively, on a "local transition mission" each in turn engaged in piloting a B-26 military airplane, the property of the United States of the value of $250,000 at an altitude less than 500 feet above the ground in violation of Army Air Force regulations (Spec., Chg. I) and, at a time when accused Wright was at the controls, negligently suffered the plane to be damaged by striking the top of a tree about 50 feet above the ground (Spec., Chg. II).

The 201 file of accused Long shows that on 12 August 1943 he was found guilty by special court-martial of driving a Government vehicle without authority and in such a reckless manner as to cause it to be damaged and was sentenced to be restricted to his post for 2 months and to forfeit $100 pay per month for 6 months and that on 10 February 1944 he was reprimanded and restricted to his quarters for 7 days by his commanding officer under the 104th Article of War for violation of curfew regulations.

Attached to the record of trial is a recommendation for clemency in behalf of both of the accused signed by all of the members of the court, the trial judge advocate and defense counsel.

In a memorandum to me dated 8 March 1944 the Commanding General, Army Air Forces states:

> "1. I have personally considered the evidence in the case of the above-named officers who were tried together and, upon plea of guilty, were sentenced to dismissal by general court-martial, for violations of flying safety regulations.
>
> "2. Although pleas for the commutation of the sentences have been signed by each member of the court and by the trial judge advocate and the defense counsel, I am convinced that the sentences should be executed. The record discloses that these officers not only violated flying safety regulations but also violated specific orders governing this specific flight to maintain a minimum altitude of 1,000 feet. The fact that the damage to the airplane was relatively slight does not lessen the offense. They were merely fortunate that the plane was not completely wrecked and the lives of the crew members lost.

"3. There is no dispute as to the violation of flying regulations. They have admitted this in their plea of guilty. The violation was deliberate. It is my opinion that there are no proper grounds for clemency, and that the best interests of the service will be served if the sentences are executed."

I am unable to find in the record of trial or accompanying papers any evidence that the accused were "specifically ordered" to maintain a minimum altitude of 1000 feet on the flight involved. I do find, however, in the "Local Aircraft Clearance" under the signature of Pilot Long, the typewritten words: "Minimum Altitude,—1000'". I recommend that the sentences to 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 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- Drft. ltr. for sig. S/W.
Incl.3- Form of Action.
Incl.4- Memo. to The JAG, 8 Mar. 1944.

(Sentence as to each accused confirmed but execution suspended. G.C.M.O. 236, 29 May 1944)

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

SPJGK
CM 249921

7 APR 1944

UNITED STATES v. Second Lieutenant DONALD L. MAURER (O-1588146), Quartermaster Corps.	MOBILE AIR SERVICE COMMAND Trial by G.C.M., convened at New Orleans Army Air Base, New Orleans, Louisiana, 29 January 1944. Dismissal, total forfeitures, and confinement for four (4) years.

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

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

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

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

Specification: In that Second Lieutenant Donald L. Maurer, 37th Base Headquarters and Air Base Squadron, did, without proper leave, absent himself from his station at New Orleans Army Air Base, New Orleans, Louisiana, from about 15 October 1943 to about 27 December 1943.

CHARGE II: Violation of the 64th Article of War (Finding of guilty as to Specification 1 disapproved by reviewing authority; finding of not guilty as to Specification 2).

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

Specification 2: (Finding of not guilty).

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

Specification: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications, and was found guilty of Charge I and its Specification, guilty of Specification 1 of Charge II, not guilty of Specification 2 of Charge II, guilty of Charge II, and not guilty of Charge III and its Specification. No evidence of

previous convictions was introduced. He was sentenced "to be Dishonorably Discharged from the services of the United States, to forfeit all pay and allowances due and to become due, and to be confined at hard labor at such place as the reviewing authority may direct for a period of four (4) years". The reviewing authority disapproved the findings of guilty of Specification 1 of Charge II and of Charge II, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

The prosecution introduced a series of extracts from various morning reports of accused's squadron to show his status over the period of time of his absence (Pros. Exs. 1,2,3,4 and 5).

The net result of these entries shows that accused obtained a leave of absence of 15 days, effective 25 September 1943; that on 9 October 1943, the date upon which this leave expired, he was granted an extension of his leave for 5 more days, the first day of the extension beginning at midnight of the expiration of his original leave; and that thereafter he remained absent until 27 December 1943, for a total of 74 days' unauthorized absence.

Colonel Floyd N. Shumaker, Air Corps, Commanding Officer, New Orleans Army Air Base, testified that on 22 October 1943, a "Lieutenant Donald S. Maurer" had called him on the telephone saying that he (Maurer) had been granted a five-day extension of his leave, but that he had thought that it was a fifteen-day extension. The caller also told Colonel Shumaker that he had been prepared to return to his base, but that the apartment at which he had been staying in Berkeley, California, had been robbed and that he had lost his uniforms and identification papers. Accused also told witness that the Provost Marshal had asked him to appear as a witness against some apprehended persons thought by them to be guilty of the theft (R. 11).

Witness stated that he told accused to "conform with" the request of the Provost Marshal and then to return, bringing with him a statement from the Marshal that he had been detained for the purpose of being a witness. The statement of the Provost Marshal was to contain the reason for detention and the time of accused's release from the Marshal's control (R. 11,12,16). He was to return to the New Orleans Army Air Base from San Francisco (R. 17). On the same day, witness received a telegram from Oakland, California, signed by accused, and reading in part:

> "Confirming telephone this morning request additional leave to finish business matters and theft of uniforms with me need sufficient time clear this matter. Have confirming documents to return with me which am sure will justify additional leave.",

and requesting a reply, collect (R. 13; Pros. Ex. 8). A reply was sent

"through the agency of his (accused's) existing commander", over Colonel Shumaker's name, stating:

> "Extension not granted. Return to your proper station immediately repeat immediately or orders will be issued to the provost marshal for your apprehension" (R. 13; Pros. Ex. 6).

Colonel Shumaker stated that he did not grant accused any further extension of his leave, and that he did not receive any statement from the Provost Marshal concerning accused's detention or the reasons therefor (R.12). He did not personally hear from accused after receiving this telegram, but there was introduced into the record a letter from accused, written from Washington, D.C., postmarked 10 December, 1943, and addressed to the "Commanding Officer, New Orleans Army Air Base" (R. 14; Pros. Ex.7). In it accused stated that after communicating with Colonel Shumaker by telephone, he had left California by automobile, expecting to arrive in New Orleans no later than 1 November. Just before leaving, his business partner, "Mr. Lomba", received an induction notice from a draft board in Jefferson City, Missouri, "through some mix up in * * * Selective Service". Since it was "not much out of the way", they decided to go through Jefferson City to "try to straighten the matter out". Due to "war conditions" they were several days longer in reaching Jefferson City than expected. While there, Lomba telephoned his attorneys in Detroit, Michigan, about a lawsuit which had been pending for four years and in which accused was to be a "material witness". They learned that it was set for trial on 6 November. Missouri Selective Service officials refused to do anything about Lomba's draft status, and "there was a possibility of receiving help in Detroit", so they went on to that city. The trial took place there on 8 and 9 November. They were delayed in Detroit for six days by "motor trouble", during which time Lomba called his father and learned of Colonel Shumaker's telegram. They left Detroit for Washington, D.C., on 15 November, because, "everything considered, I decided that it would be best to proceed to Washington, D.C. as advised (sic) and attempt to untangle Mr. Lomba's Selective Service status". They arrived in Washington on 22 November and had been there since that time. Accused stated that he had called on Selective Service officials almost daily and that "finally having accomplished all possible am returning to base". He stated that he had been in uniform at all times, had always used his proper name, and had reported to Military Police in Denver, Salt Lake City, St. Louis, and Chicago, trying to trace the A. R. Smith who had stolen his uniforms (R. 14,15; Pros. Ex. 7).

Evidence for the defense.

Accused's individual counsel stated that accused's rights as a witness had been explained to him, and accused elected to testify in his own behalf. He stated that prior to the commission of the offense charged, his record

had been good, but that when he joined the 1007th Quartermaster unit, "we went to classes, [but] there were no instructions, and in general it was a mess" (R. 22). He was "very dissatisfied with" the organization (R. 26). Two weeks prior to the time he went on his authorized leave, he finished the course, during which he "worked hard and stayed in the top of my classes", but was then told that there would be no crew for him. He was placed in the "no duty" status, with no one to whom to report, and "no control over me whatsoever", and was told to "sit and wait for a transfer" (R. 22,23,25). He had made applications for transfers to Engineers, to Quartermaster, Maritime Service, to the Second Air Force, and had been trying since May to get overseas. He stated that, "I had nothing to do and I was afraid this would be my last chance for a furlough" (R. 22, 26). Accused stated that he went to his home "by air", arriving (in Oakland) about 28 or 29 September, and left four days before he was due back (which was on 9 October) for Detroit, Michigan, for a lawsuit in which he and his business partner were involved, and which "was supposed to be on the 10th" (R. 26,27). Meanwhile he learned of the extension of his leave for five days (in the telegram mentioned in Prosecution's Exhibit 1), though it does not appear how this information was communicated to him, and was at the same time informed by his business partner of the latter's pending induction into the Army (R. 27). Accused stated that this "would mean the business for which we worked [for seven years] would go under and we would lose $30,000 and seven members of the Armed Forces would not have jobs when they came back" (R. 21,23). The partnership was apparently involved in a second lawsuit in San Francisco, for accused testified that "I figured the extra ten (sic) days would be enough to prepare" for it and that "I would have enough time to testify in that before I went back". He reached his home on 16 October (R. 27). From there he telephoned "Colonel Williams" at the New Orleans Army Air Base, apparently on or about 20 or 21 October, 1943. Colonel Williams "refused to do anything so I was ready to go back". He had been promised an airplane ride to Kelly Field, but "the next night" his house was broken into by a Private A. R. Smith, whom accused had previously befriended, and who was then absent without leave from Fort Leonard Wood, and accused's uniforms and luggage were stolen. Smith was later apprehended and convicted (R. 24,27). Accused then telephoned Colonel Shumaker, informing him of the theft, and saying that he "desired sufficient time to clear up certain matters"; that he knew who the thief was; and that he was going to help the Military Police apprehend Smith. Colonel Shumaker told him "that everything could be arranged, but to bring with me a statement from the Provost Marshal", and to return to the base as soon as accused was finished with the matter (R. 21,24).

Accused left Oakland on the morning of 23 October, accompanied by his business partner, and bound for New Orleans. They drove by way of Jefferson City, Missouri, in an effort to clarify the partner's draft status. He had originally registered there while on a business trip in the east, although he was actually a resident of California, and had apparently been notified by the Selective Service Board of that city to report for induction (R. 21,23,27). While there, accused's partner telephoned Detroit, and found that a lawsuit in which they were parties defendant was set for trial there on 5 November, and that accused would be subpoenaed as a material witness (R. 21,22,26,28). Although it is not shown clearly, it appears that this was the same action which had taken accused to Detroit the first time. They proceeded to Detroit, accused stopping on the way at Military Police headquarters in St. Louis, Chicago, and Detroit, "informing them and giving my name and all the pertinent data" concerning Smith, with whose habits he was familiar, and whom he believed he could locate (R. 21,23,27,28). The trial took place on 8 and 9 November (R. 28; Exhibit B). Some time during their stay in Detroit, accused's partner telephoned his father in San Francisco, and learned that there was a telegram there for accused, directing him to return to his base. "He did not say that it was signed by Colonel Shumaker" (R. 24). Accused and his partner, however, went from Detroit to Washington, D.C., where accused visited Selective Service officials, apparently in a further attempt to adjust the partner's draft status. The "national head" of Selective Service promised accused an answer from the state board in Missouri in three days, but it actually was over a month in arriving. Accused stated that "I had no idea it would take so long. If I had I would never have tried it" (R. 21,23). From Washington accused wrote his letter to Colonel Shumaker, on 10 December (R. 26,29; Pros. Ex. 7). He testified that he thought of turning himself in while in Washington, but "believed that would be more harmful" (R. 21,26). It took him seventeen days to get back to New Orleans, "due to war time conditions", and the fact that he had to put a new engine in his automobile at St. Louis (R. 24,26).

Accused's counsel offered in evidence during the cross-examination of Colonel Shumaker, a witness for the prosecution, a certificate of Captain Lewis H. Keyes, commanding Company B, 524th Military Police Battalion, San Francisco, California, to the effect that at 0110 on 22 October, accused had reported to that headquarters the theft of his uniform and luggage, and that "he had reason to believe" that the thief was a Private Alvin R. Smith, 291st Infantry, Fort Leonard Wood, Missouri. The certificate gave no further details concerning accused's activities at the Military Police Station (R. 17; Ex. A).

Accused denied any intention to desert, reiterated his belief that each step he took would not take as long as it did, his lack of intent willfully to violate orders, and his anxiety concerning the loss of the

business investment. He stated that he desired to remain in the service and "would like very much to go overseas" (R. 21,23,24,25,26).

4. It is clear beyond all dispute that accused overstayed an authorized leave and a five day extension thereof, and was absent without leave from 15 October 1943 to 27 December 1943. During that time, despite the knowledge that his leave had expired, he traveled from Oakland, California, to Jefferson City, Missouri, Chicago, Detroit, and Washington, before finally returning to his base at New Orleans. He gave as reasons for his unauthorized absence the necessity of attending the trial of a lawsuit in which he was financially interested; an effort to trace a person who had stolen his uniforms and equipment, attempts to clarify the draft status of his business partner, in the hope of avoiding a financial loss which would result to their joint venture if the partner were inducted, and the assertion that he himself was in a "no duty" status at his station. It is unnecessary to cite authority to the effect that none of these excuses provides any defense to the offense charged. On the contrary they show that the accused had an utter disregard of his duties and responsibilities as a commissioned officer. The court's finding was clearly proper.

5. Prior to accused's arraignment, his counsel moved for a continuance "for a period of time sufficient to allow the defendant to be sent to the hospital for examination and mental observation" (R. 3). The court, in closed session voted to deny the motion for continuance. No specific reason was advanced by counsel for his motion, nor did he offer any evidence in support thereof. The Board of Review is therefore of the opinion that the court's action was not error. While a court is bound to inquire into the existing mental condition of an accused whenever at any time while the case is before the court it appears that such an inquiry ought to be made in the interests of justice, nevertheless -

> "* * * until the contrary is shown, a person is presumed to be sane, and a mere assertion that a person is insane is not necessarily and of itself enough to impose any burden of inquiry on the court." (MCM, 1928, par. 63.)

The Board of Review is of the opinion that counsel's motion, unsupported by further allegation and evidence of mental irresponsibility of accused, did not require an inquiry into accused's sanity by the court under the circumstances. The record indicates that in one or more instances the President (who was also the law member) of the court was somewhat abrupt towards accused's individual defense counsel in his rulings upon motions by counsel. Most of this occurred, however, in controversies upon the admissibility of evidence upon Charges and Specifications of which accused was found not guilty, and in the face of the abundant and competent evidence introduced concerning the unauthorized absence, no substantial injury may be said to have occurred. The Board of Review is of the opinion that accused received a fair and impartial trial.

6. The court sentenced accused "to be dishonorably discharged from the services of the United States, etc.". Inasmuch as accused is a commissioned officer, such a sentence is inappropriate, being that which is applicable to enlisted men (MCM, 1928, p. 273, Form 22; Op. JAG. 1919, pp. 318 et seq.). The Board of Review is of the opinion, however, that the sentence is not an illegal one, and that no substantial right of accused has been prejudiced thereby. It has been held that the sentence by a court-martial of an officer "to be dismissed the service without honor * * *",or "to be dishonorably dismissed the service * * *" is not illegal, the words or phrases specifying the dishonor being considered superfluous and therefore to be disregarded (CM 218520, Coome; CM 243683, Bowling).

It has likewise been stated by eminent authority that -

> "A sentence - 'to be dismissed the service; while a rare and irregular form, inappropriate to the case of a soldier, has, where employed, the same effect as if the word discharged had been used." (Winthrop, Military Law and Precedents, 2d Ed., pp. 433,434.)

It has also been held that the dismissal of an officer from the service, and the dishonorable discharge of an enlisted man, by sentences of general courts-martial, should neither of them be considered to be under "honorable conditions" within acts granting benefits to persons who have served in the military forces and discharged therefrom under such honorable conditions (Op. JAG 1919, pp. 318 et seq.).

The opinion of the Board of Review in CM 191831, Shoop, to the effect that the sentence of a flying cadet "to be dismissed the service" was not the equivalent of a sentence "to be dishonorably discharged" has been considered by this Board. An analysis of that case shows clearly that the Board's opinion was based upon the court's own statement in an indorsement to the record of trial that it "was not the intention of the court that the man be dishonorably discharged". The Board of Review in its opinion stated that it was not considering "whether the sentence 'to be dismissed' in this case is, or may be, equivalent to a sentence 'to be dishonorably discharged'".

In view of the opinion set forth in Winthrop, the decisions of the Boards of Review to the effect that words connoting dishonor in a sentence of dismissal of an officer may be disregarded as superfluous, and the holdings of this office that "dismissal" and "dishonorable discharge" are legal equivalents insofar as they preclude receipt of benefits under acts requiring separation from the service under honorable conditions, the Board of Review believes that no substantial right of accused in the instant case has been prejudiced by the form of his sentence and that the sentence, though inappropriate, is in all respects legal.

7. Attached to the record of trial is a letter written by accused to the Commanding General, Mobile Air Service Command, and dated 16 February 1944, in which the accused claims that due to incompetence on the part of the court reporter, his testimony is not accurately set forth and that his rights are thereby prejudiced, and in which he proceeds to give his own version of the facts. A careful reading of accused's letter and a comparison of it with his testimony in the record shows no variance which would justify any different conclusion upon the part of the Board of Review.

8. War Department records show that accused is 29 years of age and single. He attended the University of California for two and one half years, but did not graduate. He served in the California National Guard from April 1934 to July 1940. He was inducted into the Army of the United States on 16 April 1942, and was discharged therefrom and commissioned a Second Lieutenant, Quartermaster Corps, on 12 February, 1943, upon graduation from The Quartermaster School, Camp Lee, Virginia.

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

Perry G. Fox, Judge Advocate.

John Bannistriel, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 26 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 Donald L. Maurer (0-1588146), 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 as approved by the reviewing authority and to warrant confirmation thereof. I also concur in the opinion of the Board of Review that that part of the sentence which imposes dishonorable discharge, while inappropriate in the case of a commissioned officer, is not an illegal sentence. I believe that the ends of justice will be served by confinement for one year. I therefore recommend that only so much of the sentence be confirmed as provides for dismissal and confinement at hard labor for one year; that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to a letter dated 30 January 1944, written by accused to the President; a letter dated 16 February 1944 to the Commanding General, Mobile Air Service Command; a letter dated 22 February 1944, to The Judge Advocate General; and a letter dated 25 February 1944, to the President, the latter forwarded by the Honorable John H. Tolan, Member of Congress, in which letters accused claims that the record of testimony is inaccurate, and in which letters he gives his own version of the incidents constituting his offense and requests a new trial.

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

Myron C. Cramer

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

7 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. acc'd to Pres.,1-30-44.
Incl.5-Ltr. acc'd to CG, 2-16-44.
Incl.6-Ltr.acc'd to JAG, 2-22-44.
Incl.7-Ltr. acc'd to Pres.,2-25-44, forwarded by Hon. John H. Tolan.

(Only so much of sentence confirmed as provides for dismissal. G.C.M.O. 306, 17 Jun 1944)

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

SPJGQ
CM 249969

-7 MAR 1944

UNITED STATES	20TH ARMORED DIVISION
v.	Trial by G.C.M., convened at Camp Campbell, Kentucky, 1 and 2 February 1944. Dismissal.
Second Lieutenant BURTON J. GIBLIN (01018419), Cavalry.	

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

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

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

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

Specification: In that 2nd Lieutenant Burton J. Giblin, Troop "B", 33rd Cavalry Reconnaissance Squadron, Mechanized, did, at Camp Campbell, Kentucky, on or about 27 December 1943, with intent to deceive Captain Harold M. McLeod, Assistant Inspector General, 20th Armored Division, officially state to the said Captain McLeod, that the sum of seventy dollars ($70.00) was paid the band for the dance of the Provisional Regiment, 14 December 1943, at Bowling Green, Kentucky, which statement was known by the said Lt. Giblin to be untrue, in that seventy dollars ($70.00) was not paid said band nor any sum approximating seventy dollars ($70.00).

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

Specification 1: In that 2nd Lieutenant Burton J. Giblin, Troop "B", 33rd Cavalry Reconnaissance Squadron, Mechanized, with intent to defraud First Lieutenant Richard M. Raley, custodian of the Battalion Fund of the 413th Armored Field Artillery Battalion, did, at Camp Campbell, Kentucky, on or about 15 December 1943, unlawfully pretend to the said Lt. Raley that the expense of a dance of the Provisional Regiment, 20th Armored Division, at Bowling Green, Kentucky, at which the Armored Infantry Band played was ninety-five dollars ($95.00), well knowing that said pretenses were false,

in that said sum was about twenty-five dollars ($25.00) in excess of the actual expense of the dance, and by means thereof did fraudulently obtain from said Lt. Raley a check on the above described Battalion Fund for ninety-five dollars ($95.00) payable to the Armored Infantry Band.

Specification 2: (Finding of Not Guilty).

He pleaded guilty to Charge I and its Specification but not guilty to Charge II and its Specifications. He was found not guilty of Specification 2, Charge II, 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. The competent evidence of record for the prosecution may be summarized as follows:

On the night of 14 December 1943 a dance was held in Bowling Green, Kentucky, for the Overseas Provisional Regiment, 20th Armored Division. Music for the dance was supplied by the Armored Infantry Band (R. 19). The members of the band were transported from Camp Campbell to Bowling Green by Government vehicle. They left camp shortly after noon of 14 December 1943 and arrived back at camp at approximately noon of 15 December 1943. They spent the remainder of the night of 14 October, after playing for the dance, at a hotel in Bowling Green (R. 19). One meal was eaten in Bowling Green before the band played for the dance, and the members of the band paid their own expenses (R. 21-22). They had agreed to do this if permitted to stay overnight (R. 23).

Accused, as Special Service Officer of the Provisional Regiment (R. 7) was in charge of arrangements for the dance. He personally arranged for the services of the band and for additional entertainers. He first broached the subject of having the Armored Infantry Band play for the Bowling Green dance to First Lieutenant Herman Van Sickle, 70th Armored Infantry Battalion, in charge of the band, sometime early in November. While no agreement was then reached with reference to having the band play for the dance in Bowling Green, arrangements were made to have it play for a dance at the camp (Campbell). The question of charges to be made for the band was also discussed and Lieutenant Van Sickle informed accused that a charge of three dollars per band member was the customary charge. This would ordinarily aggregate approximately forty-five dollars, depending on the number of band members who actually performed. He further advised accused that no extra charge was made for playing away from camp provided transportation was furnished. Accused did not confer with him again with reference to having the Armored Infantry Band play for the dance in Bowling Green, but Lieutenant Van

Sickle assumed accused must have phoned to some one else in his office about the matter because his calendar was later marked to show this engagement and the band members knew about it. Lieutenant Van Sickle was succeeded as officer in charge of the band by Second Lieutenant Gene G. Bogardus toward the end of November or about the first of December.

Lieutenant Bogardus testified that arrangements for the presence of the band at Bowling Green were not made with him, and he knew nothing of them until the day following the dance when accused gave him the check for $95.00 discussed later herein. (R. 20) However, Lieutenant Bogardus was in attendance at the dance, and during the course of the evening loaned accused five dollars (R. 20). Thirteen members of the Armored Infantry Band played for the dance at Bowling Green on the night of 14 December 1943 (R. 21).

The expenses of this dance were to be paid with company or battalion funds belonging to the members of the Provisional Regiment, or in which they were entitled to share. These funds were derived from Post Exchange dividends which were paid while the members of the Provisional Regiment were attached, unassigned, to the 413th Field Artillery Battalion; and the funds were being administered by the 413th Field Artillery Battalion (R. 17).

At the instigation of accused, First Lieutenant Richard M. Raley, custodian of the Battalion Fund of 413th Armored Field Artillery Battalion, and while acting in his official capacity as such, made and delivered to accused, on 15 December 1943, a check for $95, payable to the Armored Infantry Band. Accused had told him "that the Armored Infantry Band was going to play at a dance to be held by the O. S. Provisional Regiment and that the bill would be $95". Raley did not know when the dance was held, and was unable to remember whether accused told him whether the dance had been held, or was to be held in the future. Accused did inform him that the dance had been, or was to be, held in Bowling Green, Kentucky (R. 16). He did not ask accused for an itemized statement of the payments to be made out of the ninety-five dollars, but he did understand there was to be a "breakdown" or apportionment of it, and that it was to be used in paying other expenses of the dance as well as paying for the band (R. 17).

Accused took the ninety-five dollar check together with a receipt, prepared by Lieutenant Raley at the time he issued the check, to Lieutenant Bogardus (officer in charge of the Armored Infantry Band), and asked if the latter could cash it. Lieutenant Bogardus cashed it, and returned $45 of the money to accused. Bogardus did not then know for what price the services of the band had been secured, but accused told him to take out $45 from this money for the band and also the

five dollars which accused owed him for a personal loan (R. 20). Lieutenant Bogardus signed a receipt to the custodian of the fund upon which the check was drawn for the entire $95 (R. 20; Pros. Ex. 3). He also personally paid the band, giving each member $3.50. He subsequently received a receipt for $25 from the other entertainers, which indicated that they had received that amount from accused (R. 23). Accused failed to account for the remaining $20, but upon one occasion subsequently told Lieutenant Bogardus that he (accused) would have to take the money out of his pocket and give it to him (Bogardus) for the meals eaten by the band while on the trip, but he did not state definitely he intended to do that (R. 23).

Subsequent to the division of the $95 as above set out (exact date not shown), accused informed Lieutenant Bogardus that he understood that an investigation was about to be made of the expenses of the dance, and asked him if he would state that he had received from accused $70 instead of $45 for the band; adding that he would try to get it straightened out later (R. 21). Lieutenant Bogardus agreed to do this as an accommodation to accused (R. 26).

In the process of investigating expenditures of the O. S. Provisional Regiment, pursuant to a directive from the commanding general of the 20th Armored Division, Captain Harold M. McLeod, assistant Inspector General, 20th Armored Division, on 27 December 1943 examined accused about the disposition he had made of the $95 in question. Accused, under oath and having had his rights under A.W. 24 explained to him, at first stated that he had paid the orchestra $70 and had turned over the remaining $25 to a Private Theise for payment to the other entertainers (R.31-32). After a few more questions and after having been shown a statement that Lieutenant Bogardus had made (not shown in this record), accused retracted the foregoing statement and admitted that Lieutenant Bogardus had returned $45 of the $95 to him, and that he still owed the band $20 for their meals. He further represented that while Lieutenant Bogardus had received the $5 which he (Bogardus) thought was in payment of the personal debt owing him by accused, accused intended that the whole $50 go to the band. He also stated that he had no particular basis for arriving at the $20 for meals - he "just figured $20 should cover the 14 men. They had breakfast and their supper". He denied any intention to defraud anyone; acknowledged as the major mistake of his life his failure to tell the band of his intentions to pay for their meals; represented that he had spent more than $20 of his personal funds in making preparations for the dance; that he had recently lost his clothing in a fire and had had to replace it; that he was broke, with Christmas approaching; that he thought he could withhold the $20 and pay the men later; and that he had used it to purchase Christmas presents for his wife (R. 33; Pros. Ex. 4).

In addition to the foregoing, introduced as a transcription of shorthand notes taken at the time, the prosecution introduced in evidence two signed statements made by accused, one on 28 December 1943

(Pros. Ex. 5) and the other on 23 January 1944 (Pros. Ex. 6). In each of these accused represented that the $20 was to be paid the band for meals eaten in Bowling Green, but, due to his shortage of funds resulting from conditions as above detailed, and his inability to collect money he had loaned, he had made use of the money for his personal ends, intending to pay it back later.

4. Evidence for the defense:

Staff Sergeant Thomas J. Monaghan, one of the entertainers at the dance, testified that when arrangements were being made a few days before the dance, accused told him that he would be paid. Upon disclaiming any desire for pay, Monaghan was informed that his expenses for meals and hotel would be paid. Accused made similar offers to all of the entertainers engaged. Witness did not know what arrangements were made for paying the orchestra. He received three dollars from Private Theise after he returned from Bowling Green (R. 51).

It was stipulated that if T/5 Jerome J. Theise were present in court he would testify under oath as follows: "He was contacted by Lieutenant Burton Giblin to arrange for a special entertainment group for the dance of the Provisional Regiment at Bowling Green, Kentucky, 14 December 1943. About a week before the date of the dance, witness asked Lieutenant Giblin about dinners for the group, since they intended to start early, about 1600, for Bowling Green. Lieutenant Giblin replied not to worry about dinners because he would take care of it, he had a whole crowd to take care of. The band was leaving sooner than Theise's group. By the 'whole crowd', witness took Lieutenant Giblin to mean the band."

Accused, having been advised of his rights, elected to be sworn as a witness in his own behalf. His testimony was, in substance, as follows:

He was in charge of all arrangements for the dance to be given in Bowling Green, including the procurement of the dance hall, orchestra, extra entertainment, attendance of girls, and refreshments. He made three trips to Bowling Green in his personal car on occasions when he could not procure government conveyance. At a regular Division Special Service meeting held on approximately the 7th or 8th of December, he told T/5 Theise that he (accused) would take care of the meals for the entertainers and the orchestra. Based upon his earlier conversation with Lieutenant Van Sickle, he rated the base pay for the orchestra at $45. He allowed $3 each for the entertainers and $10 additional for their meals. He intended to also take care of the meals of the band and, upon a comparison of numbers and meals eaten, concluded that $25 would be a fair allowance for the band. He made these decisions the day after the dance. He intended to pay the $70 to the band at the same time that he received the check for $95 from Lieutenant Raley. However, after obtaining the check, he undertook to collect $25 from a Lieutenant Murphy, who was indebted

to him personally for that amount. Failing in this, and being without funds, he concluded to withhold $20 temporarily, and applied it to his own use. The O. S. Provisional Regiment disbanded two days later and he, as Special Service Officer had to account for money drawn from the parent organization. At this time, also, there had been reported to the Inspector General's Department an alleged overcharge of $10 for the hire of a bus for a dance held in November (subject matter of Specification 2, Charge II). (R. 53-55, 60-62). He owed the Armored Regiment Band $20, and wanted to pay it and was in a position to pay it, but did not pay it because the Division Inspector General had instructed him not to (R. 66).

Among other expenses that accrued in connection with the dance were $35 for the dance hall and $30 to a bus company for conveying girls from Russelville (R. 53).

Before accused appeared as a witness during the inspector's investigation, Lieutenant Bogardus informed him that he (Bogardus) had represented to Captain McLeod, in an informal discussion, that accused had paid the band $70 (R. 54). Accused told Captain McLeod that he had paid the band $70. Within five minutes after making the statement, upon being shown a statement made by Lieutenant Bogardus that he had only received $45 for the band, accused corrected his statement to the Assistant Inspector General (R. 55).

5. Captain McLeod had an official status, was officially engaged in the line of his duties, and was making a legal investigation under proper authority at the time he was questioning accused on 27 December 1943 regarding the disposition that had been made of the ninety-five dollars. While being so questioned, accused, while under oath, stated to Captain McLeod, as alleged in the Specification of Charge I, that he paid the Armored Infantry Band seventy of the ninety-five dollars for playing at the Bowling Green dance. That this statement was false and was known by accused to be false at the time he made it is clearly shown by the evidence. It was admitted by accused while testifying as a witness in his own behalf. The statement was obviously made with the intent to deceive, accused hoping thereby to prevent discovery of his mishandling of the funds. Accused had sought in advance - as he believed, with success - to enlist the aid of a fellow officer in carrying out the planned deception. It was only after he had been confronted by evidence showing that this fellow officer had failed to cooperate as expected that accused admitted that he had paid the band not exceeding $50, and had used $20 of the money for his own private purposes. The fact that accused may have corrected his false statement under these circumstances - after the offense was complete - cannot operate as a defense. The making of the false statement under the circumstances shown constituted a violation of Article of War 95 [CM 153703 (1922), Dig. Op. JAG, 1912-40; sec. 453 (18)]; and the evidence, taken in conjunction with accused's pleas of guilty, amply sustains the findings.

Specification 1, Charge II, charges, in substance, that accused fraudulently obtained the $95 check from Lieutenant Raley by unlawfully and knowingly making the false representation to him that the expense incident to the band and entertainers who performed at the dance amounted to that sum, when, in fact, it amounted to only seventy dollars.

Accused contended that when he told Lieutenant Raley the expense amounted to $95, he had the then present intention of using the controversial $25 to pay for meals eaten by members of the band while in Bowling Green, but after receiving the check, he conceived the idea, and concluded to use a portion of the money temporarily. If accepted as true, this theory might change the technical nature of the offense committed, but it would not alter the fact that an offense was committed. There is, however, no evidence in the record, of appreciable probative value, to corroborate accused in his contention. On the other hand, a variety of circumstances combine to refute it, and to warrant the conclusion that accused deliberately exaggerated the amount needed to pay the expenses of the dance in order to procure for himself the excess.

Accused had not contracted to pay for meals eaten by members of the band, and there is no evidence of record tending to show that the band members expected him to do so. They had agreed to pay their own expenses if permitted to stay overnight in Bowling Green. Accused did not tell the band members or any representative of the band, either before or after the dance, that he was going to pay for their meals. He did not mention to Lieutenant Raley that any portion of the $95 was to be used to reimburse band members for their meals, but apparently left him under the impression that all of the money was required to pay definite and fixed obligations. Within a few minutes after the check was delivered to accused, Lieutenant Bogardus cashed it, and accused told him to retain only $45 for the band. He did not suggest to Lieutenant Bogardus that there would be any future additional payment to the band for meals. So far as the record discloses, the only amounts paid by accused to either the band or the other entertainers were those amounts that had been more or less definitely determined and agreed upon in advance. Furthermore, immediately after the check was cashed, accused began to make application of the excess, over fixed obligations, to his own private uses by instructing Lieutenant Bogardus to withhold five dollars in payment of accused's personal debt to him. Accused, admittedly, was in need of money, and made use of $20 of the $95 to purchase Christmas presents for his wife.

These facts and circumstances lead almost inescapably to the conclusion that at the time of representing to Lieutenant Raley that the expense of the band and entertainers was $95, accused intended to use the $25 excess over fixed obligations for his own purposes. These facts were amply sufficient to justify the court in rejecting the explanation given by accused in his confessions and while testifying as a witness at the trial, and to sustain its findings.

6. War Department records disclose that this officer is 27 years of age and is married. He graduated from high school but has attended no college or university. Before entering the Army he worked as a press foreman for a company manufacturing watch cases, and as a salesman for a shoe store and an oil company. Accused was a member of the National Guard from 1933 to 1936, and was inducted into the service on 31 October 1942. He was commissioned a temporary second lieutenant in the Army of the United States on 5 June 1943, after having attended The Armored Force School, Fort Knox, Kentucky, and entered upon active duty the same date.

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

William H. Pounds, Judge Advocate

Paul Stephens, Judge Advocate

Herbert B. Frederick, Judge Advocate

1st Ind.

War Department, J.A.G.O., 25 MAR 1944 To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Burton J. Giblin (O-1018419), Cavalry.

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

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

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 238, 30 May 1944)

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

SPJGV
CM 249971

(249)

28 MAR 1944

UNITED STATES v. Second Lieutenant RICHARD W. LEPLEY (0-649815), Air Corps.	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Wichita Falls, Texas, 8 February 1944. Dismissal and total forfeitures.

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 Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Second Lieutenant Richard W. Lepley, 62nd Base Headquarters and Air Base Squadron, Sheppard Field, Wichita Falls, Texas, did, at MacDill Field, Tampa, Florida, on or about 5 December 1943, feloniously embezzle by fraudulently converting to his own use money, of the value of $20.00, the property of Staff Sergeant Robert M. Read, entrusted to him by the said Staff Sergeant Robert M. Read for repayment of loan made to Staff Sergeant Robert M. Read by American Red Cross at Moses Lake, Washington, on 1 November 1943.

Specification 2: Same form as Specification 1, but alleging Sergeant Otis E. Hoover, Jr. to be the owner of the money embezzled.

Specification 3: Same form as Specification 1, but alleging Corporal Edgar L. Foster to be the owner of the money embezzled.

Specification 4: Same form as Specification 1, but alleging Staff Sergeant William F. Ryan to be the owner of the money embezzled.

Specification 5: Same form as Specification 1, but alleging Sergeant James J. Lambros to be the owner of the money embezzled.

Specification 6: Same form as Specification 1, but alleging Staff Sergeant Roy M. Hewitt to be the owner of the money embezzled.

He pleaded not guilty to and was found guilty of the Charge and all Specifications. There was no evidence of previous convictions 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 is substantially as follows:

It was stipulated respectively as to each that if Staff Sergeant Robert M. Read, Sergeant Otis E. Hoover, Jr., Corporal Edgar L. Foster, Staff Sergeant William F. Ryan, Sergeant James J. Lambros and Staff Sergeant Roy M. Hewitt were present and sworn as a witness each would testify under oath that his organization, B-17 Mobile Training Unit No. 7, was on duty at Moses Lake, Washington Army Air Base on 1 November 1943. That the Red Cross at Moses Lake loaned each of them $20 on 1 November 1943 and the accused as commanding officer signed each application. On 5 December 1943 the Mobile Training Unit No. 7 and each of these soldiers was at MacDill Field, Tampa, Florida. At this field each of the witnesses turned over to accused $20 out of his pay check, which was to be paid to the Red Cross at Moses Lake in settlement of the debt owed by the witness as above-mentioned. No receipt was requested or given, and accused told each of the witnesses the reason he wanted the $20 paid to him was to enable him to repay the loan and thus be relieved of all responsibility (R. 7-12).

Without objection, a copy of a telegram sent to the Field Director of the Red Cross at Drew Field, Tampa, Florida from the Field Director of the Red Cross at Moses Lake was received in evidence (R. 6; Pros. Ex. 1). This telegram was as follows:

"RETEL CPL FOSTER SGT LAMBROS S/SGT READ

TWENTY DOLLAR LOANS MADE NOVEMBER FIRST

NO PAYMENTS MADE AT THIS BASE"

Without objection, a statement voluntarily made by accused to Major William H. Cobb, the investigating officer in this case, was received in evidence (R. 14; Pros. Ex. 2). This statement fully corroborates the facts set forth in the stipulated testimony of the six enlisted men as heretofore set out, and in addition states:

> "* * *I was under the impression that as I had signed the applications, I was responsible for their repayment. Therefore, at MacDill Field, Tampa, Florida, when the men received their pay check from Denver I requested that they pay me and I would pay the Red Cross. At the time I received the money from the men I had every intention of turning it over to the Red Cross. The money was paid me in the late morning, and I decided to go to mess first and take care of it after dinner. At the time I also

had money of my own in my wallet. After eating at the club I went to the game room, saw a poker game and decided to get in. At that time I had no intention of using any other than my money. After playing for awhile I lost all of my money and for some unknown reason used the Red Cross money to try to win back my losses. The result was that I lost all the Red Cross money. Then I tried to borrow enough to repay the Red Cross money and failed.

"However, on 29 December 1943 I was able to pay two of the loans. They were credited to S/Sgt. Roy M. Hewitt and Corporal Edgard L. Foster. I have in my possession the receipts for those payments. Also before leaving Drew Field for Sheppard Field (the unit had been transferred from MacDill to Drew around the middle of December) I went to the Red Cross Director and explained to him exactly what happened and showed him a plan which he approved for repayment of the balance. He also instructed me to write him after arriving at Sheppard and finding out what the disposition of my care [case] would be so he would know which man would receive credit when each payment arrived.

"I have been in the Army Air Corps for four (4) years and five (5) months, having enlisted August 24, 1939. I have been commissioned since January 18, 1943. Never in that length of time have I ever been in trouble. My honorable discharge as an enlisted man shows excellent character.

"I am married and have a daughter eight months old.

"For these reason I am hoping and begging for another chance to prove my value to the service and a chance to repay my debt.

"I have carefully read and fully understand the foregoing statement. No force or threats have been made to me, neither have there been any promises of clemency or immunity made in order to obtain this statement, but I do voluntarily and willingly make the same, knowing that it can be used against me."

4. For the defense:

Accused at his own request was sworn as a witness in his own behalf (R. 15). His testimony was substantially the same as set forth in his statement given to the investigating officer (par. 3, supra).

In addition, during examination by the court, he stated that around the 15th of December 1943 one of his staff sergeants asked him if he had paid the loan, and he had replied "yes", as he was afraid that if he answered "no" he would get himself in a worse jam than he was in (R. 30). The sergeant checked with the Red Cross and found the loans had not been paid, and accused

was then questioned by an Intelligence officer (R. 31).

On 29 December 1943 he received a payment of $60 for per diem. He used $40 to pay two of the loans, the payment being made to the Red Cross at Drew Field, Tampa, Florida on 29 December 1943 (R. 23; Def. Ex. A). On 1 February 1944 he paid the remaining four loans to the Red Cross at Sheppard Field, Texas (R. 20; Def. Ex. A). Charges had been preferred when he paid the last four loans (R. 25).

5. The evidence thus shows that accused received at MacDill Field, Florida, $20 from each of six enlisted men to be used for the purpose of repaying loans in that amount made to the respective enlisted men by the Red Cross at Moses Lake Army Air Base, Washington. He went to the Red Cross office at MacDill Field to pay the money and finding it crowded decided to eat lunch at the Officers' Club and attend to the matter after lunch. At the Officers' Club he engaged in a poker game and lost $40 of his own money and on the spur of the moment and in an effort to recoup his losses he used and lost all of the money turned over to him for the payment of the Red Cross loans. On 29 December 1943 he paid two of the loans out of a $60 per diem allowance he had received, and on 1 February 1944 paid the remaining four loans out of his salary check received on that day. He was under court-martial charges at the time these last four loans were paid. The evidence establishes beyond all reasonable doubt that the accused was guilty of the Charge and all Specifications.

6. Data on the charge sheet shows the accused to be 24 years of age. He enlisted in the Air Corps 24 August 1939 and was commissioned second lieutenant, Air Corps, in the Army of the United States, 18 January 1943.

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

Thomas N. Tapley, Judge Advocate.

Herbert M. Kridler, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 249971

1st Ind.

War Department, J.A.G.O., 1 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 Richard W. Lepley (0-649815), 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. In view of the unusual circumstances of this case, accused's previous good record and the fact that complete restitution was made prior to trial, I recommend that the sentence be confirmed but that the forfeitures adjudged be remitted and that the execution of the sentence as thus modified 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

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 forfeitures remitted. Execution suspended. G.C.M.O. 240, 30 May 1944)

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

SPJGK
CM 249993

6 APR 1944

UNITED STATES	103D INFANTRY DIVISION
v.	Trial by G.C.M., convened at Camp Howze, Texas, 31 January 1944. Dismissal, total forfeitures and confinement for five (5) years.
Second Lieutenant HERBERT D. YATES (01316370), Infantry.	

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

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

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

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

Specification: In that Second Lieutenant Herbert D. Yates, Company F, Four Hundred and Tenth Infantry, did, without proper leave, absent himself from his organization at APO 470, c/o Postmaster, Shreveport, Louisiana, from about 23 October 1943, to about 24 November 1943.

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

Specification 1: In that Second Lieutenant Herbert D. Yates, Company F, Four Hundred and Tenth Infantry, did, at APO 470, c/o Postmaster, Shreveport, Louisiana, on or about 16 October 1943, with intent to defraud, wrongfully and unlawfully make and utter to Private John D. Fitzgerald, Company F, Four Hundred and Tenth Infantry, a certain check, in words and figures, as follows, to wit:

Alexandria, La. Oct 16 1943 No

FIRST NATIONAL BANK, SAINT JO, TEXAS

Pay to
the order of John D. Fitzgerald $150.00

One Hundred and Fifty and no- - - - DOLLARS

Signed: Lt. Doyle Yates

and by means thereof, did fraudulently obtain from the said Private John D. Fitzgerald, One Hundred and Fifty ($150.00) Dollars, lawful money of the United States, he, the said Second Lieutenant Herbert D. Yates, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank, Saint Jo, Texas, for the payment of said check.

Note: And 7 additional Specifications, identical in form with Specification 1, except as to dates, payees and amounts, which are, respectively, as follows:

	Date of Check	Payee	Amount
Spec. 2		(Finding of not guilty.)	
Spec. 3	15 Oct. 1943	Cash	$20
Spec. 4	22 Oct. 1943	Washington-Youree Hotel Co., Inc.	$20
Spec. 5	26 Oct. 1943	Washington-Youree Hotel Co., Inc.	$25
Spec. 6	27 Oct. 1943	Washington-Youree Hotel Co., Inc.	$25
Spec. 7	8 Nov. 1943	Nob Walter Garage	$10
Spec. 8	26 Oct. 1943	Palace Jewelry Company	$50

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

Specification 1: In that Second Lieutenant Herbert D. Yates, Company F, Four Hundred and Tenth Infantry, did, at APO 470, c/o Postmaster, Shreveport, Louisiana, on or about 6 October 1943, wrongfully borrow Ten ($10.00) Dollars, lawful money of the United States, from First Sergeant John S. Clark, Company F, Four Hundred and Tenth Infantry.

Note: And 5 additional Specifications, identical in form with Specification 1, except as to dates, lenders and amounts, which are, respectively, as follows:

	Date of Loan	Lender	Amount
Spec. 2	3 Oct. 1943	Pfc. Chester J. Wilk	$20
Spec. 3	14 July 1943	Cpl. Charles G. Ward	$20
Spec. 4	(Withdrawn by prosecution.)		
Spec. 5	4 Aug. 1943	Sgt. Roland M. Marshall	$10
Spec. 6	25 June 1943	T-5 Herbert U. Pierce	$10

ADDITIONAL CHARGE: (Finding of not guilty).

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Specification 4: (Withdrawn by the prosecution).

Specification 5: (Finding of not guilty).

Specification 6: (Finding of not guilty).

Accused pleaded guilty to Charge I and its Specification, and not guilty to the remaining Specifications and Charges. The prosecution withdrew Specification 4 of Charge III and Specification 4 of the Additional Charge. At the conclusion of the prosecution's case the court granted the motion of the defense for a finding of not guilty of Specification 6 of the Additional Charge. The court found accused guilty of Charge I and its Specification, guilty of Charge II and Specifications 1, 3, 4, 5, 6, 7 and 8 thereunder, guilty of Charge III and Specifications 1, 2, 3, 5 and 6 thereunder, and not guilty of Specification 2, Charge II, and of the Additional Charge and its Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for ten years. The reviewing authority approved the sentence, remitted five years of the confinement, 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. Accused is a second lieutenant, Company F, 410th Infantry, stationed at Camp Howze, Texas (R.11).

Evidence offered by the prosecution is as follows:

Charge I and its Specification: Accused pleaded guilty to this Charge and its Specification. He was absent without leave from his organization, APO 470, c/o Postmaster, Shreveport, Louisiana, from 23 October 1943 until he returned to his organization at Camp Howze, Louisiana, on 24 November 1943 (R. 11, 12, 13, 14, 15, 40, 59; Pros. Exs A, B).

Charge II: On 16 October 1943, at APO 470, c/o Postmaster, Shreveport, Louisiana, accused wrote a check drawn on the First National Bank, Saint Jo, Texas, in the amount of $150 which he gave to Private First Class John D. Fitzgerald, a member of his company, and asked him to hold a few days. Fitzgerald gave this check to his company commander. At the time the check was made out, the soldier testified, he gave accused $40 which in addition to the amounts previously borrowed by the accused totalled $150 (R. 18, 19; Pros. Ex. C). The Investigating Officer testified that accused stated to him that he had borrowed $150 from the soldier and "gave him that check in payment for the cash". "It was to be held for about a week or ten days" (R. 42). This check was presented for payment on 26 November 1943, and payment was refused because the account was closed (R. 24, 36). Since then the amount of $150 has been paid to the soldier by the accused (R. 19, 20, 60).

On 15 October 1943 accused asked Private Anders D. Strandburg, a member of his company, to cash a twenty dollar check which he did; and accused received twenty dollars for the check. This check was also drawn

on the First National Bank, Saint Jo, Texas (R. 21; Ex. D). At that time they were at APO 470, c/o Postmaster, Shreveport, Louisiana, and the soldier planned to cash the check when he had time to go into town. However, he gave the check to his company commander who said he was going to get the money (R. 21, 22). This check was presented for payment by the company commander for the soldier and the payment was refused by the bank on 26 November 1943 with a notation that the account was closed (R. 24, 36). Payment of this $20 was made three weeks prior to the date of trial (R. 22).

The deposition of Mr. Alfred Roper, Comptroller of the Washington-Youree Hotel, Incorporated, was introduced into evidence (R. 24, 25; Pros. Ex. F). This deposition showed in substance that on 22 October 1943, 26 October 1943, and 27 October 1943, the Washington-Youree Hotel, at Shreveport, Louisiana, cashed checks for the accused in amounts of $20, $25, and $25 respectively, drawn on the First National Bank, Saint Jo, Texas. These three checks were presented for payment in the usual course of business and were returned marked "insufficient funds". They were again presented for payment on 3 November 1943 and again returned marked "insufficient funds". They were never honored for payment by the bank because accused's account was insufficient to meet them (R. 26, 27, 28, 34, 35; Pros. Exs G, H, I). Accused paid the hotel in full the amount of these checks by money order dated 7 January 1944 (R. 61; Def. Ex. 1).

The deposition of Nowell Walter, owner of Nob Walter Garage, was introduced into evidence by the prosecution (R. 31, 32; Pros. Ex. L). The testimony showed in substance that on 8 November 1943 the Nob Walter Garage, at Dallas, Texas, cashed a check for the accused in the amount of $10. This check was presented for payment in the usual course of business and was not honored by the First National Bank, Saint Jo, Texas, on which bank it was drawn (R. 32, 33; Pros. Ex. M). Payment of this check was refused by the bank because of "insufficient funds" (R. 36) but the money was paid by accused about thirty days prior to the date of trial (R. 33).

The prosecution introduced into evidence the deposition of Milton Goetschel, President of the Palace Jewelry Company, Incorporated (R. 29; Pros. Ex. J). This deposition showed that on 26 October 1943 the Palace Jewelry Company, at Shreveport, Louisiana, cashed a check for the accused, drawn on the First National Bank, Saint Jo, Texas, in the amount of $50 for which the accused received merchandise of a value of $38.85 and the balance in cash. This check was twice presented for payment in the usual course of business and was returned marked "insufficient funds". It was never honored for payment by the First National Bank of Saint Jo, Texas. Accused by money order made full payment for this check the latter part of December 1943 (R. 30, 31; Pros. Ex. K). Payment of this check was refused by the bank because of "insufficient funds" (R. 35, 36).

Mr. Sam C. Roach, Vice President and Cashier of the First National Bank, Saint Jo, Texas, testified in substance that he was the

custodian of the records of the bank. He stated that the accused opened an account on 25 August 1943 and that the account was finally closed by a service charge on 18 November 1943. During this period, accused deposited $144.30 on 7 September, $245.90 on 1 October and $90 on 28 October. He said that "it wasn't an exceedingly active account". In September and October government checks were deposited. This was not a joint account, but the bank would honor checks drawn on this account by the wife of the accused (R. 34, 35, 37). The balance of the accused on 16 October 1943 was $92.71 (R. 39) and on 23 October 1943 the account was overdrawn in the amount of $17.74. This overdraft was covered by the deposit made on 28 October 1943 in the amount of $90 and no other deposits were made thereafter (R. 37, 39). Mr. Roach testified with respect to the checks mentioned in the Specifications of Charge II, Exhibits G, H, I, K and M, that they were presented for payment and that payment was refused because of "insufficient funds". Mr. Roach also testified that the checks mentioned in Specifications 1 and 3 of Charge II, Exhibits C and D, were presented for payment on 26 November 1943 and that payment was refused for the reason that accused's account was closed (R. 34-37).

Major S. J. Palos, Headquarters 410th Infantry, testified that he was the Investigating Officer and that accused made statements to him "regarding his case"; that before accused made these statements he was told "that any statements made could be held against him, and that if he did not make a statement it would not indicate that he was guilty" (R. 40). This witness testified that accused "admitted giving checks to various business houses without having sufficient funds to cover them". The checks were payable to The Palace Jewelry Company, Washington-Youree Hotel, and Nob Walter Garage. He also said, purporting to quote accused, "part of the checks were given knowing that there were not sufficient funds. Other arrangements had been made for the cash if they fell through. * * * He was making arrangements with his brother and the money was to be deposited to his account. The money failed to come" (R. 40-43).

Charge III: On 6 October 1943 accused borrowed $10 in cash from First Sergeant John S. Clark, a member of accused's company. This money was repaid by the first of December 1943 (R. 14, 15).

On 3 October 1943 the accused borrowed $20 in cash from Private First Class Chester J. Wilk, a member of accused's company. The soldier was finally repaid about one month prior to the date of trial (R. 16, 17).

The deposition of Corporal Charles G. Ward, 228th Company, 70th Battalion, Camp Wheeler, Georgia, was introduced into evidence by the prosecution (R. 50; Pros. Ex. P) and stated in substance that on the fourteenth day of July 1943, at Camp Wheeler, the accused was a second lieutenant and borrowed $20 in cash from the corporal. This loan was repaid on 25 December 1943 (R. 50, 51, 52).

The prosecution introduced into evidence the deposition of Staff Sergeant Roland M. Marshall, 70th Battalion, Camp Wheeler, Georgia (R. 53; Pros. Ex. Q). He stated in substance that on 4 August 1943 accused was a second lieutenant and borrowed $10 in cash from him. This loan was repaid on or about 25 December 1943 (R. 53, 54).

The deposition of Sergeant Hubert U. Pierce, 228th Company, 70th Battalion, Camp Wheeler, Georgia, was introduced into evidence by the prosecution (R. 44; Pros. Ex. N). It showed in substance that on 25 June 1943 the soldier was a Technician Fifth Grade while the accused

was a second lieutenant. On this date the accused borrowed $10 in cash from the soldier. This loan was repaid by accused on or about 25 December 1943 (R. 44, 45, 46).

4. For the defense. Accused called Captain Jack W. Bailey as a character witness in his behalf. Captain Bailey testified in substance that the accused had been assigned to him "for details", and "for the past two months" he would say the character of the accused had been "excellent" while his efficiency as a soldier had been "very satisfactory" (R. 57).

It was stipulated by the prosecution and the defense that if the accused's company commander, Lieutenant Gibbs, were present he would testify that the character of the accused during the time he had known him was satisfactory or very satisfactory and "his efficiency as a soldier would be satisfactory or very satisfactory" (R. 69).

After having his rights explained to him, the accused elected to take the stand under oath on his own behalf (R. 58). He testified in substance that he had been stationed at Camp Barkeley, Texas, about a year ago and had left to go to Officer Candidate School. At that time he left a girl pregnant, but did not learn of it until the first part of October 1943. The baby was born the last part of October 1943. "After 'D' Series" he applied for a leave, not having had a leave since his commission. His application was denied. He telephoned his wife and learned their child was ill, so he went absent without proper leave (R. 59). He stayed in Abilene, Texas, 2 weeks and was on his way "back" when he was injured and laid up a week. The accused admitted borrowing the money from the enlisted men, testifying in substance that he did not know it was an offense for an officer to borrow money from an enlisted man. In mitigation he testified that his wife had given birth to a baby on 21 June 1943 and with all his expenses he ran short of money and borrowed the various amounts from the enlisted men (R. 62, 63, 64). At the time the accused gave the check to Private Fitzgerald in the amount of $150, he did not "know" whether he had sufficient funds but "thought there was". The reason for his doubt was the fact that both he and his wife were checking on the account and the only working arrangement was the monthly statement from the bank. Accordingly, he asked Fitzgerald to hold the check "until the first of the month" (R. 60, 66, 67). Neither the accused nor his wife used a single check book, but drew checks on any bank check that they found (R. 67). His entire pay was allotted to his bank (R. 60). With regard to the other checks, the accused testified in substance that he thought he had sufficient money in the bank to cover the checks, for which reason he did not ask Strandburg to hold his check (R. 61, 62). About the first of November 1943 he called his brother and told him the trouble he was in. The brother promised to send $200 by wire to Western Union in Dallas where he made arrangements to transfer the money to his bank. He never checked up on the Western Union in Dallas and his brother did not send him the money because he was AWOL (R. 62). At the time he made this call to his brother, he had found out he did not have sufficient funds (R. 65). About 25 October 1943 when he went by his home, he found the account was overdrawn and sent $90 to his bank

(R. 66). He did not learn that "some checks had not cleared" until he returned to camp. He had assumed that his brother had sent the money (R. 67). He did not see his bank statement for October until about 1 December (R. 67).

All the dishonored checks have been made good and the borrowed money paid in full (R. 60, 61, 62, 63, 64, 65). This money was paid from funds received from his brother on 10 December 1943 (R. 65, 68). After he returned to camp and found that his brother's money had not been sent in (R. 67), he called his brother and he sent the money (R. 68). On examination by the court, accused said that an officer does not get paid "while he is AWOL" (R. 65).

5. The evidence is clear and undisputed with respect to Charge I and its Specification, absence without leave, and with respect to Charge III and the Specifications thereunder of which accused was found guilty, borrowing money from enlisted men. The evidence offered by accused in connection therewith did not deny but was intended to mitigate.

With respect to the Specifications of Charge II: The Board of Review is not convinced beyond a reasonable doubt that in issuing the checks involved in these Specifications accused intended to defraud. His reasonable reliance on the availability of his pay check on 1 November, allotted to his bank, when the earlier checks were drawn, his arrangement at the time the large check for $150, one of the early checks, was issued that it be held until 1 November, his actual deposit of $90 on 28 October, and his effort about 1 November to obtain $200 from his brother which effort though futile at first was ultimately successful to the extent that he liquidated all of these obligations, all indicate an absence of fraudulent intent.

Deciding this point, it becomes unnecessary to pass on the issue of whether accused knew that his bank balance or credit was insufficient to meet the checks which he issued, complicated as that issue is by reason of the fact his wife living in Texas where the bank was located, some distance from accused, had the right to draw on his account.

It is the opinion of the Board of Review, therefore, that the evidence does not show accused guilty of Specifications 1, 3, 4, 5, 6, 7 and 8, Charge II, in violation of Article of War 95. It is the opinion of the Board of Review, however, that accused was guilty of these Specifications in violation of Article of War 96, failure to maintain a bank balance or credit sufficient to meet these checks, a lesser included offense clearly established by the evidence. It having been shown that accused issued the checks for value and that they were not paid because of lack of funds or credit, it became the duty of accused, when charged with this military offense under Article of War 96, to show that ignorance of the inadequate state of his account, was not due to carelessness or neglect on his part. And where it is a joint account and checks drawn by a wife have overdrawn or depleted the account, extra caution is required of the husband with respect to his own checks. In this case accused failed to explain or justify his lack of knowledge regarding his bank account other than to show that his wife had drawn some checks against that account. This was

not sufficient. (CM 249232, Norren.) In finding accused guilty of Specification 1, Charge II, in violation of Article of War 96, the Board of Review has considered the fact that in the transaction there involved accused and the payee of the $150 check agreed that it should not be presented until 1 November and that this check, in fact, was not presented for payment until 26 November. However, the military offense under consideration applies where the failure to present a check in due course is occasioned by an agreement to hold it, as here. Nor did the failure of the payee to present the check on 1 November, the future date agreed upon, relieve accused since payment would have been refused by reason of insufficient funds had the check been presented 1 November.

6. Accused is 23 years old, is married and has one infant child. He completed three years of high school. He enlisted 2 February 1939 and served as an enlisted man until his graduation from officer candidate school when, on 1 April 1943, he was commissioned second lieutenant, Infantry, Army of the United States.

7. The court was legally constituted and had jurisdiction over the person and the offenses. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support only so much of the findings of guilty of Charge II and its Specifications as involves a finding of guilty of the Specifications in violation of Article of War 96, legally sufficient to support the findings of guilty of the remaining Specifications and of the Charges, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized under Articles of War 61 and 96.

Percy E. Zon, Judge Advocate.

Wm Wannstill, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 4 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 Second Lieutenant Herbert D. Yates (O-1316370), 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 its Specifications as involves a finding of guilty of the Specifications in violation of Article of War 96, legally sufficient to support the findings of guilty of the remaining Specifications and of the Charges, and legally sufficient to support the sentence and to warrant confirmation thereof. In view of the lack of fraudulent intent upon the part of accused, his youth and previous good service as an enlisted man, and the other mitigating circumstances of the case, I believe that dismissal would be adequate punishment. I therefore recommend that the sentence be confirmed, but that the confinement and forfeitures be remitted, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to a letter from Honorable Ed Gossett, Member of Congress, inclosing a letter from accused's mother and an affidavit from accused's brother, requesting clemency. The letters and affidavit are attached to the record of trial.

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

Myron C. Cramer

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. fr. Hon. Ed Gossett, w/ incls.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 314, 19 Jun 1944)

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

SPJGN
CM 249998

26 FEB 1944

UNITED STATES	)	CARIBBEAN WING AIR TRANSPORT COMMAND
v.	)	Trial by G.C.M., convened at Morrison Field, West Palm Beach, Florida, 29 January 1943. Dismissal and total forfeitures.
Captain Edward P. Patka (0348418), Air Transport Command.	)	

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 Charges and Specifications:

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

Specification 1: In that Captain Edward P. Patka, 25th Transportation Transition Training Detachment, Domestic Transportation Division, Air Transport Command, Army Air Base, Station #9, Caribbean Wing, Air Transport Command, 36th Street Airport, Miami, Florida, did, at or near Miami, Florida, on or about 15 December 1943, wrongfully, knowingly and wilfully dispose of about 1,250 rounds No. 8 c.s., 12 gauge shotgun shells of the value of about thirty dollars and nineteen cents ($30.19), property of the United States, furnished and intended for the military service thereof, by selling and delivering the said 1,250 No. 8 c.s., 12 gauge, shotgun shells to one Ted M. Brown, a civilian.

Specification 2: Same form as Specification 1, but alleging wrongful disposition, same place, 25 November 1943, about 500 rounds .22 caliber long rifle cartridges, value about $1.79, by delivery thereof to one William F. Conrad, a civilian.

Specification 3: Same form as Specification 1, but alleging wrongful disposition, same place, 25 November 1943, about 300 rounds .30 caliber M.2 cartridges, value about $15.28, by delivery thereof to one Robert Fatt, Jr., a civilian.

Specification 4: Same form as Specification 1, but alleging wrongful disposition, same place, 20 December 1943, about ½ ton of coal, value about $2.20, by delivery thereof to one William Scharf, a civilian.

Specification 5: In that Captain Edward P. Patka, 25th Transportation Transition Training Detachment, Domestic Transportation Division, Air Transport Command, Army Air Base, Station #9, Caribbean Wing, Air Transport Command, 36th Street Airport, Miami, Florida, did, at or near Miami, Florida, on or about 15 December 1943, wrongfully, knowingly and wilfully apply to his own use and benefit a government vehicle, to-wit: one-half (1/2) ton Dodge truck, USA No. 25496, of the value of more than fifty dollars ($50), property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Captain Edward P. Patka, 25th Transportation Transition Training Detachment, Domestic Transportation Division, Air Transport Command, Army Air Base, Station #9, Caribbean Wing, Air Transport Command, 36th Street Airport, Miami, Florida, did, at or near Miami, Florida, on or about 4 December 1943, with intent to deceive Captain Louis H. Klaer, Ordnance Officer, Army Air Base, Station #9, Caribbean Wing,

Air Transport Command, 36th Street Airport, Miami, Florida, make and present an official certificate to the said Captain Klaer on the face of a certain requisition, War Department QMC Form No. 400, in words and figures as follows, to-wit:

War Department
Q.M.C. Form No. 400
(Revised Apr. 6, 1931)

REQUISITION

To: ORDNANCE No. of Sheets L Sheet No. 1

Requisition No. 44-56 Date 4 December 1943 Period Present

SHIP TO SO, 25th TTTD, DTR, ATC, AAB 36th St Airport, Miami, Florida

Requisitioned By (show Signature, Rank, Organization, Destination. If different from "Ship To" include address):	Approved by:
/s/ Martin Z. Post /t/ MARTIN Z. POST 1st Lt, AC, Sup. O.	/s/ Edward P. Patka /t/ EDWARD P. PATKA Capt, AC, Comdg.

Stock No.	Articles	Unit	On Hand And Due	Consumed	Required	Approved
	Shell, Shotgun 12 guage, 8.CS.	Rd	0	0	2400	
	Basis for Requisition: 600 Rds per 0 for year.					
	Ammunition being drawn is for the following flying officers of this organization.					
	2nd Lt. Gulbransen, John D.	0801858				
	2nd Lt. Hall, George M.	0802744				
	2nd Lt. Hamilton, William H.	0801859				
	2nd Lt. Harwell, Rufus T.	0801861				
	I hereby certify that no ammunition has been drawn by this organization for these officers.					
				/s/ Edward P. Patka /t/ EDWARD P. PATKA, Capt, AC, Comdg.		

for the purpose of obtaining 2400 rounds No. 8 c.s., 12 gauge, shotgun shells, which official certificate was known by the said Captain Patka to be false and untrue in that the said Captain Patka intended to apply the said shotgun shells to his own use.

Specification 2: In that Captain Edward P. Patka, 25th Transportation Transition Training Detachment, Domestic Transportation Division, Air Transport Command, Army Air Base, Station #9, Caribbean Wing, Air Transport Command, 36th Street Airport, Miami, Florida, did, at or near Miami, Florida, on or about 6 December 1943, with intent to deceive Captain Louis H. Klaer, Ordnance Officer, Army Air Base, Station #9, Caribbean Wing, Air Transport Command, 36th Street Airport, Miami, Florida, make and present an official Certificate of Expenditure to the said Captain Klaer on the face of a certain certificate in the words and figures as follows, to-wit:

Place Station #9, 36th St. Airport, Miami, Florida.

Date 6 December 1943.

I certify that the following ammunition was expended by 25th TTD, DTR, ATC, (ORGANIZATION) Station #9, Miami, Florida, for Base Ordnance Officer during the period from 1 December 1943 to 15 December 1943.

1. Item and Lot # of Item expended	2. Purpose	3. Weapon (give model)	4. Course fired	5. Authority	6. Alw.per Ind.Org. &Weapons Actually firing	7. No. of Inds.or weapons firing	8. Total allowance	9. Amt.of Amm.exp. during this trng yr.	10. Amt.exp. on this cert.
Shell, Shotgun, 12 ga. 8 C.S.	Skeet	SHOTGUN 12 ga.	Skeet	AR 775-10, P.60 (4)	600	4	2400	2400	2400

(Certificate continued).

The above listed ammunition is for the following flying officers:
2nd Lt. John D. Gulbranson
2nd Lt. George M. Hall
2nd Lt. William H. Hamilton
2nd Lt. Rufas T. Harwell

APPROVED

s/ Earl T. Ricks
EARL T. RICKS, Lt. Col.,
Air Corps, Commanding

NAME, RANK, AND DESIGNATION OF APPROVING OFFICER

Certified by s/ Edward P. Patka
NAME and RANK
Edward P. Patka, Capt. Air Corps
RECEIVING OFFICER

for the purpose of dropping accountability of said property and applying the same to his own use, which official certificate was known by the said Captain Patka to be false and untrue.

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

Specification 1: In that Captain Edward P. Patka, 25th Transportation Transition Training Detachment, Domestic Transportation Division, Air Transport Command, Army Air Base, Station #9, Caribbean Wing, Air Transport Command, 36th Street Airport, Miami, Florida, did, at Army Air Base, Station #9, Caribbean Wing, Air Transport Command, 36th Street Airport, Miami, Florida, on or about 30 October 1943, for his own personal gain and benefit and to the prejudice of good order and military discipline, knowingly, wilfully and unlawfully order and cause Corporal Edward (NMI) Lasecki, a non-commissioned officer of the Army of the United States, to perform manual labor upon the private automobile of said Captain Patka during the regular duty hours of said non-commissioned officer.

Specification 2: In that Captain Edward P. Patka, 25th Transportation Transition Training Detachment, Domestic Transportation Division, Air Transport Command, Army Air Base, Station #9, Caribbean Wing, Air Transport Command, 36th Street Airport, Miami, Florida, did, at Army Air Base, Station #9, Caribbean Wing, Air Transport Command, 36th Street Airport, Miami, Florida, on or about 8 July 1943, wrongfully take and carry away two (2) pairs of cotton khaki trousers and two (2) cotton khaki shirts of the total value of about eight dollars and thirty four cents ($8.34), property of the United States, furnished and intended for the military service thereof.

Specification 3: In that Captain Edward P. Patka, 25th Transportation Transition Training Detachment, Domestic Transportation Division, Air Transport Command, Army Air Base, Station #9, Caribbean Wing, Air Transport Command, 36th Street Airport, Miami, Florida, did, at Army Air Base, Station #9, Caribbean Wing, Air Transport Command, 36th Street Airport, Miami, Florida, on or about 30 October 1943, wrongfully take and carry away one (1) pair of service shoes, size 8½D, of the value of about three dollars and eighty cents ($3.80), property of the United States, furnished and intended for the military service thereof.

Specification 4: In that Captain Edward P. Patka, 25th Transportation Transition Training Detachment, Domestic Transportation Division, Air Transport Command, Army Air Base, Station #9, Caribbean Wing, Air Transport Command, 36th Street Airport, Miami, Florida, did, at Army Air Base, Station #9, Caribbean Wing, Air Transport Command, 36th Street Airport, Miami, Florida, on or about 1 November 1943, wrongfully take and carry away four (4) cotton undershirts, four (4) pairs of cotton drawers, eight (8) pairs of cotton socks, six (6) cotton handkerchiefs, and one (1) barracks bag, all of the total value of about four dollars and fifty-seven cents ($4.57), property of the United States, furnished and intended for the military service thereof.

He pleaded guilty to Specifications 1-4, Charge I, and Charge I, not

guilty to Specification 5, Charge I, the Specifications under Charge II and Charge II and Specification 1, Charge III, and guilty to Specifications 2-4, Charge III, and Charge III. He was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, adduced upon the Specifications and Charges to which the accused pleaded guilty, consisted of an agreed stipulation showing with particularity every material allegation in such Specifications and establishing all essential elements of the offenses therein alleged. In addition the stipulation with respect to Charge II and the Specifications thereunder shows that the accused executed and presented the two official certificates on the dates and for the purposes specified and provides for the admission into evidence of photo copies of the questioned certificates which were so admitted (R. 7-9; Pros. Ex. 1-2).

Upon the Specifications and Charges to which the accused pleaded not guilty, testimony was adduced. Corporal Edward Lasecki, a member of the accused's organization, testified that on or about 15 December 1943, he, pursuant to the accused's order, conveyed him in a Government vehicle from their station to the Tropical Park Race Track on the outskirts of Miami, Florida, at about 1300 o'clock and returned for him a few hours later, reporting the trip as a mere routine trip to Miami. It was stipulated that the car used had a value in excess of $50. He also testified that on or about 30 October 1943 during regular duty hours he was ordered by the accused to accompany him to his home and to assist in "simonizing" the accused's car for about three hours for which he received no pay from the accused. On or about 4 December 1943 the accused executed a requisition for 2400 shotgun shells, 12 gauge with number 8 C.S., which he directed Sergeant John L. Karutz to deliver to the ordnance officer and to secure the ammunition. The ordnance officer advised that shotgun shells could not be drawn except for flying officers in the organization, which the sergeant reported to the accused who selected the names of four flying officers formerly at the station, caused their names to be inserted on the requisition and certified that the requested ammunition was being drawn for them. At such time no flying officers were at the accused's station. The requisition was re-submitted to the ordnance officer who then honored it which he would not have done except for the affixed certificate. Thereafter, a certificate of expenditure was prepared in the ordnance office on the basis of the store slip

and the requisition, and the accused executed and presented it on or about 6 December 1943 notwithstanding the fact that the ammunition, which was the only ammunition of such type issued to his station, had not been expended as by him certified. Part of the ammunition was disposed of by the accused as alleged in Specification 1, Charge I. During the investigation the accused, after explanation of his right to speak or remain silent, admitted that he had falsified the requisition in order to obtain the ammunition (R. 9-16, 16-21, 22-23, 24-26; Pros. Ex. 1-2).

4. The accused, after explanation of his rights as a witness, testified that upon graduation from a military school and further training in ROTC for about two months, he was commissioned a second lieutenant in the Officers' Reserve Corps, on 16 September 1936, that from such time until he was called to active duty on 5 May 1941 he had engaged in a remunerative undertaking business with his father, that he had served for about 16 months in Iceland where he drew clothing and equipment from the Quartermaster without requisition, that he was injured in a fall while on maneuvers in Iceland, was hospitalized for about a month, and then returned to the United States where he invested a substantial portion of his $1300 savings in War bonds and that about 1 March 1943 was assigned as Commanding Officer of the 25th Transportation Transition Training Detachment at Miami, Florida. He had sat on courts-martial and was familiar with military law to "a certain extent" but professed ignorance of any wrong connected with his acts or he would never have committed them as he was desirous of making the Army a career. He admitted selling the shotgun shells to Mr. Ted M. Brown but denied the premeditated acquisition thereof for such purpose as he intended to fire the ammunition when it was requisitioned. He did not sell the other described ammunition or the coal but gave it to the named persons as friendly gestures. He had placed the names of the flying officers on the requisition because the ordnance officer had advised that they had to be flying officers to get the ammunition and had certified to the expenditure of the ammunition as a routine matter so that Ordnance would have a verification that it had been expended, although he was aware of the serious consequences to an officer giving a false certificate. While admitting the use of the government vehicle to attend the races and his knowledge of directives prohibiting its use for personal purposes, he thought it was subject to his use as he saw fit and he also understood that, as Commanding Officer, he was entitled to draw the coal, pants, socks and other clothing. The enlisted man had worked on the accused's automobile during a period of the month when they were not busy which had been preceded by conversations about securing such help in which the enlisted man had indicated his willingness to assist (R. 26-40).

Evidence was adduced by stipulation and exhibits that the accused was an excellent administrator and had performed his duties in an efficient manner (R. 40-41; Def. Ex. "A", "B", "C").

5. Specifications 1-4, inclusive, Charge I, allege that the accused on designated occasions "wrongfully, knowingly, and wilfully" disposed of described and valued property of the United States, furnished and intended for the military service thereof, by delivering it to named civilians, and in the one instance described in Specification 1 of selling to a named civilian. Specification 5, Charge I, alleges that the accused on a specified date "wrongfully, knowingly and wilfully" applied to his own use and benefit a described government vehicle of the value of more than $50, property of the United States, furnished and intended for the military service thereof. The offenses specified are alleged in violation of Article of War 94 which in pertinent part provides as follows:

> "Any person subject to military law * * * who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof; * * * Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties * * *" (M.C.M., 1928, p. 224).

Manifestly, the acts alleged in the Specifications, Charge I, fall squarely within the condemnation of the above excerpt from Article of War 94.

The evidence for the prosecution, adduced by stipulation, conclusively establishes the accused's guilt of the offenses alleged in Specifications 1-4, inclusive, Charge I, because the stipulation meticulously shows his commission of all essential elements of the offenses alleged therein by establishing all material facts in support thereof. The stipulated evidence, therefore, fully supplements the accused's plea of guilty to such Specifications and leavesno question of his guilt. Although pleading not guilty to Specification 5, Charge I, the accused in his testimony admits his guilt thereof even after acknowledging that he was aware of directives prohibiting the use of government

vehicles for personal purposes and the testimony of the enlisted man driver of the vehicle on the occasion in question likewise conclusively shows the commission of the offense as alleged (CM 128947 (1918) and CM 162148 (1924) Dig. Ops. JAG, 1912-40, Sec. 452 (17) and (20)). The evidence, consequently, establishes beyond a reasonable doubt the accused's guilt and amply supports the findings of guilty of Charge I and all the Specifications thereunder.

6. Specifications 1 and 2, Charge II, allege that the accused on two occasions with intent to deceive made and presented false official certificates known by him to be untrue, on the first to secure ammunition which he intended to apply to his own use and on the second to secure the "dropping" of accountability of such ammunition and applying it to his own use. "Knowingly making a false official statement" is violative of Article of War 95 (M.C.M., 1928, par. 151).

The prosecution's evidence shows that the accused made and presented both of the certificates. In the first instance, after notification that shotgun shells would be issued only to flying officers, he deliberately added to the requisition the names of four flying officers who were not and had not been for some months at his station and certified that the requisitioned ammunition was for such officers whose names he took from a former roster with full knowledge that neither such officers nor any other flying officers were then at his station. The certificate upon the requisition was therefore false and known by the accused so to be. Two days later he certified that the ammunition, secured by the first false certificate, was wholly expended whereas more than half of it was about ten days later sold by him to a civilian. The second certificate was therefore false and known by the accused so to be. While the accused disclaims any premeditation of his crime, the sequence of events as shown by the two false certificates and the wrongful sale of the ammunition shortly thereafter compels the conclusion that the false certificates were made with the intent to apply the ammunition to his own use. The evidence, consequently, establishes beyond a reasonable doubt the accused's guilt as alleged and fully warrants the findings of guilty of Charge II and the Specifications thereunder.

7. Specification 1, Charge III, alleges that the accused at a designated time and place "for his personal gain and benefit and to the prejudice of good order and military discipline, knowingly, willfully and unlawfully" ordered and caused a named non-commissioned officer to perform manual labor during duty hours upon the accused's private automobile. To this Specification the accused pleaded not guilty but to Specifications 2-4, inclusive, Charge III, which allege that he did on three different

occasions "wrongfully take and carry away" described and valued property of the United States, furnished and intended for the military service thereof, he pleaded guilty. "Employment of soldiers for non-military or other illegal uses" is violative of Article of War 96. "Allowing illegal or irregular practices within his command" is also violative of the same Article of War (Military Law and Precedents, Winthrop, 1920, Reprint, pp. 726-727). Requiring a soldier to perform non-military personal services for an officer is clearly within the purview of the former rule and continued wrongful abstraction by an officer of government property is within the latter where so alleged in terms not sufficient to allege a felonious taking and asportation or an embezzlement.

Upon the first Specification the evidence is clear that the accused ordered and caused a non-commissioned officer to perform manual labor during duty hours in "simonizing" the accused's personal automobile. The accused in his own testimony likewise admits all the material facts alleged in the Specification and seeks merely to explain his action by saying that the work was done during a period when the men at his station were not busy. His plea of guilty to the remaining Specifications of Charge III is supplemented by stipulated evidence which establishes all the material facts as therein alleged. His action in this connection he, notwithstanding some experience as a supply officer, seeks to explain by saying that he thought he was entitled to draw the described articles. The attempted explanations fall so far short of a bona fide defense and sound so weakly even in extenuation that they are unworthy of serious condiseration or comment. The evidence, therefore, establishes beyond a reasonable doubt the accused's guilt as alleged and amply supports the findings of guilty of Charge III and the Specifications thereunder.

8. The accused is about 28 years of age. The War Department records show that he was commissioned a second lieutenant, Infantry Reserve, on 11 September 1936 and was ordered to active duty on 5 May 1941 since when he has had active duty as an officer and that he was promoted to first lieutenant and captain on 5 September 1942 and 20 March 1943, respectively.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 94 or 96 and is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. S. Cooper, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 249998

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 Edward P. Patka (O-348418), 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 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 remitted. G.C.M.O. 212, 26 May 1944)

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

SPJGQ
CM 250168

1 MAR 1944

UNITED STATES v. Second Lieutenant DONALD E. PATTERSON (O-751420), 511th Fighter Bomber Squadron.	THIRD AIR FORCE Trial by G.C.M., convened at Columbia Army Air Base, Columbia, South Carolina, 18 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 Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Donald E. Patterson, 511th Fighter Bomber Squadron, 405th Fighter Bomber Group, did without proper leave absent himself from his organization and duties at Walterboro Army Air Field, Walterboro South Carolina, from about 23 November 1943, to about 1 December 1943.

He pleaded guilty to and was found guilty of the Charge and Specification. 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 evidence for the prosecution may be briefly summarized as follows:

The accused was a member of the 511th Fighter Bomber Squadron, stationed at Walterboro Army Air Field, Walterboro, South Carolina (R. 5, 6). On 14 November 1943 he was assigned to the special duty of accompany-

ing the body of Lieutenant Pennell another Air Corps officer, who had been killed in an airplane accident, to the home of the deceased in Pittsburg, Kansas upon the completion of which detail he was to return to his proper station. His orders provided for neither delay enroute nor for leave of absence (R. 7, 8).

Based upon information obtained from the Official Railway Guide published by the National Railway Publication (November 1943 issue), Sergeant Richard M. Ham, the noncommissioned officer in charge of rail transportation at the Walterboro Army Air Field, testified that the normal travel time between Walterboro, South Carolina and Pittsburg, Kansas is two days over the route indicated in accused's transportation request. By an alternate route, however, approximately three days would be required.

An extract copy of the morning report of the 511th Fighter Bomber Squadron, 405th Fighter Bomber Group, Walterboro Army Air Field, Walterboro, South Carolina, for 1 December 1943 was introduced in evidence without objection by the defense. This extract showed entries regarding accused on the morning report of the organization submitted at Walterboro Army Air Field on 1 December 1943 as follows:

> "0751420 Patterson (DS) (1021) 2d Lt. M/R of 23 Nov 43 is amended to include 'above named officer fr DS Pittsburg Kansas to AWOL 6 A.M.' 0751420 Patterson (AWOL) (1021) 2d Lt. Fr. AWOL to ar in qrs 1445."

Interrogatories and the deposition of Mrs. Irene Pennell, telephone operator, residing in Pittsburg, Kansas were introduced in evidence without objection by the defense. Therein Mrs. Pennell testified that she had known accused since June 1943. On 16 November 1943 the accused arrived at her home in Pittsburg, Kansas and on 19 November 1943 she accompanied him to the bus station in Pittsburg, Kansas, saw him get on a bus and saw the bus leave at 1:30 a.m. on that day.

4. The accused having been informed of his rights elected to remain silent.

5. An examination of the record of trial discloses that the court had jurisdiction of the accused and the offenses alleged and it follows, as a matter of law, that he was properly convicted by the findings upon the Charge and Specification to which he had pleaded guilty.

There is nothing in the record to show that the plea was improvidently entered by the accused, or that there was any lack of understanding by him of its full meaning and effect. The significance of his voluntary act was explained to him by the law member and the

accused, nevertheless, chose to allow the plea to stand. So also, when advised of his right to testify or make a statement he elected to remain silent.

While the entry in the morning report purporting to show the initial absence without leave at Pittsburg, Kansas, was obviously hearsay insofar as the morning report submitted on the date in question at Walterboro, South Carolina, is concerned, and under other circumstances, its admission might have constituted a violation of accused's substantial rights, no injury has been done in this case, under the judicial confession of the accused contained in his plea.

It appears, therefore, that the accused, having been detailed to the honorable duty of escorting the remains of a deceased brother officer to Pittsburg, Kansas, left Walterboro, South Carolina, in accordance with his orders, on 14 November 1943. He had no privilege of delay enroute and no leave of absence had been granted to him. The normal return travel time over the customary route between Walterboro, South Carolina and Pittsburg, Kansas was four days and, at the utmost, by an alternate route, the return travel time was six days.

The accused was not seen again at his post and duty station until he was placed in arrest in quarters at Walterboro Army Air Field on 1 December 1943. A civilian in Pittsburg, Kansas had seen the accused in Pittsburg on 16 November 1943, and last saw him there on 19 November 1943 when he boarded a bus and left at 1:30 a.m.

The record is silent as to his actions between that hour and the time of his arrest in Walterboro, South Carolina but the accused's confession leaves no question regarding the unauthorized absence with which he stood charged and he failed to offer any explanation thereof or show any extenuating circumstances at the trial when he had the opportunity to do so.

6. The accused was born in Taylors Falls, Minnesota on 13 March 1923. He was graduated from high school and thereafter enlisted in the Army Air Forces on 7 July 1941. On 25 May 1942 he became an Aviation Cadet and upon completion of his pre-flight, elementary, basic and advanced flying training was commissioned a second lieutenant, Army of the United States on 28 July 1943. Thereafter he was, in due course, assigned to the 511th Fighter Bomber Squadron at Walterboro, South Carolina.

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 sustain the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War 61.

William A. Pounds, Judge Advocate

Earle Hepburn, Judge Advocate

Herbert B. Fuderica, Judge Advocate

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 Second Lieutenant Donald E. Patterson (0-751420), 511th Fighter Bomber Squadron.

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

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

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 160, 7 Apr 1944)

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

SPJGN
CM 250223

10 MAR 1944

UNITED STATES	)	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND
v.	)	
Second Lieutenant FRANK B. STAFFORD, JR. (0-579329), Air Corps.	)	Trial by G.C.M., convened at La Junta Army Air Field, La Junta, Colorado, 10, 28 January 1944. Dismissal, total forfeitures and confinement for two (2) years.

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OPINION of the BOARD OF REVIEW
LIPSCOMB, GAMBRELL 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 of Review submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that 2nd Lieutenant Frank B. Stafford, Jr., Headquarters and Headquarters Squadron, 311th Two Engine Flying Training Group, did, at La Junta, Colorado, on or about 25 August 1943, wrongfully and knowingly sell one Magic Air Vacuum cleaner of the value of about $20.50, property of the United States furnished for the military service thereof.

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

Specification: In that 2nd Lieutenant Frank B. Stafford, Jr., Headquarters and Headquarters Squadron, 311th Two Engine Flying Training Group, did, without proper leave, absent himself from his organization at La Junta Army Air Field, La Junta, Colorado, from about 5 December 1943 to about 8 December 1943.

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

Specification 1: In that 2nd Lieutenant Frank B. Stafford, Jr., Headquarters and Headquarters Squadron, 311th Two Engine Flying Training Group, did, at Denver, Colorado, on or about 3 December 1943, with intent to defraud, wrongfully and unlawfully make and

utter to the Shirley Hotel Company, a certain check, in words and figures as follows, to-wit: Denver, Colo. 12/3/43 1943 Pay to the order of Shirley Savoy Hotel $25.00 Twenty Five Dollars and no cents Dollars I hereby certify that I have funds in the bank on which this check is drawn subject to this check. Drawn on Colorado Trust Co. La Junta, Colo Frank B. Stafford 2nd Lt A.C., and by means thereof, did fraudulently obtain from the said The Shirley Hotel Company $25.00, he, the said 2nd Lieutenant Frank B. Stafford, Jr., then well knowing that he did not have and not intending that he should have any account with the Colorado Trust Company, for the payment of said check.

Specification 2: (Disapproved by reviewing authority).

Specification 3: In that 2nd Lieutenant Frank B. Stafford, Jr., Headquarters and Headquarters Squadron, 311th Two Engine Flying Training Group, did, at Denver, Colorado, on or about 6 December 1943, with intent to defraud, wrongfully and unlawfully make and utter to Hotel Park Lane Corporation, a certain check, in words and figures as follows, to-wit: To Colorado Trust Co. Date 12/6/43 19 43 At La Junta Colo. Pay to the order of Park Lane Hotel $25.00 Twenty Five Dollars & No cents Dollars I hereby represent that the amount drawn for in this check is on deposit to my credit in the above named bank, free from any claims, and acknowledge that this amount has been paid to me upon my representation of such facts. My permanent post office address is: La Junta A.A.B. Colo. Frank B. Stafford 0-579329 2nd Lt. A.C., and by means thereof, did fraudulently obtain from the said Hotel Park Lane Corporation $10.12 and credit on account for services rendered in the amount of $14.88, he the said 2nd Lieutenant Frank B. Stafford, Jr., then well knowing that he did not have and not intending that he should have any account with the Colorado Trust Company for the payment of said check.

Specification 4: (Disapproved by reviewing authority).

The defense's motion for a medical inquiry into the accused's sanity having been overruled and his special plea to all Charges and Specifications of "not guilty by reason of mental derangement" having been denied, he pleaded guilty to Charges I and II and their Specifications, not guilty to Charge III and its Specifications and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority disapproved the findings of guilty of Specifications 2 and 4, Charge III, approved the sentence, but remitted three 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. Subsequent to arraignment but prior to the entrance of pleas to the general issues the defense moved the court to recommend to the appointing authority that a "Board of Medical Examiners" be requested to inquire into and report upon the accused's mental condition and that, pending such inquiry and report, the case be continued. In support of this motion the defense adduced the testimony of the provost marshal, the assistant defense counsel, a medical officer and the accused's father who also is a physician. According to the provost marshal, who had observed the accused twice in December, 1943, the accused displayed a "lack of interest" and "little concern" over the seriousness of his offenses but otherwise his actions were satisfactory. The defense counsel had found the accused reticent about answering questions asked by them and unimpressed with the seriousness of his offenses and their possible consequences all of which had created a suspicion in the minds of the defense counsel as to accused's mental stability. The medical officer characterized the accused as a "psychopathic personality", "self-assertive" and "fundamentally selfish" whose personal desires must be satisfied regardless of the probable results and without consideration in his own mind of the consequences, although knowing the difference between right and wrong. The accused's father described him as a "problem child" who was subject to intermittent periods of depression, during which he was "without any sense of responsibility", and elation, during which he appeared normal. This situation had been noticed by the accused's high school principal who had discussed the matter with the father and suggested psychiatric treatment, all as related in a telegram which was admitted into evidence. The father, although a physician was not a psychiatrist and was, therefore, unable to evaluate the accused's symptoms psychiatrically, asserted that he had been convinced that the accused was mentally incompetent from his twelfth birthday until he entered the army at the age of 18 (R. 7-10, 10-12, 12-18, 19-24; Def. Ex. "A").

The prosecution in rebuttal adduced the testimony of Major Collis M. Spencer, Director of the Ground School at which the accused was an instructor, who had known the accused for over two years and who had found him of high intelligence and an excellent instructor, free from any observed abnormalities but hesitant to accept responsibility. A fellow instructor and a former student both were of the opinion that the accused was a normal person (R. 25-26, 27-28, 28-30).

After argument by counsel was heard for and against the motion, the court denied it and the accused was required to plead to the Charges and Specifications which, to the surprise of his counsel as they had been informed by him that he intended to plead guilty, he did in the following terms: "To all Charges and specifications: Not Guilty by reason of Mental Derangement". The defense, thereupon moved for a continuance because of their surprise at accused's plea and the court continued the trial until 27 January 1944 (R.30-36).

When the court reconvened, the law member announced that the accused's surprise plea was a special motion raising the question of the accused's sanity and that the court would hear evidence upon such issue. By agreed stipulation it was shown that if the Chief of the Neuropsychiatric

Section of the Fitzsimons General Hospital, Denver, Colorado, and the Ward Officer of The Neuropsychiatric Section, at the same hospital, both medical officers, were present they, after qualification as expert witnesses, would testify as follows:

"This is to certify that the history of 2nd Lieutenant Frank B. Stafford, Jr., O-579329, reveals that he has been a disciplinary problem since early childhood. At the present time he is facing a general court-martial for having passed bad checks, having sold government property, and for being AWOL for two days. On the week end of December 4, 1943, this patient wrote checks for $90.00 to cover expenses of a party and drinking while in Denver. At that time he was fully aware that he had no funds to his account in the bank. He failed to report back to his station at the proper time and was two days AWOL. In August 1943 when he was in need of money he sold a vacuum cleaner belonging to the Air Base. This action was done with the full knowledge of the possible consequences.

"Past history reveals that patient had difficulty in adjusting to parental authority. In school he was a constant problem in management for many misdemeanors. While attending a military academy he was frequently punished for breaking rules. He was expelled for cheating in a quiz and for other infractions of college regulations. Since the age of 16 he was indulged impulsively in spree drinking. He held one position for a short time in civilian life but abandoned it to travel through this country and northern Mexico with a friend. When his money was exhausted on this trip he enlisted in the military service at El Paso, Texas. As an enlisted man from August, 1940 until April, 1943, he was subject to frequent company punishment and had one special court-martial for being AWOL. At no time in his life has he ever adopted any long term values. His behavior has been repeatedly impulsive. He has never profited or learned from experience.

"Psychiatric examination reveals a cooperative, alert patient who shows emotional coldness and indifference. His speech is logical, coherent and relevant. No delusions or hallucinations can be elicited, and there is no evidence of abnormal mood swings. Patient admits impulsivity and having only short term values for which he demands immediate satisfaction regardless of the consequences. He shows no genuine regard for the feelings of others. It is the consensus of the Neuropsychiatric staff that Lieutenant Stafford's diagnosis is: Constitutional Psychopathic State, inadequate personality.

"This is to certify further that Lieutenant Stafford is not insane; that he knows the difference between right and wrong; that he realizes the consequences of his actions; and that he is mentally responsible. There are no neuropsychiatric reasons to defer completion of the pending military legal procedure".

No other testimony being offered upon the issue, the court, after being instructed by the law member that it should consider all the evidence heard at the prior session, the accused's demeanor as observed in court, and

the stipulated testimony, denied the accused's plea of "Not Guilty, by reason of insanity". The accused thereupon pleaded guilty to Charges I and II and their Specifications and not guilty to Charge III and its Specifications (R. 37-40).

It is clearly apparent that the court exercised an abundance of caution in considering the defense's suggestion of the accused's insanity and his "special plea" similarly asserting such defense. The provisions of paragraph 63, M.C.M., 1928, were rigidly followed and the court resolved the issue against the accused upon evidence which beyond a reasonable doubt so required. It is considered not inappropriate to here record that prior to the reviewing authority's action upon this case the accused was examined by a medical board which reached a similar result as that expressed in the court's denial of the accused's plea of insanity. It follows, consequently, that the court's action upon such plea was both proper and lawful.

4. The prosecution relied upon the accused's pleas of guilty to Charges I and II and their Specifications except that such plea to Charge II and its Specification was supplemented by the introduction of the organization's morning report showing the accused's absence without leave as alleged. Upon Specifications 1 and 3, Charge III, the evidence for the prosecution shows that on 3 December 1943 the accused made and presented a check in the amount of $25 drawn on the Colorado Trust Company, La Junta, Colorado, to the Shirley Savoy Hotel, Denver, Colorado, for which he received "either the full amount of $25.00 in cash or part cash and credit on hotel room". On 6 December 1943 the accused made and presented a check in the sum of $25, drawn on the same bank, to the Park Lane Hotel, Denver, Colorado, for which he received $14.88 credit on his room rent and $10.12 in cash. Both checks bore a representation that the maker had an account in the named bank containing sufficient funds to pay them. There was no bank in La Junta named the Colorado Trust Company but the checks were presented in due course to the Colorado Savings and Trust Company of that city as its name closely approximated that of the named bank and were dishonored because the accused had no account there in December, 1943, although he subsequently opened an account with such bank on 5 January 1944. The dishonored checks bearing the notation "no account" were admitted into evidence. After the checks had been dishonored the Park Lane Hotel received a letter from the accused stating that he had been "warned" that his account was delinquent and no checks for "replenishment" had reached them and requesting that the dishonored check be held until he could make arrangements to pay it. This letter was admitted into evidence (R. 42, 43, 44, 45-48, 48-55; Pros. Exs. 1, 2, 4, 6, 8, 9).

5. The accused, after explanation of his rights as a witness, testified that he had "done business" on various occasions with the Colorado Savings and Trust Company, La Junta, Colorado, and that he had cashed the two checks for "present expenses" although he knew he had no account at the bank but contended that he did "actually intend to make these checks good" because he gave his right name and address and then wrote the letter "to hold them off" as he did not intend "to cheat any of these

Denver business houses". He, while admitting his pay was his only source of income, spoke vaguely of having an account managed by his father of about "a thousand or fifteen hundred" dollars with the First National Bank, Charlottesville, Virginia, of which two-thirds was invested in stocks and bonds which he contended his father had used to ultimately redeem the checks when his deposit of $150, opening an account with the bank on 5 January 1944, had been applied to the liquidation of his note to the bank which had accelerated its maturity because of its delinquent installments. He admitted that he had been absent without leave as alleged but was silent upon the matters alleged in the Specification, Charge I (R. 57-68).

6. The Specification, Charge I, alleges that the accused at La Junta, Colorado, on or about 25 August 1943 "wrongfully and knowingly" sold a vacuum cleaner valued at $20.50, the property of the United States, furnished for the military service thereof. The alleged act is within the express interdiction of the applicable provision of Article of War 94 (MCM, 1928, page 224).

The accused pleaded guilty to the Charge and its Specification, and permitted such plea to stand after explanation of the effect thereof. The record of trial is void of any indication whatsoever that the plea was improvidently made. The plea of guilty admitted the material allegations of the Specification beyond a reasonable doubt and consequently amply supports the findings of guilty of Charge I and its Specification (Id. par. 64a, C.M. 118766 and 121429 [1918] Dig. Ops. 1912-40 JAG, Sec. 378 [3]).

7. The Specification, Charge II, alleges that the accused without proper leave absented himself from his organization at La Junta Army Air Field, La Junta, Colorado, from about 5 December 1943 to about 8 December 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." (MCM, 1928, par. 132).

The evidence contained in the morning report and the accused's admission of his guilt of this offense, as alleged, in his own testimony supplements his plea of guilty thereto. The evidence, therefore, establishes his guilt beyond a reasonable doubt of Charge II and its Specification and amply supports the findings of guilty thereof.

8. Specifications 1 and 3, Charge III, allege that on two designated occasions the accused "with intent to defraud, wrongfully and unlawfully" made and uttered two checks for $25 each wherein he represented that he had upon deposit with the named bank sufficient funds to pay them and thereby fraudulently obtained from each payee of said two checks $25 when he well knew that he did not have and not intending that he should have any account with the named bank for the payment thereof. The cashing of checks

against a nonexistent bank account is certainly conduct of a nature to bring discredit upon the military service (CM 202027 [1934] Dig. Ops., JAG, 1912-40, sec. 453 [22]).

The evidence for the prosecution conclusively shows that the accused made and uttered the two checks as alleged, receiving full value therefor, either in cash or services and also that at such times the accused had no account whatsoever in the bank involved and did not attempt to create such an account until about a month later. In the meantime the accused by letter to one of the payees attempted to secure delay in payment. The accused was bound to know that he had no account in the drawee bank and his action, since his income was limited to his pay, was prima facie fraudulent because he, therefore, could not reasonably have intended to have a sufficient account for the payment of the checks when presented. The accused in his testimony admits all of the essential elements of the offenses alleged except that he disavows a fraudulent intent, insisting that he intended to pay the checks and to create an account for such purpose. His actions, performed with full knowledge that he had no bank account, repel the acceptance of such view and inexorably compel the conclusion that they were fraudulent and that no intention existed in the mind of the accused, when the checks were cashed to have an account in the bank for their payment when presented. The evidence, therefore, beyond a reasonable doubt establishes the accused's guilt as alleged and abundantly supports the findings of guilty of Charge III and Specifications 1 and 3 thereunder.

9. The accused is about 22 years of age. The War Department records show that the accused had enlisted service from 12 August 1940 until 16 April 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.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications, as approved by the reviewing authority, and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Articles of War 61, 94 or 96.

Abner E. Lipscomb, Judge Advocate.

William H. Lambrecht, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 250223

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 Frank B. Stafford, Jr. (0-579329), Air Corps.

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

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

Myron C. Cramer

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

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

(Sentence confirmed but confinement remitted. G.C.M.O. 268, 6 Jun 1944)

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

SPJGV
CM 250231

4 APR 1944

UNITED STATES	)	THE INFANTRY SCHOOL
v.	)	Trial by G.C.M., convened at Fort Benning, Georgia, 4 February 1944. Dismissal.
Captain HARRY E. NEW (0-327105), 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. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Harry E. New, Third Service Command, Internal Security Division, attached to 3d Company, 1st Student Training Regiment, The Infantry School, was, at Fort Benning, Ga, on or about 17 December 1943, in the Civilian Dormitory, disorderly while in uniform.

Specification 2: In that Captain Harry E. New, Third Service Command, Internal Security Division, attached to 3d Company, 1st Student Training Regiment, The Infantry School,was, at Fort Benning, Ga, on or about 1 January 1944, while in uniform, disorderly on the Post.

He pleaded not guilty to and was found guilty of the Charge and all Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence but remitted the forfeitures adjudged and forwarded the record of trial for action under Article of War 48.

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

a. Specification 1.

Mrs. Mayme Arnold, Manager of the Post Exchange Cafeteria, and Miss Annie E. Hall, employee of the Officers' Mess, who resided in the Civilian

Barracks, Fort Benning, Georgia, heard a commotion in the hall outside their rooms in the barracks on 17 December 1943, between 1:00 and 1:30 o'clock a.m. Some of the other girls were telling accused he could not come into the barracks (R. 7, 13) and Mrs. Arnold heard one girl say, "Get the hell out of here" (R. 13). The accused came in the barracks calling for "Edith", and knocked on Miss Hall's door, who apparently did not leave her room immediately, but did go out a few minutes later. She said, "I hollered in a very rude tone" for him to get out (R. 7). Mrs. Arnold stepped into the hall from her room and saw Captain New arguing and quite angry. He made some remark about how cute she looked in her blue negligee and he would see how cute she was (R. 13, 14). She told him he could not come in the barracks and that she would call the guard. Both witnesses testified that accused then told Mrs. Arnold that "his name was New and would always be New" and that she could report him to any damned officer she pleased, that his car was outside, and he gave the Pennsylvania license number thereof (R. 7, 14). Mrs. Arnold did report the matter to the guard, who merely replied, "Yes Ma'm", and kept on walking (R. 14). Accused was quite angry after this and Mrs. Arnold testified that accused said "if any of us would come outside he would stomp us in the earth" (R. 14). Accused was drinking at the time (R. 11, 15).

For the defense:

Captain John H. Martin, accused's commanding officer, testified that he had never informed accused that the Civilian Barracks was off limits, nor was there any information to that effect that would normally be available to accused in his company or on the battalion bulletin board. This witness had no reason to consider accused anything but an excellent officer (R. 43).

In that portion of his unsworn statement pertaining to the offense under Specification 1, made through counsel, the accused stated that he came to Fort Benning on 28 November 1943 and had never been informed that the Civilian Barracks was off limits. A Captain Hoover had asked accused to get him a date and he immediately thought of a girl named Edith with whom he had previously had a conversation, and was told by the cashier at the Post Exchange that she lived in the Civilian Barracks. The accused and Captain Hoover then drove in accused's car to the Civilian Barracks, where accused knocked on the screen door, but received no answer. Lights were on in the building so he went into the hall, knocked on a door and said, "Hello, can you tell me where Edith lives." Someone replied, "Get the hell out of here. You are not supposed to be in here." He replied, "O.K. Will you please come to the door and answer a simple question?" Receiving no answer he went out into the street behind his car. In a few minutes about four girls came to the door and stood in the doorway. Accused asked if they could tell him where Edith lived. One of them then said, "You had better get to hell away from here or I am going to report you." Another girl asked "Edith who?" and accused replied, "The blonde Edith who works at the Officers' Mess", and

was told "Edith" did not live there. The girl who had first spoken said, "You had better get away from here or I am going to report you." She then called an M.P. who was walking in front of the building and asked him to run the accused away. The accused asked the M.P. if he could not knock on a door and ask a civil question, and the M.P. replied he didn't "know anything about it" and continued to walk his post. Accused then started for his car, and hearing something said about getting his license number he turned and said, "My name is New and it always will be New. My license number is Pennsylvania 8864J and you can report me to any damn officer you like." He was angry because of the way he had been treated. Thereupon, accused and Captain Hoover drove away (R. 46, 47).

b. Specification 2.

The accused, his wife, Mrs. Polleys and Captain King, riding in accused's car driven by Mrs. New, upon arrival at Outpost No. 1, Fort Benning, Georgia at about 1:00 a.m. on 1 January 1944, were stopped by Private First Class Erwin W. Lane and Private Grady P. Preston, military policemen, because Mrs. Polleys did not have a pass. Captain King and Mrs. Polleys went into the Outpost to obtain a pass for Mrs. Polleys. Mrs. New was asked to move the car as it was blocking traffic into the post. Accused then said he "wouldn't move the damn thing anywhere, that nobody would tell him to move his car", and resisted all efforts of his wife to move the car (R. 29, 32). Private Blanchard L. Kline, Jr., a motor patrolman, was attracted to the scene and met with the same results in his efforts to get the car removed. The accused had a glass in his hand which had just been drunk out of, which he handed to Private Kline with the remark that it had better be put some place before he (accused) smashed it in somebody's face (R. 18). Accused refused to show his A.G.O. card (R. 18, 29). Private Kline then told Mrs. New that the accused would have to be taken to the Provost Marshal's office to see the officer of the day (R. 19). The accused said he would not go, but Mrs. New said she would follow the military policemen to the Provost Marshal's office (R. 32). Captain King and Mrs. Polleys returned to the car and the group started for the Provost Marshal's office. At a stop sign at the intersection of two streets the car stopped and accused got out. Mrs. New drove around the corner and stopped. Accused then urinated in the street (R. 19, 32). Quite a few cars passed at this time (R. 24). After some insistence by accused that he be permitted to see Colonel Hobson, he was persuaded by Captain King to return to the car. He tried to get under the wheel but was not permitted to drive by the military police (R. 20). The party got under way but stopped at an intersection, where accused said he was going to take Captain King home first. Again starting, they arrived at the First Student Training area where the car stopped and accused insisted on seeing Colonel Hobson. At this time a carryall arrived and after an argument accused was placed in the carryall, hitting two M.P.'s with his arms as he jerked loose while on the way to the

carryall. Accused finally agreed to proceed to the Provost Marshal's if he could ride in the front seat of the carryall, which was permitted (R. 21, 33).

At the Provost Marshal's office accused was argumentative, referred to military police as sons-of-bitches, and at one time made for the gun rack, stating if he had a gun he would shoot all M.P.'s (R. 21, 34). It was necessary for Captain Hoegemann, Assistant Provost Marshal, to twice leave his office to quiet the accused. Finally accused was given the alternative of being released to go home and report back to the Provost Marshal at 0900 in the morning, or being locked in a cell for the night (R. 39). As accused did not know if he could get up in time the next morning, he remained (R. 54). Accused had been drinking and was quite angry during this episode (R. 26-27).

Defense evidence pertaining to Specification 2 consisted of the unsworn statement of the accused made through counsel, and the stipulated testimony of Mrs. New. Both tend to substantially corroborate the testimony of the prosecution witnesses, and do not traverse this testimony in its material aspects. The accused did say he had moved off the road about seven feet to a small tree at the time he urinated (R. 49). Mrs. New stated that at the time accused was put into the carryall by the military police he was pulled and pushed around by them (R. 52).

At the close of prosecution's case the defense moved for a continuance in order to have Mrs. New and Mrs. Polleys attend as witnesses (R. 40). No material variance between the testimony of the witnesses for the prosecution at the trial and their written statements of expected testimony, which the accused had seen prior to trial, could be shown by defense. Accused also knew in advance of the date set for his trial. The motion for the continuance was overruled (R. 41). There was clearly no abuse of discretion in this ruling.

4. The evidence shows that accused went to the Civilian Barracks at Fort Benning, Georgia between the hours of 1:00 and 1:30 in the morning of 18 December 1943, in search of a girl named "Edith". This barracks was off limits to military personnel, though this fact was not known to accused. After being told rather roughly by several of the women residents of this barracks to leave, and after a guard had been requested to make accused leave, he became highly incensed. He told the women his name was New, would always be New, and they could report him to any damn officer they wanted to. One of the women testified that after accused had gone out of the barracks he told them that if any of them would come out he would stomp them into the earth. The accused had been drinking upon this occasion.

About one o'clock in the morning on 1 January 1944, the accused's car, driven by his wife, Mrs. New, and with accused, Mrs. Polleys and Captain King as passengers, arrived at Outpost No. 1, Fort Benning, Georgia. Mrs. Polleys did not have a pass. She and Captain King went into the Outpost to obtain a pass. The guard asked Mrs. New to move the car which was blocking traffic into the post. Accused said she did not have to move the car

and that no one could tell him to move. After considerable argument along this line, the military police told accused they would have to take him to the Provost Marshal's office. The accused said he would not go, but Mrs. New consented to drive to the Provost Marshal's office. Captain King and Mrs. Polleys returned to the car and the group, accompanied by motor patrolmen, started for the Provost Marshal's office. At an intersection the car stopped and accused got out. Mrs. New drove around the corner and stopped. Accused then urinated in the street, during which time several cars passed. Accused insisted he be permitted to see Colonel Hobson. At this time a carryall arrived and accused was forcibly placed in it. At the Provost Marshal's office accused was argumentative, referred to military police as sons-of-bitches, and at one time made for the gun rack, stating that if he had a gun he would shoot all M.P.'s. It was necessary for Captain Hoegemann, Assistant Provost Marshal, to twice leave his office to quiet the accused. Accused was drinking upon this occasion, and was quite angry.

5. The evidence establishes beyond all reasonable doubt that accused was guilty of the Charge and each of its two Specifications. His conduct was clearly in violation of the 96th Article of War.

6. War Department records show that accused is 31 years of age. He graduated from Clemson College, South Carolina, and was for several years prior to entering the Army a textile engineer. He was commissioned second lieutenant, Infantry-Reserve, in 1935, promoted to first lieutenant, Infantry-Reserve, in 1937, and entered on active duty 3 February 1942. He was given a temporary promotion to the grade of captain, Infantry, Army of the United States, 5 December 1942.

7. Five of the six members of the court joined in a letter recommending clemency because of Captain New's reputation, previous good record, general appearance and demeanor before the court, and the belief that he will make an excellent officer. The record contains letters attesting the accused's good character from J. Mac. Rabb; George Wrigley, partner in the firm of J. E. Sirrine and Company; John M. Holmes, General Secretary of the Y.M.C.A.; A. H. Cottingham, General Manager, Victor Monaghan Company; John W. Hunt, Assistant Manager, Basketeria Store; and B. Rhett Turnipseed, formerly pastor of Buncombe Street Methodist Church, all of Greenville, South Carolina. There is also a letter requesting clemency signed by Brigadier General W. F. Tompkins, G.S.C.

8. 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, to support 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 96th Article of War.

Thomas H. Tappy, Judge Advocate.

Walter McTeddie, Judge Advocate.

Robert B. Harwood, Judge Advocate.

1st Ind.

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 Captain Harry E. New (0-327105), Infantry.

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

Myron C. Cramer

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

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

(Sentence as approved by reviewing authority confirmed. Execution suspended. G.C.M.O. 226, 29 May 1944)

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

SPJGK
CM 250233

4 MAR 1944

UNITED STATES	)	THIRD SERVICE COMMAND
	)	
v.	)	Trial by G.C.M., convened at Camp Lee, Virginia, 1 February 1944. Dismissal.
	)	
First Lieutenant WILLIAM E. MOORE (O-1575477), Quartermaster 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 Charges and Specifications:

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

Specification 1: In that 1st Lieutenant William E. Moore, QMC, Quartermaster Corps Replacement Pool, Quartermaster Replacement Training Center, did, without proper leave, absent himself from his organization and station at Camp Lee, Virginia, from about 6 November 1943, to about 20 November 1943.

Specification 2: In that 1st Lieutenant William E. Moore, QMC, Quartermaster Corps Replacement Pool, Quartermaster Replacement Training Center, did, without proper leave absent himself from his organization and station at Camp Lee, Virginia, from about 12 January 1944 to about 21 January 1944.

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

Specification 1: In that 1st Lieutenant William E. Moore, QMC, Quartermaster Corps Replacement Pool, Quartermaster Replacement Training Center, being indebted to the Poweshiek County National Bank in the sum of three hundred dollars ($300.00) on a loan made to the said Lieutenant Moore on or about 18 June 1943, which amount became due and payable on 15 July 1943, did, from 15 July 1943, to 27 November 1943, dishonorably fail and neglect to pay said debt.

Specification 2: In that 1st Lieutenant William E. Moore, QMC,

Quartermaster Corps Replacement Pool, Quartermaster Replacement Training Center, being indebted to Burt H. Speth, Grinnell, Iowa, in the sum of ninety dollars forty-five cents ($90.45) for refreshments and other loans in United States currency, which amount became due and payable on or about 25 July 1943, did, from 25 July 1943 to 27 November 1943, dishonorably fail and neglect to pay said debt.

Specification 3: In that 1st Lieutenant William E. Moore, QMC, Quartermaster Corps Replacement Pool, Quartermaster Replacement Training Center, did, at Camp Lee, Virginia, on or about 28 November 1943, with intent to deceive Captain William H. Coogan, QMC, Investigating Officer, officially state to the said Captain William H. Coogan, that he had not been married subsequent to his marriage on 1 June 1935 to Clara M. Bellinger, which statement was known by the said Lieutenant Moore to be untrue.

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

Specification 1: In that 1st Lieutenant William E. Moore, QMC, Quartermaster Corps Replacement Pool, Quartermaster Replacement Training Center, having contracted and entered into a legal and valid marriage with one Clara Bellinger on or about 1 June 1935 in the City and State of New York, did, at Santurce, Puerto Rico, on or about 11 October 1941, while in the military service of the United States, contract and enter into a bigamous marriage with one Laura Sayers, without having been first duly divorced from the said Clara Bellinger, who was living at that time, and accused concealed his former marriage, and cohabited with Laura Sayers as his wife having one child by her born 16 Aug 1943.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

He pleaded not guilty to and was found not guilty of Specifications 2 and 3 of Charge III, and pleaded guilty to and was found guilty of all the other Specifications and of the Charges. 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 only so much of the sentence as provided for dismissal, and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

a. Specification 1, Charge I.

The prosecution introduced in evidence the morning report of the 51st Headquarters and Headquarters Company, Quartermaster Base Depot, Camp Lee, Virginia, for 11 November 1943, showing accused "dy to AWOL effective 0600 EWT" as of 6 November 1943 (Pros. Ex. 1). While so absent, accused was relieved from duty with that organization and assigned to the Quartermaster Replacement Pool, Quartermaster Replacement Training Center, Camp Lee, by paragraph 8, Special Orders No. 303, Army Service Forces, Office of The Quartermaster General, dated 15 November 1943 (Pros. Ex. 2). The morning report of the Quartermaster Replacement Pool for 24 November 1943, corrected in the minor detail of the hour of accused's return by the morning report of 26 November 1943, showed accused "From AWOL to dy 2100 EWT 20 Nov/43, no specific dy asgd." (Pros. Ex. 3).

b. Specification 2, Charge I.

The prosecution introduced in evidence the morning report of the Quartermaster Replacement Pool, Quartermaster Replacement Training Center, Camp Lee, Virginia, for 21 January 1944. It showed accused from "Dy to AWOL 1130 E.W.T. 12 Jan/44, no specific dy asgd," and from "AWOL to arrest in qtrs. 1600 E.W.T., no specific dy asgd" (Pros. Ex. 4).

c. Specification 1, Charge II.

It was stipulated between the prosecution and accused and his counsel, that if present in court and sworn as a witness, Mr. R. S. Kinsey, Executive Vice President and Cashier of the Poweshiek County National Bank of Grinnell, Iowa, would testify as follows: that on 18 June 1943, while stationed at Army Administration Officer Candidate School Number 2, at Grinnell, accused negotiated a loan of $300 from that bank through witness. Accused gave a note, payable with interest, on 15 July, and a few days before its maturity accused informed witness that he would have the money within a very short time. On 23 July 1943, accused telegraphed witness from Niles, Ohio, "Check for note mailed this date", but no remittance was received, and "numerous" letters mailed to accused at his Niles address were not answered. In response to a letter from witness to accused's commanding officer, witness received a telegram from accused on 21 October 1943 asking acceptance of terms of three equal monthly installment payments, beginning 1 November 1943, to which witness telegraphed his acceptance. No payments had been received at the time of witness' statement (Pros. Ex. 9).

Captain William H. Coogan, Headquarters, Quartermaster Replacement Training Center, Camp Lee, Virginia, testified that he was the investigating officer in the case, that he had questioned accused on 29 November 1943, that he had read to accused Article of War 24 and explained to accused his rights to make a statement or to remain silent, and that accused had made a statement under oath. Accused told witness that he had borrowed the $300 from

the bank "some time around 18 June 1943", that he had been "contacted" by five different officers upon as many occasions at Camp Lee with regard to his indebtedness, that he had arranged to repay the money by three payments of $100 per month, in the telegram sent to the bank "some time around" 29 September 1943, but that he had made no payments (R.19).

d. Specification 2, Charge II.

It was stipulated between the prosecution and accused and his counsel that if present in court and sworn as a witness, Mr. Burt H. Speth, the operator of Russ' Tavern, Grinnell, Iowa, would testify as follows: that on 2 July 1943 accused became indebted to Speth in the amount of $15 cash and 45 cents for merchandise, and that on 17 July 1943 accused became further indebted to Speth in the amount of $75, on accused's personal check, which latter sum accused promised to repay on 25 July 1943. Speth wrote a letter to the Commanding Officer, "AST Units", Grinnell, Iowa, reporting this unpaid account, on 15 September 1943, although it appears from evidence upon other specifications that accused was no longer in Grinnell at that time. On 21 October 1943 accused promised witness by long distance telephone call (from what place witness did not state) to pay the entire account by 1 November 1943. On 23 October 1943 witness received a letter from Lieutenant Colonel Harry A. McColly, Executive Officer, 51st Quartermaster Base Depot, Camp Lee, concerning the status of the account. Witness had heard nothing from accused since 21 October 1943 and as of 27 November 1943, the entire account remained unpaid (Pros. Ex. 10).

Captain Coogan testified that accused had stated to him at the investigation that he had "borrowed" $90.45 from Burt Speth, "some time around the 17th, 18th or 19th of July, 1943", that he had been "contacted" by the five officers at Camp Lee about repaying the money, that he "had made arrangements to repay * * * the loan * * * in two equal payments over a period of two months", and that he had not made the payments as of the date of the investigation (R.19).

e. Specification 1, Charge III.

Mrs. Clara B. Moore, Petersburg, Virginia, testified that she married accused on 1 June 1935, in New York City, New York. The prosecution introduced in evidence a Certificate of Marriage issued by the Office of the City Clerk of that city showing that a marriage was performed on that date between William E. Moore of Wilson, North Carolina, and Clara M. Bellinger of New York City (R.9,10; Pros. Ex.5). Mrs. Moore stated that she had never divorced accused, and had never discussed the subject with him. To the best of her knowledge he had never divorced her, and they were then living as husband and wife. She stated that she had never lived in Ohio (R.9,10). The prosecution also

offered in evidence a photostatic copy of a marriage certificate, in the English and Spanish languages, issued by the "Departamento de Sanidad" (Department of Health) of Puerto Rico, dated 11 October 1941, showing the performance of a marriage between "William E. Moore" and "Laura M. Sayers" by one Andrew I. Keener, clergyman, of Santurce, Puerto Rico (Pros. Ex. 7), and a stipulation between prosecution and accused and his counsel that accused and Laura M. Sayers, of Niles, Ohio, were principals in the marriage ceremony of which Exhibit 7 was a record (Pros. Ex. 6). Paragraph 9 of Special Order Number 20, Headquarters, Puerto Rican Department, dated 20 May 1942, authorized the transportation at Government expense to Niles, Ohio, of Laura M. Moore, wife of Master Sergeant William E. Moore, of the Quartermaster Officer Candidate School, Camp Lee, Virginia (Pros. Ex. 8). Lieutenant Colonel Frank B. Maxim, Headquarters, The Quartermaster School, Camp Lee, Virginia, testified that on "one Sunday afternoon" between July and September of 1942 he had been introduced by accused to a woman as accused's wife; that she had come from Ohio to Camp Lee, and that prior thereto she had been a teacher in Puerto Rico. Witness was not able to describe or identify her further (R.11,12).

f. Specification 3, Charge II.

Captain Coogan testified that at the investigation, accused had told him that he (accused) was married to Clara M. Bellinger in the City Hall, New York City, on 1 June 1935, and that when asked if he had been married subsequently, accused replied that he had not. Accused said that he had one child by Laura Sayers of Niles, Ohio, born on 16 August 1943. Accused told witness that he had visited Laura Sayers in Niles, but was "very indefinite" in his reply to witness' question whether these visits were as her husband, or otherwise. Accused stated to Captain Coogan that when there, he and Laura Sayers had occupied separate rooms, offering no explanation of this to her parents, who "never asked any questions"; that he had been introduced to them as "this is Bill Moore, the one I have been talking about"; and that "neither one of us [accused or Laura Sayers Moore] has ever mentioned marriage" (R.16-18).

Accused's rights as a witness were explained to him by the law member of the court. He did not testify or offer evidence concerning any of the Specifications to which he had pleaded guilty (R. 20,21).

4. The evidence requires no recapitulation. It is clear and convincing beyond all doubt on all of the Specifications to which accused pleaded and of which the court found him guilty. Any minor irregularities in the admission of evidence were cured by accused's pleas, the nature of which were explained to him and understood by him.

5. On the face of the record the trial of the offense of the bigamous marriage was barred by the Statute of Limitations set forth in Article of

War 39, since it took place on 11 October 1941, and accused was not arraigned until 1 February 1944, and was not absent from the jurisdiction of the United States in the interval. Accused's plea of guilty must be construed as a waiver of this defense (CM 195863, Zurkoskey). Though it is not shown in the record that the defense counsel informed accused of his right to enter this plea in bar, it has been held that -

> "* * * there is no requirement that it appear of record that such a duty was properly performed by military counsel for the defense, and, in the absence of such a requirement, the prescription that it be performed 'before the trial' [par. 45b, M.C.M., 1928] removed it entirely from the record. In the absence of an affirmative showing to the contrary, it may be presumed that such military counsel performed * * * the general duties of his office prescribed by paragraphs 43b and 45 b, Manual for Courts-Martial, since the law presumes that public officers duly perform their official functions, and this presumption continues until the contrary is shown" (Dig. Op. JAG, 1912-1940, sec. 396(1)).

The Board has considered the previous opinion of this office in CM 195388, Flannagan (Dig. Op. JAG, 1912-40, Sup. I, sec. 396(1)), and believes that the holding therein is not in conflict with its opinion in the present case, on the different circumstances involved in the respective cases.

6. War Department records show that accused is 38 years of age. He attended the University of North Carolina for two years, but did not graduate. He enlisted in the United States Army on 30 August 1927, and served continuously as an enlisted man until 13 June 1942, upon which date he graduated from The Quartermaster School, Camp Lee, Virginia, and was commissioned a Second Lieutenant in the Army of the United States. In an indorsement to an application made by accused in December 1941, for appointment as a Warrant Officer, Junior Grade, Major Allan M. Emerson, Commanding Officer, 25th Field Artillery, stated that accused's character and general fitness were "excellent". In recommending accused for attendance at Officers' Candidate School, Colonel James H. Genung, Jr., stated that accused had "rendered valuable assistance over and above that required in the ordinary line of duty", and that his efficiency rating was "superior". In recommending accused's promotion to the grade of First Lieutenant, Colonel William H. Hammond, Infantry, Commanding Officer of Officers' Candidate School Number 2, Grinnell, Iowa, stated that accused had performed his duties as an instructor at that school in an "excellent" manner. War Department records also show that on 10 April 1937, accused was reduced from the grade of staff sergeant to private, the reason for this being, according to a letter from Colonel C. C. Oakes, Finance Department, Headquarters, Panama Canal Department, that he had used intoxicating liquor to an extent that on several occasions it had

interfered with his work, that he had been remiss in payment of debts to the proprietor of a restaurant and saloon in the City of Panama, and that he had not accounted for $63 given him by another enlisted man for the payment of the other man's post exchange bill, charges of embezzlement being withdrawn when the money was finally repaid. Accused had, however, again attained the rank of Master Sergeant at the time he was sent to Officers' Candidate School.

7. 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 as approved by the reviewing authority 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 Articles of War 61 and 96.

Lucy E. Eson, Judge Advocate.

Wm Wannstiel, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 23 MAR 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant William E. Moore (0-1575477), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence as approved by the reviewing authority and to warrant confirmation thereof. 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.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 210, 26 May 1944)

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

SPJGV
CM 250261

18 APR 1944

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Barksdale Field, Louisiana, 1 February 1944. Dismissal.
Second Lieutenant RALPH E. JOHNSON, Jr. (0-747811), Air Corps.	

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 96th Article of War.

Specification: In that Second Lieutenant Ralph E. Johnson, Jr., 644th Bombardment Squadron (L), 410th Bombardment Group (L), Muskogee Army Air Field, Muskogee, Oklahoma, did, on or about 24 December 1943, at a point approximately three (3) miles southwest of Hanna, Oklahoma, wrongfully and unlawfully fly an A-20 C military airplane at an altitude of less than 500 feet, this in violation of Paragraph 16a (1) (d), AAF Regulation 60-16, dated September 9, 1942.

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

Specification: In that Second Lieutenant Ralph E. Johnson, Jr., * * *, did, on or about 24 December 1943, at a point approximately three miles southwest of Hanna, Oklahoma, suffer an A-20 G airplane, Number 42-86891, of the approximate value of $145,660.00, military property belonging to the United States by negligently causing said airplane, flown by Second Lieutenant Benjamin D. Randolph, over which he had command, to be damaged by collision with electrical wires.

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. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

For the convenience of the court and the reviewing authority an extract copy of paragraph 16a (1) (d), Army Air Forces Regulation No. 60-16 dated 9 September 1942 was read into evidence, this regulation being as follows:

"16. Minimum altitude of flight.

a. Except during take-off and landing, aircraft will not be operated

(1) below the following altitudes:

* * * * * *

(d) 500 feet above the ground elsewhere than as specified above." (The operation of aircraft in this case did not fall within any of exceptions listed above).

There was also received in evidence a copy of Operations Order No. 81 of the 644th Bombardment Squadron (L), 410th Bombardment Group (L) for the date of 24 December 1943 (R. 7; Ex. B), which document showed that accused and Second Lieutenant Benjamin D. Randolph flew a mission 24 December 1943 between the hours of 0900 and 1045, the accused flying an A-20 C type plane, serial number 41-19161, and Lieutenant Randolph flying an A-20 G type plane, serial number 42-86891. A copy of accused's certificate that he had read and thoroughly understood the Regulations, Memorandums and Letters contained in the safety file was without objection received in evidence (R. 7; Ex. C). It was stipulated that the value of the A-20 G airplane, serial number 42-86891 flown by Lieutenant Randolph on 24 December 1943, was, on that date, $145,660 (R. 8).

By deposition (R. 7; Ex. D), Second Lieutenant Benjamin D. Randolph testified that on 24 December 1943 he flew a formation mission with the accused, the accused piloting an A-20 C plane, serial number 41-19161 and witness flying an A-20 G plane, serial number 42-86891. The take-off was from Muskogee Army Air Base, and while accused was acting as flight leader he peeled off, and was immediately followed by this witness. Suddenly accused pulled up, and as witness followed, his plane struck a wire. This wire was approximately 100

feet above the ground. At this time the accused's plane was from 100 to 300 feet above the ground. Neither the accused nor witness were authorized to fly below 500 feet on this mission.

On cross-examination this witness stated that he and accused were instructed to alternate as flight leader on this mission, and that this was the first time accused had ever acted as flight leader, and was not experienced as such. This accident occurred over a river, and resulted from making a pass at the river from an altitude of approximately 3,000 feet. An A-20 G plane, being heavier, mushes more than an A-20 C, and witness' plane probably mushed more than the A-20 C plane flown by accused. This witness feels that dry runs of the type they executed are good training for combat missions. He has flown with accused as co-pilot and found him very efficient, and considers him one of the finest officers he has ever met.

It was stipulated that if Mr. Allen Wisdom were present he would testify that he was employed as patrolman by the Public Service Company of Oklahoma. On 24 December 1943 he and another employee went to a point about four miles southwest of Hanna, Oklahoma and discovered two high tension wires on the ground on the bed of the South Canadian River, and a third wire damaged. These wires are strung on poles 90 feet high and sag to about 60 feet above the river bed (R. 8).

4. For the defense:

Captain Stuart R. Lauler, accused's commanding officer for over four months, testified that the 3,000 feet altitude noted on accused's operations order of 24 December 1943 was an error due to inexperienced clerks and no specific altitude was given accused for this particular mission (R. 9). The damage to the plane hitting the wire consisted of damage to the two cowls and nose, which has been repaired, two welded spots in the tail due to contact with the power line, and three propellor blades needed replacing. The plane will be flyable (R. 9). After the accident the plane was flown in by Lieutenant Randolph with approximately six feet of cable trailing from the wing. While low flying cannot be condoned, this witness doubts that accused's offense was serious, since dry runs of this nature are more or less instinctive with all attack pilots, and are to be distinguished from buzzing a town. The accused is one man this witness would want on his wing in combat, as he considers him one of the two natural pilots he has met in the last three years in the Air Corps. His devotion to duty is exemplary, and as an officer accused's rating is superior (R. 10).

On cross-examination and examination by the court Captain Lauler testified that AAF Regulation 60-16 is applicable at all times except on a

specifically ordered low flying mission, and accused was not on such a mission. AAF Regulation 60-16 is included in the Safety File (R. 10).

The accused, at his own request, took the stand and made the following unsworn statement:

"Members of the court, I admit that I flew low; that I acted on impulse and through my own negligence flew too low, but I still would like to continue with my squadron. I feel that I could be of the best service to my country and to the war effort by serving with my squadron with whom I have trained for four and one-half months. I still would like to be with them".

5. The evidence thus shows that on 24 December 1943, while serving as flight leader of a flight composed of a plane flown by accused and a plane flown by Lieutenant Randolph, the accused peeled off from an altitude of about 3,000 feet and made a dry run or simulated strafing attack on a river near Hanna, Oklahoma. As the planes pulled suddenly out of this maneuver the plane piloted by Lieutenant Randolph struck a high tension wire running across the river, damaging its cowls, nose, and propellor blades. This wire was strung on poles 90 feet high and sagged to about 60 feet above the river bed. During this maneuver the plane flown by accused descended to within 100 to 300 feet above the ground.

6. The evidence establishes beyond all reasonable doubt that the accused was guilty of all Charges and Specifications.

7. War Department records show that the accused is 26 years of age. He graduated from the Tucson Senior High School, Tucson, Arizona, and attended the University of Arizona for two years. He was inducted into the military service on 7 August 1942, and appointed second lieutenant, Air Corps, in the Army of the United States, 22 June 1943.

8. All members of the court trying this case have signed a letter of clemency addressed to the Commanding General, Third Air Force, Tampa, Florida. The pertinent parts of this letter are as follows:

"2. It is recommended by all members of this court who participated in this trial that clemency be shown the convicted officer for the following reasons:

"a. It appears from the record that the violation of flying regulations committed by Lieutenant Johnson was impulsive as distinguished from a premeditated willful violation. It is felt that the reviewing authorities should differentiate between a willful and deliberate violation such as buzzing a town in

order to 'show-off' and an impulsive and instinctive violation which would appear to be a normal reaction following an excessive period of combat training which involved low flying, strafing, and ground support tactics.

"b. The age of the accused.

"c. The excellent service and character of the accused.

"d. The salvage value of the accused.

"3. The court recommends to the Commanding General that due consideration be given to the above named extenuating circumstances and facts, and that due consideration be given to commutating the sentence of the court to a lesser sentence of restriction and a forfeiture of pay."

9. 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. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 83rd or 96th Article of War.

Thomas N. Tappy, Judge Advocate.

Herbert M. Kiedner, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 250261

1st Ind.

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 Second Lieutenant Ralph E. Johnson, Jr. (0-747811), 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.

3. Consideration has been given to a recommendation for clemency signed by all members of the court and also to the attached memorandum from the Commanding General, Army Air Forces, to The Judge Advocate General, dated 20 March 1944, stating he has personally considered the evidence in this case and that in his opinion the best interests of the service will be served if the sentence is approved and executed. I concur in the views expressed by the Commanding General, Army Air Forces, and recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Memo from Gen. Arnold 20 March 1944.
Incl.3-Dft. ltr. for sig. Sec. of War.
Incl.4-Form of action.

(Sentence confirmed. G.C.M.O. 242, 30 May 1944)

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

SPJGQ
CM 250293

9 MAR 1944

UNITED STATES	)	PERSIAN GULF COMMAND
v.	)	Trial by G.C.M., convened at Andimishk, Iran, 6 January 1944. Dismissal.
Second Lieutenant ROY L. RILEY (0-1635257), Signal Corps.	)	

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

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

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

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

Specification: In that Second Lieutenant Roy L. Riley, Signal Corps, Provisional Unit 2726th Signal Company, was at Sultanabad, Iran, on or about 11 September 1943 in a public place, to wit, a house of prostitution, commonly known as the "White House", drunk and disorderly while in uniform.

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

Specification 1: (Finding of not guilty).

Specification 2: In that Second Lieutenant Roy L. Riley, Signal Corps, Provisional Unit 2726th Signal Company, was at Sultanabad, Iran, on or about 11 September 1943 drunk and disorderly in uniform in a public place, to wit, a house of prostitution commonly known as the "White House".

He pleaded guilty to Specification 1 of Charge II and to Charge II and not guilty of the other Specifications and Charge. He was found guilty of the Specification of Charge I and Charge I and of Specification 2 of Charge II, excepting, in both Specifications, the words "drunk and", and not guilty of Specification 1 of Charge II. 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 evidence for the prosecution briefly summarized, is as follows:

The accused was a member of Provisional Unit, 2726th Signal Company, stationed at Camp Scott, near Sultanabad (Sultanabad and Arak being interchangeable names for the same town) in the Persian Gulf Command, Iran (R. 2, 4, 31). He was serving in the capacity of Assistant Adjutant of the Post (R. 8, 19, 23).

In the town of Sultanabad there were several houses of prostitution among which was one known as the "White House" (R. 6, 11, 19) and it was customary for the military police stationed at Camp Scott to make nightly, routine inspections of these houses to determine whether military personnel were violating any of the rules and regulations whereby such places were, from time to time, declared to be "out of bounds" or "off limits" (R. 15, 19, 22). It is not certain whether the "White House" was "out of bounds" for officers on the night of 10-11 September 1943 (R. 8, 15, 20, 23, 32). It was a place to which Americans, British and Persians had free access and it was evidently well patronized for "everybody went there" (R. 19).

In the late evening of 10 September 1943 the accused was one of a group of eight or ten officers who had gone to Sultanabad and had dinner and a few drinks of wine at the "Yankee Bar" (R. 5, 11). With regard to uniforms Lieutenant Fredolin J. Litteken testified "We were all in khaki" (R. 10). During the course of the evening it was suggested that the group make an "inspection" of the brothel area in the town (R. 5). Second Lieutenant Theodore D. Franzek, who was the provost officer for the area, was present but no one asked him about making the inspection trip, although his duties included jurisdiction over the military police patrols in the brothel areas (R. 33, 34).

At some time around midnight the group of officers left the "Yankee Bar" and returned to Camp Scott (R. 5, 11), where some of them, including Lieutenant Franzek, left the party and went to their quarters (R. 5, 11, 34).

The other officers, however, returned to Sultanabad, presumably for the purpose of making an "inspection" trip to the "White House" for that is where they went (R. 6, 11). Second Lieutenant Litteken, of the 791st Railway Operating Battalion, said all of the officers were making the "inspection" (R. 6); that "nobody in particular was in charge"; that it was "more or less an inspection of curiosity more than anything else" (R. 8); and that "there were officers all over the place"

and "we all talked to the girls" but he did not recall whether any of the officers "went into any of the rooms with the girls" (R. 7). Lieutenant William T. Murphy, 762nd Diesel Shop Battalion, was, however, of the opinion that the accused was making "the inspection" in his capacity as "Adjutant" (R. 11) and when two military policemen, who were making their nightly inspection of the brothel area, came to the "White House" and one of them demanded the name of a warrant officer who was accompanying the officers from Camp Scott, Lieutenant Murphy ordered him to tear up the paper upon which he had written the warrant officer's name informing the policeman that they (the officers) were on "an inspection trip" (R. 11, 12, 16, 22). The military police then left the "White House" and returned to Camp Scott where they reported the incident to Staff Sergeant Daniel F. Kennard, Company B, 727th Military Police Battalion, who was in charge of the detachment of military police at that post. Sergeant Kennard then accompanied the two military policemen back to the "White House" (R. 16, 22, 26). As soon as they arrived at the brothel, Private First Class Russell Pierson and Sergeant Kennard went upstairs (R. 22) where they found a captain, undressed, in bed with a girl (R. 24) and two other officers in bed with girls in two other rooms (R. 27). Meanwhile Privates First Class Kopchik and John L. Rogers remained standing at the main entrance in the courtyard (R. 17, 22, 27).

At this point the accused appeared on the scene brandishing a service pistol, gave a command to Kopchik and Rogers to "move in" and, holding the pistol at an angle to the floor, fired one shot. Both Privates First Class Kopchik and Rogers distinctly heard the clicking sound of an automatic pistol being cocked just prior to the shooting (R. 17, 22). The policemen had never heard such an order as "move in" and, being confused and fearful of the consequences, backed up and stood against the wall (R. 17, 20, 21, 22, 24, 25, 27). The accused, watching them, said "you boys don't understand commands" (R. 23). The accused then began to shout, called for Sergeant Kennard, saying: "Where is Sergeant Kennard? I want him down here" (R. 20, 21), and ordered Private First Class Kopchik to go and get him (R. 23). Sergeant Kennard got lost in trying to get in behind the accused without being seen and he returned to Camp Scott (R. 27). Privates First Class Pierson and Kopchik soon rejoined Private First Class Rogers, however, in the courtyard and the accused, who still had the pistol in his hand, said "I'm relieving you of your duties" and ordered them to get out (R. 18, 25).

By this time Lieutenant Murphy who had heard the pistol shot came into the courtyard, went up to the accused who appeared to have "lost his head" and asked him to give him the pistol (R. 13), but the accused told him to stand back, that he could take care of himself (R. 23). Lieutenant Litteken had also heard the shot and, as he came into the courtyard, heard the accused telling the military police to get out. He approached the accused and asked him to give up the gun which he

refused to do, saying it had gone off accidentally and that he was all right. The accused then stuck the pistol in his belt as he was not wearing a holster (R. 9, 17). An altercation then arose in which the accused ordered the military police to leave, and Lieutenant Litteken ordered them to stay (R. 6, 23). Lieutenant Litteken tried to countermand the accused's order "so that we could iron it out right then and there without further ado" (R. 6). When the police were told by Lieutenant Litteken "Don't go" they told him they could not argue with officers. Lieutenant Litteken then said: "Well, I'm an officer, I'm giving an order to stay here" and the accused countered by saying: "As Assistant Adjutant of Camp Scott, I demand that these men be relieved of their duties". Whereupon the military police left (R. 23).

As soon as the military police arrived in camp they reported the incident to Captain Thomas F. Kenney, the post commander (R. 18, 30). By the time he had dressed, several jeeps drove into camp and as he approached one of them he saw the accused driving it. When he saw the exposed pistol sticking in the accused's belt he reached over, removed it and examined it, noting powder marks and an odor of burnt powder in the barrel. He then talked with the accused and Lieutenant Murphy and interviewed each of the military police, including Sergeant Kennard, who arrived during the discussion. The accused in the interview, gave as his reason for having fired the pistol shot "that the MPs had not moved into the courtyard at his command and that when he gave the command, he expected somebody to act" (R. 31).

According to Captain Kenney's testimony it was the duty of the accused, in his capacity as adjutant, to see that the military police were doing their duty although Lieutenant Franzek as provost officer actually guided the military police activities. There had been no special orders placing the brothel area of Sultanabad under restrictions but there was a verbal order in effect at the time establishing a 9 o'clock curfew in the town and this order was enforced by the military police. While there had been instances of military police apprehending enlisted men in the brothel area there was no serious condition requiring a periodic check of the area by officers. Captain Kenney knew of nothing that had happened recently in Sultanabad to cause the so called "inspection" to be made by the accused and his fellow officers. He had neither ordered it to be done, nor did he have any knowledge of it, until the matter was brought to his attention after the episode at the "White House" on the night of 10-11 September 1943 (R. 32, 33).

Captain Kenney (R. 32), Lieutenant Litteken (R. 7), Lieutenant Murphy (R. 11), Private First Class Kopchik (R. 19) and Sergeant Kennard (R. 26) were all of the opinion that the accused was not drunk on the night of 10-11 September 1943. Captain Kenney stated that it was apparent the accused had been drinking and that he was under the influence

of alcohol (R. 32) but Lieutenant Murphy said he was not (R. 11). Lieutenant Franzek was of the opinion that the accused had not lost "control of his actions" because of any alcohol he had consumed (R. 35).

4. The accused, having been informed of his rights, elected to be sworn as a witness and testified as follows:

On the evening of 10 September 1943 he had gone to Sultanabad in company with eight other officers and a warrant officer where they had dinner at the "Yankee Bar". He had previously borrowed a .45 caliber automatic which he carried during the evening in his coat pocket. After dinner there was a discussion regarding the advisability of "putting the town off limits to all troops" and it was "decided to make an inspection of the town and the brothel areas". Lieutenant Franzek, the acting provost marshal, was present but accused said "it was given me to understand that he did not desire to go along".

These officers then returned to Camp Scott for the purpose of getting cigarettes, which could not be purchased in town. Lieutenants Franzek and Wilbur left the group at Camp Scott while the others returned to Sultanabad and proceeded to the "White House". They all entered the place in a group and the accused "looked over the rooms downstairs, then upstairs and then went to the back courtyard" after which he inspected the alleyways looking for American motor vehicles which might have been taken and used without authority. This he did in his capacity as motor officer of Camp Scott.

When he returned and entered the courtyard through a passageway he found military policemen and a truck driver blocking the doorway. He told them to move inside and when they failed to obey he again told them to move inside which they then did. As he proceeded to enter the courtyard he was obliged to step down and, in doing so, he stumbled and the pistol, which he had been carrying in his hand while inspecting the alleys, was accidentally discharged. The pistol was at the time pointed at the ground at a 45 degree angle and he was later informed "that the projectile had struck the wall near the floor, about twelve feet from the entrance" to his right. The policemen were, at the time, to his left.

The accused then called several times in a loud voice for the sergeant of military police, but when the sergeant failed to respond he sent Private First Class Kopchik to get him. At this time Lieutenants Murphy and Litteken appeared and requested the accused to give up his pistol which he refused to do, sticking it in his belt. He then ordered the police to return to camp and wait for him there, but Lieutenant Litteken countermanded the order. Thereupon the accused again ordered them to leave telling them that, as assistant adjutant of Camp Scott, he was giving them a direct order, and they left.

All of the officers except Lieutenant Litteken, then returned to Camp Scott together where, when theystopped at the officers' quarters, Captain Kenney, the post commander, relieved the accused of his pistol. Thereupon Captain Kenney, in turn, interviewed one of the military police privates, Sergeant Kennard and the accused, after which the accused was told he could go to his quarters (R. 36, 37).

He denied having cocked the pistol before it was fired (R. 38) and stated that he was familiar with the use of pistols as he had been handling them for four years in the Army (R. 39).

It was orally stipulated between the prosecution and the defense that if Major Allen J. Stevens, Cavalry, the former commanding officer at Camp Scott, were present he would testify as follows:

> "The following statement in behalf of Second Lieutenant Roy L. Riley is based on my close personal observation of him over a period of several months. This officer has over this period, demonstrated his ability in a commendable manner, and proved his efficiency in the execution of his duties to which he has been assigned.
>
> "He has at no time conducted himself in a manner unbecoming to a commissioned officer."

5. The accused stood charged, in identical specifications laid under both the 95th and 96th Article of War respectively, with being drunk and disorderly in uniform in a public place, to wit: a house of prostitution. By exception he was absolved of the charge of drunkenness. There remains to be considered only whether the accused was disorderly at the time and place alleged and, if so, whether the place may properly be characterized as "public".

It clearly appears that military police, in the performance of their duties. habitually patrolled the brothel area in the town of Sultanabad, Iran, at night. Whether the rendezvous to which the group of officers, including the accused, resorted on the night of 10-11 September 1943 was "out of bounds" to military personnel at that time is not shown by the evidence of record, but it is sufficiently established by the testimony of the post commander and the military police, that a 9 or 9:30 o'clock curfew regulation applied alike to both officers and enlisted men.

It was, therefore, contrary to the rules and regulations for the accused and his friends to leave Camp Scott after midnight and enter the town of Sultanabad unless ordered so to do or in the performance of some lawful military mission. No such justification appears. Although the accused contended that he was making an "inspection" at the "White House" and adjacent alleys, presumably in his capacity of

Assistant Adjutant, it is evident from the circumstances that the "inspection" was more in the nature of a personally conducted tour for the gratification of the members of the party, some of whom were strangers, passing through town.

That the "White House" was a house of prostitution is nowhere denied, and it amply appears that all of the officers at the time of the group visit, engaged in conversation with "girls" who were present, and, although some officers, not identified in the record, were discovered consorting with other girls in different private rooms and in various stages of dishabille, there is no showing that any of the officers in the "inspection" group in question were among them.

It is hardly conceivable that such a state of affairs in which, as it was shown, a group of men walked boldly and promiscuously through the house, peeking into private rooms occupied by other men in beds with girl inmates, could have been an orderly one. However that may be, it is not upon this disorderly behaviour that the alleged misconduct of the accused rests.

It so happened that, shortly after the accused and his companions had started their tour through the house, members of the military police detachment of the post arrived on the scene in the routine performance of their nightly duties. That their intrusion was resented is apparent from the attitude of one of the accused's companions, a commissioned officer, who, when one of the police had demanded and had written down the name of a warrant officer there present, ordered that the slip of paper containing the name be destroyed and informed the military police that the officers were themselves making "an inspection".

This evidently perturbed the police and they reported the matter to the Staff Sergeant in charge of military police at Camp Scott who thereafter returned to the "White House" with them.

While the sergeant went upstairs the military police remained downstairs at the main entrance in the court yard and it was at this place where the episode, which is the basis of all the specifications, transpired.

The accused explained that as he was again entering the "White House" after "inspecting" the alleys in the vicinity, he found the military police blocking the doorway from a passage into the courtyard and that he was obliged to twice order them to move inside before they obeyed. Then, when he entered the courtyard, he was obliged to step down and in doing so stumbled, at which time, a pistol which he was carrying in his hand at an angle toward the floor, was accidentally discharged.

The military police, however, told an entirely different, and far more plausible, story. They testified that the accused suddenly appeared

brandishing an automatic pistol and shouted the command "move in" several times - after which he pulled back the slide of the pistol and fired a shot toward the floor. The projectile of the cartridge ricochetted from the floor to the wall on the left of the police. They were nonplussed and confused by the unfamiliar and nonmilitary character of his order and, fearful of the consequences, backed up to the wall and remained there until other officers appeared on the scene and remonstrated with the accused in an attempt to get him to give up the pistol. This he refused to do and an altercation followed in which the accused ordered the police to leave and another officer ordered them to stay. This dilemma was resolved when the accused invoked his authority as assistant adjutant of Camp Scott and issued an order purporting to relieve the military police of their duties, whereupon they left.

No argument is necessary to demonstrate that this conduct on the part of the accused was highly disorderly and especially prejudicial to good order and military discipline and constituted a violation of Article of War 96.

Since it is alleged in the Specifications that the accused was disorderly "in uniform" it was incumbent upon the prosecution to prove that he was in uniform. While this fact was not clearly established by direct evidence, this deficiency is supplied by logical and reasonable inferences from all the facts and circumstances. The group of officers could hardly have gone, in a body, to a restaurant in Sultanabad clad in civilian clothes in war time in a foreign country while on duty with troops; indeed, it would have been a violation of regulations for anyone of military personnel to do so. One officer testified "We were all in khaki". There was no hiatus in the itinerary of the party. They left the "Yankee Bar", went back to Camp Scott for cigarettes and immediately returned to Sultanabad and proceeded to the "White House". Accused testified that he was making an official inspection at the time and he was "carrying side arms". He was recognized as "Lieutenant Riley" and he announced his authority as Assistant Post Adjutant in giving orders. All indications point to the inescapable conclusion that he was "in uniform" on the occasion.

Finally, it is necessary to determine whether a house of prostitution may be deemed a "public place" within the intendment and meaning of military law. In proceedings under Article of War 95, the Boards of Review have held that "public place" includes an armory where enlisted men and officers are quartered and a dispensary where only enlisted men on duty are present (CM 216764 (1941)). It is unnecessary to show the presence of persons other than military personnel (Dig. Op. JAG, 1912-40, sec. 453 (10); CM 202846 (1935)). The last case also concludes that a porch which is visible from a

public road but which is used for access to apartments within a military reservation is a "public place". Other locations considered to be a "public place" are a hotel, even though facts show that the activity took place in the rooms of two officers with few people present (I Bull. JAG, November 1942, sec. 453 (10); CM 226357 (1942)); and, by implication, the bar of an officers' club (CM 207887 (1937)). In the instant case there were at least four enlisted Military Police officially present at the White House, the house of prostitution, as well as a number of American and British officers.

In civilian courts the general rule holds that what is a "public place" is a matter for factual determination (Grant v. State, 27 S.W. 127 (Texas, 1894); 35 Words and Phrases, 258 et seq.). Bowker v. Semple, 152 A. 604, 606 (R.I., 1930), states "the phrase 'public place' is relative, not absolute. * * * The nature, location, and use made of the particular place are to be considered, also the intent of the statute". A house of prostitution was held to be a "public place" by a New York Court which said that an exhibition that five men paid six women to give in a room of a house of prostitution was given in a "public place" within the meaning of the statute prohibiting indecent exposure in public places (People v. Bixby, 67 Barbour, 221, 222 (1875)). The record is legally sufficient to support the findings of guilty as to Charge I and its Specification.

6. Although the accused pleaded guilty to Specification 1 of Charge II and at no time during the trial changed this plea, the court nevertheless found him not guilty thereunder. After announcing the sentence and just prior to adjournment the law member made the following announcement:

> "Let the record show in explanation of the court's finding of "Not guilty' of Specification 1 of Charge II, that this finding was based upon the opinion of two-thirds of the members of the court, that the accused discharged the pistol deliberately, and not through carelessness".

While it was within the province of the court to do so the proceedings were unusual to say the least and can only be justified in the light of the findings upon the other Specification and the Charges. It is probably that the court, in order to justify findings of guilt upon Charge I and Charge II and the other Specifications thereunder, felt obliged to remove the anomaly which would have been apparent had they accepted the plea of guilty to Specification 1 of Charge II, inasmuch as the intentional discharge of the pistol may have been the disorderly conduct upon which they based their findings.

7. Attached to the record of trial is a recommendation of clemency submitted by the commanding officer of the 231st Signal Operation Company under whom the accused had served since September 1942, and also a recommendation made by 7 of the 9 members of the court urging that "so much of the sentence as exceeds reprimand and forfeiture of pay be remitted". In a recommendation for commutation addressed to the President of the United States, the reviewing authority urges that the sentence of dismissal be commuted "to forfeiture of $50.00 per month for six months and to be reprimanded". Among other reasons advanced for such action he states that "the accused has definite salvage value to the military service by reason of his ability as shown in previous service and because of his military training and experience".

8. Records of the War Department disclose that the accused was born in Bishop, Texas and is now 27 years of age. He attended and was graduated from the Wichita Falls, Texas high school in 1938 and the Field Artillery Communication School at Fort Sill, Oklahoma in 1941. He enlisted in the Texas National Guard on 1 October 1939 and entered federal service on 24 November 1940. After completing the Officer Candidate Course at the Signal Corps School, Fort Monmouth, New Jersey, he was commissioned a second lieutenant, Signal Corps, Army of the United States on 13 August 1942 and was assigned to 231st Signal Company, Camp Crowder, Missouri.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused occurred at the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. A sentence of 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.

William A. Rounds, Judge Advocate.

(on leave), Judge Advocate.

Herbert B. Fredman, Judge Advocate.

1st Ind.
12 APR 1944

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 Roy L. Riley (0-1635257), 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 thereof. In a recommendation for commutation addressed to the President of the United States, the reviewing authority urges that the sentence of dismissal be commuted "to forfeiture of $50.00 per month for six months and to be reprimanded". Among other reasons advanced for such action he states that "the accused has definite salvage value to the military service by reason of his ability as shown in previous service and because of his military training and experience". I concur in the recommendation of the reviewing authority and recommend that the sentence be confirmed but that it be commuted to a reprimand and a forfeiture of $50 of his pay per month for a period of six months, and that the sentence as thus modified be carried into execution.

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

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

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

(Sentence confirmed but commuted to reprimand and forfeiture of $50 pay per month for six months. G.C.M.O. 227, 29 May 1944)

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

SPJGV
CM 250294

13 MAY 1944

UNITED STATES	PERSIAN GULF SERVICE COMMAND
v.	Trial by G.C.M., convened at
Private ELIJAH MARTIN (33139290), Company B (Detachment), 352nd Engineer Regiment (GS).	Khorramshahr, Iran, 27, 28 and 29 December 1943. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by 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 above-named soldier.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Elijah Martin, Company "B", (Detachment), 352nd Engineer Regiment (GS), did, at Khorramshahr, Iran, on or about 14 November 1943, forcibly and feloniously, against her will, have carnal knowledge of Zahara Bakar.

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

3. The evidence for the prosecution shows that on the late afternoon of 14 November 1943 Zahara, daughter of Bakar, a native girl of Iran about 10 years of age, in the company of several natives including one Mohamed Ali, was gathering firewood from a salvage dump on or near the desert in

the vicinity of the No. 3 lumber yard, Khorramshahr, Iran (R. 6, 7, 9, 10). Sometime between 4:00 and 5:00 p.m. on that afternoon the accused, a colored soldier, accompanied by another colored soldier, Private Albert Stepter, Company B (Detachment), 352nd Engineer Regiment, drove an Army truck to the salvage dump (R. 7, 9). There the accused's companion, Private Stepter, jumped from the truck, approached Zahara, picked her up putting one hand over her mouth and the other between her legs, and carried her to the truck (R. 8, 34, 35). The child, screaming and crying, dropped the wood she was carrying on her head (R. 7, 8, 11, 35). She was placed in the cab of the truck between the accused and his companion and they drove off (R. 8). During the ride the accused struck the girl about the mouth and nose causing blood to flow (R. 35). When the girl was carried off, Mohamed Ali, who was but a few feet distant, pursued them, crying in Persian, "Don't take her" (R. 8, 12). He then reported what had happened to the girl's brother, Hagie (R. 8). The accused meanwhile drove the truck a "long distance" and then stopped (R. 35). His companion, Private Stepter, descended from the truck and the accused "took off his pants" (R. 35). He then assaulted Zahara inserting the head of his penis inside her private parts; he "thrust it in and out for several times". She could not feel anything "go" inside her "only he thrust it in and thrust it out and thrust it in and thrust it out" (R. 35, 36). She did not know "if anything was into me or not" except that "he put it in and take it out"; "he thrust his penis twice" (R. 36, 37). She was semi-conscious from the blows she had received from the accused (R. 37). Zahara's brother, Hagie, questioned her several times on the night of 14 November and also the next day as to whether the soldier had intercourse with her. She told him that "they hit me on my face and that is all. They did not do me any more harm" (R. 38).

During the late afternoon of 14 November, Master Sergeant Joseph Vogelius, Company B, 363rd Engineers, was called upon by the brother of a native girl who asked him to "get his sister away from some men" (R. 21). Vogelius and Private First Class Chaney then drove off in an Army vehicle called a weapon's carrier, picking up Privates First Class Fowler and Wilson en route (R. 21, 26, 30). After receiving directions from some natives they proceeded across the salvage dump and in a short time saw an Army truck on the "other side of the levee" or dike (R. 21, 26, 30). The accused's companion, Private Stepter, was standing by the right hand door of the truck and, as the weapon's carrier approached, he jumped on the running board of the truck and the accused drove off (R. 21, 32, 33). The weapon's carrier pursued the truck, halting it after a chase of several hundred yards (R. 21, 25, 30). Fowler and Chaney then walked over to the truck as Zahara and the accused's companion, Private Stepter, jumped out of it. Both Fowler and Chaney peered into the cab of the truck and saw

the accused with his pants down around his knees (R. 28-31). The accused asked Chaney if they were going "to tell on him" (R. 26). Zahara, bleeding about the nose and mouth, was sobbing hysterically (R. 22, 23, 27, 30). Being frightened of her rescuers, she resisted being taken to the weapon's carrier and jumped from it when she was first placed aboard it (R. 22, 27, 28). Sergeant Vogelius delivered Zahara to Captain Carl L. Minning, M.C., at the dispensary within ten or fifteen minutes (R. 23, 27). She carried no clothing in her hands when she was rescued from accused and made no change of clothing up to the time she was turned over to Captain Minning for examination (R. 24).

It was about 5:30 p.m. when Zahara was delivered for examination to Captain Minning, battalion surgeon for the First Battalion, 363rd Engineer Regiment (R. 13). He found Zahara excited and agitated, dressed in ragged and dirty clothes with blood "all over her face, a considerable amount of blood on her clothes" (R. 13). She "had no underclothes, no pants on", and she carried no loose clothing with her (R. 39). Captain Minning was requested by the M.P.s to make a pelvic examination of the girl and, after she was informed that the purpose of the examination was to determine if she had been molested, she finally consented. The captain estimated her weight as 80 to 90 pounds and her age to be about 12 years. Her genitalia were sufficiently developed to have pubic hair and her vagina was of the average size of that of a woman, admitting the insertion of two fingers. The captain found "that the vaginal outlet was uniformly bruised, red, the kind of red called maroon which signifies that the bruise would be black and blue in an hour or two" (R. 13). The bruise had occurred within an hour of the time she was examined and the captain had seen similar bruises on the genitalia of newly married women (R. 19). There were no bruises on the lips of the girl's genitals (R. 40). No male sperm was found within the vagina (R. 14). The captain was of the opinion that the soft head of a penis could cause the bruise found in the vagina and that it was extremely unlikely that any other object could cause that particular bruise (R. 18). He was of the opinion that "there was penetration in this particular case" (R. 20).

About 7:00 p.m. on the evening of this same day the accused was brought to the Khorramshahr stockade. Subsequently he made a statement confessing his guilt which was admitted in evidence (R. 63). In it he confessed that, after the girl had been placed in the truck, "We went out a little further out in the field. I stopped the truck and Stepter went to the back of the truck. I had the girl in the front seat. I pulled her dress up and she was lying down on the seat. I opened my pants and attempted to have intercourse with her. I was using a rubber. I tried but wasn't successful because she was too small. The girl just said 'No, no, Johnny'" (Pros. Ex. 1).

4. The defense offered expert medical testimony to prove that the bruise could have been caused otherwise than by penetration of the girl's genitals by a penis. A hypothetical question was propounded to several medical experts. The hypothetical question stated the size and condition of the girl's genitalia as testified to by Captain Minning, including the fact that "the vaginal outlet was red, uniformly red, the kind of red which might be called maroon", and then posed the inquiry as to whether, in the absence of swelling of the privates, of recent tears of the hymeneal membrane and of the membranes of the vagina, and of blood, it could be stated that the "discoloration of the mucous membrane of the vulva was due to attempted penetration of the vagina" (R. 66, 67). One witness, Captain A. H. Conrad, M.C., testified that an "attempted penetration" was only one of several things which could have caused the discoloration and that a penetration of the hymeneal ring of the vagina of a female about 10 to 12 years of age by the penis of an adult would probably result rather in laceration and tear of the parts (R. 68, 69). He further testified that, before reaching the restriction of the hymeneal ring there must be a penetration of the external genitalia, i.e. the vulva, which includes passage through the labia majora, labia minora and a small amount of mucous membrane (R. 70). First Lieutenant E. H. Keys, Jr., M.C., expressed an opinion substantially similar to that of Captain Conrad (R. 71, 73). Lieutenant Colonel Theodore Steinert, M.C., testified, in reply to the hypothetical question, that he would expect a laceration rather than a bruising from an attempted penetration (R. 79). He further testified that penetration of the vulva, the external genitalia, "would not require any force, merely requires separation of the vulva" (R. 83).

5. The accused's confession (Pros. Ex. 1) was admitted in evidence over objection of the defense and after substantial testimony had been introduced as to the circumstances under which it was made. The evidence showed that accused was brought to the Khorramshahr Stockade about 7:00 p.m. on 14 November 1943 and was questioned by the prison officer at the stockade, First Lieutenant Rene J. Hicks (R. 41). The accused and another man had been brought in for questioning as to the instant case and, in order to keep the two separated so that they could not converse, the accused was placed in a solitary confinement cell and the other one was placed in a tent (R. 51). The solitary confinement cell was a room about 8 feet by 4 feet in dimensions. It had no furnishings whatsoever and no window, the only openings being the cracks in the door and the sides as required by Army Regulations (R. 45, 46). There was nothing upon which to sit or recline except the floor (R. 46). The accused was brought before the prison officer, First Lieutenant Rene J. Hicks, 788th Military Police Battalion, approximately six different times from 7:30 p.m., 14 November until about 12:30 a.m. the next morning, each interview lasting about five or ten minutes (R. 42, 43, 48). Some enlisted personnel of the lieutenant's organization was present during the interviews (R. 43).

The accused did not appear to be "especially" sleepy during this time but was reluctant at first to give any information (R. 43). During these interviews the lieutenant used no force and made no threats or promises of rewards to secure a statement but he did not explain to the accused his rights about making a statement (R. 44, 46, 48). The accused was sober and was asked such questions as why he had blood on his uniform and from where it had come (R. 46). The lieutenant received information piecemeal, "a little at a time", until about 12:30 a.m., 15 November when he had sufficient to prepare a condensed statement (R. 47, 48, 42). The lieutenant believed he told the accused sometime during the interviews "when he was ready he could just call and let me know" (R. 47). The accused signed the statement (R. 49).

The accused spent the night of 14 November in the solitary confinement cell. He was fed all meals the next day and did no work except to clean his mess gear. The night of 15 November he was placed in Cell Block No. 1 and was given a cot and two blankets (R. 59). He had asked for reading matter and was given some magazines (R. 60, 61). This cell block was in a regular barracks and was about eighty feet long and twenty feet wide with four feet at each end for solitary cells and a place for an office (R. 60). Commencing on 16 November he worked and ate alone in the stockade, not being permitted to associate with the other prisoners (R. 53, 60). The only night he was in the solitary cell was the night of 14 November.

Within a day or so after 14 November, Lieutenant Hicks was appointed investigating officer on this case and, on the afternoon of 18 November, he showed the accused a prepared statement which was the same as the first statement signed by the accused on the early morning of 15 November except for slight grammatical corrections. The lieutenant then explained to the accused the Article of War he was charged with "that it was not necessary for him to sign a statement, that he need not incriminate himself, that he did not have to sign it, and several other things" (R. 48, 49). The accused was also informed that if he did sign the statement it could be used against him (R. 52, 55, 62). He was then given the prepared statement to read (R. 51-53). On the morning of 19 November the accused signed and swore to the statement before Captain Leon E. Newman, summary court officer at Khorramshahr after first being told to read it and after taking five or ten minutes to do so (R. 55, 56).

The statement received in evidence was the one signed on 19 November after the accused's rights had been fully explained to him. There is no evidence that any promises or threats were made or that the confession was induced by hope of benefit or fear of punishment or

injury or that military authority was exercised to induce it. It was read and signed during the investigation some 3½ days after accused had signed the first statement. If an accused is induced to confess by promises made to him or under threats of violence and then subsequently reaffirms his statement at an investigation of the charges, after having first been fully apprised of his rights, the second confession is voluntary and admissible in evidence (Dig. Op. JAG, 1912-40, sec. 395 (10); CM 187615, Bruton). Accordingly, it is unnecessary to determine whether the first confession was voluntarily made. The second confession was properly admitted in evidence.

6. The evidence conclusively sustains the findings of guilty. Although the youthful victim told her brother, shortly after the assault, that all the soldiers had done was to strike her and although there may appear to be some discrepancies in her testimony, nevertheless, she was adamant on the stand that the accused's penis had penetrated her private parts. It is apparent from all her testimony that, when she testified she didn't feel "anything go into" her, she did not intend to state that a penetration had not been effected for she reiterated numerous times, referring to the accused's organ, that "he thrust it in and thrust it out" (R. 35-37). The various questions asked her on cross-examination as to whether she felt anything "go into" her clearly were not interpreted by her to relate to whether or not the accused's penis had penetrated her private parts (R. 36, 37). Adding to her testimony, the evidence of the condition of accused's clothing when he was overtaken, the bruised condition of her privates plus the doctor's opinion that a recent attempted penetration of the internal genitalia had occasioned it, and the accused's confession, it is fully established that at least a penetration of the external genitalia, i.e. the vulva, had occurred.

The defense's evidence was aimed at establishing that the bruised condition of the hymeneal ring of the vagina could have arisen from other causes than an attempted penetration of the vagina. However, such evidence does not disprove penetration of the external genitalia, i.e. the vulva. Indeed, one medical witness for the defense testified that penetration of the vulva "would not require any force, merely requires separation of the vulva" (R. 83). Penetration of the genitals is one of the essential elements of the crime of rape. However, it is not requisite that the internal genitalia be penetrated. "Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not" (MCM, 1928, par. 148b). Such carnal knowledge of a woman by force and without her consent constitutes rape (MCM, 1928, supra).

Mindful of the fact that we are considering here a child in the hands of an adult male, it is obvious from her frightened, hysterical

condition, and her actions when she was rescued, plus the accused's confession, that she did not consent and that the crime committed was as charged and not the crime of statutory rape under Article of War 96 (MCM, 1928, par. 148b). Although verbal protestations alone may not be sufficient to show want of consent in the case of a mature female, nevertheless, in the case of this child, considering her age, size and her frightened condition, it is clear that she took all measures to frustrate the accused's design as were available to her and as were called for by the circumstances (MCM, 1928, par. 148b).

7. The accused is about 24 years of age. The charge sheet shows continuous enlisted service commencing with the accused's induction on 7 February 1942.

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. Death or imprisonment for life, as a court-martial may direct, is mandatory upon conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Section 278, Criminal Code of the United States, (18 U.S.C. 457).

Thomas H. Tappy, Judge Advocate.

Herbert M. Kiddier, Judge Advocate.

Robert B. Harwood, Judge Advocate.

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

(331)

17 JUN 1944

SPJGH
CM 250309

UNITED STATES	)	UNITED STATES ARMY FORCES CHINA, BURMA, INDIA
v.	)	Trial by G.C.M., convened at New Delhi, India, 28-29 September 1943. Dismissal.
Major RUSSELL E. HOLLIS (0-418090), 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 Charge and Specifications (exclusive of the words inclosed in brackets):

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Russell E. Hollis, Major A.C., Headquarters, Tenth Air Force, while acting as contracting officer, Air Force Supplies, Tenth Air Force did, at New Delhi, India, on or about the 9th day of April, 1943 wrongfully attempt to acquire or possess [for his private advantage] a financial interest in [the transactions of] the Allied Chemical Works, who's business was to include the manufacture and sale of articles of a kind of which it was a function of his office as contracting officer to make purchases for the Government, viz, Hydraulic Brake Fluid and De-Icer Fluid.

Specification 2: In that Russell E. Hollis, Major A.C., Headquarters, Tenth Air Force, while acting as contracting officer, Air Force Supplies, Tenth Air Force, did, at New Delhi, India, on or about the 19th day of January, 1943 wrongfully attempt to acquire or possess [for his private advantage] a financial interest in [the transactions of] the Balgopal Das and Company, who's business includes the manufacture and sale of articles of a kind which it was a function of his office as contracting officer to make purchases for the Government, viz, Plastic Compound, containers and other products and slushing compound.

Specification 3: In that Russell E. Hollis, Major A.C., Headquarters, Tenth Air Force, while acting as contracting officer, Air Force

Supplies, Tenth Air Force did, at New Delhi, India, on or about the 22nd day of June, 1943, with intent to deceive Dan F. Callahan, Colonel A. C., Chief, Maintenance and Repair Division, his commanding officer, willfully and knowingly make a false official statement in writing, to the effect, that no agreement or contracts, with individuals, firms, or corporations, had been entered into by the said Major Russell E. Hollis, except an agreement with Balgopal Das and Company, which statement was known by the said Major Russell E. Hollis to be untrue at the time.

He pleaded not guilty to the Charge and to all Specifications thereunder, was found not guilty "as written but guilty as revised" of Specifications 1 and 2 (the revision consisted of the addition of the words enclosed in brackets as shown above) and guilty of Specification 3 and of the Charge. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War. The Commanding General of the United States Army Forces in China, Burma and India confirmed the sentence but withheld the order directing the execution thereof pursuant to Article of War 50½. The record of trial was examined by the Board of Review in the Branch Office of the Judge Advocate *General with such forces and the Board, with the approval of the Assistant Judge Advocate General with such forces, held the record of trial legally sufficient to support the findings of guilty and the sentence. The sentence was ordered executed by General Court-Martial Orders No. 2, Headquarters United States Army Forces, China, Burma and India, 2 February 1944. The orders contained the provision that the accused "ceases to be an officer of the Army at twelve o'clock midnight of the date of notice to him of this order". The accused was returned to the United States, The Adjutant General stayed the execution of the sentence of dismissal, and the record of trial has been referred to The Judge Advocate General for reconsideration.

3. Under the 48th Article of War a sentence extending to the dismissal of an officer of the grade of the accused may in time of war be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division. Article of War 50½ provides that the President may direct The Judge Advocate General to establish a branch of his office, under an Assistant Judge Advocate General, with any distant command and to establish in such branch office a board of review or more than one. When the power to review courts-martial decisions and to confirm sentences has thus been decentralized and lodged in a distant command such command becomes practically autonomous in the administration of military justice and, if all jurisdictional requirements have been met and the prescribed procedural steps taken the confirmation of a sentence by the commanding general is conclusive and final on

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* The opinion of the Board of Review in the Branch Office of The Judge Advocate General with USAF China Burma India, will be included in compilation of CBI cases under C.M. CBI 47 (1944).

the question of the legality and validity of the findings of guilty and the sentence. Neither the letter nor the spirit of the Articles of War under consideration contemplates that after the commanding general of a distant command has lawfully confirmed and ordered executed a sentence of dismissal of an officer below the grade of brigadier general the record of trial shall again be reviewed by a Board of Review in the Office of The Judge Advocate General for the purpose of weighing the evidence and determining whether the record of trial is legally sufficient to support the findings and sentence. In the present case The Judge Advocate General has referred the record of trial to the Board of Review for a special, limited examination. The Board has been directed to determine and report whether in its opinion the court was legally constituted with jurisdiction over the accused and the offense; whether the court had the power to impose the sentence; whether the accused had a fair and impartial trial in accordance with the procedure prescribed by the Articles of War and the Manual for Courts-Martial; and, in the event that all of the foregoing questions are resolved against the accused, whether the record of trial or accompanying papers disclose any reasonable grounds for the exercise of clemency. As a necessary introduction to the consideration of these questions, particularly the one pertaining to clemency, the evidence, as shown by the record, will be comprehensively summarized.

4. The evidence for the prosecution:

On 7 October 1942, at the request of his commanding officer, Colonel Daniel F. Callahan, Chief of the Maintenance and Repair Division, China-Burma-India Air Service Command, New Delhi, India, accused was designated as a contracting officer for the Tenth Air Force. He was at that time in charge of research in the division and authority to make purchases was conferred upon him in order that he might obtain promptly materials needed to carry on his various experimental and research projects. He was authorized to make purchases of hydraulic brake fluid, de-icer fluid, plastic compounds, and slushing compound. At various times during the year 1942 accused talked with Colonel Callahan about certain inventions on which accused had worked before coming to India. There was a shortage of hydraulic brake fluid in the India Theater and considerable difficulty was experienced because the slushing compound available could not be used properly with the aromatic gasoline in use there. Accused expressed the desire to protect his personal interests in order that he might derive the financial benefits to which the law entitled him and discussed with Colonel Callahan the matter of securing Indian patents. Each time these discussions occurred Colonel Callahan questioned accused "as to whether he was complying with the proper laws and regulations". On 18 December 1942, Colonel Callahan wrote a letter (introduced in evidence as Def. Ex. I) to the Controller of Patents, Calcutta, India, in which he referred to a letter of the Controller to accused and stated that "it is perfectly agreeable to this Division that Major Hollis take out these patents as they are his personal developments". Accused was relieved of his duties as contracting officer on 20 May 1943 (R. 8-11, 18-21; Ex. C).

In January 1943 accused entered into negotiations with Mr. Balgopal Das, proprietor of Balgopal Das and Company, which operated a factory in

New Delhi, with reference to the manufacture of certain products invented by accused. Accused employed to represent him in these negotiations an attorney by the name of Harjeinan Lal, who conferred with Mr. Das and drafted a written agreement for the parties. This document (Ex. M), which was not dated and was not signed by either Das or the accused, designated accused as the inventor and Das and Company as the manufacturer and recited that accused, "the first and true Inventor" of plastic compound, containers and other plastic products "of the formulae disclosed by the Inventor to the Manufacturers" had transferred his rights in these inventions to the manufacturers upon the terms therein recited. These terms included the following provisions: The manufacturers had paid the Inventor 5,000 rupees, by check dated 4 January 1943, as the "first salami money which shall not be claimed back by the manufacturers under any circumstances or any reason whatsoever"; the Manufacturers were authorized to sell the plastic compound and the containers and other articles made of plastic; and the Inventor was to receive, on a monthly accounting basis, 3% of the gross sales of all such plastic products and up to a fixed maximum return was to receive an additional one-half of one percent if the gross sales exceeded a specified amount (R. 37-39, 47; Ex. M).

Mr. Das testified that he had supplied the United States Army with a few hundred gallons of slushing fluid but had had no other work or business with "them". In his negotiations with accused certain terms were jotted down "time and again" but it was "all subject to getting patent". Mr. Lal came to him "sometimes" and they discussed the terms of the proposed contract. Mr. Das identified the draft of agreement, but stated that after it had been written there were a number of "changes", one of which was that if the plastic products were sold to the "Government" the accused "would have to be sure whether he be allowed to take the 3% but if allowed he would take it, otherwise no". The agreement was to be "finalized" after accused received the patent and transferred it to Mr. Das. At one time when they first discussed the agreement the parties reached the decision that accused was to receive 3% of the gross sales but they did not then contemplate selling the products to the "government" —— "then it was found that maybe it would be useful for your purposes". He had paid accused the 5,000 rupees mentioned in the draft of agreement (he did not remember the date) and at about the same time had paid accused an additional 5,000 rupees "for two patents", one for plastic compound and another for slushing compound. Neither of the two compounds was ever made by Mr. Das who had never seen the formula on which accused "was trying to get a patent". Das expected to find a market for the product anywhere throughout India (R. 37-42).

Mr. Das identified as coming from his office three invoices for labor charges for the preparation of leak proof coverings, directed to "Major R. E. Hollis x U.S.A.F.S.G., New Delhi". One invoice dated 6 May 1943 was for 776 rupees plus, another dated 11 May was for 2,958 rupees plus and another dated 31 May was for 1,190 rupees. The invoice of 31 May was

enclosed in a letter of the same date directed to the accused which stated that the bill was for labor charges "as agreed by you for making Leak Proof Sheets for you". Mr. Das stated that he expected to receive payment from the United States Government and not from the accused. He did not know who placed the orders for the tank covers. No royalties were paid to accused on either plastic or slushing compound. In answer to the question whether he had ever discussed with accused the possible uses of plastic compound Mr. Das answered that "It is a basic thing" and "We don't know what we would have made". He stated that by "certain processes" the compound could be used as a wall for a leak proof tank and "thought they might be able" to use it on military aircraft. Accused had promised that if he did not get "this patent" he would refund the 10,000 rupees advanced by Mr. Das. Accused had given Das his promissory note in that amount, dated 22 June 1943 and payable one year after date (R. 42-44).

On cross-examination Mr. Das testified that he had never received the formula for the slushing compound and did not know what it contained. The draft of agreement had never been signed by the parties and had not gone into effect. Mr. Das had paid the 10,000 rupees salami money because he wanted to be sure that he would get "the formula" when it had been patented. The "whole purpose" of the negotiations had been the possibility that the "Supply Department" might take the leak proof containers but accused "could not take any action on that until he could get in touch with legal advisers". Mr. Das had reserved the right to charge any prices he chose for the products after the patents had been obtained. Accused informed him that "in case of prices to Army" he would be allowed only "a reasonable profit" but Mr. Das had thought that he "might charge any price and since it was useful to you, you might pay it". The prospect of getting orders from the United States or British Government was not a "moving factor" in his mind. He could see a very good future for all the things he could make and "might be able to make something very useful". Under examination by the court he stated that he had paid 10,000 rupees without any disclosure of the formula for the slushing compound and without knowing whether it was "any good" because "you have to trust a gentleman when you deal with them" and because accused had shown him "certain containers, self sealing, shot proof, sealed back like rubber". Das did not know why accused was unable to get the patent. On redirect examination he stated that he had spent 25,000 rupees making preliminary arrangements to put his factory in condition to manufacture the products that were to be patented by accused (R. 45-47; Exs. N, O, P).

It was stipulated by the prosecution, the defense and accused that if Staff Sergeant Ward D. Burdine, Jr. were present in court he would testify that at the direction of accused he deposited on or about 19 January 1943, in Lloyd's Bank, New Delhi, India, to the credit of accused, checks totaling the sum of 10,000 rupees (R. 36; Ex. K).

Mr. Achraj Ram Dhawan, a stock and share broker of New Delhi, met accused in February 1943 through the latter's attorney, Mr. Lal, negotiations followed and an agreement drafted by Mr. Lal dated 9 April 1943

was signed by accused and Dhawan. This agreement, which was in substantially the same form as the draft of the Das agreement, designated accused as the Inventor and Mr. Dhawan and three other persons "proprietors of the business known as the Allied Chemical Works" as the Manufacturers and recited that accused as the first and true inventor of hydraulic brake fluid and de-icer fluid of the formulae disclosed by him to the Manufacturers had transferred his rights in such inventions to the Manufacturers. The agreement stated that the Manufacturers had paid the Inventor 2,500 rupees as "first salami money" and would pay "second salami money" in the amount of 2,000 rupees "in a month". As in the case of the Das agreement, accused was to receive 3% of gross sales and an additional one-half of one percent under certain conditions (R. 24-26; Ex. Q).

Accused gave Mr. Dhawan the hydraulic brake fluid formula mentioned in the agreement. The formula was written out in the handwriting of accused and was dated 8 April 1943. The 2,500 rupees salami money was demanded by accused as "his rights" and Mr. Dhawan paid it "for the invention". He had learned from accused that the brake fluid and de-icer fluid were required by the American Army, the British Supply Department and other sources. He expected to sell the products to the United States Army, had discussed this with accused, and the provision that accused receive 3 percent of the gross sales was to apply to all business including sales to the United States. Accused told Mr. Dhawan that the latter would receive orders "through proper channels" but none were ever received from the United States Army. Mr. Dhawan expected to set up manufacturing plants at Delhi, Agra and Asansol. He received from accused a letter dated 8 May 1943, headed "Agra-Third Air Depot USAAF", which stated in part that "For military reasons it might be best to set up your mfg. in Agra which would put you close to our Depot activities. Another very good location would be Asansol area because of our activities there". In explanation of the portion of the letter just quoted Mr. Dhawan stated that it was better for him to have his manufacturing plant at Agra or Asansol because "I have to deliver raw materials also" and "Rawmaterials we can't get in the market". Accused promised to recommend Mr. Dhawan to the "Supply Department" as a manufacturer of hydraulic brake fluid and informed him that he (Dhawan) would receive orders from that source. Mr. Dhawan's partner Mr. Kapoor went to see "Colonel Felton" about getting orders from the United States Government but to no avail. When he learned that "these things" were not required by the United States Army Mr. Dhawan felt "disheartened". Subsequently he received another letter from accused headed "Third Air Depot—— Agra" and dated 15 May 1943, which stated that "Mr. Kapur has misrepresented certain aspects of our negotiations to the Delhi headquarters and I wish to terminate the tentative agreement". The letter also stated that accused was enclosing his check for 1,000 rupees and had instructed Mr. Lal to repay an additional 400 rupees, and that accused would sand his check for the balance either before or by 1 June. Mr. Dhawan testified that 500 rupees of the 2,500 rupees salami money which he had paid to the accused had never been refunded (R. 26-31; Exs. S, T).

On cross-examination Mr. Dhawan stated that he was a broker and share dealer, not an engineer, and did not understand the technical details of "the inventions" of accused when they were discussed in the course of the negotiations. Accused tried to explain that his brake fluid and de-icer fluid had "various better qualities" and Mr. Dhawan understood that under the agreement he was buying "the invention". Accused was to procure the patents. The Allied Chemical Company mentioned in the agreement never existed but was only the name of a proposed company. Defense counsel then asked Mr. Dhawan a series of questions designed to elicit testimony to the effect that the agreement was not to become operative until certain conditions had been fulfilled. Objections interposed by the prosecution were sustained and defense counsel toward the close of the trial arranged with the trial judge advocate to attach to the record of trial a proffer of proof covering Mr. Dhawan and other witnesses. This proffer of proof states that if permitted to do so Mr. Dhawan would have testified that it was the understanding of the parties that the written agreement was not to become operative until accused had, at his own expense, procured in India patents on his inventions and the agreement in final form had been approved by "proper U.S. Military Authorities"; that the salami money or earnest money was paid to defray the expenses of accused in connection with procurement of the patents; and that accused was not to receive any royalty money on sales of brake fluid until he had obtained a patent thereon and assigned it to Dhawan (R. 31-35, 88).

Mr. Lal had been employed by accused to draft both the Das agreement and the Dhawan agreement. Several drafts of the former were made, the first one about the last of January 1943. The agreement was not signed because the parties could not agree to certain terms. Mr. Das objected to the provision that he could not under any circumstances claim back the salami money and also to the clause prohibiting him from transferring his rights in the inventions without the consent of the accused. There was no disagreement between the parties as to any other provision of the draft. Mr. Lal was paid for his services by the accused (R. 47-49).

On cross-examination Mr. Lal stated that "it seemed" the accused had to obtain the patents and that if he was unable to procure them it was the "understanding" of the parties that the salami or earnest money would be returned. He was asked by defense counsel whether there was any agreement between the parties to the Dhawan contract as to when the contract would become finally operative but an objection to the question was sustained. In the proffer of proof attached to the record the defense stated that if permitted to answer the question Mr. Lal would have testified that the contract would not be finally operative until the military authorities had approved it and until the patents had been obtained. (R. 50)

Mr. Lal further testified that full information about the formula and data concerning the invention of accused was to be delivered as soon as accused "would like to do so" either before or after a patent had been

obtained. Accused was "under obligation" to procure a patent. He told Mr. Lal that he was taking steps to obtain a patent "through men in Calcutta". When asked by the court to explain why neither the Dhawan agreement nor the Das draft contained any reference to the procurement of a patent by accused Mr. Lal stated that it is implied by the language of the agreement describing accused as the inventor and "therefore, it is his duty to obtain the patent at his own expense" (R. 51-52).

After accused was designated as a contracting officer Colonel (then Lieutenant Colonel) George E. Felton arrived in New Delhi to become Chief of the Supply Division of the Air Service Command. At that time accused was in the experimental section of the Engineering Division working on the development of new products and Colonel Felton came into contact with him in connection with the procurement of hydraulic fluid, de-icer fluid, plasticizer, slushing compounds and leak proof coverings. The Supply Division had its own procurement officer and gradually took over all procurement from engineering. About 12 May 1943 "Mr. Kapoor" called upon Colonel Felton at New Delhi with a small handwritten "chit of introduction" from accused in the following language:

> "Lt Col Geo. Felton 12/5/43
>
> George: I have discussed with Mr. Kapur of Dhwan & Co. to set up their facillities--Agra to mfg. Tank Compound, De Icer Fluid or Hydraulic Fluid, which would be expedient for the Depot, from which supplies would readily be available to them. By this means, we could have Hydraulic Fluid in 24 hrs and I have fooled around with the Supply Dept for months getting no place Russ."

Colonel Felton referred Mr. Kapoor to Captain William R. Hill, the procurement officer of the Supply Division. At noon the next day Mr. Kapoor called at the hotel room of Colonel Felton who telephoned accused and informed him that Mr. Kapoor "was very much upset about not being able to get business, which he claimed had been promised him". Colonel Felton told accused that he should do something about it as it was a "very grave matter" and accused asked that Mr. Kapoor be sent to Agra immediately (R. 52-56; Ex. V).

Soon thereafter Colonel Felton received the following letter from accused:

> "Dear George:
>
> In view of the aspect which Kapur of Dhwan & Co is placing on the matter I shall not complete an agreement tentatively discussed, to produce certain Tank Compound and Plasticizer under my patents, which was apart from the items being made by Balgopal Das & Co. Tank Compound is <u>not</u> the Bullet Leakproofing made by Balgopal Das, or Slushing Compound. Instead, I

may complete an agreement with a manufacturer in Bombay. I had felt that their production of the other items would be a boon to D.S., and especially here in Agra, while also giving them some business, in which I said I would merely try to help them get this business, which was to have no part of our agreement. In breaking the negotiation I am mailing Dhwan & Co my check.

P.S. This may be a scheme on their part to force my hand to give them certain patent rights, which I had intended to give, but Not now.
R.E.H."

Regards

Russ

In explanation of the reference in the letter to the mailing of a check by accused Colonel Felton stated that it had been reported "to us" that accused had received "this amount of money down payment" and that he was to "hand over certain formulae to them". In answer to a question by the court Colonel Felton stated that the supplies which accused was "charged with getting" at first were for experimental purposes and "later on for manufacturing" (R. 56-58; Ex. W).

On 16 May 1943, Colonel Felton sent to Colonel Callahan an inter-office memorandum in which it was requested, among other things, that, because of certain information and facts "learned recently", the accused be removed from the list of approved purchasing and contracting officers and that he be instructed to submit a complete report of arrangements made with any concern for the manufacture of hydraulic fluids, de-icer fluid, tank compound, slushing compound, plasticizer or leakproofing work, especially with reference to "Balgopaldas & Company and Industrial Products". Colonel Callahan referred the memorandum to accused by an indorsement dated 17 May specifically directing him to comply with its instructions and suggesting that he confer with the Judge Advocate of the Tenth Air Force "to insure that proper procedures according to Army Regulations and pertinent laws of the United States are being complied with" (R. 12-13; Exs. F and G).

Accused replied by indorsement dated 8 June. He stated that he had discussed the "subject matter" with "Col. O'Keefe" in New Delhi on 17 May, and had written him "at considerable length" on 19 May for assistance "in handling these agreements"; that he would discuss "the matter" with Colonel O'Keefe again when next in New Delhi "on the 12", and that "This applies only to a single contract for Slushing Compound and Plastic Leakproof Fuel Cells with Balgopal Das & Co." Upon receipt of the indorsement Colonel Callahan interviewed Colonel O'Keefe. As he was not satisfied with the reply of accused, Colonel Callahan wrote accused a letter dated 21 June which stated that, according to Colonel Callahan's information, accused had talked with Colonel O'Keefe and had written O'Keefe a letter dated 19 May 1943 but had made no mention of any specific contracts, patents or royalties arising therefrom and

that the principal query of accused had been whether royalties could be paid to him under an undisclosed contract. Colonel Callahan's letter further stated that the records of the Tenth Air Force Headquarters mentioned a contract of accused with Balgopal Das, "a preliminary contract with some undisclosed firm", and other transactions of accused and that no information or explanation "other than a general reference" regarding these matters had been furnished to the Staff Judge Advocate or to the "Supply Division, X Air Force Service Command". In the closing paragraph (5) of the letter accused was directed to furnish by indorsement information as to "any agreement or contract you have entered into with individuals, firms or corporations since you have been in the capacity of a U.S. Army Officer in India" and information regarding negotiation for the sale in India of patents and royalties thereunder (R. 14-16; Exs. H, I).

Accused answered Colonel Callahan's letter by 1st Indorsement dated 22 June in which he stated in part that "The sole agreement and this never prepared in final form, has been with Balgopal Das & Co., for manufacture under my patents of Slushing Compound and Plastics Leakproof Fuel Cells"; that a tentative agreement with a firm in Bombay to manufacture Tank Sealing Compound "has been dropped"; and that "any discussion or understandings with Balgopal Das & Co. regarding the use of my patents especially as to sale or royalty have now been cancelled ——". Colonel Callahan testified that in his letter to accused of 21 June he "was endeavoring to get Major Hollis, as I also told him verbally, to simply come forward with all details as to negotiations and contracts; to lay the entire matter on the table in order to get the entire thing cleared up" (R. 16-17; Ex. J).

5. For the defense, Squadron Leader Erich Gordon Tate, Royal Air Force, testified that during the latter part of 1942 and early part of 1943 he was liaison officer to the Air Service Command and in that connection came in contact with accused. Slushing compound was used in the R.A.F. for flushing rubber fuel cells which were affected by aromatic fuel. The slushing compound in use had proved unsatisfactory, resulting in several "failures of planes" and the "British" definitely encouraged accused to develop a more satisfactory compound. Squadron Leader Tate knew that accused was making application for patents and "the British" intended to buy the materials which were the inventions of accused. In placing orders for slushing compound with various firms which manufactured it under specifications of accused indents were issued to such firms for the various materials required (R. 59-61).

During the latter part of 1942 and the first half of 1943, Colonel George E. Schaetzel, who was assistant to Colonel Callahan in the Engineering Section of Air Service Command, became familiar with the research work of accused and was informed in general terms of the latter's inventions.

In the discussion of his inventions with Colonel Schaetzel accused had mentioned the possibilities of commercial activity "in line with plasticizer" after the war (R. 61-62).

In November or December 1942 accused called upon Colonel C. C. Fenn, Judge Advocate General's Department, and stated that he was desirous of securing a patent in India to cover local patent rights on a sealing fluid which he had patented in the United States. Accused stated that he had not secured the United States patent while in the military service but as a civilian. Colonel Fenn informed accused that he was not familiar with Indian Patent Laws but would attempt to find out what could be done to secure a patent in India. Colonel Fenn obtained the names of two patent attorneys in Calcutta, and on 4 December 1942 gave them to Colonel Thomas N. Tappy, the staff judge advocate of the Tenth Air Force, for delivery to the accused. He did not discuss with accused "rights of royalties". Accused told Colonel Fenn that some of his inventions had military use but the latter advised him that even so, since it was "a product of his mind during civilian days", accused had the right to secure a patent. Colonel Fenn did not know that accused was a contracting officer but such knowledge would not have affected the character of the advice given as the question of securing a patent was the only one presented to Colonel Fenn (R. 63-65; Def. Ex. II).

Colonel Tappy, Judge Advocate General's Department, testified that in November or December 1942 when he was in the office of Colonel Fenn the latter gave him some papers to deliver to accused. Colonel Fenn stated that accused had called with reference to securing a patent right on some formula "or something" which might be used in connection with the air forces, that Colonel Fenn had secured the names of several patent attorneys in Calcutta and that these names were among the papers which were to be delivered to accused. Colonel Tappy walked around to the office of accused, delivered the papers to him and told him who had sent them. Colonel Tappy did not discuss the "nature of the business" with accused and the latter made no inquiry of him about it. When asked whether he had made any objection to the procurement of patents by accused Colonel Tappy replied "No sir, it was not my business, I didn't know the facts" (R.66-67).

The accused testified that he was born 1 May 1897 and had entered upon active duty on 1 July 1941. He had served in the armed forces of the United States from July 1917 until February 1919 as aviation cadet, in fighter and bomber training and as station pilot. Beginning in 1925 he had engaged extensively, for many years, in development work in plastics, waterproof adhesives, and kindred materials. His tank sealing compound was tested by the United States Navy and the results of the tests were published in a secret Navy report. About 1935 accused did some work with reference to leakproofing tanks with combinations of rubber and synthetic resins. He also carried on considerable research in the development of combinations of steel and plywood and steel and aluminum for lightness and strength and from his knowledge of the effect of gunfire upon aircrat acquired in the First World War he became aware of the possibility of providing protection to gasoline tanks, oil tanks, engine

and crew. In 1938 and 1939 he made and submitted to the British Air Ministry in Washington, D. C., designs of "very light combinations of high alloy steel, laminated, waterproof adhesives to plywood". In conjunction with two large American industrial concerns accused made assemblies of armor plate and rubber and in 1940 or 1941 submitted them for tests to several Government departments. Accused arrived in the China-Burma-India Theater 11 August 1942, was assistant engineering officer and was at all times under the command of Colonel Callahan. There was a very small staff in the Air Service Command and Engineering, Supply, Training, and Operations each knew what the others were doing. Immediately upon his arrival accused became aware of "the extreme urgency" that existed with regard to engine parts and various materials including fuel cells and hydraulic fluid. Many items concerning which he "had manufacturing and research contacts" were not available in India. His investigation disclosed that India was a remarkable source of various raw materials and semi-processed materials but actual fabrication or final processing did not exist. Reports came in that carburetors had become loaded up with slushing compound and that engines had failed. Some "P-66s" were wrecked at the New Delhi airdrome, the tanks were removed and tests made with permission of Colonel Callahan. Accused discovered that the tanks had aromatic gasoline in them and that there was a "very considerable dissolving of yellow slushing compound". He reported these findings to Colonel Callahan, expressed the opinion that something should be done about it immediately and "pressed home the manufacture of a slushing compound in this theater" (R. 67-72).

Accused further testified that from the time of his arrival in India he had discussed with Colonel Callahan and various staff officers the work which he had done in civilian life. He told Colonel Callahan of his many years of research in plastics, water proof adhesives and cementation of metals to plywood. There was a critical shortage of materials particularly with reference to the Royal Air Force, this brought up the subject of getting manufacturing under way in India and accused engaged in extensive discussions with Squadron Leader Tate and the Secretary of the British Supply Development Committee. In November 1942 accused told Colonel Callahan that it was his intention to take out patents on slushing compound, hydraulic fluid and plastic leakproof fuel cells and Colonel Callahan said, "by all means go ahead, you may as well make some money out of these inventions to pay you for your time here in India". Accused then made an investigation of the firms in India which were equipped to make tanks and slushing compound. He wrote to a firm of manufacturers in Calcutta who recommended one of their subcontractors, Balgopal Das. For several months, beginning the latter part of November 1942, accused carried on negotiations with Das. Just before entering into these negotiations accused informed Colonel Fenn that he was seeking manufacturers in India for his inventions, that he wished to take out patents in British-India and also secure competent legal advice "from the Army" to protect his rights as an Army officer and his interests as a civilian after his return to inactive status. After being informed that the things which accused intended to patent were his own development, Colonel Fenn told him that he had a right to take out patents, encouraged him to do so, and suggested that since

Colonel Tappy was in the Air Corps accused see him with reference to "the subject of contracts as covered by patents". Accused immediately acted upon the suggestion and told Colonel Tappy that he was negotiating in India for the sale and manufacture of inventions "under my patents" and wished to have a contract drawn which would fully protect his military and civilian rights. Colonel Tappy stated that he knew nothing about patent law, could not help accused with reference to the drafting of contracts and advised accused to employ a local civilian attorney and "proceed on exactly the same basis as you did at home". Accused then employed Mr. Lal. The negotiations with Mr. Dhawan which were conducted in the hotel room of accused began in February 1943, continued for several months, consisted of five or six conversations and were carried on in the presence of Colonel Felton, the roommate of accused. At various times accused discussed his inventions and patents with Colonel Felton. Accused also testified that the draft of the agreement with Mr. Das was never executed or finally completed and did not contain all of the agreements which the parties had "arrived at orally". Most of the "general points were arrived at" before accused met Mr. Lal. The rights of accused as an officer and as a "civilian citizen" were fully discussed by accused and Mr. Das, and also the subject of profits, and accused "wanted it clearly understood" that if Mr. Das entered into manufacture there would be no attempt on his part "to gouge the United States Government". The "basic point" was that the entire matter hinged upon the securing of patents by the accused in the British-India Patent Department and that no agreement would be final until approved by The Judge Advocate General. Accused believed that the omission of "those items" from the Das draft "probably" was due to the fact that Mr. Lal was not present at several of the conferences between accused and Mr. Das. The Dhawan agreement, introduced in evidence by the prosecution, likewise did not embody the full agreement between the parties as it was subject to the securing of patents by the accused and to the approval of The Judge Advocate General. Accused "would say" that the omission of these terms from the Dhawan agreement was due to an error on the part of Mr. Lal. During the negotiations with Mr. Das his company fabricated several items for the Tenth Air Force from materials furnished by the British Supply Department but they were the result of experimental work based on rubber and were different from the invention of accused. His patent applications in the states were for leakproof fuel cells composed entirely of plastics and containing no rubber. Accused received no royalties and intended to receive none on the leakproof covers made by Das for the Tenth Air Force. The slushing compound purchased from Das by the United States Government was not the formula of accused. When asked in what respect the slushing compound purchased from Das differed from his own accused replied "The principal plans and various formulae of mine deal with plasticizer and my invention is not available in India". Slushing compound has many uses, some of which are the slushing out of rubber or metal fuel cells, as a cement and gasket material and as a waterproofing material (R. 72-78).

Accused first discovered that there was an apparent misunderstanding between himself and "Dhawan" when Mr. Kapoor came to see him at Agra "around the 10th of May" while he was Depot Engineering officer there.

He told Mr. Kapoor that it was not within his province to purchase hydraulic brake fluid, Mr. Kapoor asked from whom he could get orders and accused directed him to the Supply Section at New Delhi. The brake fluid for which Mr. Kapoor was soliciting orders was not the invention of accused but was "an ordinary United States Specification" which accused had furnished to Mr. Dhawan and his associates. Accused had given it to them so that in case they started to manufacture hydraulic fluid at once they would be in a position to supply either the British or American Air Forces. It was not and had not been represented to be the invention of accused. He had not disclosed the details of his inventions either to Dhawan or to Das. He had written to the patent attorneys whose names Colonel Fenn gave him and had asked them whether they would make a flat rate for a group of six patents and had filed an application in India for a patent on slushing compound. The Dhawan contract had been terminated on 15 May 1943 and the negotiations with Das had been broken off on 22 June 1943 when accused "presented" his "IOU for Rupees 10,000". Accused had talked with Colonel O'Keefe on 17 May and had practically reiterated the points made to Colonel Fenn in December, namely that accused desired assistance in the preparation of a contract for the sale of his inventions in order that his rights as an officer and upon his return to inactive status would be protected. In answer to the question "Did you go over the history of what you had done up to that point?" accused stated "I touched on several matters". On 19 May accused wrote a letter to Colonel O'Keefe in which he stated that in order to comply with Colonel Callahan's request he believed "the easiest manner" would be to either have "such contracts" written "in your office for me" or give the "specifications" to the civil attorney of accused "for your final approval of contract". In the letter accused also stated that he had a preliminary contract with "one firm while I secure patents" the applications for which had been filed by his attorneys in Calcutta, and asked whether the contract could be written in two parts, one (a) to be effective while he remained in India and the other (b) to become effective upon his return to the "USA" or to inactive status, and if it were so written whether it would be lawful for royalties to be paid to him under "contract (a)". The indorsement of accused to Colonel Callahan's letter of 21 June had been drafted after a consultation with Colonel O'Keefe in the latter's office. Accused prepared a draft of the indorsement, they went over it together, Colonel O'Keefe interrogated accused as to whether he had actually terminated any and all agreements and had made restitution of funds to firms involved, specifically as to Balgopal Das and Company, Colonel O'Keefe suggested some changes and in its final form the indorsement represented their joint efforts. When accused was asked why the Dhawan agreement was not mentioned in the indorsement he replied "The Dhawan matter was not brought up by Colonel O'Keefe to me and as the matter had been discussed, as Colonel Felton told me he had discussed the matter with Colonel Callahan and I, in turn, had terminated the agreement and tendered my check for Rupees 1,000, I considered the matter dropped". Accused did not at any time intend to complete the agreements with either Dhawan or Balgopal Das before having the approval of "United States authorities". He received no royalties, and did not represent to anyone that as purchasing agent for the Government he would assist in purchasing

materials covered by his inventions (R. 79-82; Def. Ex. 4).

Under examination by the court accused testified that he had "patent applications on file" in the United States on articles covered by his contracts or "intended" contracts with Indian firms but "couldn't frankly state what the status is" with reference to the manufacture of such articles there. The full formulas and the research work thereon had been completed before his arrival in India. He had not made application for a patent in India on any article involved in his contracts with Indian firms except slushing compound. His failure to make applications was due to "the controversy which arose" and to censorship difficulties which made it "very, very difficult" for him to proceed. He had discussed with the Patents Section at Wright Field, Dayton, Ohio, the subject of obtaining patents and his "general rights" had been outlined to him but after coming to India he had written no inquiry to that Section concerning his patents. He terminated the Dhawan contract because of misrepresentations made by Mr. Kapoor and broke off the Das negotiations at the request of Colonel O'Keefe. In answer to the question whether hydraulic brake fluid compounded according to the formula which he had given to Mr. Dhawan was satisfactory accused stated that he did not recall seeing any unsatisfactory reports on hydraulic brake fluid received from the states. Accused gave the brake fluid formula to Mr. Dhawan before they entered into negotiations for the assignment of patent rights. Accused did not disclose to Colonel O'Keefe the existence of a contract with Mr. Dhawan when the indorsement to Colonel Callahan's letter of 21 June was being prepared. Accused did not request relief from his assignment as contracting officer but it was his intention "to do so, shortly". He was not "directly aware" that it was illegal for him to have a financial interest in a company to which he could direct business as a contracting officer. He did not know whether or not any of his applications for patents in the United States had been granted as he had been in India for 14 months and did not know "what the status is". He could not say how long it would take to obtain a patent in India but "my experience in the United States is that it is a very long, drawn out period". When asked to explain why he had made contracts with civilians so many months in advance of the time when the patent would be granted accused replied, "Well, as to the period of time in India, I can't answer. No one ever told me and I have never asked how long that period is in India" (R. 83-86).

6. The Charges were investigated, served upon the accused on 18 September 1943, and referred for trial on the same day to a general court-martial appointed by the commanding general of the Tenth Air Force, who was empowered to appoint such a court by War Department General Orders Number 12, 6 March 1942. The court convened on 28 September 1943. No member was of lower grade than lieutenant colonel. The accused stated that he wished to be defended by the regularly appointed defense counsel. The accused was ably defended by exceptionally skillful and diligent counsel, he testified at length in his own behalf and, in that connection, was allowed very wide

latitude. The trial judge advocate was capable and fair and there is no indication that the law member was partial or biased in his rulings or that the members of the court were in any manner influenced by ulterior motives or improper considerations. Each of the three Specifications of the Charge states a military offense under the 96th Article of War and a sentence to dismissal is authorized upon conviction of a violation of that article.

In November 1943 Colonel William Cattron Rigby, Judge Advocate General's Department (Ret.) and associated with him, Colonel Fred W. Llewellyn, Judge Advocate General's Department, (Ret.), both of Washington, D. C., submitted in behalf of the accused a written brief which was transmitted to the China-Burma-India Branch Office of The Judge Advocate General for consideration. A copy of the same brief has been submitted to this Board of Review and on 28 April 1944 its authors argued orally before the Board after they had been informed of the limited scope of the examination of the record that would be made as stated above. They have not contended that the court lacked jurisdiction or the power to impose the sentence nor that the accused did not have a fair trial. The principal points raised were that the Specifications were defective and not sufficiently specific in certain particulars, that the court erred in the exclusion of evidence and in limiting the scope of cross-examination and that the evidence failed to establish by the requisite degree of proof certain essential elements of each of the offenses charged. As these contentions do not involve jurisdictional questions or fundamental irregularities they will not be given further consideration.

Counsel for the accused have contended, however, that in making findings of guilty of Specifications 1 and 2 at variance with the language of such Specifications the court exceeded its powers by convicting the accused of offenses materially different from the offenses alleged. The Specifications state that the accused attempted to acquire a financial interest in certain concerns. The findings state that the financial interest attempted to be acquired was for the private advantage of accused and was an interest in the transactions of the concern. A court may properly deviate from a Specification to conform to the proof presented if the nature or identity of the offense is not changed or the amount of punishment that may be imposed increased or it may find the accused guilty of any lesser offense necessarily included in the offense alleged (MCM, 1928, par. 78c). The variance in the findings in the present case clearly has not changed the nature or identity of the offenses charged. By inserting the clause "for his private advantage" the court merely gave definite expression to what was implicit in each Specification as written, namely, the allegation that the accused attempted to acquire an interest for his own private or personal benefit. A financial interest in the "transactions of" a concern is one form of financial interest in the concern. Moreover, the qualifying language employed in the findings is narrower than and therefore included within the language of the Specifications. A financial interest for private advantage is narrower than a financial interest in general and a financial interest in the transactions of a concern is narrower than a financial interest in the concern.

In the opinion of the Board of Review the court was legally constituted and had jurisdiction of the accused and of the offenses of which he was found guilty, the sentence to dismissal was within the power of the court to impose, and the accused had a fair and impartial trial in accordance with the procedure prescribed by the Articles of War and the Manual for Courts-Martial.

7. There remains for consideration only the question whether the circumstances are such as to call for the exercise of clemency.

With reference to Specifications 1 and 2 the evidence for the prosecution shows that on 7 October 1942 accused was appointed a contracting officer for the Tenth Air Force and continued to act in that capacity until 20 May 1943. He was authorized to purchase all of the articles mentioned in the Specifications under consideration. At the time of his appointment he was engaged in research work designed to develop for the use of the Air Forces substitutes for products and articles which were scarce or of unsatisfactory quality and his purchases for the most part were limited to materials to be used in such research. There was a definite shortage of hydraulic brake fluid, and the slushing compound used for flushing out leak proof fuel cells was unsatisfactory because it did not mix well with the local gasoline. Accused had discussed with his commanding officer, Colonel Callahan, the matter of securing patents in India on compounds which he claimed that he had invented in the United States before he entered the service. In January 1943 accused employed Mr. Lal, an attorney and with his assistance carried on a series of negotiations with Balgopal Das and Company, a concern which operated a factory in New Delhi. Mr. Lal drafted an agreement which was never signed as the parties were unable to agree as to all of its terms. This agreement recited that accused was "the first and true inventor" of plastic compound, containers and other products and had transferred his rights as inventor to Das who was authorized to manufacture and sell the plastic products. The agreement stated that Das had paid accused 5,000 rupees as "first salami money" (earnest money) by check dated 4 January 1943. Accused was also to receive 3% of the gross sales and, under certain conditions, 3½ percent. At about the same time that accused received the earnest money on the plastic compound agreement he also received from Das an additional 5,000 rupees which the latter testified was "for two patents", one for plastic compound and another for slushing compound. Das supplied the United States Army with several hundred gallons of slushing compound and during the month of May 1943 made leak proof tank coverings for the Army Air Forces on purchase orders placed by accused in the total amount of about 5,000 rupees but no royalty was ever paid to accused by Das. On 22 June 1943 accused broke off negotiations with Das and gave the latter his note for 10,000 rupees payable one year from date, as a refund of the earnest money received.

In February 1943, through his attorney, Mr. Lal, accused met Mr. Dhawan, a stockbroker of New Delhi, and after protracted negotiations entered

into a contract with him and several of his associates under the name "Allied Chemical Works". This agreement, dated 9 April 1943, which was signed both by accused and by Mr. Dhawan, was very similar in form to the Das draft of agreement. Accused was described as "the first and true inventor" of hydraulic brake fluid and de-icer fluid according to a formula disclosed by him to the manufacturers. The agreement stated that he had transferred all of his rights in the inventions to the manufacturers, that he was to receive 3 percent or 3½ percent of the gross sales, and the manufacturers had paid him 2,500 rupees "first salami" money and would pay him 2,000 rupees as "second salami money in a month". Accused gave Mr. Dhawan a formula for hydraulic fluid which, according to Dhawan's testimony, was the formula mentioned in the agreement. Dhawan had learned from accused that brake fluid and de-icer fluid were required by both the American and British Armies, it was contemplated that Allied Chemicals was to sell the fluids to the United States Army and the payment of 3 percent to accused was to apply to all sales including sales to the Army.

Accused promised Dhawan that he would receive orders from the "Supply Department" and on 8 May 1943 wrote him a letter suggesting that "for military reasons" it would be advisable for Dhawan to set up his manufacturing plant in Agra or Asansol in order that he might be "close to our Depot activities". Accused was then Depot officer at Agra. In explanation of this letter Mr. Dhawan stated in effect that raw materials for the fluids which he was to manufacture were not available "in the market" in India and it was to his advantage to locate his plants near the United States supply depots where such materials could be had. On 12 May accused, who was then at Agra, gave one of Mr. Dhawan's associates, Mr. Kapoor or Kapur, a note of introduction to Colonel Felton, Chief of the Supply Division at New Delhi. The note pointed out the advantages of having a plant for the manufacture of tank compound, de-icer fluid and hydraulic fluid located at Agra where supplies would be readily available to the manufacturers from "the Depot". When Mr. Kapoor called upon Colonel Felton and learned that his company would not be given the orders which he claimed accused had promised, he was bitterly disappointed and very much upset. Colonel Felton informed accused by telephone of Mr. Kapoor's attitude, remarked that it was "a very grave matter" and suggested that accused do something about it. On 15 May accused wrote Mr. Dhawan that he wished to terminate the "tentative agreement" because Mr. Kapoor had misrepresented "certain aspects of our negotiations", and inclosed his check for a portion of the earnest money which he had received.

Accused testified that it was the understanding of the parties that neither of the written agreements was to become effective until he had procured patents from the Government of India covering the inventions involved and until the terms of the agreements had been approved by The Judge Advocate General or by "United States authorities". In that regard his testimony was corroborated by the testimony of Mr. Das, and in his proffer of proof accused claimed that if permitted to do so Mr. Dhawan and the attorney, Mr. Lal, on cross-examination also would have testified to the same effect. The court

obviously rejected this defense and there are many good reasons why it should have done so. Both written agreements were drafted by the attorney employed by accused, after protracted periods of negotiation. The word "patent" does not appear in either instrument, nor is there in either of them any other reference to or mention of the conditions claimed by accused. To accept the testimony of accused we must assume that his attorney, in drafting one agreement in January and the other in April, inadvertently left out of each of them the same two vitally important provisions and that both accused and Mr. Dhawan signed the later agreement without discovering the omission. Moreover, a substantial sum of earnest money was paid to and accepted by accused under each contract and Mr. Das expended 25,000 rupees putting his factory in condition to manufacture the products involved. It seems incredible that Mr. Das and Mr. Dhawan would have made such substantial outlays under agreements which were subject to two major contingencies over which they did not have the slightest control. Apparently neither of them made any effort to ascertain whether accused had any patentable invention or if so how long they would have to wait before he could procure a patent. Accused admitted that he did not know how long it would take to obtain a patent in India and that he had never taken the trouble to inquire. Accused accepted, retained and expended for some purpose not disclosed in the record, the earnest monies paid by Das and Dhawan. He had to give his note for the 10,000 rupees which he received from Das, and when on 15 May he declared his desire to cancel the signed Dhawan contract he tendered his check for only 1,000 rupees of the 2,500 rupees which he had received and according to the undisputed testimony of Mr. Dhawan 500 rupees of the earnest money never was refunded. Although accused claimed neither written agreement was to take effect until he had procured Indian patents on his inventions he never filed an application for patent on any of the articles covered by the written agreements. He admitted that the only application he ever filed was one for slushing compound and the date appears to have been 8 May 1943. (See assignment of patent rights by accused to United States attached to record of trial.)

Accused also testified to the effect that he had been engaged in research work for many years and that the purpose of all of his negotiations with Indian manufacturing concerns was to realize the financial returns to which he was entitled on inventions made and completed while he was a civilian in the United States. Upon his arrival in India on 11 August 1942 he immediately became aware of the "extreme urgency" that existed with reference to certain strategic materials, particularly fuel cells and hydraulic fluid. He soon learned also that the slushing compound used in India was unsatisfactory because of certain peculiar properties of the local gasoline and that fouled carburetors and engine failures had resulted. He obtained Colonel Callahan's consent to take out Indian patents and took steps to get Indian concerns to manufacture some of the products so urgently needed by the American and British Forces. The foregoing explanation of the commercial transactions of accused in India will not stand up under critical analysis. In the first place it seems an extraordinary coincidence

that accused at some time prior to his entry upon active duty in July 1941 should have invented and perfected new kinds of slushing compound and hydraulic brake fluid which precisely met and solved the peculiar local supply problems with reference to those compounds which accused found to exist upon his arrival in India in the summer of 1942. Moreover, if as he claims, accused was actuated by a patriotic desire to relieve a critical shortage of materials in India, it is hard to understand why he did not make his valuable inventions immediately available to the armed forces. According to his own testimony he carried on protracted negotiations culminating after many months in contingent manufacturing contracts which were not to become operative until some indefinite future time when he had obtained Indian patents on the products involved.

In his testimony accused many times mentioned his patents, patent rights and patent applications "in the States". He told Colonel Fenn that he had secured a patent in the United States on a sealing fluid. Under examination by the court accused testified as follows:

> "Q. Have you secured in the United States patents on articles covered by your contracts, or intended contracts, with Indian firms?
>
> "A. I have patent applications on file, yes.
>
> "Q. Those items are not being manufactured in the United States under your patents?
>
> "A. I couldn't frankly state what the status is - I couldn't state." (R. 83)

A search of the records of the United States Patent Office made by the Patents Division of The Judge Advocate General's Office for the period from the year 1935 to 10 April 1944 shows that no application for a patent was filed in that office by Russell E. Hollis. The only record in the War Department concerning an application for patent, prepared (but never filed) for Russell E. Hollis, is of one covering "Armored Airplane Nose Spinner" mailed to accused at New Delhi, India, by the Army Air Forces on 31 December 1943. The memorandum of the Patents Division conveying the foregoing information is attached hereto.

Accused also claimed that in making his contracts with Indian firms he tried to no avail to get legal advice and assistance from Colonel Fenn, Colonel Tappy and Colonel O'Keefe, all of The Judge Advocate General's Department. The record shows that his discussions with these officers, with the exception of Colonel O'Keefe, dealt primarily with the matter of his procuring patents in India. Colonel Fenn testified that he gave accused the names of two patent attorneys in Calcutta but did not discuss "rights of royalties" with him. Colonel Tappy testified that he delivered to accused the slip of paper on which Colonel Fenn had written the names of the patent attorneys but that he (Tappy) did not discuss "the nature of the business with accused". Accused did not talk with Colonel O'Keefe until after he had

been directed to do so by his commanding officer, Colonel Callahan, in connection with the latter's order that accused submit a report of his negotiations and dealings with Indian manufacturing concerns. Even then accused did not tell Colonel O'Keefe about the Dhawan agreement.

Specification 3 of the Charge is based upon the failure of accused to disclose the Dhawan agreement in his report to Colonel Callahan. Accused claimed that he overlooked mentioning it in his written statement of 22 June 1943 because at that time he considered it canceled and at an end. The evidence as disclosed by the record clearly indicates that the omission was not an inadvertent oversight.

In his note to Colonel Felton introducing Mr. Kapoor accused stated that he had "discussed" with the latter "of Dhawan & Co." the matter of setting up facilities at Agra to manufacture "Tank Compound, De Icer Fluid or Hydraulic Fluid". Accused did not disclose that he had an agreement with Dhawan or that he had any personal interest in the matter. After Colonel Felton had telephoned to accused and informed him of Mr. Kapoor's attitude and representations accused wrote a letter of explanation to Colonel Felton. The letter stated that accused had decided that he would not complete "an agreement tentatively discussed, to produce certain Tank Compound and Plasticizer under my patents which was apart from the items being made by Balgopal Das & Co. * * * Instead, I may complete an agreement with a manufacturer in Bombay. I had felt that their [Dhawan and associate's] production of the other items [De Icer Fluid and Hydraulic Fluid] would be a boon to D. S., and especially here in Agra, while also giving them some business, in which I said I would merely try to help them get this business, which was to have <u>no part</u> of our agreement * * * ." The plain import of the quoted language is that the tentative agreement of accused with Dhawan covered tank compound and plasticizer and that the manufacture of de-icer fluid and hydraulic fluid, actually the very two products covered by his agreement with Dhawan, constituted "<u>no part</u>" of that agreement.

On 16 May Colonel Felton wrote an inter-office memorandum to Colonel Callahan in which he requested inter alia, that accused be instructed to submit a complete report of arrangements made with any concern for the manufacture of hydraulic fluids, de-icer fluid, tank compound, slushing compound, plasticizer or leak proofing work "especially with reference to Balgopaldos & Company and Industrial Products". Colonel Callahan transmitted the memorandum to accused by indorsement directing him to comply with its provisions and suggesting that he confer with Colonel O'Keefe. Accused did confer and communicate with Colonel O'Keefe several times but did not disclose that he had ever carried on any negotiations or entered into any agreement with Dhawan. In his reply by indorsement to Colonel Callahan dated 8 June accused made it clear that all of his discussions with Colonel O'Keefe had applied "only to a single contract ---- with Balgopal Das & Co". On 21 June 1943 Colonel Callahan again wrote accused a letter in which he reviewed the

situation in detail, stated that the action taken and the reports made by accused in response to Colonel Callahan's indorsement to Colonel Felton's memorandum of 16 May had not been satisfactory, and in the concluding paragraph in part directed accused to furnish by indorsement the following information: "(1) Any agreement or contract you have entered into with individuals, firms, or corporations, since you have been in the capacity of a U.S. Army Officer in India; (2) information regarding negotiation concerning the sale in India of patents and royalties thereunder——" (Underscoring supplied) Accused replied by indorsement dated 22 June, in which he stated in part that "The sole agreement and this never prepared in final form has been with Balgopal Das & Co., for manufacture under my patents of Slushing Compound and Plastics Leakproof Fuel Cells. ——— A tentative agreement with a firm in Bombay to manufacture Tank Sealing Compound has been dropped". (Underscoring supplied) The statement made by accused was false since he had entered into an agreement with Mr. Dhawan and his associates for the manufacture of hydraulic fluid and de-icer fluid. Accused knew that the statement was false and the circumstances indicate that he made it deliberately and with intent to deceive. It is clear from the record that accused did not want it known that he had entered into the contract with Dhawan to take a 3 percent royalty on sales of hydraulic brake fluid made in accordance with the Army Air Forces formula and de-icer fluid, which Colonel Felton described as only a simple mixture of glycerin and alcohol (R. 56). Accused never had a patent and never filed an application for a patent on either of those products either in the United States or in India. He misrepresented the nature and scope of his dealings with Dhawan in his letter to Colonel Felton by indicating that they had not progressed beyond the tentative discussion stage and by inferring that even if an agreement had been reached it would not have covered hydraulic fluid and de-icer fluid. Accused further indicated his attitude toward the Dhawan agreement by the hot haste with which he tried to back out of it when it came to the attention of Colonel Felton. Two days after the latter called accused by telephone and reported what Mr. Kapoor had said (all of the negotiations preceding the making of the agreement appear to have been with Mr. Dhawan), accused wrote a letter to Dhawan giving notice of his desire to cancel the contract. In his extensive discussions with Colonel O'Keefe accused refrained from mentioning the Dhawan agreement. Colonel Callahan's final directive to accused was not limited to agreements then in existence but plainly and unequivocally ordered accused to disclose any agreement which he had entered into since he had been in India as a United States Army officer. Accused showed by his own choice of words that he understood what was expected of him when he replied that the sole agreement "has been" with Das.

8. The Army Regulation (AR 600-10, par. 2e(2)) on which Specifications 1 and 2 are based deals with the limitations upon the activities of persons subject to military law. It provides that such a person shall refrain from all business activities and interests not directly connected with his military

duties which would tend to interfere with or hamper in any degree his full and proper discharge of such duties or would normally give rise to a reasonable suspicion that such participation would have that effect. The regulation recites as a typical example of forbidden outside activity the acquisition or possession by an officer of a financial interest in any concern whose business includes the manufacture and sale of articles of a kind of which it is the duty of the officer to make purchases for the Government. The agreement which accused entered into with Dhawan, and his negotiations and dealings with Das constituted attempts to violate not only the letter but the spirit of the cited regulation. He attempted to acquire, and to the extent of the earnest money which he received actually did acquire, an interest in the financial transactions of the two concerns. They were to manufacture and sell articles which it was the duty of accused to buy as a contracting officer. His purchases as contracting officer were not extensive and for the most part were limited to materials used in his research work it is true, but under the circumstances his activities relative to securing a financial return on the manufacture and sale to the United States Army of the very products which it was his duty as an Army research engineer to develop and perfect, necessarily would tend to interfere with the full and proper discharge of his military duties.

With reference to the finding of guilty of Specification 3, the evidance shows that accused not only made a false official statement with intent to deceive his commanding officer but that his whole course of conduct with reference to the Dhawan transaction was characterized by a deplorable lack of candor toward other officers. A search of the records of the United States Patent Office has disclosed that accused testified falsely under oath at his trial when he stated, in effect, that he had filed applications for patents in the United States on plastic compound, slushing compound, hydraulic brake fluid and de-icer fluid. As a matter of fact he had not filed an application for a patent on any of those products.

In the opinion of the Board of Review the circumstances do not warrant the exercise of clemency and the Board therefore recommends that the sentence to dismissal be carried into execution.

Samuel M. Driver, Judge Advocate

_____, Judge Advocate

F. J. Lotterhos, Judge Advocate

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

SPJGN
CM 250331

6 MAR 1944

UNITED STATES	)	FOURTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	March Field, California, 31
Second Lieutenant RAY H.	)	January 1944. Dismissal.
PETERSON (O-750835), Air	)	
Corps.	)	

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

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

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

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

Specification: In that Second Lieutenant Ray H. Peterson, Air Corps, Headquarters Detachment, 399th Bombardment Group (H) AAF, did, without proper leave, absent himself from his organization and duties at March Field, California, from on or about 2000, December 28, 1943, to on or about 0700, December 29, 1943.

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

Specification: In that Second Lieutenant Ray H. Peterson, Air Corps, Headquarters Detachment, 399th Bombardment Group (H), AAF, having been restricted to the limits of his post pursuant to sentence of a general court-martial promulgated in General Court-Martial Orders No. 301, Headquarters Fourth Air Force, December 31, 1943, did, at March Field, California, on January 4, 1944, break said restriction by going to Riverside, California.

He pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specification. He was found guilty of all Charges and Specifications and was sentenced to be dismissed the service. Evidence of one prior conviction for a violation of Article of War 61 adjudged on 22 December 1943 was introduced. 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 22 December 1943 a court-martial adjudged the accused guilty of a violation of Article of War 61 and sentenced him to be restricted to his post for three months and to forfeit part of his pay for twelve months. The accused was present before the court when this sentence was pronounced. The reviewing authority by General Court-Martial Order No. 301, dated 31 December 1943, approved the sentence but reduced the amount and duration of the forfeiture (R. 9; Pros. Ex. 1).

His organization's executive officer checked the accused's quarters three times during the night of 28-29 December 1943 to ascertain whether the accused was complying with his restriction and found the accused absent from about 2000 o'clock 28 December 1943 to about 0700 o'clock on 29 December 1943. On the evening of 4 January 1944 the accused requested permission of the executive officer to go to Riverside, California, about 9 miles away to see his sick wife and was refused. The accused nevertheless went to such town where he was observed by a civilian who knew him and so testified. On the morning of 5 January 1944 in a conversation with the executive officer, the accused admitted his two violations. On the same day he signed a sworn confession which recites that he was appropriately advised of his rights under Article of War 24 and which was admitted into evidence without objection. At no time subsequent to 22 December 1943 had the accused been given permission to leave his station at March Field (R. 6-9, 9-11, 12; Pros. Ex. 2).

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

> "At my previous trial, I was brought in here after the birth and death of our baby, said trouble left my wife in a serious condition. She is living now in Riverside and her physical condition is improving steadily. Her mental condition is likewise, except for a - well, she misses the baby. I had previously been given passes while confined to the post for the express purpose of seeing my wife in Riverside and on December 28th after working my full duty that day, I proceeded to Riverside, to our residence and stayed with her at that time. I arrived back here on the field approximately 6:30 or quarter of seven, in time for duty the next day. I was - I signed a statement before Major Adamson on that occasion. The Major felt apparently that I was worthy of salvaging, so he held it, just held it up. On January 4th I had not had contact with my wife by telephone or otherwise for a couple of days, - two days previously. At the time I had

last seen her she was feeling rather ill and contrary to previous testimony we do not have a telephone there. I requested permission to get one put in, due to my confinement, but was unable to secure one. I proceeded to Major Adamson to request permission to go to town because I was very worried about her. The reason I went to Major Adamson was, at the time my sentence from a previous court had not been approved or returned and that part of the sentence dealing with the fine had not taken effect apparently until it was reviewed, because I didn't make a payment on the fine before. After seeing Col. Boynton I assumed the Major still had the authority until the case was reviewed and returned. After being denied permission to go to town I attempted to call her once more and having no success, proceeded to town. I drove directly to the place, found that she was still somewhat ill, she had had the Flu. Not wanting to leave her alone, put her in the car, proceeded back to the field, stopping only on an errand at Baxter's Liquor Store. Following that time she stayed out here for a day or so, until she was ready enough and well enough to go back. I think that's all, sir."

5. The Specification, Charge I, alleges that the accused without proper leave absented himself "from his organization and duties at March Field, California, from on or about 2000, December 28, 1943, to on or about 0700, December 29, 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, * * * , quarters, station, or camp for a certain period, as alleged; and (b) that such absence was without authority from anyone competent to give him leave" (MCM, 1928, par. 132).

The accused's plea of guilty to the Charge and its Specification is abundantly supplemented by the evidence of the prosecution consisting of the testimony of the organization's executive officer and the accused's own sworn confession. The offense, furthermore, is aggravated by its commission while the accused was under a sentence of restriction to the post which had been pronounced a few days before and of which he had full knowledge. The evidence, therefore, shows beyond a reasonable doubt the accused's guilt as alleged and amply supports the findings of guilty of Charge I and its Specification.

6. The Specification, Charge II, alleges that the accused, having been restricted to the limits of his post pursuant to a sentence of a general court-martial promulgated by a described order on 31 December 1943, on 4 January 1944, at March Field, California, broke said restriction by going to Riverside, California. "Disobedience of standing orders" is a violation of Article of War 96. Orders duly promulgating the sentence of a general court-martial adjudging restriction of an accused to the limits of his post for a specified period of time are for its duration tantamount to "standing orders".

The evidence is conclusive that on 31 December 1943 there were promulgated orders which effectuated the sentence of a general court-martial adjudging restriction of the accused to the limits of his post for a specified period of time. The evidence is equally conclusive that the accused during such period requested permission for a brief relief therefrom which was refused. He thereafter breached his restriction and violated the promulgated orders. His unsworn statement contains an admission of his dereliction which cumulatively substantiates the prosecution's conclusive evidence as it sounds wholly in extenuation and not in defense. The evidence, consequently, establishes beyond a reasonable doubt the accused's commission of the offense as alleged and amply supports the findings of guilty of Charge II and its Specification.

7. The accused is about 26 years old. The War Department records show that he had enlisted service from 3 March 1941 until 28 July 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 all Charges and Specifications and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of either Article of War 61 or Article of War 96.

Abner E. Lipscomb, Judge Advocate.

William H. Gambrell Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 250331

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 Second Lieutenant Ray H. Peterson (0-750835), 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. In view of an official report from the Commanding General, 4th Air Force, that the accused has, subsequent to his present offenses, absented himself without leave for approximately 35 days, 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.

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Radio from Commanding General, 4th Air Force.

(Sentence confirmed. G.C.M.O. 267, 6 Jun 1944)

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

SPJGQ
CM 250426

-8 MAR 1944

UNITED STATES	CHARLESTON PORT OF EMBARKATION
v.	Trial by G.C.M., convened at Charleston, South Carolina, 10 February 1944. Dismissal, total forfeitures, and confinement for four (4) years.
Major LEO H. HECHT (0306947), Quartermaster Corps.	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Major Leo H. Hecht, Quartermaster Corps, Charleston Port of Embarkation, Charleston, South Carolina, did, at Charleston, South Carolina, on or about 13 January 1944, wrongfully, knowingly, and willfully appropriate to his own use and benefit and deposit in the United States mail for mailing to an unauthorized person, twelve (12) sheets, cotton, bleached, bed, value about $14.28, and two belts, wool, olive drab, value about $1.50, property of the United States intended for the military service thereof.

Specifications 2, 3, 4 and 5 are identical in form with the previous Specification, differing only in date and description of the property alleged to have been appropriated. The differences are as follows:

Specification	Date	Property
2	14 January 1944	Twenty (20) pairs of drawers, winter, 75 percent cotton, 25 percent wool, value about $20.

Specification	Date	Property
3	14 January 1944	Ten (10) pairs of drawers, winter, 75 percent cotton, 25 percent wool, value about $10.
4	16 January 1944	Twenty-two (22) pairs of sun glasses, value about $11.
5	16 January 1944	Two (2) blankets, wool, olive drab, value about $15.48, one (1) raincoat, value about $3, and two (2) pairs of leggings, canvas, value about $1.60.

He pleaded not guilty to and was found guilty of the Charge and all of the Specifications, except, as to Specification 1, the words and figures "and two belts, wool, olive drab, value about $1.50". No evidence of previous convictions was 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 at such place as the reviewing authority may direct for four years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record of trial for action under Article of War 48.

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

The accused during the occurrences hereinafter related was a Major in the Army of the United States, on duty at the Charleston Port of Embarkation, Charleston, South Carolina, as the Port Quartermaster (R. 5).

Specification 1

On 13 January 1944 at the United States Post Office in Charleston, South Carolina, the accused delivered to the postal authorities for mailing, two packages (R. 8, 10, 12-14) addressed to his father Mr. E. W. Hecht, 46 West Palisades Avenue, Englewood, New Jersey, bearing the return address of "C. Brown, 138 Bull Street, Charleston, S.C." (R. 7, 10, 12-14, 48). One of these packages when opened by the Postal authorities, shortly thereafter, contained an original manufacturer's package which bore a label or inscription "12 sheets, cotton, bleached, bed, size 72 inches by 108 inches (torn length). Specification No. DDD-S-281 (amended)

Stock No. 27-S-7090. J. P. Stevens and Company, Inc. - Contract No. W-669-QM-19256, dated June 4, 1942, Philadelphia, Q.M. Depot", and also two O.D. cloth belts. The other parcel contained another package marked with the same printed label (R. 14). The Post Office Inspector who opened the parcels did not open the inner or manufacturer's packages (labelled as described) to determine whether or not they contained sheets, but closed the outside wrappings on both packages and permitted them to continue on their way through the mail (R. 14, 18). Neither the packages nor the labels were produced in court. The meaning of the lettering and numbers on the label described was explained by a witness who testified that it indicated that the contents of the package were manufactured for the Quartermaster Depot at Philadelphia under the War Department contract indicated (R. 27).

There was on hand, in the Equipment Warehouse, Section C, Staging Area, Charleston Port of Embarkation, as of January 17, 1944, an opened box containing one remaining package of an original shipment of eight packages, which remaining package contained twelve sheets and a label which answered the same description--manufacturer's name, War Department contract number and date--as the label that appeared on the packages mailed by the accused. This package with its label was put in evidence (R. 28, 49; Ex. F). The records of the warehouse disclosed no sale of sheets to the accused (R. 33).

During the week of 9 to 16 January 1944 accused had inquired, by telephone, if there were any 72 x 108 sheets in stock and was advised that there were two full cases in bulk stock (R. 43).

A check of the stock records and the physical inventory of the sheets in the warehouse, Section C, made on 17 January 1944, disclosed a shortage of "roughly about 20 sheets" according to one witness (R. 52), but an overage of 61 sheets according to another witness (R. 37). The value of the sheets described was, at the time, $1.19 each (R. 30).

Specifications 2 and 3

On 14 January 1944, at the same United States Post Office, the accused delivered, for mailing, two packages addressed to his father and bearing the return address of "C. Brown, 138 Bull St., Charleston, S.C." (R. 8, 11, 14, 15, 58). When opened by the Postal Authorities one contained 20 pair of men's long leg drawers and the other 10 pair, sizes 34 and 36 (R. 11, 15, 18, 19). Inside of the belt band of each pair was stamped the percentage of wool and cotton, the name of the manufacturer, the date and number of the War Department contract, the number of the stock, and "Phila. Q.M. Depot" (R. 15). A qualified witness, testifying as to the meaning of these abbreviations and numbers, stated they indicated the kind of material

and type of stock used in the article, the date and number of the contract under which the article was manufactured for the War Department and that the contract was given through the Phila. Quartermaster Depot (R. 26). The drawers were shown to be worth $1 per pair (R. 30).

Specifications 4 and 5

On 16 January 1944 at the same United States Post Office the accused delivered for mailing two packages, one addressed to his father at the same address set forth above, and the other to his brother, Arthur Hecht, 87 W. Palisades Ave., Englewood, New Jersey (R. 16, 20, 31, 25; Ex. B). Both bore the return address "C. Brown, 138 Bull St., Charleston, S.C." (R. 16, 26). The package addressed to the brother contained a cardboard carton which in turn contained 22 pairs of sun glasses, of which 20 pairs were of one style and two of another (R. 16, 22, 25). Inscribed on the carton was a label showing "20 pair", the stock number, type of glasses, manufacturer, and War Department contract number (Ex. D). This carton also contained this message written in the handwriting of accused in pencil, "Arty - You owe me $11 for these 22 prs of glasses. They ought to sell for at least $2.00 a pair. Leo" (Ex. D; R. 87).

The package addressed to the father contained two wool olive-drab blankets. One was marked "U.S." and had attached to it a label giving the name of the manufacturer and the War Department contract number and date. The other blanket contained no identifying marks or labels. This same package also contained two pair of canvas leggings, apparently new, marked with the name of the manufacturer, date and War Department contract number, and a raincoat with the name "L. C. Williams" inscribed on the inside of the coat. Attached to the raincoat was a tag bearing a manufacturer's name, and a War Department contract number and date (R. 22, 23, 25).

A Post Office Inspector testified, in laying the ground for introduction of the two packages in evidence, that accused, on 17 January 1944 signed a letter addressed to the Postmaster, describing the contents of the two packages (sun glasses, blankets, raincoat) and authorizing him to withdraw them from the mail (Ex. B, R. 16-17).

These two packages with their contents were displayed in court and received in evidence (Ex. C and Ex. D). The defense admitted the enclosed written message to his brother Arthur to be in the handwriting of the accused (R. 24). The markings on the carton of sun glasses, the blanket, the leggings, and on the tag attached to the raincoat were the manufacturer's identification marks showing the property was manufactured for the Quartermaster Corps under

contract made through the Philadelphia Quartermaster Depot (R. 26-27).

There was on hand in the Equipment Warehouse, Section C, as of 17 January 1944, a large container containing nine cartons, being the remainder of an original ten cartons of sun glasses. Each carton contained twenty pairs of glasses. The description of these glasses, including the name of the manufacturer and the War Department contract number and date, was identical with the carton of glasses accused is alleged to have appropriated to his own use and benefit (R. 23). The large container was opened in the presence of the accused on 15 January 1944 (R. 46), and one carton was removed therefrom by Sergeant Brennan and delivered to accused (R. 40). Accused said that he would replace the carton later (R. 40, 42). The glasses were not returned and the warehouse stock was short one carton of glasses (R. 42). On 18 January 1944 a check of the stock records and a physical inventory of the glasses in the warehouse was made, which disclosed a shortage of 58 glasses (R. 37). A subsequent inventory made in the early part of February, 1944, showed a shortage of 71 glasses (R. 51, 52). These glasses were a part of the stock in the warehouse (R. 31). The records of the warehouse disclosed no sale of glasses to accused, in fact, no sale of sun glasses had been made to anyone during the preceding three months (R. 33). The sun glasses were worth $.75 each; the blankets $7.74 each; the leggings $.81 per pair (R. 30-31).

The accused, after warning of his rights, voluntarily admitted to Lt. Col. P. F. Baetcke, I.G.D.,during an official investigation that he had taken the two Army blankets, the two pair of canvas leggings and the raincoat from "our salvage" without any authority and without anyone else knowing about it (R. 48, 50).

In addition to the accused, one other officer and three enlisted men had keys to the warehouse (R. 30). The procedure for obtaining property out of the warehouse is by valid vouchers and sales (R. 29) and when property is transferred to a commissary it is done by shipping tickets (R. 31). A search of the record of sales and delivery slips for sales made to accused at Section C Warehouse for the months of November, December, and up to and including 16 January 1944 disclosed that accused had purchased during that time only two pair of tan officer's gloves (R. 33). A similar search of the records and sales slips at the commissary, Section A, for the months of November, December, and up to and including 16 January 1944, disclosed only one purchase by accused, namely, of ten bath towels during that period (R. 35). It was possible for sheets of the kind described to have been sold at the commissary to any officer prior to the time indicated (R. 35).

4. Competent defense evidence was introduced to the effect that officers were permitted to, and did, purchase property through the local commissary of the same kind as that here alleged to have been appropriated by accused, and also that one officer could purchase such articles for another (R. 53, 69, 71). There was in fact a Captain Sidney Brown who, for some time prior to March 1943 lived at 138 Bull Street, Charleston, S.C., and who was a close friend of the accused's (R. 55, 57, 59). Used property, known as Class B property, was sold at half of the list price from the salvage warehouse for a considerable length of time to any officer who wanted to purchase such property (R. 72, 73).

Lieutenant B. J. Cutler, Property and Supply Officer testified that the posting and records for the purpose of taking inventory at the warehouse involved were in such a chaotic state that they did not reflect the correct condition of the inventory on hand; further that there are shortages and overages of stock in the warehouse, and that this condition had existed since the witness took over his duties in March 1943 (R. 75). This condition was due to lack of personnel to keep the records accurately and up to date and the effort to perform the primary function of supplying the troops (R. 75). Articles collected as salvage and placed in the salvage warehouse are not sold to military personnel (R. 79).

Mr. Leon Steinberg, a dealer in scrap metals and salvage materials in Charleston, South Carolina, as a defense witness testified in substance as follows:

He bought his salvage from the Charleston Port, Fort Moultrie, Navy Yard, and Coast Guard, and has repaired some of the articles and resold them. These items consisted of scrap metals, leggings, field jackets, shirts, pants, belts, and a conglomeration of rags some of which he resold to any army store (R. 81, 82). Accused had never been in his store to his knowledge (R. 82).

Mr. Israel Goldberg, Charleston, South Carolina, operator of an army store, also a defense witness, testified in substance as follows:

He has bought salvage materials at Fort Moultrie and New York consisting of seconds or rejects. These items had Government contract numbers and symbols (R. 83).

The defense further introduced testimony to the effect that items of salvage had been issued to officers for their personal use in Government service, but to be returned. Such issues were made without receiving payment or a memorandum receipt therefor (R. 85, 86).

Accused elected to make an unsworn statement in his own behalf (R. 87) which was read to the court by his counsel and attached as defense Exhibit 1. In substance it states:

The articles named in the Specifications of the Charge are available at any post, camp or station and may be obtained from dealers in army salvage. An individual is not required to explain his presumably lawful possession of personal property. The presumption of lawful possession was not overcome by evidence adduced by the Government. He is one of the many officers who has, or had, possession of Government-purchased or Government-sold property and should not be singled out and charged with mistrust without direct and positive proof of wrongful possession, and there is no occasion to explain that which under the law requires no explanation.

5. The accused is charged with having wrongfully appropriated to his own use five different lots of goods of certain values alleged to be "property of the United States intended for military service thereof". The Specifications set forth dates and places, when and where the alleged misappropriation took place and the manner thereof. The evidence produced and uncontradicted clearly established that on the dates and at the places specified the accused while in the military service did appropriate to his own use the contents of five different packages that he mailed to his father and brother. The value of the articles involved were clearly shown with the exception of the raincoat in Specification 5. Failure of the prosecution to prove value does not affect the findings, since value of the goods is not an essential element of proof in the case.

All of the elements of the offense were shown beyond any reasonable doubt with the exception of the all-important allegation that the property misappropriated was the property of the United States at the time the accused mailed it. The accused's defense is based on the ground that the prosecution failed to prove this fact beyond a reasonable doubt. Analysis of the competent evidence with respect to the contents of each package and consequently as to each Specification follows.

Accused was the Port Quartermaster and theoretically had legal custody and control for the Government of the Quartermaster stores in the warehouses at the Port of Embarkation. In his official capacity he had easy access to Government stores located therein and in his position of trust could, if he so desired, easily help himself to these stores with very small risk of detection or question. All of the articles involved in the subject case which were either produced or described in court during this trial were articles which could be commonly used for military as well as civilian purposes, except the contents of the package described in Specification 5. There we find articles made primarily and exclusively for military purposes, such as army leggings, army blankets, and an army raincoat.

With reference to Specification 5 the evidence as to the ownership of these articles was the accused's voluntary admission to the officer investigating the circumstances in his official capacity as an Inspector General of the Army. Accused admitted that he procured them from the salvage warehouse without authority and without the knowledge of anyone else. There was no evidence to the contrary. He did not deny making this admission during the trial. It is a fair and reasonable inference that property of this kind contained in a quartermaster warehouse on a military reservation (port of Embarkation) is Government property. The finding of guilty of Specification 5 is therefore legally supported by the evidence.

With reference to Specification 4, which involves the carton of sun glasses, there was direct evidence that after the "QM" warehouse had received a package containing ten cartons of sun glasses, marked and intended for military use, accused removed therefrom one carton when the package was opened. The carton mailed by the accused, recovered from the mails and produced in court, corresponded in every detail to the missing carton. It was mailed by the accused on the day after he took the carton from the original container in the warehouse. Coupled with all of the surrounding circumstances it is a logically inescapable inference, that this was the same carton of sun glasses. Under the same reasoning as applied above to Specification 5, this carton of sun glasses belonged to the United States. Therefore the evidence is legally sufficient to support the finding of guilty of Specification 4.

With reference to Specifications 2 and 3, involving the drawers, there is no evidence of record that these drawers or any drawers like them, were ever stored in the "QM" warehouses at Charleston. Further there is no evidence of any shortage of drawers, nor any evidence of where the accused procured those drawers contained in the packages that he mailed. The only evidence of ownership as to these articles was the stamp on the inside of the belt band of each pair. Giving full credence to this stamp, and the interpretation thereof by the prosecution's witness, all that is proven is the quality of the article and that it was manufactured by the manufacturer whose name appeared thereon under a contract of a certain date and number made with the War Department through the Phila. Quartermaster Depot. The only inference of ownership which can be drawn from these facts is, that the articles so stamped at one time belonged to the manufacturer and that it was intended to become Government property because it was made under a contract with the War Department through the Phila. Quartermaster Depot. But when and where it became Government property is not established. Even if it had become Government property there is, for consideration, evidence that articles of the same kind were sold at numerous commissaries to military personnel and that these articles continued to retain similar markings. It was, therefore, reasonably possible for the accused to have obtained lawful possession and ownership of the drawers in question. While the probabilities are strong that the accused procured these articles from one of the warehouses

in his charge, unless such theory is founded upon competent evidence deemed sufficient to exclude every reasonable hypothesis except the one of the accused's guilt, the conviction of guilt remains unsupported and must be disapproved. Findings may not be sustained on strong suspicions or probabilities. "It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens". Buntain v. State, 15 Tex. App. 490; CM 207591; CM 228831. By failing to show that there were any articles of this description missing from the "QM" warehouses under the accused's command the prosecution failed to prove the corpus delicti. For the foregoing reasons the Board of Review is of the opinion that the evidence is not legally sufficient to support the finding of guilty of Specifications 2 and 3 of the Charge.

With reference, however, to Specification 1, in which the accused is charged with wrongfully appropriating 12 sheets belonging to the United States, the corpus delicti is established by circumstantial evidence in the record. The warehouses under the accused's control did contain sheets and sheets were missing therefrom. Packages of sheets identical with that mailed by the accused were in the warehouse at Charleston under the control and in the custody of the accused. The box in the warehouse in which the packages of sheets were originally crated was found opened shortly after the offense was alleged to have been committed. Seven of the original packages therein had been removed. The records disclose that no sheets had been sold to the accused from that source. There was no affirmative evidence in the record to show directly, or by inference, that accused was lawfully in possession of either of the two packages which he had mailed. The sheets he thus mailed were still in their original manufacturer's package which is prima facie evidence that they were not purchased at retail from the commissary store as the accused attempts to infer. His act of placing a fictitious return name and address on the outside of these mailed packages containing sheets, when coupled with evidence of his other proven acts of misapplication of the government owned glasses and the salvaged articles, from the same source is convincing that he was engaging generally in an unlawful enterprise, viz; that he was mailing articles to his father and brother which were stolen from government property in his custody and control. The markings, the labels, and the packages themselves disclose that the contents were obviously property manufactured expressly for the United States and, since they were identical with the package in evidence, the final link in the chain of circumstantial evidence leads to only one reasonable conclusion, viz; that he, as the Quartermaster, in complete charge of this type of property, procured those packages from the box of such packages in the warehouse under his control. The circumstances exclude any other logical or reasonable conclusion. That the packages mailed by the accused contained sheets was not disputed by the defense and for that reason the logical and unescapable inference that the original manufacturer's package so labelled did contain sheets will be sustained.

Under all of the circumstances, therefore, the Board of Review is of the opinion that there was legally sufficient evidence to support the finding of guilty of Specification 1 of the Charge.

6. War Department records show the accused to be 32 years of age. Born and raised in and near the city of New York he graduated in 1929 from Erasmus Hall High School and in 1933 from City College of New York. For two years thereafter he was employed as a clerk in the dry goods business of his father and brothers "E. W. Hecht & Sons". He was appointed 2nd lieutenant, Infantry Reserve, 14 June 1933; promoted to first lieutenant, 2 July 1936; transferred to Quartermaster Corps Reserve 16 December 1940; promoted to Captain, Army of United States 4 June 1942; and promoted to Major 23 December 1942. He was on active duty for a period of two weeks during 1933 and 1934; from 6 May 1935 to 15 April 1938; two weeks additional during 1938 and 1939, and has been on active duty continuously since 9 January 1941. In the performance of his duties he has been rated "superior" since September 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications 2 and 3 of the Charge, but is legally sufficient to support the findings of guilty of Specifications 1, 4 and 5 of the Charge, and the Charge, 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.

William A. Rounds, Judge Advocate.

Earle Stebbins, Judge Advocate.

Herbert R. Frederick, 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 Major Leo H. Hecht (0-306947), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Specifications 2 and 3 of the Charge, but is legally sufficient to support the findings of guilty of Specifications 1, 4 and 5 of the Charge, and the Charge, and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the findings of guilty of Specifications 2 and 3 of the Charge be disapproved, that the sentence be confirmed and 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 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

(Findings of guilty of Specifications 2 and 3 of Charge disapproved. Sentence confirmed. G.C.M.O. 271, 8 Jun 1944)

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

SPJGQ
CM 250462

7 MAR 1944

UNITED STATES v. Second Lieutenant PAUL C. GOLDSTEIN (0-1895184), Army of the United States.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Sam Houston, Texas, 20 January 1944. Dismissal, total forfeitures and confinement for two years.

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 Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Paul C. Goldstein, 1857th Service Unit, Fort Sam Houston, Texas, did, at Fort McIntosh, Texas, from on or about 16 June 1943 to on or about 19 August 1943, being then and there custodian of Army Emergency Relief funds and acting in such capacity, feloniously embezzle by fraudulently converting to his own use One Hundred Forty-Five and No/100 Dollars, lawful money of the United States, of the value of $145.00, which said money came into his possession while acting in the capacity aforesaid, the property of Army Emergency Relief, a corporation, and entrusted to him by the said Army Emergency Relief.

He pleaded not guilty to the Charge and Specification. By exceptions and substitutions, he was found guilty of the embezzlement of only $135. 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 two (2) years. The reviewing authority approved only so much of the findings of guilty of the Charge and its Specification as involves findings of guilty

of embezzlement, at the time and place alleged, of Army Emergency Relief funds of a value of $120; approved the sentence, and forwarded the record of trial for action under Article of War 48.

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

The accused was appointed chief of the Army Emergency Relief Section, Personnel Branch, at Fort McIntosh, Texas, on 16 June 1943. He was relieved as chief and appointed as assistant on 19 August 1943 and served in this latter capacity until 1 September 1943 (R. 8; Ex. 1). The records of loans made to, and collections from, various clients as maintained in the office of the Army Emergency Relief included Army Emergency Relief Form #3 (similar to a promissory note, evidencing loan and indebtedness); a card index abstracting each loan; a receipt or voucher file; a cash book, and bank statements. Money collected on outstanding loans, under normal office procedure, were entered upon each of these records (Exs. 3 to 24).

By stipulation regarding each transaction, and by additional evidence in the majority of instances, the prosecution proved that the persons hereafter named were justly indebted to Army Emergency Relief; that, on the dates indicated, they made payments on their respective obligations in the amounts shown, and that such payments were either made directly to accused, or, if not, that he, in due course, came into actual physical possession of the money so paid, as follows:

Teresa Kelley, on 8 July 1943, paid $10 (R. 12-13; Ex. 7 and 8). Private Walter Gullett, on 12 July 1943, paid $40 (R. 13-14; Ex. 9 and 10). Private First Class Jesse F. Tapp, on 16 August 1943, paid $10 (R. 15-16; Ex. 11 and 12). Private First Class James H. Singleton, on 10 July 1943, paid $10 (R. 17-18; Ex. 13 and 14). Sergeant Melvin L. Shelp, on 13 August 1943, paid $15 (R. 18-19; Ex. 15 and 16). Corporal Henry A. Taroni, on 5 August 1943, paid $10 (R. 20-21, 31-32; Ex. 19 and 20). Sergeant Carl W. Jones, on 14 August 1943, paid $15 (R. 22-23; Ex. 21 and 22). Corporal Henry C. Robles, on 14 July 1943, paid $5, and, on 18 August 1943, made another payment of $5 (R. 24-25; Ex. 2, 3 and 24).

These collections were not entered in the cash book, nor were they deposited in the bank to the credit of Army Emergency Relief (Ex. 3, 4, 5, 6, 8, 10, 12, 14, 16, 20, 22 and 24). However, receipts were issued, and credit was given on either the index card or Army Emergency Relief Form #3, or upon both, in each instance.

On 14 September 1943, Corporal Henry C. Robles made still another $5 payment to accused, for which accused gave him a receipt. This amount was never credited to him on the index card or Army Emergency Relief Form #3; nor was it entered in the cash book or deposited in the bank.

Accused borrowed $75 from Army Emergency Relief on 24 May 1943 (Ex. 17). On 5 August 1943, he made an entry on the index card of this loan, showing payment of $10. No corresponding entry was made in the cash book, nor was such sum deposited in the bank (R. 19-20; Ex. 17 and 18). Accused made deposits, varying in amounts from $40.50 to $362.50, to the credit of Army Emergency Relief in The Laredo National Bank on the following dates: 7 July, 17 July, 24 July, 3 August, and 13 August, 1943.

Upon being advised by Lieutenant Ninde (exact time not shown by record) that there was a possible shortage in the account of Sergeant Carl W. Jones, accused requested that Ninde recheck the records, and told him that if there was an error, he (accused) would repay it "when he was able" (R. 28).

Apparently to establish accused's financial condition during the period of the offenses the prosecution proved that on 9 July 1943, accused, personally, borrowed $150 from The Laredo National Bank. This note was not paid in full with interest until January 1944 (Ex. 25). It was further established that his personal bank balance in The Laredo National Bank on 16 June 1943 was $1.65 and this was reduced to sixty-nine cents on 20 June 1943; was increased during early July 1943; was again reduced, and remained at $1.94 from 17 July 1943 until 22 October 1943 (Ex. 25).

4. Accused, having been advised of his rights, elected to be sworn as a witness in his own behalf, and testified substantially as follows:

He served approximately nine months, commencing 15 June 1942, as an enlisted man, with a rating of "excellent." Neither company punishment nor any other type of punishment was administered to him during that period of his service. He was classified as "limited service", due to blindness in his right eye (R. 43).

During the time he was Army Emergency Relief Officer at Fort McIntosh, he was also Post Public Relations Officer, Ordnance Property Officer, and Assistant Military Personnel Officer. He devoted approximately thirty-five per cent of his time to his duties as Army Emergency Relief Officer (R. 44).

He had had no experience in handling Government money before assuming his duties as Army Emergency Relief Officer. His predecessor in office explained to him how to make out the records and his own personal methods of handling the affairs of that office (R. 44). Accused also had available a copy of the Army Emergency Relief Handbook (R. 51-54).

When cash collections were made, he prepared a receipt in duplicate. He delivered one copy of the receipt to the person making payment. He clipped the money to the other copy, which he required to be signed by the person who had made the payment, and then placed the money and duplicate receipt in a file in his desk drawer. If the payment was not final he entered it upon the index card for the loan, and thereon showed the balance due. If it was a final payment, he marked the Army Emergency Relief Form #3 "Paid in full". From time to time - usually each week or within two weeks - he would remove the vouchers or receipts and the money from the file, enter the various amounts in the cash book, and deposit the money in the bank (R. 44).

His desk was situated in the Adjutant's office for a time, and was later situated in the office of the Post Quartermaster. The desk could not be locked, and accused was frequently away from it while attending to his other duties. It was possible that others could have had access to his desk and have removed the money during his absences, without being detected (R. 45). He left camp hurriedly on a 15 days' emergency leave of absence, Sunday, 19 July 1943, and left whatever undeposited collections he had on hand in the desk drawer (R. 49).

He did not fraudulently convert or appropriate any funds of the Army Emergency Relief to his own use at Fort McIntosh (R. 49). His records were audited monthly while he was Army Emergency Relief officer, and those audits failed to disclose any discrepancies in his accounts (R. 45-46). It was sometime in October that Lieutenant Ninde spoke to him about the Jones account. He told Lieutenant Ninde to recheck this account and if an error had actually been made, he would pay the amount. Accused heard nothing more from Lieutenant Ninde, and assumed that upon a recheck, Ninde had discovered that no discrepancy existed (R. 48). When he credited his own index card with a payment of $10 towards his personal loan on 5 August 1943, he was preparing to go to the bank and make a deposit. He was interrupted immediately after entering the credit, and did not go to the bank until several days later. When he did finally make a deposit of Army Emergency Relief funds, he had forgotten about crediting his index card with ten dollars (R. 47). He did not miss any of the money at any time, and did not know when any of it disappeared (R. 72). He had discovered and reported to higher authorities certain irregularities in the records of his predecessor in office, and was actively engaged in helping investigate them. He knew some one from the Inspector General's office would audit the books as soon as the report was sent in. Under such circumstances, he was unable to see how he could have fraudulently converted any of the money to his own use. He did not know what had happened to it (R. 50).

Private First Class James H. Singleton, upon being recalled as a witness for the defense, testified that accused placed the $10 which he paid on 10 July 1943 in his (accused's) wallet (R. 41).

5. The Manual for Courts-Martial, 1928, par. 149h, gives the following definition and discussion of embezzlement:

> "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, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship."

It is clear that neither the crediting by accused of $10 on his own index card nor conversion by him of the $5 paid by Corporal Robles on 14 September 1943, when accused was no longer connected with Army Emergency Relief, could meet the requirements of the foregoing definition or come within the contemplation of the Specification of the Charge. Consequently, the reviewing authority properly excluded these items by his action on the findings and sentence.

However, the facts attending accused's failure properly to account for the remaining $120 entrusted to him as a fiduciary are quite different. Accused was the chief of the Army Emergency Relief Section at Fort McIntosh at the time the money came into his possession. As such, he was legal custodian of such funds belonging to Army Emergency Relief as were being administered through his office. He was not only legally entitled, but it was his official duty and responsibility to collect the various sums comprising the $120 shortage. He admitted having received this money, and it came into his possession lawfully. It was money belonging to Army Emergency Relief, and accused held it in trust for that organization. A fraudulent conversion of the money by accused under such circumstances would, if established by competent evidence, clearly constitute the offense of embezzlement in violation of Article of War 93.

Accused, as a witness in his own behalf, denied that he converted this money to his own use. But at the same time he gave no plausible explanation of why he was unable to account for the $120. He said that he did not know what had become of it, and suggested that some other person or persons could have taken it from his unlocked desk when he left his station on a two weeks' leave. Accused's suggestion that the money was taken by a third person is not convincing when viewed in the light of all the facts and circumstances established by the evidence in this case.

It over-taxes credulity to accept accused's statement that during the comparatively short time intervening between 8 July 1943 (date of first collection involved) and 19 August 1943, nine separate sums of money, ranging in amount from $5 to $40, and attached vouchers disappeared from his files without his missing or becoming aware of any of them. Particularly is this so when the fact is kept in mind that during that same period accused, according to his own testimony, posted his cash book and deposited various sums in the bank upon four different occasions, and that not exceeding ten days intervened between any two of those occasions. Furthermore, there is no affirmative evidence of record tending to support this speculative theory of the defense, while, on the other hand, there is positive evidence showing that upon at least one occasion accused placed $10 of this money in his own wallet instead of placing it with a duplicate receipt in a file in his desk drawer, as he testified was his usual practice. The inference that accused misappropriated the $120 is logical and is justified by the competent evidence in the record of trial. C.M. 234153 (1943), Bull. J.A.G., September 1943, page 341.

Considering the dates of his collections and the dates upon which he made deposits thereof in the bank, it could be logical to assume there were in fact several separate embezzlements rather than one. However, the penalty is not dependent upon the amount involved. If, in fact, there was more than one offense committed, accused was benefitted rather than harmed by having them charged as one offense with the result he may legally receive one rather than an aggregate of several penalties.

6. War Department records disclose that this officer is 23 years of age and is unmarried. He graduated from high school and attended the School of Business Administration of City College of New York for two and one-half years. He is qualified as a mimeograph operator and bookkeeper, and has had experience as a buyer representing a men's clothing manufacturer. He was inducted into the Army of the United States in June 1942, and classified for limited service, due to his eyesight. He was commissioned a second lieutenant, Army of the United States, on 17 March 1943, after having completed the three-month course of instruction prescribed for Army Administration School, OCS #2, Grinnell, Iowa, and entered on active duty the same date.

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

William A. Rounds, Judge Advocate.

Earle Stephens, Judge Advocate.

Herbert B. Fredener, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 25 MAR 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Paul C. Goldstein (O-1895184), 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, as approved by the reviewing authority, and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

Myron C. Cramer

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

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

(Sentence confirmed but confinement reduced to one year. G.C.M.O. 220, 29 May 1944)

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

SPJGV
CM 250472

12 APR 1944

UNITED STATES	)	FIRST AIR FORCE
v.	)	Trial by G.C.M., convened at Langley Field, Virginia, 8 February 1944. Dismissal.
Second Lieutenant ROGER L. HOFFMAN (0-802181), 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. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Roger L. Hoffman, Air Corps, 4th Search Attack Squadron (H), 1st Search Attack Group (H), having been ordered by First Lieutenant Joseph A. O'Bara, Air Corps, to fly an overwater training flight from Langley Field, Virginia, and not to fly over land, the said First Lieutenant Joseph A. O'Bara being in the execution of his office, did, on or about 2 January 1944, in violation of said order, fly over Manhasset, Long Island, New York.

Specification 2: In that Second Lieutenant Roger L. Hoffman, Air Corps, 4th Search Attack Squadron (H), 1st Search Attack Group (H), did, at Manhasset, Long Island, New York, on or about 2 January 1944, wrongfully and unlawfully fly a B-17E airplane at an altitude of less than 1,000 feet in violation of paragraph 16 a (1) (a), Army Air Forces Regulation No. 60-16, 9 September 1942.

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

3. The evidence for the prosecution shows that the accused on 2 January 1944 was attached to the 4th Search Attack Squadron (H), 1st Search Attack Group (H), stationed at the Army Air Base, Langley Field, Virginia and was the pilot of a B 17 E No. 2473 airplane. On that date he was ordered to make an overwater training flight from Langley Field, Virginia. Instructions from the briefing officer, First Lieutenant Joseph A. O'Bara, to the accused and the other members of the crew, forbade flying over land, except in emergency, the purpose of the flight being training in overwater navigation. Further instructions from Lieutenant O'Bara provided that if the navigation proved faulty and land was approached the crew should check the position of the plane and "turn back to sea and continue with their course over water" (R. 7, 8, 18; Ex. 1, 2). The course to be followed was known as the "King" flight and extended due east from Langley Field for 150 miles, thence north northeast 200 miles, thence north northwest 40 miles to a point about 25 miles from the south shore of Long Island, New York, thence about 60 miles along a line parallel to the south shore, thence in a south southwesterly direction to Langley Field. The only place where the set course crossed land, aside from the take-off and landing, was the southern tip of Cape Charles (R. 11, 13, 17; Ex. 1, 3).

At noon, on 2 January 1944 accused approached First Lieutenant Lawrence R. Daly, Jr., the navigation officer of his squadron and inquired how close the flight would come to Long Island. Lieutenant Daly replied, "It comes rather close". Accused then mentioned that he lived on Long Island and Lieutenant Daly cautioned him against crossing any land during the flight, stating that he (Daly) had had considerable experience flying over water and knew "there were strict regulations governing the crossing of land, especially in the vicinity of New York harbor, where the firing is heavy." Accused made no reply to these words of caution (R. 14, 16, 17). Accused's father lived at Manhasset, Long Island (R. 27, 28; Ex. 6).

Second Lieutenant Francis J. Crahen, the navigator of accused's plane, testified by deposition that after the plane left Langley Field, he instructed the accused and gave him the courses to fly and the turning points in the course. When the plane reached the vicinity of Long Island, land was sighted and before the witness gave accused the turning point of the course which would make the next leg of the flight parallel to the south shore of Long Island and about 25 miles distant therefrom, accused took over the plane from the navigator, who was in command up to that time for the purpose of providing the course to be flown. Accused told Lieutenant Crahen, over the interphone, that he (accused) was going to fly the plane. Lieutenant Crahen responded that accused was not supposed to fly over land; that the time

of return to Langley Field did not permit deviation from the course and that the briefing instructions forbade flying over land. Nevertheless accused said "he would like to fly over Long Island anyhow". Thereafter, accused did fly the plane over Long Island, changing altitude five or six times, making ten or more turns and following "Sort-of a mixed course". This witness could not estimate the altitude of the plane because his position on the wing gave him a very limited outlook. He (Lt. Crahen) did not resume his navigation until the plane returned to its overwater course. The accused was "in full command" of the plane during the entire flight.(Ex. 4).

Patrolman Harry R. Erb of the Nassau County, Long Island Police, testified by deposition that he was on duty about 1700 on the afternoon of 2 January 1944 in the Strathmore Village area of Manhasset, Long Island, and observed a large four-motored plane flying over the area at an altitude of "200 feet or more", or "about three times the height" of the two-story houses in the vicinity. He noted the plane number as 12474 but stated he could easily have been mistaken in one or more of the digits (R. 20; Ex. 5).

First Lieutenant William G. Johnson, the investigating officer in the case, stated that he advised accused of his rights and that thereafter accused stated that difficulty was experienced during the flight, due to the failure of certain radar equipment, and the resulting loss of contact with stations along the eastern seaboard. Accused further stated that during the flight he passed near a convoy and following rules he avoided the convoy by going around it, and in so doing found he was over Long Island; that he flew down the island to his home (Manhasset) where he first made a circle of the town at approximately 1,000 feet, then let down to 500 feet, and then came down the main street of the town at a lower altitude (R. 29, 32).

Paragraph 16a (1) (a) of Army Air Forces Regulation No. 60-16, dated 9 September 1942 was offered into evidence by the prosecution. The regulation prohibits the operation of Aircraft (except during take-off and landing) at an altitude below 1,000 feet above any building, house, boat, vehicle, or other obstructions to flight (R. 34; Ex.7).

4. Accused's co-pilot, Second Lieutenant William H. Churchill, testified by deposition for the defense. He confirmed the briefing instructions to the effect that the flight was to be over water, but stated that the plane "could have very easily gotten over land on the course that we had". He stated that he flew the plane part of the time but that accused took over the piloting of the ship before it was flown over Long Island. The witness stated that he could not accurately estimate the altitude of the plane during its flight over Long Island because he was not in the cockpit, but that he looked out of the window once and estimated the altitude as between 1,000 and 1,500 feet. The witness confirmed the fact that the radio navigation equipment was not operating properly during the flight (R. 34; Ex. A).

The prosecution introduced into evidence a statement of Lieutenant Churchill made prior to the deposition in which this witness said:

"I was co-pilot of this airplane on the above-mentioned flight. We left Langley Field and flew a course of 90° until approximately 1530, we then turned and took up a heading of 25° and flew this for sometime until we sighted a convoy, turned in a direction to avoid the convoy and continued on this heading.

"The radar operator called and said there was land ahead so the pilot took over and flew on in. We crossed over the Island and flew along the other side of it. The pilot pointed out a town and said that he lived down there and located his house. He then circled over his house at approximately 500 feet, and then made one pass at a lower altitude. We then left the area ***"(R. 36; Ex. 8).

The accused, after an explanation of his rights, elected to remain silent.

In his final argument to the court following the presentation of evidence by the prosecution and defense, and prior to the findings and sentence, the trial judge advocate, over defense's objection, read to the court a letter of Major General F. O'D. Hunter, the reviewing authority, dated 3 December 1943 on the subject of hazardous flying. The letter is attached to the record and is substantially as follows:

"SUBJECT: Hazardous Flying.
TO : Commanding General, I Bomber Command, Mitchel Field, N.Y.
Commanding General, I Fighter Command, Mitchel Field, N.Y.
Commanding Officers, All Army Air Base, First Air Force.

1. The following letter from General Arnold, Commanding General, Army Air Forces, is quoted for your information and guidance:

'It has been forcibly brought to the attention of this headquarters by letters and telegrams from all over the United States, from individuals in every walk of life, that there to day exists in the Army Air Forces a vast amount of hazardous flying. The continued increase of such complaints definitely indicates that such flying is on the increase. Army pilots have made dives at civilians and navy personnel on beaches, have flown at trucks and at gasoline barges, at small boats and

at Naval vessels, as well as at Army transports and Navy fighter planes. Many pilots definitely have endeavored to terrify civilians. Some of these attacks have had fatal results.

'It is not my desire to curb in any way the aggressiveness of our pilots, but there is a boundary between encouraging the will to fight and foolhardiness which is being continually overstepped, undoubtedly by young pilots who desire to demonstrate their ability. In addition to the hazard to their own lives, in which the Government has made considerable investment, there is the hazard to Government property and to the property of civilians. There is, further, the danger in such actions of creating a resentment among the civilian population against the Army Air Forces, aside from the wastage of manpower and material essential to the war effort.

'This headquarters has endeavored in the past to correct this matter by issuing regulations, but it would appear that such efforts have so far been in vain. I wish to impress upon you the necessity for enforcing those regulations to the limit and bringing to each member of your command the fact that this hazardous flying must be stopped and stopped now.'

"2. Individuals who violate flying regulations to a degree resulting in extraordinarily hazardous flying shall be tried by General Courts-martial. It is considered that appropriate punishment for such violations is dismissal from the service ***.

"3. It is desired that this letter be brought to the attention of all pilots now assigned and subsequently assigned to your command ***.

/s/ F. O'D Hunter
F. O'D HUNTER
Major General, U. S. Army
Commanding."

The trial judge advocate concluded his remarks to the court on the subject of General Hunter's letter by saying:

"To the words in this letter, which quotes General Arnold, and which also quotes General Hunter, the Trial Judge Advocate can add little, other than to say that that in all solemnity and in full recognition of the seriousness of the matter, he asks that if the court finds the accused Guilty as charged

that he be sentenced to dismissal from the service" (R. 40).

5. The evidence fully supports Specification 1 of the Charge and conclusively shows that accused disobeyed specific instructions to fly an overwater course known as the "King" flight. The course of said flight came within approximately twenty-five miles of Long Island but did not pass over it. The accused's home was on Long Island and accused in discussion prior to the flight indicated an interest in the proximity of the flight course to his home. During the flight, accused, refusing to heed the advice of his navigator, deviated from the prescribed course and flew over his Long Island home although no emergency is shown as a justification for such action.

The evidence also fully supports Specification 2 of the Charge and conclusively establishes that accused violated Army Air Forces Regulation No. 60-16, issued by the Commanding General, Army Air Forces, dated 9 September 1942. This regulation prohibits the operation of aircraft (except during take-off and landing) at an altitude below 1,000 feet above any building, house, boat, vehicle, or other obstructions to flight. The testimony of a civilian witness shows that a plane similar to that flown by accused flew over the area of Manhasset, Long Island at an altitude of approximately 200 feet or "about three times the height" of the two-story houses in the vicinity. The time and place of this occurrence checks with the time and place accused's plane was in that vicinity as established by other prosecution witnesses. The statement of the co-pilot used to impeach his deposition states that accused "circled over his [accused's] house at approximately 500 feet, and then made one pass at a lower altitude". After being warned of his rights accused told the investigating officer that he (accused) flew down the island to his home where he first made a circle of the town at approximately 1,000 feet, then let down to 500 feet, and then came down the main street of the town at a lower altitude.

In the opinion of the Board of Review the evidence is compelling that accused, to the prejudice of good order and military discipline, committed the offenses alleged in Specifications 1 and 2 in violation of Article of War 96.

The record presents the question of whether the reading of a letter of the reviewing authority on the subject of hazardous flying to the court prior to the findings and sentence injuriously affected the substantial rights of the accused.

Among the precedents examined by the Board of Review in its determination of the foregoing question are the following:

CM 125676, Walter, Dig. Op. JAG, 1912-40, sec. 395 (53). During the trial of this case, while the accused was challenging several members of the court, a short address was given to the court by the division judge advocate which, at the request of the trial judge advocate,

was not made a matter of record. It was held that inasmuch as the record was silent as to the subject of the "short address" it was an unavoidable inference from the record that the address was in connection with either the law or the facts in the case and that the proceeding was so contrary to the orderly administration of military justice that it constituted prejudicial error.

CM 156620, German, Dig. Op. JAG, 1912-40, sec. 395 (39). During the trial of this case upon completion of the evidence and final argument, the court was closed and, upon reopening without having made any findings, adjourned for the stated purpose of "consulting higher authority on certain questions". The record failed to disclose the nature of these questions. Upon reconvening the court, without disclosing what advice it had received or from whom, immediately proceeded to find the accused guilty. It was held that the procedure was unauthorized. A court-martial is not permitted, in closed session, to consult any outside authority. Under the circumstances the error was fatal to the conviction.

CM 216707, Hester, Dig. Op. JAG, 1912-40, Sup. I, sec. 395 (55). During the trial of this case involving an officer, a circular letter announcing a mandatory policy of dishonorable discharge in cases of enlisted men referred to general courts-martial was distributed to the members of the court after they had deliberated without result for one hour and twenty minutes. It was held that this procedure constituted an error injuriously affecting the substantial rights of accused and vitiated both the findings and the sentence.

The Board has carefully considered the foregoing decisions and does not believe that these precedents make mandatory a conclusion in the instant case that the introduction of the letter of the reviewing authority on the subject of hazardous flying constitutes an error or irregularity injuriously affecting the substantial rights of the accused.

The subject of the letter in question is "Hazardous Flying". It deals generally with foolhardy flying, its dangers, and the punishment appropriate to such an offense. It was issued for the guidance of commanding generals and commanding officers of the Air Forces. It does not contain the reviewing authority's personal view of the evidence or the merits of the instant case. While the introduction into trial of letters setting forth views of reviewing authorities might, under certain circumstances, constitute an error or irregularity injuriously prejudicing the substantial rights of the accused, there is nothing in this record to cause the Board to believe that the introduction of General Hunter's letter overcame the volition and independent judgment of the members of the court.

It is to be noted that in the first two cases heretofore cited (Walter and German), the contents of the extraneous matter were not made a matter of record so that it was impossible to reach a determination of

whether the extraneous matter was such as to unduly influence the court. The facts in the third case cited (Hester) may appear at first glance to be similar to the facts of the instant case. However, there are added factors in the Hester case, to wit: The letter introduced in that case related to enlisted men, whereas the trial involved an officer. The letter announced a mandatory or fixed policy of dishonorable discharge in sentences of enlisted men tried by general courts-martial. In the case at bar the letter in question contained the reviewing authority's opinion of the seriousness of the offense for which the accused was tried and his opinion of an "appropriate" not mandatory punishment therefor. It is also to be noted that the improper letter in the Hester case was introduced at a time when the court had already deliberated one hour and twenty minutes without being able to arrive at a finding.

The instant letter on the subject of hazardous flying contained proper information for commanding officers and others of the Air Corps. Certainly, the perusal of such a letter by a member of the court immediately prior to this trial would not be considered per se a sufficient ground for challenge nor would it be a reasonable inference that the reading of this letter by a member overcame that member's volition and independent judgment on a specific case. It is fundamental that courts-martial have the right and duty to take into consideration, in arriving at proper sentences, general policies announced by the War Department and commanding officers relative to enforcement of discipline and uniform sentences. An important consideration in determining the punishment to be imposed in a given case is "its effect upon military discipline" (Winthrop's Military Law and Precedents (Reprint) p. 397). Indeed, it is fundamental that courts-martial are "instrumentalities of the executive power to aid him in properly commanding the Army and enforcing discipline therein" (Winthrop's Military Law and Precedents (Reprint), p. 49). While the functions of a court-martial and the reviewing authority should remain separate and distinct, it is equally essential to the enforcement of military discipline that members of courts-martial be made aware of the gravity of certain offenses and the need of drastic punishments to deter commission thereof. For a commanding officer to inform his courts-martial of offenses that are impairing the efficiency and discipline of his command and to suggest to them his opinion of appropriate sentences, the ultimate decision in each specific case being left, of course, to the wisdom and judgment of the court is consistent with all our principles of military justice. This letter indicated to the court the commanding general's opinion of the gravity of the offense as it related to the maintainance of the efficiency and discipline of his organization, and, accordingly, it was proper for the court to have knowledge of it to determine the type and extent of punishment warranted by the offense. In the enforcement of military discipline, the imposition of insufficient punishment for serious military offenses is as great an evil as the imposition of

excessive and extreme punishment. Members of courts-martial should "bear in mind that the punishment imposed must be justified by the necessities of justice and discipline" (MCM, par. 80, p. 67).

It is therefore, the opinion of the Board that the instant letter contained proper information for the court to have before it in its deliberations and its introduction did not improperly affect the volition and independent judgment of the court. The evidence is compelling and conclusive as to the guilt of the accused of the Specifications and Charge and the examination of the entire proceedings leads to the conclusion that no error prejudicial to any substantial right of the accused was committed by the court.

6. Accused is about 22 years of age. He attended New York University for one and one-half years. He served as an enlisted man from 2 April 1942 to 29 April 1943 when after completion of a course of instruction for twin-engine pilots at George Army Air Field, Lawrenceville, Illinois, he was commissioned second lieutenant, Air-Reserve. He has served as an officer since that date.

7. Accompanying the record of trial is a recommendation, signed by eight of the ten members of the court which tried accused, that the sentence imposed by the court be commuted to a forfeiture of $50 a month for six months. The reasons stated for the recommendation are as follows:

"a. The character and previous record of the accused are apparently excellent.

"b. Use of the skill and experience of the accused as pilot and flying officer is to the greater interest of the Government."

8. 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, to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas N. Jabley, Judge Advocate.

Herbert W. Kiedner, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 250472

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 Roger L. Hoffman (0-802181), 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.

3. Consideration has been given to the recommendation of clemency accompanying the record of trial signed by eight of the ten members of the court which tried accused; also to the request for clemency contained in the attached letter dated 29 February 1944 of Mr. Eric L. Hoffman, father of the accused, addressed to the President. There is also attached to the record the memorandum dated 20 March 1944 of General H. H. Arnold, Commanding General, Army Air Forces, to The Judge Advocate General, in which General Arnold recommends that the sentence be confirmed and ordered executed. I concur in the recommendation that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

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

5 Incls.
Incl.1-Record of trial.
Incl.2-Ltr. fr. Mr. Eric L. Hoffman.
Incl.3-Memo of Gen. Arnold, 20 March 1944.
Incl.4-Dft. ltr. for sig. Sec. of War.
Incl.5-Form of action.

(Sentence confirmed. G.C.M.O. 246, 30 May 1944)

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

SPJGK
CM 250475

9 MAR 1944

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Avon Park Army Air Field, Avon Park, Florida, 26 January 1944. Dishonorable discharge and confinement for five (5) years. Federal Reformatory, Chillicothe, Ohio.
Private CHARLES H. ELLINGTON (36536767), Company C, 1894th Engineer Aviation Battalion.	)	

HOLDING by 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 soldier named above.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Motion for finding of not guilty sustained).

Specifications 2: In that Private Charles H. Ellington, 1894th Engineer Aviation Battalion, did, at Avon Park Bombing Range, Avon Park, Florida, on or about November 6, 1943, wrongfully cause to be introduced into Avon Park Bombing Range, Avon Park, Florida, an unknown quantity of marijuana, a narcotic drug.

Specification 3: In that Private Charles H. Ellington, 1894th Engineer Aviation Battalion, did, at Key Field, Meridian, Mississippi, Langley Field, Virginia, MacDill Field, Tampa, Florida, Avon Park Bombing Range, Avon Park, Florida, and Camp Van Doren, Mississippi, during the period between December 2, 1942, to October 19, 1943, agree and conspire with Private First-Class Charles H. Reid to wrongfully use the United States Mails for the purpose of transporting marijuana, a narcotic drug, in violation of Sec. 588 Postal Laws and regulations and 18 USC 340.

Specification 4: In that Private Charles H. Ellington, 1894th Engineer Aviation Battalion, did, at MacDill Field, Avon Park Bombing Range, and Fort Clark, Texas, during the period

between the 28th of July, 1943 and November 6th, 1943, agree and conspire with Corporal Warren D. Ellington, Hq Btry, 79th FA Bn, Fort Clark, Texas to wrongfully use the United States Mails for the purpose of transporting marijuana, a narcotic drug, in violation of Section 588, Postal Laws and Regulations, and 18 USC 340.

He pleaded not guilty to the Charge and Specifications. The court sustained a motion by the defense for a finding of not guilty of Specification 1. Accused was found guilty of Specifications 2,3, and 4 and of the Charge. Evidence of one previous conviction for behaving with disrespect toward two officers in violation of Articles of War 63 and 96 was introduced. Accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Specifications 3 and 4 allege conspiracy to wrongfully use the United States mails for the purpose of transporting marijuana (marihuana), a narcotic drug, in violation of Section 588, Postal Laws and Regulations, and 18 United States Code, Section 340. Section 588 of the Postal Laws and Regulations contains nothing pertinent except a duplication of the statute alleged to have been violated. The pertinent part of 18 United States Code, Section 340, reads as follows:

> "All kinds of poison, and all articles and compositions containing poison, and all poisonous animals, insects, and reptiles, and explosives of all kinds, and inflammable materials, and infernal machines, and mechanical, chemical, or other devices or compositions which may ignite or explode, and all disease germs or scabs, and all other natural or artificial articles, compositions, or material, of whatever kind, which may kill or in anywise hurt, harm, or injure another, or damage, deface, or otherwise injure the mails or other property, * * * are hereby declared to be nonmailable matter and shall not be conveyed in the mails * * *."

A subsequent part of the section contains a penal provision for violation thereof. An exhaustive search fails to disclose any Federal case determining whether or not marihuana is "nonmailable matter" under the statute. The solicitor's office of the Post Office Department has ruled that marihuana is not a poison within the meaning of Section 340, and that the mailing of marihuana is not a violation of that section. In the absence of a court decision to the contrary, the Board of Review is of the opinion that the ruling of the solicitor's office should be followed. As a result, no conspiracy to wrongfully use the United States mails was either alleged or proved, and there is no lesser included offense

of which accused may be convicted.

Other Federal statutes require persons dealing in marihuana to register and pay taxes, and punish the possession or interstate transportation of marihuana by persons who have failed to comply with those requirements (26 U.S.C. 2590, 2591, 2593, 2596, 3230-3238). But the offenses denounced by those statutes are entirely separate from and not included in the offense of wrongful use of the mails. It is obvious that under a charge of conspiring to use the mails wrongfully, an accused may not be convicted of conspiracy to commit an entirely unrelated crime.

Attention is invited to a communication from this office to the Commanding General, Sixth Service Command, recommending that marihuana cases be tried under the applicable statutes in 26 United States Code, cited above (SPJGJ 1944/24, 19 Jan. 1944).

For the foregoing reasons the Board of Review holds the record of trial legally insuffucient to support the findings of guilty of Specifications 3 and 4 of the Charge.

4. As noted, Specification 2 charges accused with wrongfully causing the introduction of marihuana, a narcotic drug, into a certain military station. There was no proof that marihuana is a narcotic drug and we are unable to take judicial notice thereof. Doubtless that is the reason why this office, in the communication previously referred to, advised against alleging that marihuana is a narcotic drug. However, it is common knowledge that the use of marihuana produces a deleterious effect upon human conduct and behavior, for which reason we are of the opinion that its introduction into a military station is prejudicial to good order and military discipline within the meaning of Article of War 96.

5. As noted, accused's sentence included confinement at hard labor for five years. The maximum period of confinement for introducing a habit-forming, narcotic drug into a military station for purposes other than sale is one year (MCM, 1928, par. 104c). In the opinion of the Board of Review, the offense involved in the present case is closely related to that offense and therefore carries the same maximum punishment (MCM, 1928, par. 104c). Since we hold the record of trial legally insufficient to support the findings of guilty of Specifications 3 and 4, only one year of the confinement is legal. That being so, accused may not be confined in a Federal reformatory, but should be confined in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

6. The Charge Sheet shows that accused is 23 years of age and was inducted into the military service on 20 October 1942.

7. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specifications 3 and 4 of the Charge; legally sufficient to support the finding of guilty of Specification 2, except the words "a narcotic drug"; legally sufficient to support the finding of guilty of the Charge; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 15 MAR 1944 - To the Commanding General, Third Air Force, Tampa, Florida.

1. In the case of Private Charles H. Ellington (36536767), Company C, 1894th Engineer Aviation Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specifications 3 and 4 of the Charge; legally sufficient to support the finding of guilty of Specification 2, except the words "a narcotic drug"; legally sufficient to support the finding of guilty of the Charge; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. Upon vacation by you of the findings of guilty of Specifications 3 and 4 of the Charge, of so much of the finding of guilty of Specification 2 as involves the words "a narcotic drug", and of so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year, you will have authority to order execution of the sentence. Inasmuch as the sentence as thus modified includes confinement for one year only, you should designate the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, 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 250475).

William A. Rounds

William A. Rounds,
Colonel, J.A.G.D.,
Acting 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.

SPJGH
CM 250484

7 APR 1944

UNITES STATES	)	III CORPS
v.	)	Trial by G.C.M., convened at Camp Beale, California, 4 February 1944. Dismissal.
Captain GEORGE K. HEBB, II (O-1165399), Field Artillery.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain George K. Hebb II, 753rd FA Bn did at Camp Beale, California, on or about 16 December 1943, wrongfully fail to maintain a sufficient bank balance with The Bank of America NT and SA, Camp Roberts Branch to meet a certain check made to cash and issued by him to W. E. Denton, in words and figures as follows:

Camp Roberts
~~90-232~~ ~~RIDEOUT~~ BRANCH ~~90-232~~

BANK OF AMERICA
National Trust and Savings Association

No. 306

Camp Roberts
Marysville, Calif., Dec 16, 1943.

Pay to the order of Cash $45.00
Forty-five and no/100 DOLLARS

George K Hebb II
0-1165399 Capt FA

receiving therefor four checks in the amount of forty-five dollars and no cents ($45.00) issued by said Captain George K. Hebb II, 753rd FA Bn to said W. E. Denton thereby bringing

discredit upon the military service.

Specification 2: In that, Captain George K. Hebb, II, 753rd FA Bn did at Camp Beale, Calif., on or about 21 December 1943, with intent to deceive Lieutenant Colonel L. B. Downing, the commanding officer, 753rd FA Bn, officially report to the said Lieutenant Colonel Downing, that a money order to cover an amount he owed the San Carlos Hotel, Monterey California, had been mailed to the San Carlos Hotel, which report was known by the said Captain George K Hebb II, to be untrue, in that said Captain George K. Hebb, II, did mail his personal check to said Hotel San Carlos instead of a money order.

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

3. a. Specification 1: The evidence for the prosecution shows that in November and the first part of December 1943, accused, who was assigned to the 753rd Field Artillery Battalion, Camp Beale, California, was at times a "guest" of Linda Villa, a night club near the post. During that time Mrs. W. E. Denton, manager of the club, cashed four checks for accused, two for $15 each, one for $10, and another for $5. When the checks were deposited in the bank, they were returned unpaid with slips attached, stating "Refer to maker". Mrs. Denton telephoned accused several times about the checks. Finally, when accused came in to see her about them, he stated to Mrs. Denton that the account was a joint account and told her to put the checks through and they would be good. When she requested him to "pick up these four checks and make one check" he did so, and asked her "to put it through right away". The new check (Ex. 1) was payable to cash for $45, dated 16 December 1943, drawn on Bank of America, Camp Roberts Branch, and signed by accused. Mrs. Denton delivered the check to "Mr. Beacom" to deposit in his account, as she was not "going to town". Later, Mr. Beacom returned the check to her, and at that time there was attached to it a slip (Ex. 1-A) which is described as follows: return item advice letter of Bank of America, Rideout Branch, dated 27 December 1943, addressed to C. G. Beacom, referring to the check (Ex. 1), and showing that it was returned for the reason, "refer to maker". When she received the check and slip Mrs. Denton telephoned accused and he said he "would be in and pick up the check". When he did not come, she tried several times unsuccessfully to reach him, and then talked to Lieutenant Colonel L. B. Downing, commanding officer of accused. Mrs. Denton delivered the check and slip to Colonel Downing. Mrs. Denton never did receive the $45 (R. 7-11).

It was stipulated (Ex. 5) that Mr. M. R. Gates, manager of the Camp Roberts Branch of Bank of America, would testify to the facts stated in

his letter of 13 January 1944 (Ex. 2), and that two bank statements (Exs. 3 and 3-A) of the Camp Roberts Branch constituted a true statement of the account of "Capt. George Kenyon Hebb II or Mrs. George Kenyon Hebb II" from 23 November 1943 to 11 January 1944. The statements show a daily bank balance in pertinent part as follows: prior to 11 December 1943, an overdraft; 11 December, a credit balance of $25.67; 13 December, $25.17; 14 December, $55.17; 15 December, $54.67; 17 December, $179.67; 18 December, $158.16; 20 December, $58.16; 21 December, $3.16; and thereafter throughout December, smaller amounts. The letter of Mr. Gates stated that debits of fifty cents or multiples thereof as shown on the statements referred to service charges for checks rejected because of insufficient funds. It was also there stated, "Apparently the check in question namely forty five dollars ($45.00) was presented to us for payment on December 22nd, 1943 and was subsequently returned for the reason insufficient funds" (R. 10).

b. Specification 2: It was stipulated (Ex. 5) that Mr. Peter W. C. Watson, manager of Hotel San Carlos (Monterey, California), would testify that on 25 October 1943 a check for $15 signed by "Capt. George K. Hebb" was cashed at the hotel, that it was returned by the bank marked "Refer to Maker", that after a letter was written to accused another check was received on 7 December 1943 to cover the one originally returned, and that on 14 December this second check was received from the bank marked "Refer to Maker" (R. 17).

Prior to 21 December, Colonel Downing indorsed to accused for payment two unpaid laundry bills of accused from Fort Sill, Oklahoma, which had been received through channels. One was for $2.42 (Def. Ex. A) and the other for $1.59 (Def. Ex. B). Each bore the notation, "This delinquency is not due to the fault of the officer concerned". Colonel Downing had the impression that accused had paid his laundry bills before leaving Fort Sill and that "apparently these bills were for laundry which had not been entered against his account prior to his departure". Several days later, not having received an indorsement back stating that the bills had been paid, Colonel Downing asked accused whether he had paid them, and accused replied that he had made out checks for them and was about to mail the checks. Colonel Downing advised accused that in cases of that nature he "considered it more positive and a better manner of paying such bills would be to pay them by money order and suggested that he do so" (R. 12-14).

A letter (Ex. 4) dated 1 December 1943 on stationery of Hotel San Carlos, purporting to be signed by Mr. Watson, addressed to The Adjutant General, indorsed to the commanding officer of Camp Beale, and sent to Colonel Downing by informal buck slip, was introduced in evidence over objection. This letter stated that on 25 October 1943 "Captain George K. Hebb" issued a check for $15 to cash, that "Lt. Edward J. Sladek"

indorsed the check and presented it to the hotel, which cashed it, and that the check was returned by the bank marked "Refer to Maker". It also stated that replies had not been received to letters written to these officers, and requested assistance. Exhibit 4 includes the letter; first indorsement to the commanding officer, Camp Beale; second indorsement dated 20 December from Colonel Downing to accused, directing action to adjust the matter and report of action taken; and third indorsement from accused to Colonel Downing dated 21 December 1943 stating "Money order to cover amount in question has been mailed to the Hotel San Carlos". Since the indorsement stated that payment had been made by money order, Colonel Downing did not expect to hear anything more about it. After receiving a letter dated 30 December 1943 from the hotel, he had a conversation with accused, the substance of which was that accused stated that he had intended to "make the money order" at the time he wrote the indorsement, but that he had not "made a money order but had paid the hotel by check instead" (R. 11-13).

On cross-examination, Colonel Downing stated that accused came to the battalion about 1 April as a first lieutenant, that accused was promoted to captain on his recommendation, and that at the time the work of accused was excellent (R. 13-14).

4. Colonel Downing testified as a witness for the defense that when accused told him a check had been mailed for the laundry bills, he (Colonel Downing) was "quite insistent" that they be paid by money order and requested that accused try to get the letter from the post office and substitute a money order. Along with the laundry bills (Def. Exs. A and B) there was introduced in evidence a receipt dated 10 December 1943 showing the bills in a total amount of $4.01 paid. The dealings of Colonel Downing with accused with reference to paying the money to the hotel were only through the official communications in evidence. He considered that accused had officially reported that a money order had been mailed to the hotel. Colonel Downing did not verify information later received from the hotel that the account was paid by check and that the check was returned (R. 14-17).

The accused testified that he had made an allotment to his mother, Mrs. Pauline C. Hebb, Detroit, Michigan, who is partially dependent on him. The record of allotment (Def. Ex. C) dated 6 April 1943 shows a monthly amount of $125 allotted to Bank of America, Camp Roberts, California, for credit of Mrs. Hebb. He and his mother had a joint account, and the understanding was that she would not draw on it except in an emergency until he went overseas, and that if she did accused would immediately be notified. Prior to October, his mother drew on the account occasionally but accused had knowledge of the checks, occasionally the allotment was delayed in going to the bank, and some checks were returned for insufficient funds. In October his mother drew checks in excess of $100 and did not

notify accused, so that he got into difficulties and his October checks were returned. At the time of trial, the only outstanding check was that held by Mrs. Denton, there was enough money in the bank to cover that, and he had instructed his mother to draw no more checks with or without notice to him. The bank statements were sent to his mother, but accused received two from the bank (R. 17-23, 27).

With reference to the Fort Sill laundry bills a letter and two series of indorsements (Def. Ex. D) were placed in evidence showing that on 6 December accused forwarded two money orders, for $1.59 and $2.42, respectively, which were subsequently returned to accused because the accounts had been paid on 10 December. Accused testified that it was not his understanding of his conversation with Colonel Downing that he was to pay all accounts by money orders, but only the two laundry accounts. He had sent a check prior to sending the money order, and the money order was returned to him (R. 19-20, 27).

As accused recalled it, he received the letter from Hotel San Carlos by indorsement from Colonel Downing on Monday (20 December). It was the practice for the battalion to go into the field on Monday and remain until late Wednesday. It was the understanding of accused that all official correspondence had to be returned within 24 hours. In order to get the reply back within that time, he had his clerk prepare an indorsement that the account had been paid by money order. The indorsement was made within an hour or so after accused received the correspondence. There was time to go to the post office, and it was his "full intention to pay it by money order". Accused was so busy "getting out in the field" that he did not get to the post office, and "rather than make the false statement that the account had been paid" he wrote a check and left it at the battery, or sent it in by the mail clerk, with instructions that it be mailed that night, which was done. He thought it was signed and mailed Monday, but was not sure. The only reason he did not use a money order was that he was "unable to get away from the battery at all". He made no effort to get the indorsement back to correct the error about the money order. He admitted his signature on the third indorsement (Ex. 4), and did not notice the date on it. He did not know whether or not the clerk had made a mistake in dating the indorsement. The check that he sent the hotel was the third check. Lieutenant Sladek paid the account, the third check was not paid, and was mailed back to accused by the hotel. Accused reimbursed Lieutenant Sladek. When Colonel Downing called him in and, without referring to the indorsement, asked how he had paid the debt, accused told him "by check", and Colonel Downing asked him "why not by money order" (R. 20-21, 24-27).

5. a. Specification 1: The evidence shows that on 16 December 1943, accused, at the request of Mrs. W. E. Denton, manager of a night club near Camp Beale, made and delivered to her a check for $45, drawn on the

Camp Roberts Branch of Bank of America, in return for four unpaid checks of accused aggregating that amount which she held. He told her to put the check through "right away". The check was drawn on a joint account of accused and his mother, and on 16 December the bank balance was $54.67. It remained in excess of $45 through 20 December, and from 21 December to the end of the month was less than $4. Mrs. Denton delivered the check to "Mr. Beacom" to deposit in his account and he later returned it to her, unpaid, with a bank slip attached to it. She notified accused that the check had been returned. There was no competent proof that the check was ever presented to the bank and dishonored by it. The check had not been paid at the time of trial. In October the mother of accused had drawn checks on the account in excess of $100 without notifying accused, so that his October checks were returned, but it was not shown what checks had reduced the account below $45 on 21 December.

The Specification charges accused with wrongfully failing to maintain a sufficient bank balance to meet the $45 check, to the discredit of the military service. It has been held that it may be an offense under the 96th Article of War to make and cash a check with knowledge that there are not sufficient funds in the bank to pay it, even though the intent to defraud is not present (CM 224286, Hightower). It has likewise been held that the wrongful failure to maintain a sufficient bank balance to meet checks issued, is an offense, in violation of the 96th Article of War, even though there is no intent to defraud (CM 202027, McElroy; CM 228480, Smith; CM 237741, Ralph). The basis for these cases is that such conduct is of a nature to bring discredit upon the military service.

Although the account maintained by accused was a joint account, it was not claimed that his mother had drawn checks against it in December whereby it was reduced below $45 in amount. The situation here is different from that in the Wanner case (CM 236070, 2 Bull. JAG 384) where it affirmatively appeared that the account of accused had been closed by a bank charge of which he had no notice. When the accused chose to open a joint account, subject to the checks of another as well as his own, he was under the responsibility of making some reasonable and practicable arrangement to prevent his checks from being returned unpaid on account of the withdrawal of funds by his mother. This was especially true after the difficulties which arose in October through the actions of his mother. Even if it be assumed, for the purpose of argument, that the account was depleted on 21 December by the presentation of checks drawn by his mother, the Board of Review is of the opinion that accused was guilty of an offense under the 96th Article of War, because he had not provided a means to make his check good in the event the account should be so reduced. Although he knew that this might occur, it is clear that no such arrangements were made, inasmuch as the $45 check remained unpaid at the date of trial.

Although an intent to defraud was neither alleged nor proved, the Board of Review is of the opinion that the facts disclose wrongful conduct, in violation of the 96th Article of War, to the discredit of the military service, within the doctrine of the cases which have been cited. It is unnecessary to decide how long an account must be maintained in an amount sufficient to pay an outstanding check, since the maintenance of such balance for only four days after the check is drawn is clearly inadequate.

In its findings, the court should have substituted 21 December as the date of the offense and Mrs. Denton as the person to whom the check was uttered, in view of the proof.

b. Specification 2: The evidence shows that about 6 December 1943 Lieutenant Colonel L. B. Downing, commanding officer of accused, instructed him to use a money order in paying two old laundry bills from Fort Sill in the amount of $4.01, which were delinquent through no fault of accused. Colonel Downing stated to accused that use of a money order was a "more positive and a better manner of paying such bills". Accused forwarded a money order to pay the laundry bills. Under date of 20 December 1943, Colonel Downing indorsed to accused a letter from a hotel with reference to an unpaid check of accused in the amount of $15, which another officer had cashed at the hotel. The indorsement directed that the matter be adjusted and a report of action taken be made. Under date of 21 December accused submitted a third indorsement to Colonel Downing stating "Money order to cover amount in question has been mailed to the Hotel San Carlos". Accused had not forwarded a money order to the hotel, but later that day forwarded a personal check. Subsequent to 30 December, when Colonel Downing asked accused how he had paid the debt, accused stated "by check". Accused testified that he had intended to use a money order when he executed the indorsement but was prevented from obtaining a money order by the press of duties preparatory to going into the field, so wrote a check. He made no effort to get his indorsement back to correct the erroneous statement.

It is obvious that accused understood from the earlier transaction that Colonel Downing would prefer that he pay the check by money order and therefore executed the indorsement stating that it had been so paid. If at that time accused had already forwarded a check instead of a money order, his statement would have been false in a material particular. The Board can see no difference in effect where accused subsequently sent a check instead of a money order, failed to correct the indorsement, and so left his commanding officer under the erroneous impression, based on official correspondence, that the check had been paid by money order. It is the opinion of the Board of Review that accused was shown guilty, beyond reasonable doubt, of an offense, in violation of the 96th Article of War, as charged.

6. Much hearsay evidence was erroneously admitted into the record by the court, but on careful consideration the Board is of the opinion that it did not prejudice the substantial rights of the accused.

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 25 September 1941; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 26 May 1942; temporarily promoted to first lieutenant, Army of the United States, 24 December 1942; temporarily promoted to captain, Army of the United States, 6 July 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 finding of guilty of Specification 1, except the words and figures "16 December 1943" and "W. E. Denton", substituting therefor respectively "21 December 1943" and "Mrs. W. E. Denton", legally sufficient to support the findings of guilty of Specification 2 and of the Charge, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Samuel M. Driver, Judge Advocate

Robert C. Carter, Judge Advocate

F. J. Lotterhos, Judge Advocate

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 Captain George K. Hebb, II (0-1165399), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the finding of guilty of Specification 1 except the words and figures "16 December 1943" and "W. E. Denton" substituting therefor respectively "21 December 1943" and "Mrs. W. E. Denton", legally sufficient to support the findings of guilty of Specification 2 and the Charge, and legally sufficient to support the sentence and to warrant confirmation thereof. The accused failed to maintain a sufficient bank balance to meet a check drawn by him in the amount of $45 to the discredit of the military service (Spec. 1) and made to his commanding officer a false official report that he had mailed a money order in payment of a debt of $15 to a hotel (Spec. 2). The $45 check was given to take up four outstanding unpaid checks of accused aggregating that amount. It appears from the papers attached to the record that subsequent to his trial on 4 February 1944 accused was absent from his battery and could not be found on 14 February and that when he was found in his room by his commanding officer late in the afternoon of 15 February accused stated that he had had his jaw lanced but the Dental Corps officer who extracted 5 of his teeth on 16 February reported that accused showed no evidence of any other dental work having been done recently. In his review the staff judge advocate states that the executive officer of the group to which the battalion of accused was attached considered him a bad influence on the younger officers because of his "habit" of passing worthless checks. I recommend that the sentence to dismissal be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 349, 13 Jul 1944)

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TITLE

DATE	BORROWER'S NAME	EXT.