OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 37

1944

R
16
B63
v. 37

Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume XXXVII

including

CM 257047 to CM 258326

(1944)

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

Office of The Judge Advocate General

Washington : 1944

02279

CONTENTS OF VOLUME XXXVII

CM No.	Accused	Date	Page
257047	Nielson	16 Jun 1944	1
257069	Bishop	22 Jun 1944	7
257081	Anderson	3 Jul 1944	17
257082	Powell	15 Jun 1944	25
257143	Smith	16 Jun 1944	33
257151	Sears	16 Jun 1944	39
257165	Maple	22 Jun 1944	47
257204	Connors	19 Jun 1944	79
257252	Warman	26 Jun 1944	85
257271	Allen	16 Jun 1944	95
257369	Sayles	26 Jun 1944	103
257417	Sims	29 Jun 1944	111
257419	Siechen	22 Jun 1944	121
257467	Bair	28 Jun 1944	125
257469	MacKay	10 Jul 1944	129
257531	Hurlbut	16 Jun 1944	143
257546	Leslie	7 Jul 1944	149
257550	O'Connor	10 Jul 1944	163
257572	Botthof	23 Jun 1944	179
257615	Lee	24 Jun 1944	187
257634	Friend	22 Jul 1944	193
257646	Short	30 Jun 1944	199
257706	Spaeth	27 Jun 1944	207
257739	Mecartney	6 Jul 1944	213
257761	Hammett	8 Jul 1944	225
257806	Engels	19 Jul 1944	231
257882	Stiehl	12 Jul 1944	243
257939	Shorter	29 Jun 1944	255
257946	DeLaney	29 Jun 1944	263
257969	Hartell	4 Jul 1944	267
258011	Henley	14 Jul 1944	279
258020	Palomera	24 Jul 1944	283
258062	Sang	24 Jun 1944	305
258105	Croslin	20 Jul 1944	309

CM No.	Accused	Date	Page
258108	Perlman	7 Jul 1944	313
258165	Thomas	7 Jul 1944	319
258171	Lucas	6 Jul 1944	327
258188	Boling	3 Jul 1944	341
258205	Green	12 Jul 1944	347
258234	Badgett	29 Jun 1944	353
258235	Armstrong	5 Jul 1944	357
258265	Shane	1 Jul 1944	363
258314	Reeser	28 Jul 1944	367
258324	Ninman	2 Aug 1944	381
258325	Jackson	8 Jul 1944	387
258326	Dougherty	2 Aug 1944	393

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

SPJGV
CM 257047

16 JUN 1944

UNITED STATES	)	OGDEN AIR SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Army Air Base, Hill Field, Ogden, Utah, 17 May 1944. Dismissal and total forfeitures.
Second Lieutenant KARL K. NIELSEN (0-766340), Air Corps.	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Second Lieutenant Karl K Nielsen, Fourth Air Force Replacement Depot, Hammer Field, Fresno, California, did at Los Angeles, California, on or about 19 February 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Payson, Utah, on or about 27 March 1944.

The accused pleaded not guilty to the Charge and Specification. He was found guilty, by appropriate exceptions and substitutions, of the lesser included offense of absence without leave, in violation of the 61st Article of War. 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 in his action improvidently stated that the sentence "will be duly executed. Pursuant to Article of War 48, the order directing the execution of the sentence is withheld." The record was forwarded to the Board of Review where

it has been acted upon under the provisions of Article of War 48.

3. In support of the Charge and Specification, the prosecution's evidence shows that on 5 February 1944 accused, who had just graduated from the Army Air Force Bombardier School, Deming, New Mexico, was assigned, and ordered to proceed, to the Fourth Air Force Replacement Depot, Hammer Field, Fresno, California. Accused was directed to report at his new station on 18 February 1944, an eleven day delay en route having been authorized (Pros. Ex. C). Accused understood these orders (Pros. Ex. D). The morning report of the Fourth Air Force Replacement Depot for the period from 15 February to 28 March 1944 contained no entry that accused joined this organization as ordered (R. 8).

During accused's delay en route he visited with his sisters in his home town of Payson, Utah, until sometime around 18 February 1944 when he departed by bus for his new station in California (R. 13). About 21 or 22 February he returned to Payson, Utah, where he remained until 27 March 1944 (R. 14, 15, 23, 25). He informed his relatives that he had traveled as far as Los Angeles and there found that severe storms had so disrupted transportation facilities that he was unable to procure further passage to his station (R. 16, 19). He further stated that he was to await orders which might come at any time directing him to duty (R. 14, 16, 18). For the first week or two following 22 February accused was ill with pharyngitis but his condition was not sufficiently serious to confine him continuously indoors (R. 17, 20, 21). During his stay at Payson he borrowed sums of money from his sisters and attended various dances and high school basketball games dressed in his uniform (R. 15). He was observed around the town almost daily and was always clothed in his officer's uniform (R. 20, 22, 24).

On 27 March 1944 the Chief of Police of Payson, Utah, acting on a communication received by him which indicated accused was absent without leave, contacted accused and exhibited the communication to him. Accused stated he had been daily expecting a telegram telling him where to report and suggested they go to Fort Douglas, Utah, and straighten out the matter (R. 22, 23, 25).

After having been duly warned of his rights and without any threats or promises being made, accused expressed the desire to make a statement to the Provost Marshal at Hill Field, Utah, to which he apparently had been moved (R. 27). He stated that, after leaving Payson, Utah, by bus on 17 February 1944, he arrived in Los Angeles, California, at 1000 hours on 18 February. Heavy snows had apparently disrupted transportation facilities and both the railroad and bus company informed him

that it would be three to five days before he could obtain transportation to Hammer Field. He wired the adjutant's office at Hammer Field that due to his inability to obtain transportation to his station he would return home and await further orders. He returned to his home in Payson on 20 February and remained there until 27 March 1944 when he was informed by the city marshal that an absentee circular had been received concerning him. He asked the marshal to call Fort Douglas, Utah, and thereafter he accompanied the marshal to that station where he was turned over to military authorities on 27 March 1944. For approximately twenty days of his absence accused stated he was under doctor's care for a streptococcus throat and was confined to the home of one of his sisters until 15 March, paying his last visit to the doctor on 25 March 1944. He further stated that he received no reply to the telegram he had sent to Hammer Field from Los Angeles (Pros. Ex. J).

4. The defense introduced evidence to show that during his absence he wore his officer's uniform with insignia of grade (R. 29). He had achieved an outstanding scholastic record in his high school work and, in the community of Payson, he bore an excellent reputation (R. 30, 31).

5. There is improperly included with the exhibits attached to the record one marked "Prosecution Exhibit E." It purports to be an extract copy of morning report of "Sq. 'G' 'Officers', FAFRD, Hammer Fld, Fresno, Calif." When offered in evidence it was denied admission (R. 4). It is not an exhibit and has not been considered by the Board of Review or referred to in the summary of evidence set forth above.

The morning reports of the Fourth Army Air Force Replacement Depot covering the period from 15 February to 28 March 1944 were admitted in evidence as Prosecution's Exhibit F (R. 9, 10). However, they were withdrawn sometime after the conclusion of the trial and were not forwarded with the record of trial, nor were copies appended to the record. The adjutant testified that he examined these morning reports and found no entry in them that accused joined the organization. Such evidence was competent. The morning reports were in evidence and available for inspection by the defense to determine the accuracy of the witness' testimony (MCM, 1928, par. 116a). Such evidence was likewise relevant on the question of whether the accused in fact did join his organization during that period. It was within the province of the court to determine what weight should be accorded it.

The evidence of the prosecution and the accused's statement conclusively sustain the findings of guilty. He was ordered to report to his new station on 18 February 1944 and did not do so. He did not

return to military control until 27 March 1944. Although weather conditions may have interrupted transportation from Los Angeles to Hammer Field for some three to five days around 18 February, accused had no authority to return home and await other orders. It is fundamental that his duty was to proceed to his station just as soon as transportation facilities were available. Only his youth and immaturity can account for the extraordinary decision he reached and the course of conduct he thereafter pursued.

6. Accused is about 19 years of age. He enlisted in the Air Corps on 9 October 1942, and on 5 February 1944 was commissioned a second lieutenant.

7. 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, legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

Thomas N. Jappy, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trevithick, Judge Advocate.

SPJGV
CM 257047

1st Ind.

War Department, J.A.G.O., 7 JUL 1944 - To the Secretary of War.

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Karl K. Nielsen (0-766340), 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, legally sufficient to support the sentence and to warrant confirmation of the sentence. Accused was found guilty of absence without leave from 19 February to 27 March 1944, in violation of Article of War 61. He was sentenced to dismissal and total forfeitures. He is 19 years of age and received his commission as second lieutenant on 5 February 1944. Extending every consideration to accused, his failure to understand and appreciate a fundamental proposition of military duty, considering the military training he has received, demonstrates his unfitness to remain an officer. 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-Dft Ltr for sig S/W.
Incl.3-Form of action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 473, 1 Sep 1944)

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

SPJGH
CM 257069

22 JUN 1944

UNITED STATES v. First Lieutenant GEORGE F. BISHOP, JR. (0-465805), Coast Artillery Corps.	ANTIAIRCRAFT ARTILLERY TRAINING CENTER CAMP HAAN, CALIFORNIA Trial by G.C.M., convened at Camp Haan, California, 19 and 22 May 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 Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 1st Lt. George F. Bishop, Jr., CAC, 818th Antiaircraft Artillery Automatic Weapons Battalion, did, at Camp Haan, California, on or about 10 March 1944, with intent to defraud, wrongfully and unlawfully make and utter to Camp Haan Officers Club, a certain check, in words and figures as follows, to wit: "Temple, Tex., 3-10-1944, National Bank, Pay to the order of Officer's Club, Cp Haan, $5.00, Five and no/100 Dollars, Geo F. Bishop Jr 1st Lt CAC Btry A, 818th AAA," and by means thereof, did fraudulently obtain from Camp Haan Officers Club $5.00, lawful money of the United States, he, the said 1st Lt. George F. Bishop, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Temple, Texas, for the payment of said check.

Specification 2: Similar to Specification 1, except that it alleges that the check was drawn on First National Bank of Temple, Texas, on or about 11 March 1944.

Specification 3: Similar to Specification 1, except that it alleges that the check was drawn on First National Bank of Temple, Texas, on or about 15 March 1944.

Specification 4: Similar to Specification 1, except that it alleges that the check was drawn on First National Bank of Temple, Texas, on or about 9 March 1944, at Riverside, California, to Banks Grill, for $10.

Specification 5: Similar to Specification 1, except that it alleges that the check was drawn on First National Bank of Temple, Texas, on or about 18 March 1944, at Riverside, California, to Banks Fountain Grill, for $25.

Specification 6: Similar to Specification 1, except that it alleges that the check was drawn on First National Bank of Temple, Texas, to Mission Inn, at Riverside, California, for $25.

Specification 7: Similar to Specification 1, except that it alleges that the check was drawn on First National Bank of Temple, Texas, on or about 18 March 1944, at Riverside, California, to Glenwood Mission Inn, for $10.

Specification 8: Similar to Specification 1, except that it alleges that the check was drawn on First National Bank of Temple, Texas, on or about 11 March 1944, at San Bernardino, California, to The Grizzly Bear, for $15.

Specification 9: Similar to Specification 1, except that it alleges that the check was drawn on Citizens National Trust & Savings Bank of Riverside, on or about 29 March 1944, at Camp Irwin, California, to Officers' Club, Camp Irwin.

Specification 10: Similar to Specification 1, except that it alleges that the check was drawn on Citizens National Trust & Savings Bank of Riverside, on or about 31 March 1944, at Camp Irwin, California, to Officers' Club, Camp Irwin, for $10.

He pleaded not guilty to and was found guilty of all Specifications and the Charge. 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. It was stipulated that accused, a member of the 818th Antiaircraft Artillery Automatic Weapons Battalion, Camp Haan, California, made and uttered each of the ten checks (Exs. 1-10) referred to in the Specifications on the dates and to the persons named as payees therein; that by means thereof he obtained in each instance the amount of money for which the check was drawn; that the checks were deposited by the payees in the usual course of business within a reasonable time; and that the checks were returned unpaid through banking channels for reasons as follows: Specification 1, because accused had no account in Temple National Bank of Temple, Texas; Specifications 2-8, because accused had insufficient funds in his checking account at First National Bank of Temple, Texas, to pay them; and Specifications 9-10, because accused had no checking account in Citizens National Trust & Savings Bank of Riverside, California. The ten checks referred to,

numbered to correspond to the Specifications, were introduced in evidence, with bank slips attached. The check described in Specification 1 (Ex. 1) is drawn on a check form of Citizens National Trust & Savings Bank of Riverside, California, with the name of the bank changed to National Bank, Temple, Texas; the checks described in Specifications 2, 3 and 5 (Exs. 2, 3, 5) are drawn on similar forms, but changed to First National Bank, Temple, Texas; the checks described in Specifications 4 and 8 (Exs. 4, 8) are drawn on check forms of First National Bank of Temple, unchanged; the checks described in Specifications 6 and 7 (Exs. 6, 7) are drawn on Glenwood Mission Inn forms with the name of First National Bank of Temple written in; and the checks described in Specifications 9 and 10 (Exs.9, 10) are drawn on forms of Citizens National Trust & Savings Bank of Riverside, unchanged (R. 7-9, 16-17).

It was stipulated further (Ex. 11) that there are two national banks in Temple, Texas, namely, Temple National Bank and First National Bank of Temple; that there is no bank there of the name of "National Bank"; that on 10 March 1944 accused did not have a checking account in a bank of that name at Temple or elsewhere; and that the banking business of accused in Temple, Texas, had been with First National Bank of Temple. The stipulation provided further that an official of Citizens National Trust & Savings Bank of Riverside would testify that the records of the bank disclosed that accused opened an account on 6 March 1943, which was closed on 20 October 1943 and not thereafter reopened, and that accused had no checking account there on 29 and 31 March 1944 (R. 21).

The statement of the checking account (Ex. 13) of accused in First National Bank of Temple from 28 December 1943 to 31 March 1944 was placed in evidence by agreement. It discloses the following facts: on 28 December, a balance of $4; from that date through 14 February, a balance of $4 or less, with numerous 25¢ debits; on 4 February, a deposit and a debit of $50; on 15 February, a deposit of $140, and a balance of $140; on 16 and 17 February, debits of $25, $25, $10, $75, and 25¢, with a balance on 17 February of $4.75; on 6 March, a deposit of $50; on 7 March, debits of $10 and $50, with a resulting overdraft of $5.25; and from then to 31 March numerous 25¢ debits, resulting in an overdraft of $9 on 31 March. It was stipulated that the 25¢ debits were service charges made by the bank on presentation of checks against the account when the balance was insufficient to pay them. Mr. Alton C. Martin, assistant cashier of the bank, testified by deposition (Ex. 12) that accused had no agreement with the bank to extend credit and pay checks drawn on the account in excess of the balance. Accused agreed to make an allotment of $50 per month to his account to retire a note in favor of the bank. The bank "received" the allotment for September and November 1943 and January, February and March 1944. The bank fulfilled the purpose of the allotment by making transfers from his checking account to credit on his note in December 1943 and February and March 1944, and by placing the allotment "directly to his note", in September and November 1943 and January 1944. Mr. Martin stated that transfers in the amount of $50 were made on 4 February and 7 March, that no transfer was made for December 1943,

and that $50 deposited on 6 December was withdrawn as follows: $10 on 14 December, $25 on 20 December, and $10 on 24 December. Accused was authorized to draw checks against the amount for December which was not transferred (R. 39-40).

Miss Mary W. Blair, an employee of the Officers' Club, Camp Haan, testified that she deposited three checks (Exs. 1, 2, 3) and that after they were returned she wrote a letter about them to military authorities on 1 April. Mr. Glenn Smock, operator of Banks Fountain Grill, also known as Banks Grill, cashed two checks (Exs. 4 and 5) for accused, and both came back unpaid. He tried to call accused but he was "on a problem" at the time. Mr. Smock gave the information about the checks to "Colonel Varner", and an hour or two later received a wire from accused that he would pay Mr. Smock as soon as he "got in off the desert". A short time after that accused came in and paid him. Mr. Smock had cashed checks for accused over a period of three or four months and they were good. Colonel Varner took charge of the checks before accused came in to pay them. Mr. V. J. Nelson, cashier at Mission Inn, Riverside, California, cashed a check (Ex. 7) for accused, and deposited it and another (Ex. 6) for collection. Both were returned unpaid, but were subsequently paid on 14 April. Prior to payment "Lt. Col. Varner" had come in and "picked them up". On cross-examination Mr. Nelson identified a letter (Def. Ex. A) dated 7 April 1944 from The Mission Inn to accused, stating "Thank you for your letter regarding returned checks" and that if $35 should be remitted the matter would be cleared up. Corporal Paul H. Primock, who kept books for the Officers' Club at Camp Irwin, deposited two checks (Exs. 9 and 10) on 1 April. They were afterwards returned, and according to his record had not since been paid (R. 9-16, 18-25, 30-31).

Corporal Primock testified over objection, from a record of unpaid checks which he kept in his own handwriting for the club, that the following checks of accused, in addition to those described in the Specifications, were returned unpaid on account of insufficient funds: two for $10 each on 30 December 1943 and two for $10 each on 31 December. These four checks were afterward paid. Miss Margaret Rowe, a teller at the Camp Irwin Branch of Bank of America, cashed three checks for accused, as follows: 10 January, $25; 19 January, $60; and 16 February, $50. The first two checks, drawn on a bank at Riverside, "were sent to Barstow that night, and we brought them out the next day"; they were presented through banking channels and returned unpaid; accused was notified and he came in on 21 January and paid the checks. She also testified that these two checks never left the bank. The third check, drawn on a bank somewhere in Texas, was put through banking channels twice and each time came back unpaid. When it returned the second time, accused was notified by letter, and he paid it on 21 March by Western Union money ~~order~~ (R. 25-30, 33-38).

numbered to correspond to the Specifications, were introduced in evidence, with bank slips attached. The check described in Specification 1 (Ex. 1) is drawn on a check form of Citizens National Trust & Savings Bank of Riverside, California, with the name of the bank changed to National Bank, Temple, Texas; the checks described in Specifications 2, 3 and 5 (Exs. 2, 3, 5) are drawn on similar forms, but changed to First National Bank, Temple, Texas; the checks described in Specifications 4 and 8 (Exs. 4, 8) are drawn on check forms of First National Bank of Temple, unchanged; the checks described in Specifications 6 and 7 (Exs. 6, 7) are drawn on Glenwood Mission Inn forms with the name of First National Bank of Temple written in; and the checks described in Specifications 9 and 10 (Exs.9, 10) are drawn on forms of Citizens National Trust & Savings Bank of Riverside, unchanged (R. 7-9, 16-17).

It was stipulated further (Ex. 11) that there are two national banks in Temple, Texas, namely, Temple National Bank and First National Bank of Temple; that there is no bank there of the name of "National Bank"; that on 10 March 1944 accused did not have a checking account in a bank of that name at Temple or elsewhere; and that the banking business of accused in Temple, Texas, had been with First National Bank of Temple. The stipulation provided further that an official of Citizens National Trust & Savings Bank of Riverside would testify that the records of the bank disclosed that accused opened an account on 6 March 1943, which was closed on 20 October 1943 and not thereafter reopened, and that accused had no checking account there on 29 and 31 March 1944 (R. 21).

The statement of the checking account (Ex. 13) of accused in First National Bank of Temple from 28 December 1943 to 31 March 1944 was placed in evidence by agreement. It discloses the following facts: on 28 December, a balance of $4; from that date through 14 February, a balance of $4 or less, with numerous 25¢ debits; on 4 February, a deposit and a debit of $50; on 15 February, a deposit of $140, and a balance of $140; on 16 and 17 February, debits of $25, $25, $10, $75, and 25¢, with a balance on 17 February of $4.75; on 6 March, a deposit of $50; on 7 March, debits of $10 and $50, with a resulting overdraft of $5.25; and from then to 31 March numerous 25¢ debits, resulting in an overdraft of $9 on 31 March. It was stipulated that the 25¢ debits were service charges made by the bank on presentation of checks against the account when the balance was insufficient to pay them. Mr. Alton C. Martin, assistant cashier of the bank, testified by deposition (Ex. 12) that accused had no agreement with the bank to extend credit and pay checks drawn on the account in excess of the balance. Accused agreed to make an allotment of $50 per month to his account to retire a note in favor of the bank. The bank "received" the allotment for September and November 1943 and January, February and March 1944. The bank fulfilled the purpose of the allotment by making transfers from his checking account to credit on his note in December 1943 and February and March 1944, and by placing the allotment "directly to his note", in September and November 1943 and January 1944. Mr. Martin stated that transfers in the amount of $50 were made on 4 February and 7 March, that no transfer was made for December 1943,

and that $50 deposited on 6 December was withdrawn as follows: $10 on 14 December, $25 on 20 December, and $10 on 24 December. Accused was authorized to draw checks against the amount for December which was not transferred (R. 39-40).

Miss Mary W. Blair, an employee of the Officers' Club, Camp Haan, testified that she deposited three checks (Exs. 1, 2, 3) and that after they were returned she wrote a letter about them to military authorities on 1 April. Mr. Glenn Smock, operator of Banks Fountain Grill, also known as Banks Grill, cashed two checks (Exs. 4 and 5) for accused, and both came back unpaid. He tried to call accused but he was "on a problem" at the time. Mr. Smock gave the information about the checks to "Colonel Varner", and an hour or two later received a wire from accused that he would pay Mr. Smock as soon as he "got in off the desert". A short time after that accused came in and paid him. Mr. Smock had cashed checks for accused over a period of three or four months and they were good. Colonel Varner took charge of the checks before accused came in to pay them. Mr. V. J. Nelson, cashier at Mission Inn, Riverside, California, cashed a check (Ex. 7) for accused, and deposited it and another (Ex. 6) for collection. Both were returned unpaid, but were subsequently paid on 14 April. Prior to payment "Lt. Col. Varner" had come in and "picked them up". On cross-examination Mr. Nelson identified a letter (Def. Ex. A) dated 7 April 1944 from The Mission Inn to accused, stating "Thank you for your letter regarding returned checks" and that if $35 should be remitted the matter would be cleared up. Corporal Paul H. Primock, who kept books for the Officers' Club at Camp Irwin, deposited two checks (Exs. 9 and 10) on 1 April. They were afterwards returned, and according to his record had not since been paid (R. 9-16, 18-25, 30-31).

Corporal Primock testified over objection, from a record of unpaid checks which he kept in his own handwriting for the club, that the following checks of accused, in addition to those described in the Specifications, were returned unpaid on account of insufficient funds: two for $10 each on 30 December 1943 and two for $10 each on 31 December. These four checks were afterward paid. Miss Margaret Rowe, a teller at the Camp Irwin Branch of Bank of America, cashed three checks for accused, as follows: 10 January, $25; 19 January, $60; and 16 February, $50. The first two checks, drawn on a bank at Riverside, "were sent to Barstow that night, and we brought them out the next day"; they were presented through banking channels and returned unpaid; accused was notified and he came in on 21 January and paid the checks. She also testified that these two checks never left the bank. The third check, drawn on a bank somewhere in Texas, was put through banking channels twice and each time came back unpaid. When it returned the second time, accused was notified by letter, and he paid it on 21 March by Western Union money ~~order~~ (R. 25-30, 33-38).

4. Accused testified that as a result of his prior military training in "ROTC, Texas A & M" he was commissioned in May 1942. He was promoted to first lieutenant in June 1943, and is married (R. 43).

Accused admitted making the checks referred to in the Specifications and that he presented them and received value as alleged. He had maintained an account in the First National Bank of Temple, Texas, for over 10 years, and his balance had fluctuated. The last statement he received from the bank was in October or November 1943. He went to Temple, Texas, his home, while on leave from 9 February to 26 February 1944. Referring to the testimony of Miss Margaret Rowe, a witness for the prosecution, that she cashed a check for him at Camp Irwin on 16 February, he stated that this was not true as he was in Temple at that time. While on his leave, he deposited $140 in his bank account on 15 February, and at the same time discussed his note with the vice-president of the bank. Accused thought the balance on his note was $100 but the bank official advised him that it was $200, due to the fact that in two months the bank had not drawn $50 from his account to apply on the note. As a result, accused had $100 more in his checking account than he had thought. Accused had a Class E allotment of $50 per month to his account in the bank. He testified that when he presented the "checks in question" he did not intend to cheat or defraud the payees. Accused was familiar with the "process" of handling unpaid checks at the officers' clubs at Camp Haan and Camp Irwin, and in presenting checks to these clubs he did not intend to defraud. Neither did he intend to defraud the Mission Inn, Mr. Smock, or The Grizzly Bear. Accused denied that he well knew that he did not have sufficient money in the bank. He reimbursed the holders of all of the checks by payments as follows: on 14 April, the checks included in Specifications 1 to 7, and on 1 May, those included in Specifications 8 to 10. The payment to the Officers' Club at Camp Irwin was made by telegraph and the telegraph company gave him a receipt (R. 44-52).

On cross-examination accused stated that when he issued the three checks to the Officers' Club at Camp Haan he thought he had sufficient funds because that was after he deposited $140 in February. He did not know the amount of his balance just before he deposited $140, because he was in Temple only from 15 February to 17 February, was in the bank at the close of business, and "didn't want to go down to the bookkeeping department downstairs and get it". The purpose of his trip to Temple was to visit his parents, clear up his note, and pay two or three people to whom he owed money. While in Temple he did not draw checks on his account. When he was at the bank he signed a new note for about $500, as he believed. The note was shown to him and he read the amount, which was $324. Accused did not keep check stubs but tried to keep the dates and amounts of checks in his mind. He thought it would take a week, ten days or two weeks for a check to clear the bank in Temple from Camp Haan. The purpose of his allotment of $50 per month to his bank account was to keep his account there and he authorized the bank to apply the allotment on the note as "they saw fit". On 9 March when he drew a check for $10 to Banks Grill he thought his balance

was sufficient to cover it. He figured he had $240 after depositing $140 on 15 February, and knew he had written a few checks since, but did not know how many or for what amounts. As to the two checks to the Officers' Club at Camp Irwin, accused testified that he intended to draw them on the First National Bank of Temple, but failed to cross out the name of Citizens Trust and Savings Bank on the forms he was using. He also intended to draw the check mentioned in Specification 1 on the First National Bank. Some of the checks included in the Specifications were called to the attention of accused by Colonel Varner about 7 or 8 April, but at that time accused had written letters to Mission Inn and The Grizzly Bear about the checks issued to them. Accused denied that he had notice or knowledge prior to 9 March that his account was insufficient to cover the ten checks (R. 52-58, 71-78, 83-84, 88-90, 123-125).

During the cross-examination accused testified that he remembered picking up two checks at the Camp Irwin Branch of Bank of America and paying them in cash, but did not remember cashing them. The checks referred to were one for $25 on 10 January and another for $60 on 19 January. They were drawn on the First National Bank of Temple. When he "took care" of them on 21 January he knew they were not good. He did not remember cashing a check drawn to the Sontag Drug Store for $10 on 6 February but remembered that he was "notified about" a check for about $50 he had given "Lt. Goldman". Accused admitted that he had notice of "bad checks" to the Officers' Club at Camp Irwin for $40 in January. He also admitted that from 30 December 1943 to 31 March 1944 he issued "a few" checks, "possibly" 21, that were returned unpaid on account of insufficient funds or no account. Over objection there was introduced in evidence a series of official communications (Exs. 15-A, 15-B, 15-C), as follows: letter from the commanding officer of the Antiaircraft Artillery Training Center, Camp Haan, to accused, dated 28 February 1944, giving notice of intention to impose punishment under the 104th Article of War for issuing checks for about $150 without sufficient funds and for other offenses; a first indorsement from accused dated 2 March accepting such punishment; a second indorsement to accused dated 2 March, reprimanding him and warning him of the seriousness of issuing checks without sufficient funds; and a third indorsement from accused dated 2 March accepting the punishment. The court was cautioned that only those parts of the documents indicating that accused had been warned about his bank account would be considered. There was also introduced in evidence over objection a series of official communications (Exs. 14-A, 14-B, 14-C, 14-D, 14-E), as follows: a letter from Headquarters Camp Irwin, dated 8 March, through channels, to the commanding officer of accused about a check of accused for $50 held by the Camp Irwin Branch, Bank of America, which had been returned marked "insufficient funds"; a second indorsement to accused, dated 13 March, pointing out the seriousness of giving bad checks; and a third indorsement from accused dated 16 March, stating "I will not, after this date, issue any personal checks or contract any further debts until all my indebtedness is cleared up" (R. 58-65, 78-83, 85-88, 91-92).

On examination by the court accused testified in detail as to his financial affairs and living expenses. When he deposited $140 on 15 February, he did not draw any checks against it, but outstanding checks at the time took up a "small amount" of it. Before he borrowed $324 from the bank (on 15 February) accused owed the bank $200 plus interest (R. 95-123, 125-126).

Major Howard R. Wall, Captain James E. Smith, Captain B. F. Sebesta and Captain James W. Graves testified to the good reputation of accused. Major Wall stated that his opinion of the efficiency of accused is shown by the fact that he several times recommended accused for promotion. Captain Smith considered accused the best range officer his former battalion ever had (R. 126-134).

5. a. The evidence shows that during March 1944 accused made and uttered checks as follows: 9 March, check for $10 to Banks Grill (Spec. 4); 10 March, check for $5 to Officers' Club, Camp Haan, drawn on National Bank, Temple, Texas (Spec. 1), and check for $25 to Mission Inn (Spec. 6); 11 March, check for $5 to Officers' Club, Camp Haan (Spec. 2), and check for $15 to The Grizzly Bear (Spec. 8); 15 March, check for $5 to Officers' Club, Camp Haan (Spec. 3); 18 March, check for $25 to Banks Fountain Grill (Spec. 5), and check for $10 to Mission Inn (Spec. 7); 29 March, check for $5 to Officers' Club, Camp Irwin, drawn on Citizens National Trust & Savings Bank, Riverside, California (Spec. 9); and 31 March, check for $10 to Officers' Club, Camp Irwin, drawn on the bank last named (Spec. 10). All of the checks were drawn on First National Bank of Temple, Texas, except as otherwise shown above. Accused received cash for each check in the face amount; the checks were deposited for collection within a reasonable time; and they were returned to the payees unpaid because of no account (Specs. 1, 9, 10) and insufficient funds (Specs. 2-8). Accused paid all of the checks on 14 April and 1 May.

Accused testified without contradiction that he intended to draw the checks mentioned in Specifications 1, 9 and 10 on First National Bank of Temple, the only bank where he maintained an account, but failed to insert the name of that bank. The account of accused in the First National Bank of Temple was overdrawn from 7 March through 31 March.

An accused is properly chargeable with knowledge of the status of his bank account (CM 202601, Sperti, 6 B.R. 171). The facts stated above sustain the findings of guilty of all Specifications, in violation of the 95th Article of War. Subsequent payment of the checks is not a defense.

b. Accused claimed that when he deposited $140 in the bank on 15 February, while he was at home on leave, he thought he had a balance of about $240, because a bank official advised him that in two months the bank had not withdrawn from his account an allotment of $50 per month that went there to be applied on his note at the bank. He testified that he did not intend to defraud the payees of the several checks, and thought his account was

sufficient to pay them. The court rejected this testimony, and properly so. When accused was in the bank on 15 February he did not take the trouble to ascertain the state of his account, which in fact contained only $140 after the deposit. He admitted that checks outstanding at the time took up a "small amount" of the deposit, and the bank records show that checks amounting to $135 were charged to the account within two days after the deposit. Accused had had difficulties on account of unpaid checks issued by him for two or three months prior to the drawing of the checks involved in the Specifications; and on 2 March and again on 13 March he was officially warned about the seriousness of issuing bad checks. Nevertheless, he drew and uttered the ten checks, between 9 March and 31 March, in reliance upon a belief (as he testified) that he had sufficient money in the bank. The circumstances rebut this claim. It was his responsibility to know the status of his account, especially in view of the warning that had been given him.

6. Objection was made to testimony introduced by the prosecution to show prior instances of checks drawn by accused which were returned unpaid on account of insufficient funds, and to show the official warnings to accused referred to above. This evidence tended to show that accused had committed offenses not included in the Specifications, and normally would be inadmissible. However, it was offered under the rule that when criminal intent, motive, or guilty knowledge in respect of the act is an element in the offense charged, evidence of other acts of the accused, not too remote in point of time, manifesting that intent, motive or knowledge, is not made inadmissible by reason of the fact that it may tend to establish the commission of another offense not charged (MCM, 1928, par. 112b). It is clear from the record that the court considered this evidence only for the proper purpose of determining the intent of accused. In the opinion of the Board of Review, this evidence was properly considered.

7. The accused is 26 years of age. The records of the Office of The Adjutant General show his service as follows: appointed second lieutenant, Coast Artillery Reserve, Army of the United States, 16 May 1942; active duty 17 May 1942; temporarily promoted to first lieutenant, Army of the United States, 18 June 1943.

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

Samuel M. Driver, Judge Advocate

Robert Gamm, Judge Advocate

H. Foltuhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 4 - JUL 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 George F. Bishop, Jr. (O-465805), Coast Artillery Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The accused fraudulently drew and cashed 10 checks aggregating $115 in March 1944 which were returned to the payees unpaid because of insufficient funds. During the period of two or three months prior to the drawing of the checks here involved this officer had difficulties on account of unpaid checks issued by him, and had been warned by superior authority of the seriousness of issuing checks without sufficient funds. On 2 March 1944 he was reprimanded under the provisions of Article of War 104 for issuing checks totaling $150.00 without having sufficient funds to his credit to cover these checks, and for excessively drinking and gambling. The Staff Judge Advocate, Headquarters Camp Haan, California, to which accused was attached, unassigned, by Special Orders dated 31 May 1944, states in a letter dated 29 June 1944 that, in addition to the checks issued without funds for which accused was tried, 15 additional checks in various small amounts issued by him to tradespeople in and about Riverside, California, had been returned to the payees for want of sufficient funds to pay them. He also states that subsequent to the service of the charges upon him the accused issued a check for $15 on 13 May 1944, without sufficient funds and another for $25 on 17 May 1944, both to business concerns at Riverside. 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.

4 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.
Incl.4-Ltr. fr. SJA, 29 June 1944.

(Sentence confirmed. G.C.M.O. 414, 27 Jul 1944)

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

SPJGK
CM 257081

3 JUL 1944

UNITED STATES	)	92ND INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Huachuca, Arizona, 17 January 1944. Dismissal, total forfeitures, and confinement for one year.
	)	
Second Lieutenant ALEXANDER S. ANDERSON (0-1298483), Infantry.	)	

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, 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 Alexander S. Anderson, Five Hundred Ninety Eight Field Artillery Battalion, did, near Tombstone, Arizona, on or about December 7, 1943, with intent to deceive Lieutenant Colonel Robert C. Ross, Five Hundred Ninety Eighth Field Artillery Battalion officially report to the said Lieutenant Colonel Robert C. Ross, his Commanding Officer that the ground crew truck of the Five Hundred Ninety Eighth Field Artillery Battalion was lost or stolen and that he did not know its whereabouts, or words to that effect which report was made by the said Second Lieutenant Alexander S. Anderson with disregard of a knowledge of the facts in that he knew the ground crew truck to be at Fort Huachuca, Arizona in the hands of the Military Police.

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

Specification 1: In that Second Lieutenant Alexander S. Anderson, Five Hundred Ninety Eighth Field Artillery Battalion, did, at Fort Huachuca, Arizona, on or about December 7, 1943 enter the cantonment area of Fort Huachuca, Arizona without proper authority when he, the said Second Lieutenant Alexander S. Anderson knew the cantonment Area of Fort Huachuca, Arizona, had been placed off limits by competent authority for the duration of D--Exercise Maneuvers.

Specification 2: In that Second Lieutenant Alexander S. Anderson, Five Hundred Ninety Eighth Field Artillery Battalion, did, at Fort Huachuca, Arizona, on or about December 6, 1943 enter the area known as North Gate without proper authority when he, the said Lieutenant Alexander S. Anderson well knew that this area had been placed off limits by competent authority for the duration of D--Exercise Maneuvers.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for one year. The reviewing authority approved only so much of the finding of guilty of the Specification of Charge I and of Charge I as involved a finding of guilty 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.

The offenses will be discussed in the order in which they were committed, rather than as they appear upon the Charge Sheet. It appears from the evidence that the 598th Field Artillery Battalion was engaged in a series of exercises in December of 1943. These exercises took them outside Fort Huachuca to the vicinity of Tombstone, Arizona, where there was a command post near Highway 80 (R. 7,12,15). All officers in the battalion had been informed that during maneuvers the fort and the area surrounding its North Gate were off limits. Accused had no authority to enter the fort (R. 9). He was the senior liaison pilot of the observation section of the battalion, in charge of its observation plane and of the 3/4 ton truck used by his ground crew (R. 12,16,18).

Specification 2, Charge II (Violation of Article of War 96 by entering "Off Limits" area without proper authority).

On the evening of 6 December, accused, Second Lieutenant James E. Woodson, his junior pilot, and Staff Sergeant Tully D. Hickman, of the 600th Field Artillery Battalion, left their motor post near Tombstone in the ground crew truck of the 598th battalion. Lieutenant Woodson drove it to the North Gate of Fort Huachuca. Their purpose was to obtain something to eat (R. 13,15,16,18,21). Arriving at the gate, they decided to walk the balance of the way, so Sergeant Hickman parked the truck behind a house, because they "didn't want it to be seen". They then went to a restaurant in a house at or near the North Gate. When they returned, 50 minutes or an hour later, the truck was gone (R. 13,15,18,19). They were unable to locate it, and learned from the Military Police at the gate that it had been taken by the police to the Special Troops Area within the post (R. 13,14).

Lieutenant Woodson testified that the three of them then went to this area and unsuccessfully attempted to obtain the release of the truck (R.14). Sergeant Hickman denied that they made any such effort to locate the truck (R. 19), but it is clear that eventually all three returned to their organization on a gasoline truck which made routine runs to and from camp (R. 14,19).

Specification, Charge I (False official statement to his commanding officer concerning the truck's whereabouts).

On the morning of 7 December the battalion was moving along a road near Highway 80, under the command of Lieutenant Colonel Robert C. Ross, en route to a critique on the exercises. Accused flew over in his plane, signaled his intention to land, and did so on the highway ahead of the convoy. Colonel Ross went up to the plane, and accused reported to him that the ground crew truck of the battalion "was missing, or had been stolen, /and/ that he didn't know where it was". Colonel Ross was in a hurry, and told accused to report to him later (R. 6,7). He also instructed accused "to see if he could find the truck, to do anything he could to find it" (R. 10).

That evening Colonel Ross called accused to his office at the command post. The colonel was by then familiar with what had happened, but after warning accused "very carefully as to his rights and anything that he said could be used against him", asked accused if he knew anything about the truck and if he knew how the truck had gotten to Fort Huachuca (R. 8,10). Accused said that he did not. He told Colonel Ross that he, another officer (Lieutenant Woodson?) and a sergeant (Hickman?) had attempted to repair the sergeant's ground crew truck near Tombstone, that they had pushed that truck with the 598th's missing truck to get it started, that they had left their truck parked on the highway just north of Tombstone, and had found it missing upon their return. Accused told witness that he had gone to the North Gate on 6 December on the Quartermaster gasoline truck to inquire about the ground crew truck, and had learned there that it was at the Special Troop area. He denied that it had been driven to the North Gate with his knowledge, that he had been "in some places near North Gate", that the Military Police had picked up the truck, and that he had been to the Special Troop area (R. 8,9). Several days later accused admitted to Colonel Ross that his story of the evening of 7 December had been false (R. 11).

Specification 1, Charge II (Violation of Article of War 96 by entering "Off Limits" area without proper authority).

In the late afternoon or evening of 7 December, accused and Private First Class Martin F. Pratt, 598th Battalion, flew in accused's plane to a runway in or adjoining Fort Huachuca. While Pratt remained at the plane accused

went to the post, later returned, and told Pratt to go get the truck. Together they went to the Special Troop area. Pratt drove the truck back to the bivouac area (R. 22-24).

On 7 or 8 December accused made a sworn statement to Major William J. Gordon, Summary Court Officer of the 598th Battalion, after being warned of his rights. It was introduced as Prosecution's Exhibit A (R. 24,25). In it he stated that he, Lieutenant Woodson, and Sergeant Hickman were pushing Hickman's truck with their ground crew truck. He admitted driving to the North Gate, parking the truck for 45 minutes, and finding it gone on their return. He also admitted going to the Special Troop Area in an attempt to reclaim it (Pros. Ex. A).

Evidence for defense.

Sergeant Hickman, called as a witness for the defense, testified that he and accused had been flying around on the morning of 7 December in an attempt to locate the battalion and tell Colonel Ross about the truck. They observed the column moving along the road, signaled, and landed. Colonel Ross ran over to the plane, and, without waiting for accused to say anything, began giving accused instructions about his duties for that day. One instruction was that accused was to notify a Sergeant Watson to go to a water hole with the ground crew and the ground crew's truck. When Colonel Ross had completed his instructions, accused said that "he wouldn't be able to get his truck down there, that it had been stolen", and that it was at the Special Troop Area (R. 26-28). Hickman's version of Colonel Ross' instructions to accused was that accused was told "to get another truck" (R. 28).

After an explanation of his rights to testify or to remain silent, accused took the stand (R. 28). He stated that he had talked to Colonel Ross for only a "very short" time, and that the colonel was "in a big rush". He did tell Colonel Ross that the truck was at the Special Troop Area. The colonel did not give him time to explain further, but told him "to get the truck, to get a truck, or get our truck, the best way I could" (R. 29-30).

4. The Board of Review is of the opinion that the record supports the findings of guilty of Charge I and its Specification and of Charge II and Specification 1 thereof, but that there is reasonable doubt concerning accused's guilt of Specification 2 of Charge II, on the basis of the evidence.

The court could properly infer from Colonel Ross' testimony that all officers in his battalion had been notified that the Fort was "off limits" and that accused was aware of this fact. It is clear that accused had no authority to go there and it is also clear from the testimony of

Sergeant Hickman that on the evening of 6 December they were apprehensive that the truck would be seen, as actually it was.

While it is not certain from the record which statement by accused to Colonel Ross was the subject of the Specification of Charge I, the Board believes that the incident of the morning of 7 December is the one intended to be alleged. The court obviously chose to believe Colonel Ross' version of the conversation which took place at that time, rather than accused's. In view of accused's repetition and amplification of his denials at the interview which took place in the evening, there is no reason to believe that he did tell, or even attempt to tell the truth, that morning. He did not admit the falsity of his statements until several days later.

The Board believes, however, that Colonel Ross' instructions to "do anything he could to find" the truck, or (in accused's version) "to get a truck, or get our truck, the best way I could" was an implied authorization to go to the post during 7 December. It is undoubtedly true that the colonel gave these instructions while laboring under the false impression, created by accused's dissembling, that the truck had been stolen. Accused obtained the authority by false pretenses, for which he could be punished. But that is not a violation of the "off limits" rule, which was the offense charged. The Board holds that there was an implied authority to enter the post to get the impounded truck, and that the record of trial is legally insufficient to support the finding of guilty of Specification 2 of Charge II.

5. War Department records show that accused is 25 years of age. He is a high school graduate and attended Tuskegee Institute for three years, specializing in Industrial Arts. He entered the Army in January, 1942, attended The Infantry School, Fort Benning, Georgia, and was commissioned a second lieutenant, Infantry, Army of the United States, upon graduation therefrom on 3 November 1942. He served as a flying instructor for the Civil Aeronautics Association for three months in 1941 and is a member of the Negro Airmen's Association. It also appears that he was an aviation cadet at Tuskegee Army Flying School from 27 February 1942 to 15 May 1942, and that he received an "unsatisfactory" academic rating while attending Officers' Basic Course Number 108 at The Field Artillery School, Fort Sill, Oklahoma, from 17 May 1943 to 12 August 1943.

6. The court was legally constituted and had jurisdiction of the person and the offenses. Except as noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is

legally insufficient to support the finding of guilty of Specification 1 of Charge II, legally sufficient to support the findings of guilty of Specification 2 of Charge II and of Charge II and of Charge I and its Specification, as approved by the reviewing authority, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

_____, Judge Advocate.

_____ Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 31 JUL 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 Alexander S. Anderson (O-1298483), Infantry.

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 Specification 1 of Charge II, legally sufficient to support the findings of guilty of Specification 2 of Charge II and of Charge II and of Charge I and its Specification as approved by the reviewing authority, and legally sufficient to support the sentence and to warrant confirmation thereof. In view of the nature of accused's offenses, I recommend that the sentence be confirmed but that the confinement and forfeitures be remitted and that as thus modified the sentence be carried into execution.

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

Myron C. Cramer

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

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

(Finding of guilty of Specification 1 of Charge II disapproved. Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 452, 26 Aug 1944)

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

SPJGN
CM 257082

15 JUN 1944

UNITED STATES	)	97TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Leonard Wood, Missouri,
Captain DAVIS W. POWELL	)	22 May 1944. Dismissal.
(0-328954), 387th Infantry.	)	

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

---

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Captain Davis Wood Powell, 387th Infantry, did, at Fort Leonard Wood, Missouri on or about 22 April 1944, officially state to his Commanding Officer, Colonel James D. Bender, 387th Infantry, with intent to deceive his said Commanding Officer, the following: to wit, "that he was present at the 97th Division Small Arms School at all times during the entire school period on 21 April 1944" or words to that effect, which statement was well known by the said Captain Davis Wood Powell to be untrue.

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

Specification: In that Captain Davis Wood Powell, 387th Infantry, 97th Infantry Division, did at Fort Leonard Wood, Missouri, on or about 22 April 1944, with intent to deceive Lieutenant Colonel Melvin B. Harris, Division Ordnance Officer, 97th Infantry Division, falsely state to the said Lieutenant Colonel Melvin B. Harris that he, Captain Davis Wood Powell, was not absent from the 97th Division Small Arms School between 2100 and 2200 hours on 21 April 1944 and was present during the entire three hours instruction at the School, or words to that effect, which statement was known by the said Captain Davis Wood Powell to be untrue, in that said Captain Davis Wood Powell was absent from the 97th Division Small Arms School between 2100 and 2200 hours on 21 April 1944 and was not present during the entire three hours instruction at said school.

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

3. The evidence for the prosecution shows that on 14 April 1944 Colonel James D. Bender, the Commanding Officer of the 387th Infantry Regiment, issued a Training Memorandum directing his subordinate officers to attend a "three hour course in visual inspection of small arms" on certain specified dates. The accused, as Company Commander of Company K, was required to be present on 21 April 1944 between 1900 and 2200 o'clock. He and eighteen other officers reported at the time fixed and were divided into three classes, two of which had six members and the third seven. The subjects of instruction were pistols, machine guns, sub-machine guns, mortars, and rifles (R. 9, 13; Pros. Ex. 1).

A sheet of paper was passed around on which all of the student officers were requested to sign their names and state their rank and organization. The accused's signature was the sixth to be affixed to the roll. After the break at 2100, Captain Harry H. Cosgrove, who, as the representative of the Division Ordnance Officer, was the supervisor of the school, noticed that only four officers were present in Class No. 1. Realizing "that something was wrong", he "asked each officer present to indicate what line he had signed on" and wrote "OK" at the places pointed out to him. The accused "didn't indicate * * * that he was there", and no notation was made "by his name". His absence was immediately reported

to Lieutenant Colonel Melvin B. Harris, the Division Ordnance Officer, who thereupon made an independent check between 2115 and 2120 o'clock. The accused still did not answer when his name was called. The matter was reported "on the form of a buckslip" to the Chief of Staff (R. 9-17; Pros. Ex. 2).

The next day the accused was summoned before his Regimental Commander and asked "whether he was present at the 97th Division small arms school at all times during the entire school period on 21 April 1944". The reply was that "he was present at all times". That same day the accused also came to the office shared by Captain Cosgrove and Lieutenant Colonel Harris for the purpose of explaining. The accused intended to see the Captain but, finding him to be out, spoke to Lieutenant Colonel Harris instead. The latter summarized the conversationtion which took place as follows:

> "[The accused] said that he was there to see him about a matter involving his absence from this Armament School and he would like to get it straightened out with Captain Cosgrove, because he was not absent from the school. He further stated that at the time the roll was called he had been in the latrine, had returned from the latrine to the class and found out that the roll had been taken. He then stated that he had told a red-headed sergeant in charge of the class (he did not know his name) that he had been in the latrine, and would he report his name to the officer who had called the roll. I then called Sergeant Guthrie, who I assumed to be the red-headed sergeant that [the accused] was referring to, and asked him whether or not an officer had reported to him his absence during the time that the roll was called. I then told [the accused] what Sergeant Guthrie had told me, that he knew of no such instance. [The accused] then told me, 'Well, that is the way it happened,' and left. * * * The purpose of his visit, he said, was to straighten out the apparent misunderstanding by Captain Cosgrove the officer in charge of the school. He said he was reported as being absent, and he was there during the entire three hours of instruction" (R. 6-8, 17-18).

The following Tuesday Lieutenant Colonel Harris telephoned

the accused. Lieutenant Colonel Harris' purpose in making the call was to allay any doubts which he may have had in his mind before he submitted a report to the Chief of Staff. He testified that:

> "I asked [the accused] what had been taught during the hand gun and mortar class during the Small Arms Class the night of 21 April between 2100 and 2200. [The accused] told me that the instruction had been given in the pistol and the mortar. I asked [him] if that were all, and he said yes, he believed it was. I then asked [him] if there was any other discussion that dealt with any other weapons than the two that he had mentioned that had transpired during the course of that class. He said he did not remember any instruction on any other weapons. I then told [him] that it was evident that he was not there, and I recommended to him that he report the fact to his regimental commander, because it would cause quite a bit of trouble. He said 'You can submit a negative report.' I asked him what was a negative report, and he said 'that he was not there'. I recommended that he report that fact to his regimental commander, and he said he would. That ended it" (R. 18).

After his interview with the Commanding Officer of the 387th Infantry, the accused was directed in writing to report "by indorsement hereon indicating why you left prior to the completion of the class, without authority". His reply by 3rd indorsement dated 26 April 1944 read as follows:

> "1. I attended the first two classes of the School for Small Arms and was there during the break at 2100. I was in the latrine when the third class started and when I returned the class had already started and I was notified that there was a roll call during my absence. I asked one of the Sgts. that was near the class would he report that I had returned and he said he would.
>
> "2. I was told by the Sgt. that I was wanted on the outside of the building and I went out there

and my mother was looking for me as a friend who was visiting us was leaving that night and wanted to see me before she left. I was out longer than I thought I was and when I returned the class was over."

Colonel Bender by 5th indorsement commented that:

"1. Contents of the 3rd Ind. noted. Statements contained therein are in direct contradiction to official statements made by [the accused] to the undersigned concerning the alleged absence from school on 21 April 1944.

"2. In view of the foregoing charges are being preferred this date against [the accused] under the 96th Article of War for false official statements. Said charges are being investigated by the Regimental Executive Officer" (R. 19-23; Pros. Exs. 3, 4).

4. The accused, after his rights as a witness had been fully explained to him, elected to remain silent. No evidence was presented on his behalf.

5. The Specification of the Charge alleges that the accused did

"on or about 22 April 1944, officially state to his Commanding Officer, Colonel James D. Bender, 387th Infantry, with intent to deceive his said Commanding Officer, the following: to wit, 'that he was present at the 97th Division Small Arms School at all times during the entire school period on 21 April 1944' or words to that effect, which statement was well known by the said [the accused] to be untrue".

The Specification of the Additional Charge alleges that the accused did

"on or about 22 April 1944, with intent to deceive Lieutenant Colonel Melvin B. Harris, Division Ordnance Officer, 97th Infantry Division, falsely state to the said Lieutenant Colonel Melvin B. Harris that he, [the accused] was

> not absent from the 97th Division Small Arms School between 2100 and 2200 hours on 21 April 1944 and was present during the entire three hours instruction at the School, or words to that effect, which statement was known by the said [accused] to be untrue * * *".

Both acts were set forth as violations of Article of War 95.

"Knowingly making a false official statement" is one of the examples of conduct unbecoming an officer and a gentleman enumerated in paragraph 151, Manual for Courts-Martial, 1928. False statements which are not official but which are made with intent to deceive fellow officers empowered to require such statements also constitute conduct of this character. The gist of the offense is the deliberate lying calculated to mislead a brother officer.

That the accused was absent from the third hour of instruction was established by the testimony of both Captain Cosgrove and Lieutenant Colonel Harris. To avoid any possible mistake they made a double check and recorded their findings in writing. Lest there be a scintilla of doubt as to the accused's absence, Lieutenant Colonel Harris questioned him as to the subjects discussed during the third hour of instruction. The accused's reply, in which he evidenced complete ignorance of the subjects discussed, showed conclusively that he had been away from his class.

His representation to Colonel Bender that he had been present at all times was completely false. His explanation to Lieutenant Colonel Harris was not only untrue but inconsistent with his statement to Colonel Bender. The final touch was added by his indorsement dated 26 April 1944 which expounded a version containing entirely new matter. These false and irreconcilable representations establish beyond a reasonable doubt that the accused is guilty of conduct unbecoming an officer and a gentleman.

The 5th indorsement by Colonel Bender in which he said that the accused's oral and written statements were contradictory was hearsay and should not have been admitted into evidence. The error, however, was not substantially prejudicial, for the point made was a perfectly obvious conclusion from the other evidence adduced.

6. The accused is about 36 years of age. The records of the War Department show that from 10 March 1928 to 13 September 1934 he was an enlisted man and from 14 September 1934 to 17 March 1935 a second

lieutenant in the National Guard of Georgia; that on 18 March 1935 he was appointed a second lieutenant in the National Guard of the United States; that he was promoted to first lieutenant on 26 August 1940 and to captain on 16 September 1940; that since this last date he has been on active duty as an officer.

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

Abner E. Lipscomb, Judge Advocate.

Walter Shepherd, Judge Advocate.

Fabrick H. Golden, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 27 JUN 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 Davis W. Powell (0-328954), 387th 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. Consideration has been given to a letter from the accused dated 23 May 1944, addressed to the President, in which the accused seeks the extension of clemency.

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

Myron C. Cramer

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

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. ltr. for sig. S/W.
Incl 3 - Ltr. dated 5/23/44.
Incl 4 - Form of action.

(Resigned)

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

SPJGK
CM 257143

16 JUN 1944

U N I T E D S T A T E S	)	86TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Livingston, Louisiana, 29 May 1944.
Second Lieutenant FRANK G. SMITH (0-1300247), Infantry.	)	Dismissal, total forfeitures and confinement for fifteen (15) years.

OPINION of the BOARD OF REVIEW
LYON, ANDREWS, MOYSE and SONENFIELD, 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 93d Article of War.

Specification 1: In that Second Lieutenant Frank G. Smith, Infantry, 342d Infantry, then 511th Parachute Infantry, did, at Camp Polk, Louisiana, on or about 5 April 1944, feloniously embezzle by fraudulently converting to his own use lawful money of the value of $168.75, the property of Captain Lyman S. Faulkner, Company G, 511th Parachute Infantry, entrusted to him by the said Captain Lyman S. Faulkner for the purchase of United States War Savings Bonds.

Note: And nine other specifications identical in form with Specification 1, alleging that accused at the same place and time embezzled moneys entrusted to him for the purchase of War Savings bonds in the amounts and from the principals as follows:

	Amount	Principal
Specification 2:	$ 37.50	Sgt. Robert Abajian
" 3:	18.75	Technician 5th Grade Richard W. Head
" 4:	18.75	Pfc. Robert J. Martin
" 5:	18.75	Pfc. Alfred R. Rossi
" 6:	37.50	Pfc. Robert M. Van Benschoten
" 7:	60.25	Pvt. Stephen D. Conger
" 8:	18.75	Pvt. John Yaciw
" 9:	18.75	Pvt. Barclay McFadden, Jr.

	Amount	Principal
Specification 10:	$18.75	Pvt. James A. McMahon
" 11:	(Nolle prosequi by direction of reviewing authority).	

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

Specification: In that Second Lieutenant Frank G. Smith, * * * did, at Camp Polk, Louisiana, on or about 4 April 1944, with intent to defraud, wrongfully and unlawfully make and utter to The Rapides Bank & Trust Company a certain check, in words and figures as follows, to wit:

FIRST NATIONAL BANK
Birmingham, Alabama
4 April 1944

PAY TO THE ORDER OF Cash

One hundred eighty five and 00/100 -------- DOLLARS

$185.00 Frank G. Smith

and by means thereof, did fraudulently obtain from The Rapides Bank & Trust Company, Alexandria, Louisiana, Camp Polk, Branch, $185, he the said officer, then well knowing that he did not have and not intending that he should have any account with the First National Bank, Birmingham, Alabama, for payment of said check.

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

Specification 1: (Nolle prosequi by direction of reviewing authority).

Specification 2: In that Second Lieutenant Frank G. Smith, * * *, did, at Camp Polk, Louisiana, on or about January 1944, with intent to defraud, wrongfully and unlawfully make and utter to William J. Light, a civilian, a certain check, in words and figures as follows, to wit:

Leesville, La.
~~-RUSSELLVILLE, ARK.,~~ Feb. 10 194 4 No.

Grand Rapides
~~-PEOPLE'S EXCHANGE BANK-~~ 81-118

PAY TO THE ORDER OF William J. Light $100.00

One Hundred and no/100 ---------- DOLLARS

For

Frank G. Smith
2nd Lt. 511th Prcht. Inf.
0-1300247

he the said Second Lieutenant Frank G. Smith, then well knowing that he did not have and not intending that he should have any account with the Grand Rapides Bank, Leesville, Louisiana, for payment of said check.

Specification 3: Same form as Specification 2 and identical in content but alleging check dated March 10, 1944 for $125.

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

Specification: In that Second Lieutenant Frank G. Smith, * * * did, without proper leave, absent himself from his organization and duties at Camp Polk, Louisiana, from about 5 April 1944 to about 17 April 1944.

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

3. The evidence for the prosecution is as follows:

Charge I.

By stipulation, testimony was introduced to the effect that the accused on 30 March 1944 was duly appointed War Bond Officer of Company G, 511th Airborne Infantry, and that in such capacity he received from his company commander, Captain Lyman S. Faulkner, and nine enlisted men of his company as alleged in Specifications 1 to 10 inclusive the sums of money therein set forth for the purchase and delivery to them of United States War Savings bonds. The bonds were not purchased. On 5 April 1944, the accused absented himself without leave from his organization. On 10 April, Captain Faulkner purchased with his own funds and gave to the nine enlisted men of his organization the bonds which they had ordered through the accused (R. 12-14, 16; Pros. Ex. A, pars. 1-12).

Charge II.

By stipulation, testimony was introduced to the effect that on or about 4 April 1944 the accused presented his personal check for $185 to the Camp Polk Facility of the Rapides Bank and Trust Company, representing that he had an emergency leave. The bank cashed the check. The check was dishonored by the bank on which it was drawn, to-wit, First National Bank of Birmingham, Alabama. Accused had no account with the drawee bank at the time the check was negotiated and has had no account with said bank since the negotiation of the check (R. 11-14; Pros. Ex. 1, Ex. A, par. 14).

Charge III.

By stipulation, testimony was introduced to the effect that the accused

being indebted to William J. Light in the amount of $225, on or about 10 January 1944 gave to Mr. Light two post-dated checks drawn on the Grand Rapides Bank, Leesville, Louisiana, - one check in the sum of $100 dated 10 February 1944, and the other for $125 dated 10 March 1944. These checks were deposited in due course and were returned dishonored. From the stipulation it appears that there is no such bank in Leesville, Louisiana, as the "Grand Rapides Bank" (R. 11-13, 12-14; Pros. Exs. 2,3, Ex. A, pars. 15,16).

Charge IV.

Without objection the prosecution introduced in evidence duly authenticated extract copies of the morning report of accused's organization and of the Ninth Service Command Military Police Station, Los Angeles, California, containing entries of accused's absence without leave from 5 April 1944 to 17 April 1944, as alleged in the Specification of Charge IV (R. 14; Pros. Exs. 4 and 5).

4. For the defense.

The accused, advised of his rights, made an unsworn statement through his counsel, the substance of which is as follows:

Accused joined Company I, 167th Infantry, Alabama National Guard, on 21 November 1940, with the knowledge that the organization was to be called into Federal service on 25 November 1940, and served as an enlisted man until he was commissioned a second lieutenant upon his graduation from the Officer Candidate School, Fort Knox, Kentucky, on 17 November 1942. Accused has never received any disciplinary punishment, either as an enlisted man or as an officer (R. 16). In November 1943, the accused lost heavily in a poker game in which William J. Light, then an officer in his organization, was the winner. Accused was unable to pay his losses. Mr. Light was later separated from the service and threatened to report the accused to his commanding officer if the indebtedness were not paid. Thereupon, accused at Mr. Light's suggestion and insistence gave Mr. Light the two post-dated checks referred to in the Specifications, Charge III. In an effort to make good these checks, the accused entered another game of poker and lost the money which he had received for the purchase of the War Savings bonds referred to in Charge I and its specifications. Accused then went absent without leave. While absent without leave as alleged in the Specification, Charge IV, the accused realized his mistake and surrendered himself to the Military Police in Los Angeles, California, on 17 April 1944 (R. 16-18).

5. The evidence introduced by the prosecution and the admissions of the accused clearly support the accused's pleas and the court's findings of guilty of all Charges and Specifications.

6. The 201 file of the accused is not available at this time, however, the Charge Sheet shows that accused is 25 years old. Data as to service as shown in the record of trial and confirmed by accused shows that he was commissioned a second lieutenant, Infantry, Army of the United States, 17 November 1942. He attended Parachute ABC Jump School from 11 December 1942 to 9 January 1943. He was assigned to 511th Parachute Infantry 24 February 1943 and transferred to 342nd Infantry, 86th Infantry Division, 17 May 1944.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61, 93 or 96 and mandatory upon conviction of a violation of Article of War 95.

Perry G. Zon, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.
Herman Maze, Judge Advocate.
Samuel Cornfeld, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 27 JUN 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 G. Smith (0-1300247), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted; that the period of confinement be reduced to five years; 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. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

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

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

(Sentence confirmed but forfeitures remitted and confinement reduced to five years. G.C.M.O. 420, 27 Jul 1944)

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

SPJGQ
CM 257151

16 JUN 1944

UNITED STATES	)	III CORPS
v.	)	Trial by G.C.M., convened at Fort Ord, California, 23 May 1944. Dismissal and total forfeitures.
Second Lieutenant DONALD M. SEARS (0-1823498), 720th Amphibian Tractor Battalion.	)	

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL 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 1: In that Second Lieutenant Donald M. Sears, Company "B", 706th Tank Destroyer Battalion, now 720th Amphibian Tractor Battalion, being indebted to Sergeant Alvis M. Helterbrand, Company "A", 706th Tank Destroyer Battalion, now 720th Amphibian Tractor Battalion, in the sum of $50.00 for money borrowed therefrom, which amount became due and payable on or about 1 July 1943, did, at Camp Laguna, Arizona, Camp Maxey, Texas and Louisiana Maneuver Area, Louisiana, from 1 July 1943 to 1 April 1944, dishonorably fail and neglect to pay said debt, except that $20.00 thereof was paid on or about 1 September 1943.

Specification 2: In that Second Lieutenant Donald M. Sears, Company "B", 706th Tank Destroyer Battalion, now 720th Amphibian Tractor Battalion, being indebted to Technician Fourth Grade John A. Hobusch, Company "A", 706th Tank Destroyer Battalion, now 720th Amphibian Tractor Battalion, in the sum of $20.00 for money borrowed therefrom, which amount became due and payable on or about 1 June 1943, did, at Camp Laguna, Arizona, Camp Maxey,

Texas and Louisiana Maneuver Area, Louisiana, from 1 June 1943 to 1 April 1944, dishonorably fail and neglect to pay said debt, except that $10.00 thereof was paid on or about 16 October 1943.

Specification 3: In that Second Lieutenant Donald M. Sears, Company "B", 706th Tank Destroyer Battalion, now 720th Amphibian Tractor Battalion, being indebted to Technician Fourth Grade John A. Hobusch, Company "A", 706th Tank Destroyer Battalion, now 720th Amphibian Tractor Battalion, in the sum of $30.00 for money borrowed therefrom, which amount became due and payable on or about 1 August 1943, did, at Camp Maxey, Texas and Louisiana Maneuver Area, Louisiana, from 1 August 1943 to 1 April 1944, dishonorably fail and neglect to pay said debt.

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

Specification 1: In that Second Lieutenant Donald M. Sears, Company "B", 706th Tank Destroyer Battalion, now 720th Amphibian Tractor Battalion, did, at Camp Laguna, Arizona, on or about 15 June 1943 wrongfully borrow the sum of $50.00 from an enlisted man, to wit, Sergeant Alvis M. Helterbrand, Company "A", 706th Tank Destroyer Battalion, now 720th Amphibian Tractor Battalion.

Specification 2: In that Second Lieutenant Donald M. Sears, Company "B", 706th Tank Destroyer Battalion, now 720th Amphibian Tractor Battalion, did, at Camp Laguna, Arizona, on or about 27 May 1943 wrongfully borrow the sum of $20.00 from an enlisted man, to wit, Technician Fourth Grade John A. Hobusch, Company "A", 706th Tank Destroyer Battalion, now 720th Amphibian Tractor Battalion.

Specification 3: In that Second Lieutenant Donald M. Sears, Company "B", 706th Tank Destroyer Battalion, now 720th Amphibian Tractor Battalion, did, at Camp Laguna, Arizona, on or about 10 July 1943 wrongfully borrow the sum of $30.00 from an enlisted man, to wit, Technician Fourth Grade John A. Hobusch, Company "A", 706th Tank Destroyer Battalion, now 720th Amphibian Tractor Battalion.

The accused pleaded not guilty to all Charges and Specifications and was found guilty of all Charges and Specifications, except, however, certain words and figures in the three Specifications of Charge I as follows: Specification 1, "which amount became due and payable on or about 1 July 1943"; Specification 2, "which amount became due and payable on or about 1 June 1943"; and Specification 3, "which amount became due and payable on or about 1 August 1943". Of the excepted words the accused was found not guilty. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed

the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the findings of guilty of the Specifications of Charge I and of Charge I as involves findings of guilty of those 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. Evidence for the prosecution:

From sometime prior to May 1943 until September 1943, the accused, as a second lieutenant, was attached to Company A, 706th Tank Destroyer Battalion. During the same period Sergeant Alvis M. Helterbrand and T/4 John A. Hobusch were members of the same Company. In September 1943, the accused was transferred to Company B, in the same Battalion. Subsequently, and prior to the date of the trial, the 706th Tank Destroyer Battalion was inactivated and redesignated the 720th Amphibian Tractor Battalion. At the time of the trial the accused was still attached to Company B and Sergeant Helterbrand and T/4 Hobusch were still members of Company A, 720th Amphibian Tractor Battalion (R. 3, 6, 8, 13, 15).

On or about 15 June 1943, Sergeant Helterbrand lent to the accused the sum of $20, and on the next day he lent to the accused the further sum of $30 (R. 7). These sums were lent to the accused upon the latter's direct request for the loans (R. 7). At this time Sergeant Helterbrand had been acquainted with the accused approximately 4 months (R. 7). The accused did not promise to make repayment at any specific time, nor was anything mentioned in the conversations between the accused and the sergeant as to when the money would be repaid (R. 7). The accused repaid the sum of $20 on or about 1 September 1943, and the balance on or about 1 April 1944 (R. 7). There were no communications or conversations between the accused and the sergeant during the time that the loan was outstanding relative to the repayment of the loan (R. 8).

Sometime during the month of May 1943, Sergeant Hobusch lent the sum of $20 to the accused. At this time he had been acquainted with the accused approximately 3 months. The accused promised to repay this loan at the end of the month (i.e., May 1943) (R. 9). Subsequently, "around July" 1943, Sergeant Hobusch lent to the accused the further sum of $30. No promise was made with respect to the date of repayment of the $30 (R. 9, 10). The $50 so lent was repaid as follows: $10 "around September" 1943, and $40 "in April" 1944. Only one conversation was had between the accused and the sergeant during the time that the loan was outstanding relative to the repayment of the loan and that was on an occasion when the accused, having returned from an absence at school, was serving as duty officer and met the sergeant. This was "around the Spring" of 1944. The accused on that occasion said that he would pay the balance of the loan "the last of the month" (R. 9, 10). The Sergeant did not at any time ask the accused to repay the loan (R. 10). The sergeant further testified that during the time that the loan was outstanding the accused was away at school "most of the time" and was around "very rarely" (R. 11).

4. Evidence for the defense:

The accused, after having his rights as a witness explained to him, elected to be sworn and to testify in his own behalf (R. 13). He was commissioned 28 January 1943, and borrowed the money from Sergeants Helterbrand and Hobusch approximately four months later (R. 16). He was at that time in the same Company with the sergeants (R. 15). He was in the hospital during July and August 1943, and upon his return to his organization was transferred to Company B, 706th Tank Destroyer Battalion (R. 14, 15). Shortly thereafter he was sent to Camp Hood, Texas, for a three months" course in the tank destroyer school. Following his return from that school he was given three weeks special duty with the Tenth Corps, and was then sent again to Camp Hood for a one month course at the full track vehicle school (R. 14). He was then granted a fifteen day leave, returning 21 March 1944 (R. 14). Upon returning from this leave he repaid the two sergeants out of his first pay check (R. 14). When the sergeants were finally paid it was not as the result of requests made by them at the time (R. 15). On cross examination the accused testified that his compensation from the Army, including "allotment and quarters allowance" is about $303 (R. 17).

Captain John F. Newman testified that accused's character is "good" and that he would give the accused an efficiency rating of "very satisfactory". He has been accused's commanding officer only since 14 April 1944, but he has been "in the unit" since accused"was attached to the old battalion" (R. 20, 21).

5. In view of the action of the reviewing authority in approving only so much of the findings of guilty of the Specifications of Charge I as involves findings of guilty of those Specifications in violation of Article of War 96, it is unnecessary to consider whether the evidence would have supported the court's findings of guilty of the Specifications in violation of Article of War 95. Further, in considering whether the findings of guilty in violation of Article of War 96 are supported by the evidence, it is necessary to keep in mind that in the findings of guilty made by the court the due dates alleged in the Specifications of Charge I were excepted. The offenses of failure and neglect to pay must, therefore, be considered on the basis that no fixed dates for repayment were agreed upon between the borrower and the lenders.

The evidence shows that the several loans remained unpaid for periods ranging from eight to ten months. It has been held that while the "mere neglect on the part of an officer to pay debts contracted with persons with whom he has dealt upon an equal footing is not of itself sufficient ground for charges against him" the "rule does not apply where the money was borrowed from enlisted men" (Dig. Ops. JAG 1912-1940, sec. 454(19)).

"The relations between officers and enlisted men are such as very naturally inspire trust and confidence by the men in officers, and require respect and submission by the men. When the officer abuses his trust and unreasonably delays repayment, it is in the interest of the service to purge it from the influences which such conduct naturally create.. When an officer fails for a period of six months to repay a loan solicited by him from an enlisted men for which no definite time of repayment had been fixed, the mere fact that the enlisted man testified that in his opinion the officer did not keep him waiting too long should not be permitted to control the judgment of the court upon all the facts laid before it by the evidence. Conviction for violation of Article of War 96 was proper" (Dig. Ops. JAG 1912-1940, sec. 454(19), CM 117782).

The offensés in the instant case are aggravated by the fact that the two noncommissioned officers to whom the money was owed by the accused were in the same organization with the accused, thus increasing the risk that the existence of the debts would injure the proper relationship between the borrower and the lenders. It has repeatedly been emphasized that

"The obligation that flows from indebtedness to a subordinate tends to weaken authority; it can become the cause of improper favor; it impairs the integrity of required relationships" (Bull. JAG April 1943, sec. 454 (19)).

No mitigating circumstances of any substance are shown by the accused for his long delays in repaying the money borrowed from the two sergeants. The sums involved were not large - aggregating only $100, or less than 1/3rd of the regular monthly payment which he testified that he received. The Board of Review is of the opinion, therefore, that the findings of guilty of the Specifications of Charge I in violation of Article of War 96 are fully supported by the competent and legal evidence of record.

6. The offenses of borrowing money from enlisted men, alleged under Charge II, are laid under Article of War 96. The facts as to the borrowing are not only fully established by the testimony of the witnesses for the prosecution, but are corroborated by the accused's own testimony. It is well established that the mere act of the borrowing of money by an officer from an enlisted man is an offense under Article of War 96.

"The mere act of an officer borrowing money from an enlisted man is an offense under Article of War 96, but it is not an offense under Article of War 95 unless it is accompanied by such conduct on the part of the officer as evidences a moral delinquency" (Dig. Ops. JAG 1912-1940, sec. 452 (5)).

To the same effect are two more recent cases, where, as in the instant case, the borrowing was from enlisted men in the accused's own organization (Bull. JAG July 1942, sec. 453 (19); Bull. JAG April 1943, Sec. 454 (19)). The Board of Review is of the opinion, therefore, that the findings of guilty of the Specifications of Charge II, in violation of Article of War 96, are fully warranted by the competent and legal evidence of record.

7. The records of the War Department show that the accused is 29 years old. He was born and reared in Corry, Pennsylvania, and graduated from the Corry High School in 1934. He was an enlisted man in the Pennsylvania National Guard from 1933 until 1941. He was inducted into the service on 10 July 1942, and was admitted to the Tank Destroyer Officer Candidate School, Camp Hood, Texas, in October 1942. Upon graduation from the school he was commissioned a second lieutenant on 28 January 1943. In civilian life he has spent 5 years as laborer, service man and machine operator in the manufacture of automobile and aircraft accessories. Also, he was a jewelry representative for two years.

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

William A. Pounds, Judge Advocate.

William H. Gamble, Judge Advocate.

Herbert R. Fredericks, Judge Advocate.

SPJGQ
CM 257151

1st Ind.

War Department, J.A.G.O., 21 JUN 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 M. Sears (0-1823498), 720th Amphibian Tractor Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. In view, however, of the fact that the offenses of which the accused has been convicted are purely military in nature and relatively minor in character and are unaccompanied by seriously aggravating circumstances and of the fact that accused's previous record has apparently been satisfactory, I recommend that the sentence be confirmed but that it be commuted to a reprimand and that the sentence as thus commuted be carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed but commuted to reprimand. G.C.M.O. 401, 18 Jul 1944)

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

SPJGK
CM 257165

22 JUN 1944

UNITED STATES v. Private First Class DALE MAPLE (11048476), Company A, 1800th Engineer General Service Battalion.	ARMY SERVICE FORCES SEVENTH SERVICE COMMAND Trial by G.C.M., convened at Fort Leavenworth, Kansas, 17,24,25,26, 27,28 April, and 8 May 1944. To be hanged by the neck until dead. (Sentence not announced in open court.)

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

---

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

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

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

Specification: In that Private First Class Dale Maple, Company A, 1800th Engineer General Service Battalion, then the 620th Engineer General Service Company, did, on or about the 15th day of February 1944, at Camp Hale, Colorado, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Palomas, Chihuahua, Mexico, on or about the 18th day of February 1944.

CHARGE II: Violation of the 81st Article of War.

Specification 1: In that Private First Class Dale Maple, Company A, * * *, did, enroute from Camp Hale, Colorado, to the State of New Mexico, on or about the 15th, 16th, 17th and 18th February 1944, relieve the enemy with and by means of automotive transportation and other articles and things of value, by furnishing, affording and providing certain escaped Prisoners of War and members of the Army of the German Reich, at war with the United States of America, to-wit: Stabswachtmeister Heinrich Kikilius and Unteroffizier Erhardt Schwichtenberg whom he, the

said Maple, then knew to be members of the enemy's forces, to-wit: the Army of the German Reich, then at war with the United States of America, with automotive transportation and other articles and things of value, said automotive transportation, and other articles and things being of value, but of an unknown and undetermined value.

Specification 2: In that Private First Class Dale Maple, Company A, * * *, did, enroute from Camp Hale, Colorado, to the State of New Mexico, on or about the 15th, 16th, 17th and 18th February 1944, knowingly harbor and protect escaped German Prisoners of War, Stabswachtmeister Heinrich Kikilius and Unteroffizier Erhardt Schwichtenberg, persons whom he, the said Maple, then knew to be members of the enemy's forces, to-wit: the Army of the German Reich, then at war with the United States of America, and whom he, the said Maple, then knew to be such escaped Prisoners of War and who were then being sought as fugitives from Side Camp No. 1, Prisoner of War Camp, Trinidad, Colorado, located at Camp Hale, Colorado, by authorities of the United States of America, by affording them shelter and transportation in his private automobile in aid of their said flight from the custody and jurisdiction of the United States of America.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead. The court directed that the findings and sentence be not announced in open court. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence in this case, though extensive and voluminous, is not complicated. There is little dispute or doubt concerning what occurred. Accused was tried and found guilty of desertion and of relieving and aiding the enemy, in the persons of two German prisoners of war. He admits, and, in fact, his own testimony supplied many of the otherwise unknown details concerning the acts which constituted the offenses charged. He denies the motive or intent alleged by the prosecution. The legal sufficiency of the court's findings depends, in final analysis, upon the credibility of his story, and the strength or weakness of his defense.

In order to understand satisfactorily the chain of circumstances which culminated in accused's flight from Camp Hale, Colorado, to a point beyond the Mexican border, it is necessary to go back seven or eight years in time. Much of this evidence will be found in a confession made by accused the day following his and the prisoners' apprehension. It is sufficient at this time to say that the confession was made voluntarily and after a full explanation to accused of his rights. The confession is supplemented and

corroborated in many instances by testimony of prosecution's witnesses. In the interests of brevity they will be set forth together, and the sources of evidence distinguished only where it becomes necessary to do so.

4. Accused stated in his confession that he was born in San Diego, California, on 10 September 1920. During attendance at high school in that city he was always a "political dissenter", but graduated at the top of his class in June of 1936. These years were marked by frequent domestic discord between his parents, but it never resulted in more than a few days' separation (Pros. Ex. 12).

Accused entered Harvard College as a freshman in September of 1936, at the age of 16. He intended to major in History and hoped to enter the Diplomatic Corps, but during his first year changed his field to Chemistry. He had for some time, however, been interested in the study of the German language, literature, and culture, and continued with this. Influenced by the scholarship of one of his professors, who himself was cool towards the present German regime, accused again changed his field, this time to German Language and Culture. In his enthusiasm for it, he was loosely called by his friends a "Nazi", though he himself was not then aware of all the implications of that term. He joined the Harvard German Club, devoted to the academic study of the language and culture (Pros. Ex. 12).

In the club he met some ardent Germanophiles, and in his fourth year at Harvard he became ardently attached to the principles of National Socialism. In an effort to attract and get in touch with other Nazis and German organizations, he tendered his resignation as the club's treasurer, stating openly that his "attachment to the principles of National Socialism" was well-known to the members, and might be a source of embarrassment to them. The resignation was accepted, and accused was expelled from membership. He himself made this known to the Harvard Crimson, student daily, and it in turn became known to and was publicized by Boston newspapers. This resulted in his expulsion from the University's Reserve Officers' Training Corps, of which unit he was a member, although he told the commanding officer that he could take the officer's oath without reservation (Pros. Ex. 12).

Accused then got in touch with and visited the German Consul, Doctor Scholtz. The consul was aware of accused's previous activities, and received him cordially, but stated that while he appreciated accused's enthusiasm to "do something", there was at that time little that accused could do. Accused continued his visits to the German Consulate for the ostensible (and, in part, actual) purpose of gaining admission to the University of Berlin, which had an outstanding faculty in Comparative Philology, in which subject accused desired to continue his studies. He received visits from persons from presumably pro-German organizations, who had been sent to him by Doctor Scholtz. Arrangements were made for

him to travel to Germany in the summer of 1941. In June of that year he was graduated from Harvard, magna cum laude; he had also been elected to Phi Beta Kappa (Pros. Ex. 12a).

His plans to go to Germany were halted by the recall by the United States and that country of their consular agents in July of 1941. His parents had meanwhile been divorced, and his mother had gone East to live in Newport, Rhode Island. Accused spent the summer in California with his father, but his efforts through a friend to secure work at the plant of the Consolidated Aircraft Corporation proved unsuccessful. He attributed this to interference by the Federal Bureau of Investigation. In the fall he returned for work at Harvard's Graduate School of Arts and Sciences (Pros. Ex. 12a).

He stated in his confession that his enthusiasm and that of his circle of friends for National Socialism continued unabated, and when war broke out he telephoned the German Embassy at Washington to ask if he could return to Germany with the diplomatic staff for the purpose of joining the German Army, or otherwise making his services available. He was told that it was too late to make the necessary arrangements to do so. In his own words, "I was then left in the position of being in a country at war with a country whose ideals I wished to uphold" (Pros. Ex. 12a).

After a few weeks' research in the effect of noise conditions upon the operation of microphones and headsets, his studies were halted by word from authorities in Washington. He decided that in order to find employment at any time in the future he would have to establish a reputation for loyalty. He volunteered in the Army on 26 February 1942, although he had not yet been classified by Selective Service. He stated that he took the oath without reservation, explaining in his confession that he "did not wish to see the United States defeated", nor its form of government changed, but that he "did not want to see Germany destroyed". He felt that if he established his loyalty to the United States, he might be able to exercise some influence in Germany's behalf in peace-time (Pros. Ex. 12a).

Early in March, 1942, he was sent to the Field Artillery Replacement Training Center at Fort Bragg, North Carolina, where through his friendship with officers who had been in the Reserve Officers' Training Corps at Harvard, he became a member of the cadre. He believed that he was under constant surveillance there, but expected and welcomed this, and so neither discussed politics nor committed any acts of "espionage". After nine months there he was transferred to Camp Meade, Maryland, placed in a task force, became a radio operator and instructor, and was scheduled and physically fit for overseas duty. But the Army's treatment of him "suddenly became increasingly peculiar". He was transferred to a service organization at Indiantown Gap, Pennsylvania, in March, 1943, and then to the 620th Engineers General Service Company at Fort Meade, South Dakota (Pros. Ex. 12a).

This unit was believed by its members, including accused, to be composed of persons who by reason of background, ancestry, or their actions, were suspected by the Army to be of questionable loyalty to the United States (R. 52,53,101,103,104; Pros. Ex. 12a). As it turned out, some of them were disloyal. It will be helpful to pause momentarily and consider a few of those who became accused's confidants and associates.

Private Theophil J. Leonhard had been born in Germany 30 years ago. He came to the United States at the age of 11 with his mother, and lived near San Antonio, Texas. He was not an American citizen, spoke German fluently, and a little Spanish. He held B.A. and M.A. degrees, and was a graduate student and an instructor in Political Science at the University of Texas, in the field of international law and relations, at the time of his induction into the Army (R. 30,51,52,53,55).

Private Paul A. Kissman was 28 years of age. He was born in Erie, Pennsylvania, of a German father and American mother, had a high school education and two years of International Correspondence School courses in analytical chemistry. He had worked as a refrigeration inspector for the General Electric Company. He spoke, read, and wrote German (R. 99, 100). He had studied piano and voice extensively, and had travelled in Germany from September, 1939 to March, 1940. In Erie he belonged to or sang regularly with about 15 German clubs, Turnvereins and choral societies, and was acquainted with several members of the German-American Bund (R. 102, 103). He was inducted into the Army in October 1941, and after basic training at Camp Lee, Virginia, and service in the Medical Corps at MacDill Field and Camp Blanding, Florida, which work he liked very much, he had been suddenly transferred to the 620th Engineers. The outfit was then at Fort Meade. This was despite his so far satisfactory Army record and despite the fact that a brother was serving with the Army Transport Corps in the South Pacific. Kissman believed that his activities prior to induction had brought about this transfer, which he resented (R. 99,101,103-106, 108).

Private First Class Frederick Wilhelm Siering was 27 years of age. He was born in Herne, Germany, and went through the eighth grade of the German public schools. He then worked as a machinist. He became a seaman, jumped his ship in New York in 1936, and remained in the United States. He worked in Philadelphia for the General Electric Company and entered the Army in November 1942. He was assigned to the Medical Corps at Camp Grant, Illinois, but was transferred to the 620th Engineers at Fort Meade in June 1943 (R. 120-123).

The 180 or 200 enlisted men of this organization were almost entirely of German or Italian extraction or birth, and were thought to be sympathetic to those countries (R. 51,52,101,103; Pros. Ex. 12b). Many spoke German, others Italian. After reaching Camp Hale they were forbidden to speak

German in camp, but were permitted to do so off the post (R. 101,102, 105). The men in the company did not bear arms; it was purely a non-combatant unit. They pulled weeds, shoveled dirt, and chopped wood. At Fort Meade they garnished camouflage nets (R. 52; Pros. Ex. 12b).

The members who have been previously mentioned and accused came to know each other at Fort Meade. A common resentment of what they considered embarrassing and unjust treatment drove them together. In accused's words, it is possible to see how the lack of confidence placed in them found fertile soil for disloyalty, in already existing mental attitudes.

> "In this unit I met many men who were as enthusiastic in their love of Germany as I, and I met many men who were also as determined Nazis as I was. For, since the officials of the United States showed by their actions that under no circumstances would they trust me, I did not any longer feel that I was justified in serving them loyally. We consequently began to organize our outfit and as many of the other outfits of similar nature as we could contact, with the view of sabotage and other subversive action. We felt that the combined actions of units similar to ours and of the prisoners of war whom we might liberate would be sufficient to disrupt the internal economics and morale of the country to such an extent that further participation in the war would be impossible * * *. We were interested not in the military defeat of the United States, but rather in the termination of what we considered to be an unjustified and undesirable war, and in the preservation of Germany. I may say that I had no intention of remaining in the United States after such a cessation of hostilities, but only of going to Germany as rapidly as possible * * *." (Pros. Ex. 12b).

A small group of these men, called among themselves the "inner circle", "founded a lodge" in Spearfish Canyon, South Dakota, to which they went on week-ends "for fishing and other methods of relaxation" and as a place for informal discussions. They were aware that this was under surveillance (R. 105,110). The "inner circle" included accused, Kissman, Siering, probably Leonhard, and two other men named Hotelling and Maurer (Pros. Ex. 12b).

After their removal to Camp Hale, they discovered that there was a group of about 200 German prisoners of war at that camp. They were quartered only two blocks from the 620th Engineers, in a barbed wire stockade (R. 117, Pros. Ex. 12b). The 620th occupied less desirable quarters than other enlisted organizations at Camp Hale, though they did have equal pass, furlough, and other privileges. They were forbidden

to speak or fraternize with the prisoners, although they frequently worked on the same details and had become acquainted with them. An order was issued forbidding ownership of automobiles by enlisted men of the 620th Engineers. Accused proposed to contest this, but nothing ever came of it. He declared his intention to buy a car, for this reason. He several times "made the statement (to Leonhard) that he was disgusted enough to go over the hill", that he did not know why he was in the company and did not feel that there were any opportunities in it for advancement (R. 31,32,41,42,43,45,55,56,57,58,123; Pros. Ex. 12b). In accused's words, "whereas the attitude until this time had in general been one of rather passive resistance, it suddenly crystalized into one of active hostility", and "under these circumstances we could hardly feel that we were any longer considered to have in any way the privileges of soldiers" (Pros. Ex. 12b).

Among the German prisoners of war in the stockade at Camp Hale were Unteroffizier (Sergeant) Erhardt Schwichtenberg and Stabwachtsmeister (Staff Sergeant) Heinrich Kikilius. Schwichtenberg was 25 years of age, and had been in the German Army for 5 years. A member of the Afrika Korps, he had been taken prisoner by the British at Carbona in May, 1943, brought to the United States, and placed in the Prisoner of War camp in August (R. 164,165). Kikilius was 33, and had been a farmer in East Prussia before entering the German Army (R. 175-177).

Although Schwichtenberg denied that he had known accused prior to 15 February 1944, it is clear from other evidence that he was probably one of those prisoners whom accused had come to know. Accused mentioned to Leonhard that he had been approached by some prisoners of war who intended to escape. Leonhard knew accused was friendly with at least one or two of them, and he admitted to witness having given them candy and cigarettes (R. 44,166,171). The "inner circle" had even met in Denver with leaders of a similar group of malcontents stationed at Camp Carson, Colorado. They decided that a group of prisoners of war should escape under the guidance of one of the American soldiers, going to South America and thence to Germany. They would thus establish the American group's contact with the German military authorities (Pros. Ex. 12b).

It is obvious that Leonhard, unaware of the full nature of accused's previous confession, was avoiding telling the truth from the witness stand, insofar as he dared to do so. But it is clear throughout his testimony in this respect that he, too, was aware of the plans being formulated. He testified that accused had upon one occasion said to him, in effect, "Wouldn't it be a sensational thing if some of the prisoners of war were to escape from here while the company was stationed here", and further stated that since the 620th Engineers was made

up mostly of Germans they would be accused of having had a part in it (R. 42,43). On another occasion, accused said to Leonhard, "Wouldn't it be something if some of the prisoners of war escaped and some of us went with them?" (R. 43).

Accused stated in his confession that there was some delay in their plans because of divergent opinions as to what persons should go and who should lead them. There was a tentative plan for Leonhard to go on a furlough to Mexico, where he would prepare as much as possible for them (Pros. Ex. 12b). Leonhard's story again differed somewhat. He had once made a very short trip across the border into Mexico. His hobby, however, was Mexican archaeology, and he had read extensively upon the subject and had discussed it with accused and other members of the organization. Leonhard contemplated doing archaeological research in Mexico after the war, and had written a paper on the subject. Accused had inquired of Leonhard concerning the topography, people, and conditions generally, and specifically had asked what equipment and clothing it would be advisable to take in order to travel in Mexico. Accused asked if there would be any difficulty in traveling there (R. 36-38).

Leonhard made for accused a list of necessary articles. He suggested fishing tackle, a hunting knife, compass, binoculars, cooking equipment, matches, a few staples, mosquito netting, and a rifle. Sometime "in the early part of 1944" he gave this list to accused (R. 37).

Finally a tentative plan (who besides accused and Siering were participants therein is not disclosed) was evolved whereby Siering would take 5 prisoners in his car and accused would take 5 in a car which he would purchase. Without yet setting a definite time, they planned to leave on a Friday evening in two cars, hoping that their absence would not be discovered until Monday morning, by which time they would be well into Mexico. This plan, in turn, was abandoned when Leonhard failed to get his furlough and the political situation in the Argentine became uncertain (Pros. Ex. 12b).

In the latter part of January, 1944, accused learned that Kissman was going to Denver. He gave Kissman $50 in currency, with which the latter purchased for him in Denver a white shirt, two compasses, and a .38 caliber Colt revolver and 50 rounds of ammunition. He may also have bought soldiers' lapel insignias, a scarf, a hat, and fishing tackle, although it is also possible that these latter articles were merely on a list suggested by accused. He could not get a sextant, nor trousers nor a civilian coat which accused had asked him to buy (R. 88, 89,107,112). Kissman testified that this was his first definite information concerning the proposed escape (R. 107), though he "knew" that accused wanted the articles in contemplation of his plot to escape with some German prisoners (R. 90). Kissman returned from Denver the following Tuesday night and gave the articles to accused on Wednesday morning (R.89).

Eight or ten days before 15 February, accused asked Siering for the loan of Siering's automobile, telling Siering that he wished to go to Denver on a three-day pass for the purpose of clearing up matters in the case of a Private Fritz Luth, or Loock, who was a member of their organization and who was in jail there. Accused hoped to be Luth's defense counsel. Siering refused to lend accused the car (R.124). Accused, in his confession, stated that he had spent three days actually inside the Prisoner of War stockade and that it had been decided among him and the prisoners that only five of them should go. Siering refused the use of his car unless he could go along, which he was not at that time ready to do (Pros. Ex. 12b).

After that time, but before 15 February, accused again asked Siering for the loan of the car to go to "Columbus". Not being familiar with the United States, Siering did not know where Columbus was. Accused told Siering that he wanted to meet someone there, in order to go to Germany. Hotelling was to bring the car back from Columbus. Siering testified that he then believed that accused was joking (R. 124,125,127,132).

Leonhard was in charge of the camp's ash dump near the edge of the camp (R. 35,124). After the second request for the use of Siering's car, Siering drove accused out to this ash dump. Accused went to the edge of the dump and picked up a box about one foot wide, five feet long, and a foot deep. This he brought back to the car. In the box were "three or four packs or rucksacks" "like the ski-troopers wear". They appeared to Siering to be full. They put them in the back of Siering's car and drove back to the company (R. 124-126,131,132). When they first got the sacks from the dump, accused was vague and evasive in his answer to Siering's questions as to what he was going to do with them, but when Siering again asked him later, accused replied that because of the way things were going in the company and because of the treatment they were receiving he would "just like to leave" (R. 126).

Accused (he used the word, "we") by now suspected an impending removal of the company from Camp Hale, and felt that speed was urgent. He obtained money by means of long-distance telephone calls to each of his parents on the pretext that he needed it to repay a loan he had previously obtained from Harvard. When he received this he went with Kissman into Salida, Colorado, on the afternoon of Saturday, 12 February. He chose Kissman as the companion "with whom I could celebrate my last week end in the United States" (Pros. Ex. 12c). At one dry goods store accused bought a medium-sized, canary yellow lady's sweater, a lady's scarf, and a lady's hand bag. He declined the salesman's offer to have them wrapped as Valentine's Day gifts (R. 75,76,90,91; Pros. Exs. 7,8,9,10). In his confession accused stated that they intended that one of the prisoners should travel disguised as a woman (R. 113, Pros. Ex. 12c). At another dry goods store accused purchased a dark civilian

hat - the first one the saleswoman showed him (R. 78,79, 90, 91; Pros. Ex. 11). One of the prisoners was to go disguised as a civilian (Pros. Ex. 12c). In his confession accused also mentioned the purchase that day of uniforms, hats, and insignia, for three prisoners who were to go disguised as United States soldiers, and for whom he had written furlough papers. There is no other evidence, however, of such a purchase, nor, in fact, did more than two prisoners go with him. At a hardware store that evening accused purchased some fishing tackle, in the form of line, hooks and sinkers, and a few .22 caliber shells. Kissman conversed casually with the merchant, who came originally from New Castle, Pennsylvania, and who "attempted to give the boys a few good fishing points" (R. 81,82,91; Pros. Ex. 12c).

That afternoon they also looked at used automobiles, and on Sunday morning they purchased a 1934 model Reo sedan of a faded tan color, from a garage dealer. Accused paid the purchase price of $250 and $5 sales tax and received a receipt showing his correct name and organization, and the motor number and manufacturer's number of the car (R. 65-70, 92; Pros. Ex. 5). He asked the dealer to obtain new license plates and an "A" gasoline ration book, saying that he would come back for them on Monday night (R. 70). Kissman testified that while they were in Salida he understood from accused's conversation that accused was going to leave on the following Tuesday, because rivalry had arisen among the prisoners as to who should go. The rivalry was becoming so bad that it might break out in dissension among them, so the sooner they left the better it would be. One of the prisoners of war mentioned was Schwichtenberg (R. 91, 107, 113, 114; Pros. Ex. 12c).

Sunday afternoon accused and Kissman drove to Siering's home in the nearby town of Red Cliff. Also present at the home were Corporal and Mrs. Koch, Siering, and Mrs. Siering. [Kissman testified that they went to Koch's home, but it appears more probable from Siering's testimony and accused's confession that it was Siering's house (R.92)]. After being there a while, accused, Kissman and Siering left to buy some beer. On the way accused said to Siering, "Well, I bought my car", and showed it to Siering at the place where it was parked, on the way to the saloon (R. 127, 128). Accused stated in his confession that it was housed over Sunday night in Siering's garage, but this is not otherwise clearly established (Pros. Ex. 12c). They returned to camp at about 2030 or 2100 (R. 92).

Kissman and accused were together on the saw-mill detail on Monday, but accused said nothing to Kissman at that time as to when he intended to leave (R. 93). Sergeant Alexander Altman was ordinarily in charge of this detail. It was the least desirable detail in camp, and, besides some members of the 620th Engineers, there were also employed on it some of the German prisoners and some American civilians (R. 83,93, 110, 111, 118). On Monday morning a notice was posted on the company bulletin board

scheduling Altman for a dental appointment for Tuesday morning. This meant that Altman would not be in charge of the detail at that time. Kissman had customarily been in charge of this detail in Altman's absence (R. 84, 110,111). Kissman saw this notice on the board on Monday night, knew Altman would not be in charge, and assumed that he himself would be (R. 93). Though Kissman would not say definitely that accused also saw the list, he testified that "the arrangements between us were that he would leave on Tuesday morning at 0800, when the rest of us would go on detail, and that he would not be reported to the Orderly Room". Kissman was to report that accused had gone on sick call (R. 96).

Some time on Monday, Siering told accused that he wanted the sacks removed from his (Siering's) car, "because they had been there a couple of days and I did not want them any longer". Accused promised to get them that night (R. 128,129).

After the evening meal on Monday, accused, Kissman, Koch, Siering and Hotelling drove in Koch's car to Koch's home in Red Cliff. About an hour after reaching there, accused, Kissman, Siering and Hotelling went out to buy some beer. On their way, accused purchased two loaves of bread, some cocoanut, some malted-milk tablets, and matches, and obtained a couple of empty boxes (R. 93,94,95,114,129; Pros. Ex. 12c). They then went to Siering's home, where accused and Siering took the rucksacks (Kissman testified that there were three of them) out of the trunk of Siering's car and into the back of accused's car. He also packed in his car the articles he had just purchased. There may also have been some other packages already in accused's car (R. 94,95,114, 115,129,132,133). Accused stated in his confession that he already had in it articles which the prisoners had been able to give him from time to time (Pros. Ex. 12c). They spent the rest of the evening at either Siering's or Koch's house, and returned to camp at about 2230 (R. 95,129,130).

Siering saw accused at breakfast on Tuesday morning about 0615 but apparently nothing transpired between them (R.130). Some time before 0745 accused and Leonhard met Kissman in the company's day room. There was no conversation except for goodbyes between accused and Kissman. Kissman "understood what he meant" (R. 95-97, 112). Either shortly before or shortly after breakfast accused went to Leonhard's barracks, where, according to Leonhard, they discussed the plight of Private Luth, on whose behalf accused had previously proposed to go to Denver (R. 35,43). Accused told Leonhard that "possibly you will have to help him out because I may not be here to do it", and further said that "I think I may not be around for a while". In their further conversation accused said, "Well, I think this is it", and speaking of the German prisoners, "I wonder how they are going to get out". Accused then gave Leonhard his silver identification bracelet, saying,

"I want you to keep this for me". He mentioned no specific intent or future time to reclaim it (R. 35,43-46,47,48,59-62; Pros. Ex. 4). Leonhard then left for his work at the dump. He had gone part of the way there when accused caught up to him and said, "I think I am going out there with you". When they arrived they went into a little shack in which Leonhard sheltered himself during inclement weather. Accused did not stay very long, - about half an hour. Leonhard testified that accused told him that he was going to Red Cliff and directly from there to Denver, instead of returning to camp. Leonhard told him that "the chances of such a venture" were very slender, that it was not the thing to do, and that he must be aware of the consequences of such an act. Accused answered that he "knew what he was doing", said, "Well, I think I will be going", and left. Leonhard did not see him again (R. 35,36, 47-49,59).

In his confession accused briefly described reporting on Tuesday morning for work call, but stated that he "slipped off early" and spent the morning with Leonhard discussing the three-day pass to Denver to obtain a writ of habeas corpus for Luth. He set out at 1030 for Red Cliff, picked up his car, and got back to camp in time to meet Schwichtenberg and Kikilius shortly after the previously set hour of noon. He found that they were the only two who had been able to escape. Where in camp he met them he did not say (Pros. Ex. 12c).

Schwichtenberg testified that he and Kikilius met accused at the automobile on a highway "two or three kilometers" from Camp Hale. Witness knew that they were to meet someone, but stated that he did not know who it would be. Their rescuer was to pretend to have a flat tire and to be working on it. They found accused repairing something on the car, got in, and accused drove off. Schwichtenberg and Kikilius were both dressed in the blue clothing they had received at the camp, but without the "PW" on the back. Accused had on an overcoat, but witness did not know what he wore underneath it. Schwichtenberg refused to testify concerning the manner in which the prisoners had effected their escape (R. 166,167,171,172).

Accused said in his confession that he had arranged with the car dealer to pick up the new license tags, title certificate, and ration book in person, fearing that the mail and censorship might hold them up. They drove to Salida, where accused parked the car across the street, obtained the articles from a garage attendant, and departed. The time was a little before 1500. He told the attendant that he was "in sort of a hurry" and would like to be on his way because he was on his furlough (R. 73-75; Pros. Ex. 12c).

Meanwhile, Sergeant Altman had returned to the detail from his dental appointment, at about 1300. Accused was absent from the detail, but Kissman told Altman that he had gone on sick-call. Altman went to the orderly room and learned from the first sergeant that he had not, and a search of

the company buildings and area showed his absence (R. 84). But in the minor confusion which was brought about by a change in the commanding officers of the prisoner of war camp at approximately 1300 that same day, the absence of the prisoners was not discovered until 0800 on the 16th, which was Wednesday. Even then it was not learned who they were until the checkup at 1730 that day (R. 26-28).

Leaving Salida, they drove to Deming, New Mexico, via Santa Fe and Hatch, New Mexico. All of the driving except about one hour of it was done by accused. They ate in the car. They talked about the prisoners' experiences in Africa. Schwichtenberg testified that he and Kikilius had their own rucksacks from Africa, and that he did not know whether accused had one, but in all probability theirs were the ones which accused had previously stored in the car (R. 167,173,174). Schwichtenberg denied that accused gave them any articles of clothing, men's or women's. They wore the same clothes throughout the trip. Kikilius later put on a hat, but Schwichtenberg did not know where he got it. Their conversation throughout the trip was exclusively in German (R. 167,168,172).

Accused bought and paid for the gasoline purchased en route. They had more than one flat tire during the trip, and slept in the car the night of the 15th and 16th. The prisoners' objective was to reach Germany, but Schwichtenberg did not know how far accused was going (R. 167-169,172, 173).

Between 0100 and 0130 on 17 February, Sergeant John H. Breen of the United States Customs patrol, and three other men were traveling south from Deming to Columbus, New Mexico, which are 32 miles apart. About 7 miles south of Deming they saw a faded tan Reo sedan stalled on the left side of the graveled road. It bore Colorado license plate number 31-207, which was the number of the plate carried by the car prior to accused's purchase of it in Salida (R. 69,134-138, Pros. Ex. 6). There was no tire on the left rear wheel (R. 134). A man stepped out from in front of the stalled car and flagged down Breen's car as it passed. As Breen got out and came back to see if the bumpers of both cars would meet, he noticed in the stalled car what he thought was a woman sitting on the right of the front seat, with something tied around her head, and what was either a child or a bundle in her arms (R. 135-137).

They pushed the car about 100 yards, and it finally started. The driver then put his hand out the window and motioned for Breen's car to pass, but the pushed car had no lights, so Breen followed it for 7 or 8 miles before he did so. After this the Reo turned on a dim light. This was the last Breen saw of it that night. He could not identify the person who had flagged him on the road (R. 135).

In accused's confession he stated that the car developed motor trouble about 12 miles from the Mexican border (which is just three miles south

of Columbus) and that they were forced to abandon it on the road. Breen saw it there between 0700 and 0800 on 17 February, on his way back from Columbus. It was 5 or 6 miles south of where he had last seen it the night before (R. 135,136; Pros. Ex. 12c). Accused and the prisoners marched 5 miles that night, and spent the rest of the night in the desert near the road. They hid until twilight, then set out for the border. Obtaining water in Columbus, they crossed the border, and marched about 10 kilometers into Mexico, where they again spent the night. They started out again about 1500 on 19 February for the little town of Vado de Fusiles (Pros. Ex. 12c).

Near the small town of Old Palomas, they encountered Mexican customs inspector Medardo Martinez Mejia, about 1630. Suspicious of them, he asked for their passports. Mejia did not speak English, but conversed with accused, who did all the talking, through an interpreter. Accused said he was going to Mexico to work. When they could not produce immigration passports, Mejia took them to Jose Magnana-Zaragoza, the chief immigration officer at Palomas (R. 138-145). Zaragoza found them at the customs house about 1800. Accused was wearing "light green" trousers, a black hat with the brim pushed down over his face, and high, heavy shoes or boots. His clothing was disheveled and he was unshaven. One of the prisoners was apparently dressed in khaki. All had packs on their backs. Schwichtenberg and Kikilius gave him their correct names. Accused gave the name, "Edward Mueller". The conversation was through an interpreter, and accused apparently again told witness they had come seeking work (R. 146-151). He also said that they were going to a small town called Casas Grandes, and that they wanted to go from there to Tuxtla, Vera Cruz, in order to go eventually to Germany. Zaragoza turned them over to William F. Bates, United States Immigration Inspector at Columbus, New Mexico, whom he summoned by telephone to Palomas (R. 148,149,152).

Bates questioned the three captives in English, talking mostly to accused, who would then confer with the others in German. Accused again gave the name, "Mueller", and claimed that the three were Jewish refugees from Europe. The two Germans gave their proper names. Bates inspected their baggage and some little flags they had with them, and finally decided that they were three of four German prisoners known to have escaped from a camp at Amarillo, Texas. They were then formally deported by Zaragoza and taken by Bates to the Immigration Office on this side of the border (R. 152-155). The Federal Bureau of Investigation was notified, and its agents arrived. Shortly after noon on 19 February, accused and the two prisoners were seen and questioned by D.A. Bryce, Special Agent in charge of the bureau's El Paso office. The interrogation took place in the county jail at Las Cruces, New Mexico, in the presence of four other special agents of the bureau and two jailers. Accused was introduced to Bryce as "Edward Mueller". He gave Bryce a purported life history of such a person, stating that he had a family in Germany and that he had been captured in Africa as a member of the Afrika Korps. He

was thorough in his details. He spoke with a distinct German accent, explaining to Bryce that he had been educated in English schools but that he had not used English in a long time, and that it was difficult for him to carry on a conversation in English. He produced German military identification papers of an "Unteroffizier Eduard Mueller", complete in every detail. [Actually this had been obtained by Schwichtenberg before their departure from Camp Hale and had been given by him to accused (R. 168)]. After about 40 minutes of masquerading, accused admitted to Bryce his identity, dropping his German accent when he did so. Bryce immediately terminated the interview (R. 156-158).

Accused was later removed to the Albuquerque, New Mexico, county jail, where on 20 February he was again interviewed by Bryce. Bryce exhibited his credentials and explained thoroughly accused's rights to him. After perhaps an hour or more of questioning accused declared that he would like to make a statement. He was furnished a typewriter, paper, and carbon paper, and permitted to type his own statement. He typed it willingly and unhesitatingly, and signed it in the presence of Bryce and the four other agents. At the time he made it he had been informed that charges of treason had been filed against him in the Federal courts, and that he would probably be tried in a United States District Court unless the Army took jurisdiction. This confession is the one which, together with the testimony of the prosecution's witnesses, has been used to supply the story hereinbefore set forth (R. 157-160, Pros. Exs. 12,12a, 12b,12c).

Evidence for the defense.

The only evidence for the defense was offered by accused himself, who testified under oath, and by his parents. Both of the latter had been excluded from the court room during the trial. Their testimony was confined to a description of his precocity and otherwise to explaining accused's mental development.

Both his father, Mr. L. G. Maple of San Diego, and his mother, Mrs. Cleo Scoville of Newport, Rhode Island, were of native American stock. After domestic difficulties over a period of 10 or 15 years they were divorced in 1938, and both had since remarried (R. 231, 232,239). Both described accused's early liking for, and often complete intellectual and emotional preoccupation with fine music. He was visibly affected upon hearing it, studied it intensively, and at an early age gave public recitals which were widely acclaimed (R. 233,234,241). He was also an avid reader of good literature (R. 233).

This early mental development had but well started when, at the age of nine years, he was struck by an automobile and thrown upon his head on a curbstone. The doctor who attended him feared for some time that permanent mental injuries might have resulted, and cautioned the parents against allowing accused to become unduly excited; but after experiencing

some headaches and expressing a few complaints for a while, the boy recovered completely, and, in fact, his intellectual development continued apace (R. 234,235,250,251). He had always been of a somewhat nervous and emotional temperament, and this continued throughout adolescence. Although he did not confide much in his parents, his associations were generally with persons older than himself (R. 234,235).

He graduated from high school at the top of his class, the faculty breathing sighs of relief because of the difficulties they had experienced in keeping pace with accused's intellectual development and their own embarrassment at their frequent inability to answer his pertinent and searching questions. He had, however, been exemplary in his conduct, unselfish in his attitude towards and relations with his fellow students, and, in fact, had often influenced and led the latter, despite his youth. He had written, unassisted, an essay upon the monetary systems of the world and upon New York's financial organizations, which was termed a work of genius, while his graduation thesis in his high school Reserve Officers' Training Corps course had been on the subject of the trajectory and flight of a bullet from the muzzle of a gun. Since his father had been unable to aid him in the latter, accused, alone, had mastered the study of the calculus in a few days' time (R. 235,236,243-245). He received a scholarship to Harvard, and entered in the fall of 1936. In six weeks that summer, he mastered the Gregg shorthand system from a book on the subject, and without outside help, in order to prepare himself to take adequate lecture notes in college (R. 238,241). His life's ambition at that time was to be the ambassador to the Court of St. James' (R. 245).

After accused entered college his parents were divorced, and his mother went to Rhode Island to live, thereafter exchanging visits with him every week-end. She testified that he appeared to her to be studying too hard and was "very moody and nervous". His tutor told Mrs. Scoville that "no one brain could stand what Dale was trying to cram into it" (R. 236). He had never expressed to his mother any sympathies for National Socialism, but when the incident of the Harvard German Club occurred, she rushed to Cambridge to investigate personally. She was assured by the persons to whom she talked that it was no more than a "campus squabble", and nothing serious (R. 237).

The summation of his parents' appraisal of accused's history and conduct was that he had been a boy of far above average ability, and with an innate consciousness and awareness of these talents. He had had high ideals, and had overworked incessantly both in an effort to attain their fruition and also out of the sheer delight which he took in work and achievement. On the other hand, he lacked the judgment which should have come with this intellectual maturity, and though his father conceded from his observations accused's legal and moral sanity, he believed that he was fundamentally unbalanced in this vital respect (R. 238, 243-246). He did not evaluate the consequences of his acts until they had been

done (R. 249-250).

Accused's rights as a witness were explained to him, and he testified under oath (R. 179). The greater part of his testimony consisted of a statement read by him from the witness stand. He was later subjected to cross-examination upon this statement and the prosecution's evidence.

Much of the material in his statement conformed to and was corroborative of the confession he made to Bryce. He attempted, however, to explain the confession in the light of motives and purposes which, he claimed, existed in his mind at all times, and which, he argued, completely negatived the intent with which he was charged. So far as possible, repetition of facts will be omitted in setting out his statement, in order to avoid unnecessary length to this opinion. Rather, the motives which impelled him will be discussed and emphasized.

Accused testified at length concerning his early childhood, his primary interest in scientific studies, and his relative proficiency in German, and described how he had continued his study of the latter subject in his first year at Harvard because of its help in the field of history and because of the college's requirement that a student have a reading knowledge of one modern language (R. 179-184). Changing his interest to Comparative Philology, the study of languages, he studied and became eventually familiar, in varying degress of proficiency, with practically every European language except those spoken in the Balkans, as well as with Latin, Greek, Sanskrit, Babylonian, Assyrian, Arabic, Hebrew, and Maltese. Even in this broad linquistic field it was necessary to concentrate on one tongue, and he chose German, because of his previous familiarity with it (R. 184,185,187,188). The German Club was only one of the clubs of which he was a member (R. 185).

This necessarily resulted in his association with men whose courses of study were similar to his, as did his membership in the German Club. He "thus acquired the reputation" of being a sympathizer with German culture, but this was not a sympathy for German political institutions (R. 189).

He desired to pursue an academic career, for which a degree of Doctor of Philosophy was almost a necessity. The University of Berlin possessed the most renowned faculty in Comparative Philology, and he resolved to attend that institution. His resources were limited (he had come to Harvard on a scholarship, implemented by loans), and there were by then (1940-1941) no exchange fellowships between Harvard and the German universities. A scholarship from a German university would actually come through the German government. The only way, he believed, to procure one was to appear to the Germans to be a political as well as a cultural sympathizer with National Socialism (R. 182,184,189). In order to show this convincingly, he spoke and acted at the meeting of the German Club as has herebefore been described, and with the various

unpleasant results which have also been detailed (R. 189). He was surprised, and though he "backtracked" considerably and tried to point out that a study of modern National Socialism was as much a part of the study of German culture as were the works of Durer, Kant, or Wagner, he also realized that any emphatic recantation would shut off the chances of a fellowship to Berlin. He kept silent, hoping to obtain one, but also hoping that the unfavorable publicity would be forgotten (R. 190).

He made the visits to Doctor Scholtz, and eventually arrangements were perfected for his attendance at Berlin, and tentative provisions for obtaining a passport. The incident of his attempt to gain employment at Consolidated Aircraft showed him again the reputation he had acquired, but he still hoped that by his silence he could make people forget. The closing of the consulates forced his return to Harvard for graduate work, instead of Berlin, though he still hoped to attend the latter. The outbreak of war in December prevented a projected visit to the German Embassy for a last effort to achieve his goal, but it resulted in the telephone call of 8 December (R. 190).

This call was made on a foolish, spur-of-the-moment impulse. He feared that the war would result in his being called to service, thus ending his academic career. On the other hand, as an American in Berlin, he would be interned, thus being able to attend the university, where he could complete his studies and insure his academic career. Thus the telephone call, to ask if he could go to Germany with the diplomatic staff, but it was "too late". This incident, together with the prohibition of his research with microphones, made him realize that he must clear his name. He volunteered in the Army (R. 191). He described his stay at Fort Bragg, how he volunteered for glider training and for the parachute troops, and how after waiting in vain for six months for action on his applications, he became discouraged and obtained a transfer to the 76th Division, a combat unit at Camp George G. Meade. After five successful months there, he made application for attendance at Officers' Candidate School, with excellent recommendations from his commanding officer, but before action could be taken he was transferred to the 620th Engineers (R. 191).

Accused described the personnel of and the atmosphere, attitude, conditions, and treatment which developed in this organization, and particularly his own dissatisfaction and resentment at what he considered unfair treatment of a majority of "loyal Americans" because of the disloyalty of actually only a few. He was still honestly desirous of clearing himself of the taint of suspicion of disloyalty, but felt that his previous course of hopeful inactivity must now be supplanted by "some more positive attack to the problem" (R. 192).

He resolved to discover who the really disloyal ones were, to gain their confidence, learn their plans and their outside confederates, and by making known at the proper time all the valuable information thus gained,

prove his real loyalty to America. This secret purpose accounted for his adoption of a "slight German accent", his boast that his parents had been born in Germany (though, "unfortunately", he had not), his magnification of his proposed trip to Germany, and his vociferous advocacy of Nazism, and his resultant acceptance with open arms by the "more radical elements". Thus he learned all their plans and schemes (R. 192).

At the same time, however, he continually sought ways of getting out of the 620th Engineers, because of the stigma which attached to the organization, and when, after nine months at Fort Meade they were transferred to Camp Hale, the situation became intolerable. Many of the privileges previously permitted its members were now denied to them, and, in short, they "were no longer treated as soldiers". The existence of this and other similar organizations in the United States Army, and the fact that the resentment of the loyal majority in the company had led to the ascendancy of the radical element, caused accused and his friends to believe that such organizations "must be abolished" (R. 192,193).

Accused decided that something sensational was necessary to call public attention to the plight of the 620th. If, by aiding in an escape of prisoners of war from the nearby stockade, he could bring upon himself a charge of treason, this, together with a revival of the dormant unfavorable publicity he had once received, would produce a violent public reaction. He would then use this to focus the light of publicity on the unhappy 620th, and secure justice both for himself and the organization (R. 193,194). There was an order forbidding its members to communicate in any way with the prisoners of war in the stockade, but it "could not be fully enforced". Accused "took charge of the plans for escape". But to insure the desired results, two things were necessary. He must actually appear to be a traitor, and the escape genuine, and it "must obviously not succeed too well". That is, he did not actually want to escape the country (R. 194).

He therefore made his preparations as obvious as he dared, and described how he used the telephone as much as possible, obtained his company commander's indorsement on the checks received from his parents, though this was not necessary, and let it be known that he was going to purchase a car. All his acts were calculated to arouse suspicion. He did not even expect to reach Salida, for, as he described in detail, he picked up the prisoners in broad daylight near the military police station inside the camp, in an unsuccessful effort to attract attention (R. 194,195,196).

He was disappointed when he did not find the authorities awaiting them in Salida. Actually, the failure of the prisoners to be found missing at evening check-up, and the failure to connect his absence immediately with their absence, frustrated his hopes of speedy detection all the way to the border, this despite many other efforts to attract attention, such as following main highways <u>en route</u>, leaving the prisoners in the car while

he walked about in mixed uniform in the towns through which they passed, making unnecessary purchases in stores, driving on the rim of his wheel in Deming, New Mexico, flagging down Breen's car, and filling canteens at the faucet of a private house in Columbus, New Mexico (R. 196,197). He was constantly getting further away than he wished, but they finally ran out of gas a few miles beyond the place where Breen had pushed them. To avoid a too hasty crossing into Mexico, he persuaded the prisoners that it would be better to spend the night there after they had walked a few more miles (R. 197). On setting out again in the morning they walked through Columbus on the main highway, carrying their rucksacks, but still were not apprehended. He now made up his mind that he would go no farther than to a secondary customs house 50 miles inside of Mexico, and would turn himself in there if they were not apprehended sooner, which, of course, they were (R. 198).

In summary, then, he divided his life from 1940 to the time of his trial into three distinct periods. The first, which ended upon the outbreak of war, exhibited his desire to gain the confidence of German officials in order to obtain a scholarship to the University of Berlin. This gained him nothing but an unsavory reputation. The second, which covered the period prior to his transfer to the 620th Engineers, was devoted to a quiet, but determined effort to live down his past and serve his country. Again he was unsuccessful. The third period embraced his attempts to overcome the "intolerable situation" in the 620th Engineers, to cover himself with glory, and to be restored to honorable duty (R. 198). His constant objective in this last phase was to attract public attention to the situation in the 620th. He stated that he had carried out the other part of his plan, formulated as far back as the time he was at Fort Meade, to seek out and disclose information concerning the true subversive elements in the Army, by disclosing the knowledge he had gained to the Federal Bureau of Investigation and to Military Intelligence, after his apprehension. His possession of the rucksacks and equipment for a long trip he explained by the fact that two prisoners who had planned to escape with Schwichtenberg and Kikilius had not been able to do so; his continued personation of a German soldier, his conduct when apprehended, and his damaging confession to Bryce, were all climactic, publicity-seeking trappings, long planned by him, in order to obtain a public, civil trial, in which he could disclose the whole story to a just American people (R. 197,198,200).

The rest of accused's testimony consisted of cross-examination upon his statement, his confession, and other conversation with Bryce at the time of his apprehension. He admitted that the scarf and the canary yellow sweater were purchased for one of the prisoners who proposed to go disguised as a woman. This prisoner did not escape, and the articles were not used (R. 200,201). Kikilius wore the civilian hat which accused purchased in Salida. The civilian hat worn by accused at the time he was apprehended was purchased by him at a town in New Mexico (R. 201; Pros. Ex.13).

Accused stated that he changed from his OD uniform to an Army field jacket and fatigues shortly before crossing the border (R. 202). He admitted being in possession of the German military service record of Prisoner of War Edward Mueller, claimed that he had had it in his possession for only two days, and denied that he had told Bryce that he had studied Mueller's personal background for a period of two weeks (R. 202-204;Pros. Ex. 14).

He admitted having kept a bust of Adolf Hitler on the desk in his room at Harvard for "a matter of some months" in 1940, but claimed that this had been given to him by a friend, that it, too, was part of his campaign to impress favorably the German officials, and that he had subsequently destroyed it (R. 204,205). Questioned further concerning the telephone call of 8 December 1941, he admitted stating to Counter-Intelligence Corps officers of the 76th Division at Camp Meade, Maryland, as early as 10 March 1943,that he had made the call in order to request a passport to Germany in order to join the German Army (R. 205,206).

He further admitted that he had posed as Edward Mueller, but claimed that prior to and all during the time he was being questioned he was desirous of being apprehended by the proper American authorities. Although he told Bates that his name was Mueller, he made it plain to his questioners at that time that he was not telling them the truth. He implied that his reason for false personation for 30 or more minutes after being turned over to Bryce was that he wanted to be sure he would get a public, civil, trial, not a secret military one (R. 206-209,221,224). The substance of his other statements to Bryce is more properly a part of rebuttal testimony, and will be found below in that portion of this opinion (R. 209-212,214,215).

Accused stated that which prisoners of war he took with him "was absolutely immaterial" to him. He admitted, however, that he obtained entrance to the prisoner of war compound on one of the trucks on the morning of 29 January, remaining there until the morning of 31 January (Saturday to Monday), establishing his "final authority over who should go on the contemplated escape and who should not go". He stayed in one of the prisoner of war barracks, dressed part of the time in a prisoner of war uniform and part of the time in the uniform of the German Army (R. 216,217).

Accused admitted that he had written three notes from his cell, one, at least, addressed to Kissman, and that he had attempted to have them "passed on". Introduced as Prosecution's Exhibits 15,16, and 17, they are as follows:

> "They have me here because they think I know a lot about German activities in this country and they want to pump me. They know they can't prove anything and that's why they don't

want to try me. I was over the hill 4 days and I can beat a charge of desertion. I can't tell you who the boss is, but you'll get acquainted in N.Y. with a lot of fellows." (Pros. Ex.15).

"Yes, I'm mixed up with a bunch of Germans (a lot of Italians and Americans too) and I've helped more than two men escape. I haven't seen what the papers say, but I was picked up in Mexico with 2 Prisoners of War. Right now I think most of the gang in New York are working to get the right men elected when election comes around." (Pros. Ex. 16)

"Paul: Trial on April 17. Will use abused Americanism angle. Will reveal sabotage plans, etc. Pass word to others: We'll lay it on thick." (Pros. Ex. 17)

The first two notes, accused claimed, were written by him at the insistence of his guard and cell orderly, who

"* * * hounded me quite constantly to write him something, anything. He has asked me constantly questions, and in answer to the questions those were the notes which were written." (R. 221-225)

The third note was to Kissman, also imprisoned at Fort Leavenworth (R. 97) "in an attempt to get him to give true testimony" (R. 225).

Accused stated that he still considered himself a good soldier of the United States Army, that he still loved this country, and that he still wanted to protect and defend it (R. 204,217,218).

The prosecution recalled as a witness Mr. Bryce, who offered further evidence concerning statements made to him by accused in the questioning following accused's admission of his identity after his apprehension. Civil charges had been filed against accused on the afternoon of 19 February, and the confession hitherto discussed had been made on the next day. This was followed by conversations between Bryce and accused during the next four or five days at the Federal Bureau of Investigation's office in Albuquerque, New Mexico. Further statements were made by accused to witness, each period of questioning being preceded by admonitions concerning his rights. Testifying from notes taken during these investigations, and particularly that of 23 February, Bryce related statements made to him by accused, but not included in accused's confession (R. 257-260). Speaking of his efforts while still in Cambridge to go to Germany, accused said to witness:

"I intended to go to Germany and was discussing the possibility of entering a sabotage school at Hamburg and returning to the United States as a sabotage agent" (R. 258).

One of accused's associates at Harvard was a young German named Leonhard Sausman who was apparently an active member of the pro-Nazi group in the German Club. Accused told Bryce that Sausman was a member of the Hitler Jugend (and possibly of the Elite Guard), "and had the same feelings * * * and ideas * * * about the Nazi Government as I had", and that Sausman had promised to furnish accused contacts when accused should depart for Germany (R. 258).

Speaking of his connections with subversive organizations, accused told Bryce that:

> "I was never a member of the Bund. The real subversive underground is separate from the Bund. The Bund is just a front to attract attention." (R. 258)

Accused also told Bryce about plans of the subversive groups in the Army to bring about chaotic conditions in the national war effort, as follows:

> "I personally undertook the complete disruption of all railroad and motor transportation in the United States at all vulnerable points, more specifically, bridges, junctions, signal blocks and switch houses. Men would be strategically located throughout the United States, and at a given signal, at a specific time, all would be destroyed by explosions, every strategic designated terminal and so forth." (R. 259)

He told Bryce that he had already marked a map designating such vital places, and taking a railroad map of the western half of the United States, he duplicated as nearly as possible the marking of this original. Accused's duplicate map was introduced in evidence (R. 259; Pros. Ex. 18). Accused told witness that he had estimated that it would require approximately 150 agents in the western section of the United States to carry out this sabotage (R. 260).

Finally, accused stated to Bryce, concerning his actual escape plans:

> "The original plan was for 10 persons with two cars to escape. We were intending to have guns, and if anything happened, to fight to the last man."

They expected to be encountered by the Federal Bureau of Investigation's agents, but intended that none of their number should be taken prisoner (R. 260).

In further rebuttal the prosecution offered the expert testimony of medical witnesses concerning accused's mental and physical health. This may be divided into three categories.

A physical examination was conducted by First Lieutenant Sylvan D. Solarz, Medical Corps, and an ear, eye, nose and throat examination by Major Thomas I. Metzgar, Medical Corps, both of the station hospital at the United States Disciplinary Barracks, Fort Leavenworth, Kansas. Neither was psychiatrist, but each had had extensive experience in his own field of medicine. A thorough examination by Lieutenant Solarz of accused's entire body, including urinalysis, blood count, blood serology, and X-Rays of the skull, chest, and sinuses, showed accused to be physically sound. Three or four examinations of accused and a detailed study of his ears, eyes, nose and throat, showed his physical condition in this respect to be "well within normal limits". A slight deviation from normal of the septum of his nose, and some completely healed scars from punctures or incisions in the tympani of the ears were found, but they could neither have been caused by nor could they have induced any aberrations or malfunctions of the brain. X-Rays of the skull and sinuses taken 10 March 1944, showed no fractures and no abnormal intercranial pressures (R. 263-265, 266-273; Pros. Exs. 19,20).

Major Metzgar testified that it was possible for an X-Ray to show normal functions and conformations, but for the subject nevertheless to be insane, and stated that a mere physical examination would not necessarily show insanity. Both witnesses, however, from their limited knowledge of the symptoms of insanity, and from accused's conduct throughout their examination of him, testified that accused was sane (R. 265, 269,270).

Captain Ewin S. Chappell, Medical Corps, and Captain Nathan Blackman, Medical Corps, both psychiatrists at the station hospital of the Disciplinary Barracks, offered extensive testimony concerning accused's sanity. Each had examined him frequently and thoroughly since his arrival at the hospital, and, besides their testimony from these observations, they submitted a report signed jointly by them. While not introduced as an exhibit, it is appended to the record of trial at the end of the exhibits. Captain Chappell testified that he found accused to be normal and coherent in his speech, without delusions or paranoid trends, or hallucinations. He also found a normal orientation, unimpaired memory and a highly superior intelligence and intellectual development. Contrasted to these factors he noted a lack of concern over the outcome of the then impending court-martial trial, a poverty and superficiality of emotions, and an impaired insight and lack of mature judgment. There was no emotional warmth or development of lasting attachments, such as indicate criteria of adult behavior. Accused had not, however, lost any contact with reality, and even in one incident of "depersonalization" described to witness by accused, of the affectation of several Germanicisms for a time after he joined the 620th Engineers, accused's actions were conscious and purposeful. The impairment of insight and judgment was definitely not of psychotic proportions, and accused was undoubtedly sane at the time of the commission of his offenses and at the time of his trial (R. 274-277,285,286,290,291,293,295).

Captain Blackman concurred in Captain Chappell's diagnosis and appraisal of accused's sanity (R. 293). Stating that he had no personal knowledge of the facts of the case, Captain Blackman suggested that accused's upbringing in a home broken by discord, and his lack of a sense of security and attachment, had to some extent been responsible for the boy's mental attitude. He blamed his father for the discord and for economic insecurity, and in his resentment attempted acts which would bring his father embarrassment. Accused knew full well what he was doing, but was not concerned with whom he hurt or how he did it. Witness would not call accused abnormal, but "would say he is a very, very vicious type" (R. 296-298).

At the request of the defense counsel, the convening authority appointed a board to examine the sanity of accused (R. 302-308). This board consisted of Colonel Edward J. Strickler, Medical Corps, the commanding officer of the station hospital at Fort Leavenworth, and Captain Kenneth E. Powell, Medical Corps, the neuro-psychiatrist at the reception center at Fort Leavenworth. Colonel Strickler had thirty-five years' experience in psychiatric diagnosis. Their opinions were based upon interviews with accused's father, mother, and aunt, upon accused's history as previously prepared in the hospital of the Disciplinary Barracks, and upon repeated interviews with accused (R. 309,310,315,316). Both concluded that accused was sane at the time of the commission of his offenses and at the time of his trial (R. 310,316). Colonel Strickler stated that the reasons given to him by accused for the commission of his act (which reasons were the same as those expressed by accused from the witness stand) were entirely consistent with sanity. Accused believed that his actions were right (R. 311,312). Witness did not agree with other diagnoses that accused had shown no concern over the outcome of his trial, or any "poverty of emotional tone", or that he suffered from a serious lack of judgment or insight. On the contrary, his mood was one of sheepishness at having been caught (R. 312,313).

5. The evidence does not require much recapitulation, for the long trail of events leading up to accused's flight from Camp Hale with two German prisoners of war is a clear one, and few details, other than those of how the prisoners actually escaped, are lacking. Accused's defense is that he lacked the motive charged, but rather that, stung by the refusal of the Army to trust the loyalty of the great majority of the members of the 620th Engineers, and discouraged by their lot in that organization, he had chosen a spectacular method by which to bring to public attention the conditions which existed. He claimed that throughout it all he had been motivated solely by loyalty to his country, that he had associated with treasonable elements only to discover for himself and the proper authorities the ramifications of subversive organizations, and that at the proper time he intended to and did make these disclosures. Finally, he had publicly assumed the role of a traitor only to make his actions seem the more heinous, and thus insure a public trial with its

attendant notoriety, rather than a closed military court.

6. The Board of Review is of the opinion that the findings of the court are overwhelmingly sustained by the record of trial. Accused's protestations of his honorable motives are patently not true. Brief reference to a few events will serve to show this.

Perhaps the most pointed inconsistency in his story of his motives is to be found in the intercepted notes which he wrote after his imprisonment at Fort Leavenworth. In the words, "will use abused Americanism angle", is exposed the whole fraud of his defense. It is obvious that the notes were intended for Kissman who was then also imprisoned at Fort Leavenworth. Accused's statement that he was hounded into writing the notes by the guard is so obviously false as to require only the comment that the defense was given the opportunity to summon any witness it desired, and did not summon this guard. The notes never reached Kissman, and it is impossible now to tell what effect they would have had on his testimony.

The persistence by accused in his personation of the German prisoner whose identification papers he had carried, lends little credence to his own story of his honorable intentions. He had accomplished his purpose of attracting notoriety, by all reasonable standards of the word, yet he continued his masquerade for at least 40 minutes after Bryce began questioning him. This was the act of a person still seeking to evade apprehension, rather than one attempting to expose what he thought was an intolerable situation.

His request of Siering that Siering let him take the automobile to Columbus indicates an intent to get to Mexico, rather than a desire to be apprehended within a few miles of Camp Hale, as accused maintained in his testimony. Even then accused had no expectation that he would be caught within the borders of this country.

His telephone call to the German Embassy on 8 December 1941 is the key to his whole mentality. There was then no 620th Engineer General Service Company, no mistreatment of or discrimination against "loyal Americans". He still clung to his admitted purpose in his statements to Intelligence Officers at Camp Meade in March of 1943. Accused did not know and could not have known on 8 December of the circumstances in which he would later find himself. He had only one idea <u>then</u>, to get to his beloved Germany and be of service to it against the country which had given him the education and opportunities he later so abused against her. The falsity of his position at the trial is clearly demonstrated.

7. Several questions of law require a brief discussion.

Accused did not question the jurisdiction of the court, and it is

obvious from a casual examination of Article of War 2 that as a volunteer he was subject to military law.

Upon order of the convening authority, the trial was closed to the public (R. 2,13). Provision is made for such action by paragraph 49e, Manual for Courts-Martial, 1928, where good reason exists for excluding spectators. We can conceive of no better reason than that which existed in this case. The exclusion of civilian associate defense counsel from the court room in a court-martial trial when military secrets were revealed, was upheld in Romero v. Squier (133 F. (2d) 528). By logical consequence, the exclusion of all civilian spectators may be sustained under such a ruling.

Following the refusal to permit the presence of accused's parents in the court room during trial, defense counsel moved the introduction of accused's father as associate civilian defense counsel. It was stipulated that Mr. Maple was not a regularly licensed, practicing attorney (R. 13,14,15). The motion was denied, upon instructions from the convening authority (R. 20-22). The Board of Review holds that the court's action was in all respects proper. It is obvious from a reading of the record that the motion was made in an effort to circumvent the court's previous ruling that the trial be closed and that the parents be excluded. While it has been held that the counsel for an accused provided for in Article of War 17 need not be admitted to practice by some civil court (Romero v. Squier, supra), it is well established that "the right (of an accused) to select his own counsel cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same". (Smith v. United States, 288 F. 259, 261. Underscoring supplied. See also, Viereck v. United States, 130 F. (2nd) 945,961) Accused's father was unfamiliar with the facts which constituted the offenses charged. He was admittedly unlearned in the law. Nowhere in the record does it appear that his presence throughout the trial would have aided accused in any way, or that his absence from the room resulted in any prejudice. There was no error.

It does not appear clearly what legal processes were employed to return accused to the United States. Magnana-Zaragoza testified that he "deported" the three men "to the American officials" (R. 146). It is certain that there was no formal extradition. But accused did not raise the issue, and it is sufficient here to say that a court otherwise vested with jurisdiction to try a person is not prevented from doing so by reason of the fact that he may have been removed from the place of his apprehension by means not in conformity with, or even in direct opposition to, strictly legal procedures (Ker v. Illinois, 119 U.S. 436; Mahon v. Justice, 127 U.S. 700; Pettibone v. Nichols, 203 U.S. 192).

At various places throughout the record, particularly in his examination of Leonhard and Kissman, the trial judge advocate resorted to frequent leading questions. It is obvious from an analysis of the answers given to most questions by those witnesses, that they were hostile to the prosecution to the extent of being not only evasive, but also of often deliberately fencing verbally with the trial judge advocate in an effort to withhold testimony which would be damaging to accused. Colonel Winthrop says of leading questions that there are:

> "* * * certain excepted cases in which leading questions may not only be proper but necessary for the eliciting of the truth. 1st. As where the witness is manifestly hostile to the party by whom he has been called, or is in the interest of the opposite party, or exhibits, for some cause, a decided unwillingness or reluctance to testify, or a disposition to prevaricate * * *." (Military Law and Precedents, 2nd ed., p. 341. Underscoring in original.)

The Board of Review is of the opinion that these exceptions fully justified what leading there was, and that in none of it was the accused prejudiced or misled in any particular. On the contrary, he admitted, in effect, everything to which the rest of the prosecution's witnesses testified, seeking only in his defense to explain away the guilt of his acts.

8. The Board of Review is satisfied that the allegations made and the facts proved under Specifications 1 and 2 of Charge II constituted violations of Article of War 81. Discussing the old 45th Article of War, which was later incorporated into Article 81, Colonel Winthrop says:

> "This term [the enemy] does not necessarily refer to the enemy's government or army, nor is it required to constitute the offence that the relief should be extended directly to either: it is sufficient if it be furnished to a single citizen or citizens, or to a member or members of the military establishment, in his or their individual capacity. * * * Relief * * * afforded to individuals is relief to enemies, and, so far forth also, relief to the enemy considered as a nation or government.
>
> "It need hardly be remarked that the term 'the enemy', or 'an enemy', does not include enemies regularly held as prisoners of war; such, while so held, being entitled * * * to be furnished with subsistence, quarters, &c. It would include, however, a prisoner of war who has escaped and while he is at large * * *". (Military Law and Precedents, 2nd ed., pp. 630,631. Underscoring in original.)

To the same effect is a discussion of the Article in its present form in the Manual for Courts-Martial, 1921, at page 388:

"'Enemy' imports enemy citizens as well as soldiers and does not restrict itself to the enemy government or its army. All the citizens of one belligerent are enemies of the government and of all the citizens of the other."

That accused furnished supplies and "other thing(s)", in the form of the use of his automobile, is clear beyond doubt. That he harbored and protected them throughout the trip has been proved beyond all question. The mere giving of $1 and a night's lodging to each of two paroled Confederate soldiers in the Civil War was held in the court-martial of one Benjamin G. Harris, a member of Congress from Maryland, to constitute two offenses identical with those here charged. (See Court-Martial of Benjamin G. Harris, U.S. House Executive Documents, Vol. 7, 39th Congress, 1st Session, 1865-1866, Executive Document No. 14.) Winthrop cites many examples of both offenses, and points out particularly that the offense of "knowingly harboring or protecting an enemy" may be defined "as consisting mainly in receiving and lodging, sheltering and concealing, or shielding from pursuit, arrest, or any injury which in the chance of war may befall him, a person known as * * * and who is in fact an enemy" (Op. cit., pp. 631,632).

The court took judicial notice of the existence of the state of war between the United States and the German Reich, one of the elements of proof of this offense (Winthrop, op. cit., p. 632).

The same facts which prove accused's guilt of Charge II and its Specifications are ample to support the findings of guilty of desertion under Charge I and its Specification. In addition, however, there are the testimony of Leonhard that accused had said that "he was disgusted enough to go over the hill", the fact that he gave Leonhard his identification bracelet without indicating an intent to return and reclaim it, the fact that he was apprehended in a foreign country over 600 miles from his station, the fact that he denied his identity (which included a denial that he was in the Army), the fact that he had previously stated and repeated to Bryce that he intended to go to Germany - all of which not only permit but compel a finding of intent to desert (MCM, 1928, pp. 143,144).

9. The charge sheet shows that accused is now 23-8/12 years of age. He enlisted at Boston, Massachusetts, on 27 February 1942 for the duration of the war plus 6 months, and was a private first class at the time of the commission of the offenses.

10. 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 and the sentence and to warrant confirmation thereof. The death penalty is authorized upon conviction of desertion in violation of Article of War 58, and of relieving or harboring and protecting the enemy in violation of Article of War 81.

Terry E. Eyer, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

Hermann Wayne, Judge Advocate.

Samuel Sonnefield, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 20 OCT 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private First Class Dale Maple (11048476), Company A, 1800th Engineer General Service Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Accused has been found guilty of desertion in violation of Article of War 58, and of relieving the enemy by furnishing transportation and other things of value to two escaped German prisoners of war, and of knowingly harboring and protecting the same prisoners, in violation of Article of War 81. After a secret trial he was sentenced to be hanged. On the face of the record there appears to be little or nothing to suggest mitigation. But accused is only 24 years of age, and is inexperienced. While he is undoubtedly legally sane and responsible for his despicable acts, under all the circumstances I am unable to escape the impression that justice does not require this young man's life. I feel that the ends of justice will better be served by sparing his life so that he may live to see the destruction of tyranny, the triumph of the ideals against which he sought to align himself, and the final victory of the freedom he so grossly abused. Accordingly, I recommend that the sentence be confirmed, but that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life, that the United States Penitentiary, 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 from the Reverend Mr. Orson P. Jones of San Diego, California, accused's pastor in childhood, calling attention to the automobile accident in which accused was involved, and suggesting that an injury sustained at that time might explain accused's actions.

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-Drft. of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. fr. Rev. Orson P. Jones. - 30 -

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures, and confinement for life. G.C.M.O. 639, 28 Nov 1944)

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

SPJGV
CM 257204

19 JUN 1944

UNITED STATES v. Second Lieutenant THOMAS E. CONNORS (0-512144), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Deming, New Mexico, 10 May 1944. Dismissal and total forfeitures.

- - - - - - - - - - - - - - - - -

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

- - - - - - - - - - - - - - - - -

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Thomas E. Connors, Air Corps, having received a lawful order from First Lieutenant Robert L. Faulhaber, Air Corps, to pilot Plane Number 702 on Mission Number 6B-1809, Night Navigation to Las Vegas, New Mexico, and return, the said First Lieutenant Robert L. Faulhaber being in the execution of his office, did, at Auxiliary Field Number 1 of Army Air Forces Bombardier School, Deming Army Air Field, Deming, New Mexico, on or about 30 March 1944, fail to obey the same.

Specification 2: In that Second Lieutenant Thomas E. Connors, Air Corps, did, at Auxiliary Field Number 2 of Army Air Forces Bombardier School, Deming Army Air Field, Deming, New Mexico, on or about 30 March 1944, with intent to deceive Major George E. Smith, Air Corps, wrongfully cause to be officially reported to the said Major George E. Smith on Army Air Forces Group Form Number 1, that he piloted an AT-11 Army aircraft, Number 41-27602 from Deming, New Mexico, to Las Vegas, New Mexico, and return, in a flight of 3 2/3rds hours, which report was known by the said Second Lieutenant Thomas E. Connors to be untrue in that the said aircraft was landed at Auxiliary Field Number 1, Army Air Forces Bombardier School, Deming Army Air Field, Deming New Mexico, and did not proceed to Las Vegas, New Mexico.

He pleaded guilty to and was found guilty of the Charge and both Specifications. Evidence of one prior 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. The record shows that after accused's plea of guilty the trial judge advocate requested the law member to explain to accused the effect of his plea of guilty, which the law member did. After the explanation the accused stated he wished his plea to stand. The prosecution then rested.

Defense counsel stated that the defense did not wish to offer any evidence and thereupon the trial judge advocate requested that the law member explain to accused his rights as a witness. Upon the explanation being made accused stated he did not care to make a statement. The defense thereupon rested. The court was closed and upon reopening the data as to age, pay, service and previous convictions was read. Thereafter the court was closed and upon reopening announced its sentence. The court then at 1127 recessed until 1400 of the same day. Upon reconvening the court was closed and at 1423 the president announced that the court upon secret ballot, two thirds of the members present at the time the vote was taken concurring, had voted to reconsider and revoke the sentence announced, and requested defense counsel to call any witnesses they might wish to introduce (R. 5-8).

4. Thereupon the defense introduced evidence substantially as follows:

First Lieutenant J. M. East, Jr., Section Commander of Group 2, and Operations Officer, testified that accused was a member of his section and he would say he was a good pilot. The average number of hours flown by each pilot per month would be around 65 hours, and some pilots have flown as much as 90 to 95 hours per month (R. 10).

Captain Walter F. Payne, Commanding Officer of Second Training Group, Deming Army Air Field, testified that accused had been under his command for nine months. Accused is more than well qualified for the type of work done at Deming Army Air Field, a portion of such duties being that of check pilot. He considers accused a seasoned bombardier pilot. During the time accused has been at Deming he has flown close to the 90 hours maximum per month.

On cross-examination this witness said that if a check pilot made an untruthful statement concerning a pilot he had been checking, that such act would put in jeopardy the lives of the people who must fly with that pilot, and he would relieve such check pilot of that duty (R. 17). He would not consider such person proper to be entrusted with the responsibility of a check pilot (R. 18). He took accused off duty as a check pilot because he did not want the new men getting any ideas that they could violate orders or flying regulations and get away with it. They must have implicit faith in their instructors (R. 23).

On redirect examination Captain Payne said that he himself had faith in accused (R. 24).

The accused after having his rights as a witness explained to him elected to testify under oath. He said he had approximately 2400 hours of flying time, of which between 1400 and 1500 hours were Army flying. All of his Army flying with the exception of 160 hours has been on bombing missions, and he has never had an accident while flying such missions (R. 25).

On examination by the court he said he had flown four missions on the date he failed to complete the night mission, of around four hours total flying time, and the night mission would have been an additional three hours (R. 27).

5. War Department records show that accused is 31 years of age. He attended Carroll College for three years. While serving as a Civilian Pilot Trainee Instructor at Mather Field, California, he was in an inactive status from 6 November 1942 as a member of the Enlisted Reserve Corps. On 28 January 1943 he was appointed second lieutenant, Army of the United States, and has served in that status since such appointment.

6. There is attached to the record a petition for clemency signed by defense counsel and assistant defense counsel in which they set forth that in their opinion accused's sentence was affected by the fact that he had previously been tried for a violation of Article of War 96. This previous case involved a dispute between accused and a Mexican waiter in the Mission Cafe, Deming, New Mexico, and involved a question of fact as to who was the aggressor. It should be noted that General Court-Martial Orders No. 292, Army Air Forces Western Flying Training Command, shows that accused was found guilty on 28 October 1943 of three Specifications alleging that he was disorderly while in uniform, that he refused to show his identification card to military police, and that he made a false official statement as to the length of time he had been in a certain cafe, all in violation of Article of War 96. In this case accused was sentenced to forfeit $100 per month for five months.

Paragraph 5 of this clemency petition is as follows:

"5. The case upon which this petitioner was dismissed was for the failure to fly a night navigation mission to Las Vegas, New Mexico and return. On the day that this petitioner failed to fly the night navigation mission he had already flown five missions which entailed some five and a half or six hours flying time. The navigation mission which was not flown would have required some three hours and thirty minutes more flying time. Your petitioner has no excuse to offer for his failure to obey the order and landing at the auxiliary field, other than to say that due to the fact that petitioner had put in the number of hours already mentioned on that same day, he was completely exhausted and did not feel equal physically to another period of three and a half hours of flying time."

This petition also points out that on the same day accused was tried Second Lieutenant George D. Thurman was tried on charges identical with those against accused and received a sentence of a forfeiture of $2,000 payable $100 per month for 20 months, and that Second Lieutenants Wallace H. Owings, Jr. and John E. Ward, Jr., bombardier instructors, were tried on Specifications the first of which was identical to the first Specification of which accused was tried, and the second Specification in each of two above cases alleging failure to complete a required form and each of these two officers was sentenced to forfeit $1,000 payable $100 per month for ten months.

The petition was concurred in by eight of the nine members of the court hearing the case.

There is also attached to the record a letter of clemency signed by Major John P. McCrory, Air Corps, in which he states that in his opinion accused's misconduct resulted from lack of military training since accused has never attended an officer candidate school, or been subject to cadet training.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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. Jaffy, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert E. Twitchell, Judge Advocate.

SPJGV
CM 257204

1st Ind.

War Department, J.A.G.O., 28 JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Thomas E. Connors (0-512144), Air Corps.

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

3. Consideration has been given to the attached letter from the Honorable Burton K. Wheeler, United States Senate, in which he urges clemency on 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 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-Ltr fr Hon Burton K Wheeler, 9 Jun 44.
Incl.3-Dft ltr for sig S/W.
Incl.4-Form of action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 416, 27 Jul 1944)

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

SPJGN
CM 257252

26 JUN 1944

UNITED STATES	)	36TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Headquarters 36th Infantry Division, APO #36, 13 March 1944. To be shot to death with musketry.
Private LEON WARMAN (35266280), Headquarters Company, 1st Battalion, 141st Infantry.	)	

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

---

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

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

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

Specification: In that Private LEON NMI WARMAN, Hq. Co. 1st Bn, 141st Infantry did, in the vicinity of * * *, on or about 23 February 1944, draw a weapon, to wit a .45 cal. Automatic Pistol against JOHN H. BRYAN, JR, O-423627, 1st Lt., 141st Inf., his superior officer, who was then in the execution of his office.

CHARGE II: Violation of the 75th Article of War.

Specification: In that Private LEON NMI WARMAN, Hq.

Co., 1st Bn, 141st Infantry, did, in the vicinity of * * * on or about 23 February 1944, misbehave himself before the enemy, by refusing to advance having been ordered forward by JOHN H. BRYAN, JR. 1st Lt., 141st Infantry, to engage with the enemy, which forces, the said command was then opposing.

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

Specification: In that Private LEON NMI WARMAN, Hq. Co, 1st Bn, 141st Infantry, did, in the vicinity of * * * on or about 23 February 1944, with intent to do bodily harm, commit an assault upon JOHN H. BRYAN, JR, 1st Lt., 141st Inf. by shooting at him with a dangerous weapon, to wit a .45 Cal. Automatic Pistol.

He pleaded not guilty to and was found guilty of the Charges and Specifications thereunder. He was sentenced to be shot to death with musketry. The Commanding General, 36th Infantry Division approved the sentence but directed that its execution be withheld. The Commanding General of the * * * Theatre of Operations also approved the sentence and forwarded the record of trial for action under Article of War 48. In transmitting the record he wrote,

"I am cognizant of my authority under Article of War 50 to commute the sentence to one which I have authority to direct to be executed, but I have elected not to commute it."

3. The evidence for the prosecution shows that on 23 February 1944 the forward echelon of Headquarters Company, First Battalion, 141st Infantry, was engaged with the enemy near * * * , while the rear echelon of that organization to which the accused was assigned was about two miles south of * * * and within the sound of the firing in the forward area. Prior to 23 February, the day of the events in question, the accused had been serving with the rear echelon as a driver. On one occasion he had driven a truck without authority and had damaged it. He had been placed upon probation by his company commander and warned that he would be relieved of his assignment as a driver if he was the cause of more trouble. Thereafter, on 21 February 1944, two days prior to the events in question, the accused was reported as having "misbehaved in a slight way". As a result First Lieutenant John H. Bryan Jr. warned the accused that if he "had any more trouble he would be relieved as driver".

At the same time Lieutenant Bryan told the accused to come up to "the front", and the accused replied that he was going to the hospital. Two days later Lieutenant Bryan, having received instructions from his company commander "to bring" the accused to the front, returned to the rear echelon. There Lieutenant Bryan discovered that the accused had not gone to the hospital, but that he was "still in the kitchen area". Upon entering the kitchen tent he found the accused playing cards. Lieutenant Bryan forthwith ordered the accused to cash in his chips, get his "things" together, and to accompany him to the front. As Lieutenant Bryan walked out of the kitchen tent the accused followed him saying that he was not going to the front. The accused appeared to be angry and drew a .45 calibre pistol which he was not authorized to wear. Lieutenant Bryan started toward the accused and the accused began "backing up". The accused stepped down about two and one-half feet from a terrace on which Lieutenant Bryan was standing and "fired into the ground something like 18 inches from" Lieutenant Bryan's feet. The accused kept "backing up" and asserted that he would "shoot" Lieutenant Bryan if he "* * * didn't stop advancing". Lieutenant Bryan "kept advancing something like 30 yards back across the road". At this point Sergeant Lewis M. Sinclair, under whom the accused had been serving in the rear echelon, "jumped between the Lieutenant and" the accused. Sergeant Sinclair ordered the accused to give up his gun and to do what the Lieutenant directed. The accused replied "that he wasn't going to the front and he wasn't giving the gun to anyone". Sergeant Sinclair and Lieutenant Bryan then drew their pistols, and "the accused made a play for his". Sergeant Sinclair threatened to kill the accused, and the accused warned Sergeant Sinclair that he, the accused, had his pistol loaded and cocked. The accused was finally disarmed and placed in arrest (R. 6-9, 10-11, 12-14).

Lieutenant Bryan testified that the accused was not ordered to the front as a punishment, but because the accused could not be trusted under the command of the sergeant who was in charge of the rear echelon (R. 8).

4. The accused testified in his own behalf that on 21 February 1944 he had been ordered by Sergeant Sinclair to report to his company commander, but that before he could do so Lieutenant Bryan had spoken to his company commander, and had told the accused that he, the accused, was "no longer a driver". The accused, however, asked for permission to see his company commander, and had "talked with Lt. Berquist and had asked him why he wanted to punish me while the others stepped out". The accused described his difficulty with Lieutenant Bryan on 23 February as follows:

"On the 23rd when Lt. Bryan came back to the

> area I was in the kitchen. He says to me 'I thought you were going to the hospital'? He comes on in the kitchen tent and tells me to get my equipment together, that I was going to the front with him. When he goes out the tent door he has a German Luger in his hand. I had a 45 pistol under my belt. I pulled it out and I told him that I didn't want any trouble with him. I walked down the road toward * * * about 200 yards and Sergeant Sinclair comes up about that time and told me to go on to the front with the Lieutenant. He tried to get my pistol from me and I told him if I was going to the front I wanted to carry my pistol with me. I then got up on the jeep and Sergeant Sinclair throwed his pistol on my stomach. He said give your pistol up or I will kill you. Then he says they were going to take me to II Corps Headquarters. When I got down there they took me up before a Major and from there to the stockade."

On cross-examination he admitted that he had intentionally fired his pistol but denied that he had shot at Lieutenant Bryan. He insisted that he had "just pulled it off". He also denied that he had refused to go to the front (R. 15-16).

In addition to the accused's testimony the defense placed in evidence a psychiatric report concerning the accused. This report stated that the accused knew the nature and quality of the acts in question, that he was mentally able to refrain therefrom, and that he was not insane. On the other hand, the report stated that the accused was mentally dull, that he had the mental development of a person only nine years of age, and that "eventually this soldier should be disposed of under the provisions of Section VIII, AR 615-360" (R. 17; Def. Ex. A).

5. In the nature of rebuttal testimony on the issue of the accused's mental condition, the prosecution presented the testimony of two sergeants, who had previously testified concerning the offenses alleged, and that of a Technician Fifth Grade. Each of these witnesses testified in effect that the accused learned easily and was regarded by them as being normal mentally. They testified particularly that they had never observed any conduct on the part of the accused that would indicate that he was below normal mentally (R. 18, 19, 20).

6. The Specification, Charge I, alleges that the accused drew an automatic pistol against his superior officer who was in the execution of his office.

"By 'superior officer' is meant not only the commanding officer of the accused, whatever may be the relative rank of the two, but any other commissioned officer of rank superior to that of the accused.

* * *

"The phrase 'draws or lifts up any weapon' covers any simple assault committed in the manner stated. The weapon chiefly had in view by the word 'draw' is no doubt the sword; the term might, however, apply to a bayonet in a sheath or to a pistol, and the drawing of either in an aggressive manner or the raising or brandishing of the same minaciously in the presence of the superior and at him is the sort of act contemplated" (M.C.M., 1928, par. 134a).

The uncontradicted evidence shows that the accused drew a pistol in an angry and threatening manner against Lieutenant Bryan while Lieutenant Bryan was in the proper performance of his duties as an officer superior to the accused. The findings of guilty of the Specification, Charge I, and Charge I are sustained, therefore, by the evidence beyond a reasonable doubt.

7. The Specification, Charge II, alleges that the accused

"did, in the vicinity of * * * , on or about 23 February 1944, misbehave himself before the enemy, by refusing to advance having been ordered forward by JOHN H. BRYAN JR. 1st Lt. 141st Infantry, to engage with the enemy, which forces, the said command was then opposing."

The Manual for Courts-Martial states that "misbehavior before the enemy",

"* * * is a general term, and as here used it renders culpable under the article any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the history of our arms. Running away is but a particular form of misbehavior specifically made punishable by this article" (M.C.M., 1928, par. 141a).

Winthrop states that misbehavior before the enemy may consist in,

> "* * * Such acts by any officer or soldier, as - refusing or failing to advance with the command when ordered forward to meet the enemy; going to the rear or leaving the command when engaged with the enemy, or expecting to be engaged, or when under fire; hiding or seeking shelter when properly required to be exposed to fire; feigning sickness, or wounds, or making himself drunk, in order to evade taking part in a present or impending engagement or other active service against the enemy; refusing to do duty or to perform some particular service when before the enemy" (Winthrop's Military Law and Precedents, 2nd Ed., p. 623).

In explaining the above offenses, the Manual states further that,

> "Whether a person is 'before the enemy' is not a question of definite distance, but is one of tactical relation. For example, where accused was in the rear echelon of his battery about 12 or 14 kilometers from the front, the forward echelon of the battery being at the time engaged with the enemy, he was guilty of misbehavior before the enemy by leaving his organization without authority although his echelon was not under fire" (M.C.M., 1928, par. 141a).

The evidence clearly shows that on 23 February 1944 the forward echelon of Headquarters Company, 141st Infantry, was engaged with the enemy and that the rear echelon was within the sound of the firing in the forward area. In the light, therefore, of the above definition of the words "before the enemy", it clearly appears that the rear echelon of Headquarters Company was before the enemy on 23 February 1944 within the contemplation of Article of War 75.

The misbehavior of the accused is equally clearly established. When he received a direct command to accompany his superior officer to the front, the accused not only deliberately refused to obey the order but defied the authority of Lieutenant Bryan by drawing a pistol and shooting at him. Although the evidence indicates that this misbehavior may have been the result of a real or an imaginary grievance which the accused had suffered at the hands of Lieutenant Bryan, the evidence shows that the act was unprovoked, deliberate and willful. Every element of

the offense alleged is established beyond a reasonable doubt by the evidence which clearly sustains the findings of guilty of the Specification, Charge II, and Charge II.

8. The Specification, Charge III, alleges that the accused committed an assault upon Lieutenant Bryan with intent to do bodily harm by shooting at him with a dangerous weapon, to wit. a .45 calibre automatic pistol.

The Manual for Courts-Martial defines an assault as

> "* * * an attempt or offer with unlawful force or violence to do a corporal hurt to another. (Clark and Marshall). Raising a stick over another's head as if to strike him, presenting a firearm ready for use within range of another, striking at another with a cane or fist, assuming a threatening attitude and hurrying toward another, are examples of assault." (M.C.M., 1928, par. 149l).

In order to establish the offense of an assault with intent to do bodily harm with a dangerous weapon, the Manual for Courts-Martial states that proof must be presented as follows:

> "(a) That the accused assaulted a certain person with a certain weapon, instrument, or thing; and (b) the facts and circumstances of the case indicating that such weapon, instrument, or thing was used in a manner likely to produce death or great bodily harm" (M.C.M., 1928, par. 149m).

In the present case the evidence shows that the accused drew an automatic pistol in anger and deliberately and willfully fired it in such a manner that the bullet therefrom struck the ground about 18 inches from Lieutenant Bryan's feet. From these facts the court was justified in drawing the inference that the accused shot at Lieutenant Bryan and that his angry and hostile act, which was obviously "likely to produce * * * great bodily harm", was done with the specific intent of accomplishing such likely and probable consequence. The evidence is, therefore, legally sufficient to support beyond a reasonable doubt the findings of guilty of the Specification, Charge III, and Charge III.

9. Although the psychiatric report which was placed in evidence stated that the accused has the mental development of a person only nine years of age, it clearly stated that the accused was not suffering from any defect which would have prevented him from knowing the consequences of his act and of refraining therefrom. The report further stated that the accused is legally sane. The record raised no issue as to the sanity of the accused.

10. The charge sheet shows that the accused is 22 years of age, and that he was inducted into the service on 12 February 1942 for the duration of the war plus six months.

11. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. A sentence of death, or such other punishment as a court-martial may direct, is authorized upon a conviction of misbehavior before the enemy, in violation of Article of War 75.

Abner E. Lipscomb, Judge Advocate.

Walter Shepherd, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

1st Ind.

War Department, J.A.G.O., - 4 July 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private Leon Warman (35266280), Headquarters Company, 1st Battalion, 141st Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. The record establishes beyond a reasonable doubt that on 23 February 1944 the accused shamefully misbehaved himself before the enemy near * * * , by refusing to accompany his superior officer to the front, in violation of Article of War 75; and that he defied the order of his superior officer by drawing a pistol against him and assaulting him with intent to do bodily harm, in violation of Articles of War 64 and 93, respectively.

The record shows that on 23 February 1944 the forward echelon of Headquarters Company, First Battalion, 141st Infantry, was engaged with the enemy near * * *, while the rear echelon of that organization, to which the accused was assigned, was about two miles south of * * * and within sound of the firing in the forward area. On that date First Lieutenant John H. Bryan, Jr., returned to the rear echelon and ordered the accused to accompany him to the front. The accused, who had just previously been relieved of his assignment as a driver by Lieutenant Bryan, deliberately refused to accompany Lieutenant Bryan, and drawing a pistol fired it so that the bullet struck the ground about eighteen inches from Lieutenant Bryan's feet. Although the evidence indicates that the accused's misbehavior may have been the result of a real or imaginary grievance which he had suffered at the hands of Lieutenant Bryan, the evidence shows clearly that his acts were unprovoked, deliberate, and willful.

3. The accused is 22 years of age and has been in the military service for approximately two years and four months.

4. The Commanding General, * * * Theatre of Operations, in forwarding this case for the action of the President states that he is cognizant of his authority under Article of War 50 to commute the sentence to one which he has authority to direct to be executed, but that he has "elected not to commute it". The implication is clear from this

action that the Commanding General desires the sentence of death confirmed and ordered executed.

5. Although the offenses in question are very grave, they are not of the character which would warrant the imposition of the death penalty unless the necessity of maintaining military discipline requires it. The Commanding General, * * * Theatre of Operations, in transmitting the record for the action of the President, does not assert that such a necessity exists either in the 36th Infantry Division or in the * * * Theatre of Operations. Although the occasion may arise when military necessity and the demands for military discipline may require the imposition of the death penalty for offenses such as are here presented, there is no affirmative showing that such necessity exists at the present time. As I have stated on a previous occasion, I am convinced that the courage and fighting spirit of the American soldier does not depend upon fear of the imposition of the death penalty. In view of this conviction, and because the psychiatric report in the record indicates that the accused's mental development is that of a person only nine years of age, I recommend that the sentence be confirmed, but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life and that the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, be designated as the place of confinement.

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

Myron C. Cramer

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

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for life. G.C.M.O. 443, 18 Aug 1944)

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

SPJGN
CM 257271

16 JUN 1944

U N I T E D S T A T E S	)	SAN FRANCISCO PORT OF EMBARKATION ARMY SERVICE FORCES
v.	)	
Captain ROBERT M. ALLEN (0-476 644), Transportation Corps, Station Complement.	)	Trial by G.C.M., convened at Camp Stoneman, California, 11 May 1944. Dismissal and confinement for five (5) years.

- - - - - - - - - - - - - - - - -

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD 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 94th Article of War.

Specification 1: In that Captain Robert M. Allen, being at the the time Sales Officer, Headquarters, Camp Stoneman, California, did, at Camp Stoneman, California, between 1 December 1943 and 31 December 1943, feloniously embezzle by fraudulently converting to his own use money derived from the sale of subsistence items in the sum of Two Thousand Three Hundred Eight Dollars and Sixty-Two Cents ($2308.62), the property of the United States, furnished and intended for the military service thereof, entrusted to him by virtue of his office.

Specification 2: Similar to Specification 1 but alleging embezzlement of One Thousand Six Hundred Thirty Three Dollars and Eighty-Nine Cents ($1633.89), derived from the sale of subsistence items, at same place between 1 January 1944 and 31 January 1944.

Specification 3: Similar to Specification 1 but alleging embezzlement of Nine Hundred Seventy Dollars and Fourteen Cents ($970.14), derived from the sale of subsistence items, at the same place between 1 February 1944 and 29 February 1944.

Specification 4: Similar to Specification 1 but alleging embezzlement of Seven Hundred One Dollars and Eighty-Five Cents ($701.85), derived from the sale of subsistence items, at the same place between 1 March 1944 and 31 March 1944.

Specification 5: Similar to Specification 1 but alleging embezzlement of Eleven Thousand and Eight Dollars and Twenty Cents ($11,008.20), derived from the sale of clothing and equipage, at same place between 1 March 1944 and 31 March 1944.

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

Specification: In that Captain Robert M. Allen, Headquarters, Camp Stoneman, California, did, without proper leave, absent himself from his station at Camp Stoneman, California, from about 24 March 1944 to about 27 March 1944.

The accused pleaded guilty to, and was found guilty of, all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for ten years. The reviewing authority approved only so much of the sentence as imposed dismissal from the service, total forfeitures of all pay and allowances due or to become due, and confinement at hard labor for five years; designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement; and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 6 December 1942 the accused, who was then a first lieutenant, was designated Sales Officer of the Sales Commissary at Camp Stoneman, Pittsburg, California. He held that position until 25 March 1944. Special Order Number 85, issued on that day, relieved him from duty as Sales Officer and appointed a Board of Officers "to inventory the accounts" of the Sales Commissary (R. 7-8; Pros. Exs. 6, 7).

During his tenure large sums representing the proceeds of subsistence items passed through his hands. Under existing regulations they were required to be recorded in W.D., Q.M.C. Forms 388 and 389. The first evidenced the money turned over by the Sergeant in charge of cash registers to the accused at the conclusion of each day's business. The other reflected the amounts deposited with the Finance Officer by the accused in pursuance to sub-paragraph 12a of Army Regulation, AR 35-3660, 20 August 1942, which stated that:

"Sales officers will deposit funds with a disbursing officer as follows:

(1) On the 10th, 20th, and last day of each month.
(2) Whenever the cash on hand exceeds $200.
(3) At any other time desired by the sales officer or directed by the commanding officer. The deposit of checks will not be unduly delayed."

This provision was amended by Change 7, 8 July 1943, to read that:

"Sales officers will deposit funds with a disbursing officer as follows:

(1) Daily, whenever the cash on hand at the end of the day (excluding the amount advanced by a disbursing officer for making change (par. 8, AR 35-120)), exceeds $200.

(2) On the last business day of each month, the total cash on hand, excluding any amount advanced for making change."

Both instruments were executed by the accused as Sales Officer but for different purposes. His signature on Form 388 acknowledged the receipt of monies from the sergeant in charge of the commissary cash registers, and on Form 389 it certified the amounts paid over to the Finance Officer (R. 8-16, 24-25; Pros. Exs. 1-1 to 1-25, 1-26 to 1-50, 2-1 to 2-24, 2-25 to 2-46, 3-1 to 3-24, 3-25 to 3-42, 4-1 to 4-22, 4-23 to 4-34H; 8).

Between 1 December 1943 and 31 March 1944 the accused executed some ninety-five Forms 388 for the following sums:

1 December - 31 December 1943	$9610.48
1 January - 31 January 1944	6934.92
1 February - 29 February 1944	5583.57
1 March - 31 March 1944	4544.31

During the same period he signed numerous Forms 389 which showed payment of the following amounts by him to the Finance Officer:

1 December - 31 December 1943	$7301.86
1 January - 31 January 1944	5301.03
1 February - 29 February 1944	4613.43
1 March - 31 March 1944	3842.46

His shortages were accordingly as follows:

1 December - 31 December 1943	$2308.62
1 January - 31 January 1944	1633.89
1 February - 29 February 1944	970.14
1 March - 31 March 1944	701.85

(R. 18-20, 25-31; Pros. Exs. 1-51, 2-47, 3-43, 4-35).

These monies, as has been indicated above, were derived from the sale of subsistence items. The proceeds of clothing and equipage were handled in a slightly different manner. They were paid to the accused not by the sergeant in charge of the commissary's cash register, but by the Quartermaster Property Officer. Receipt was acknowledged by the accused not on Forms 388 but on shipping tickets known as W.D., AGO Forms No. 450-

5-C. The ultimate disposition of such funds was the same as in the case of subsistence items. They were turned over to the Finance Officer and their payment recorded on a Form 389. This procedure was followed by the accused between 1 March and 27 March 1944. During that period he signed three Forms 450-50-C evidencing the receipt by him of a total of $14,717.00. A form 389 dated 13 March 1944 showed that he turned in $632.06 of this sum to the Finance Department. The Board of Officers who closed his accounts credited him with another $3076.74 making a total of $3708.80. The resulting deficiency aggregated $11,008.20 (R. 16-18, 19-20, 31-32; Pros. Exs. 5-1, 5-2, 5-3, 5-4).

The Investigating Officer testified that the accused in explaining the shortages stated that:

> "* * * he had been gambling at various places in Antioch, Pittsburg, and Port Chicago and had taken cash which had been turned in to me /sic/ by either the Sergeant of the Sales Store or by the Quartermaster Property Officer with the intention of replacing it the next day. However, he invariably lost and would take more to try to get it all back and kept building up until the amounts reached larger figures. Also at times in the gambling places his checks were accepted for large sums of money which he was supposed to pick up. They were left without the intention of putting them through his account and he had taken money to cover these checks. I then asked him if all of this shortage was accounted for in that manner. He stated that he believed that he could truthfully say that every bit of it was lost in gambling."

To "get away from himself", the accused took to drink. The "more he lost the more he drank", and he lapsed into a "nervous state" (R. 34-35).

On 24 March 1944 he departed from Camp Stoneman without leave and remained absent without leave until 27 March 1944. During that time he visited Antioch, Stockton, and Sacramento, California, and Reno, Nevada. He purchased and changed into civilian clothes at Sacramento "for the purpose of purchasing liquor during the day-time". He was still wearing them when apprehended by military police in Reno (R. 32-33, 35; Pros. Ex. 9).

4. The accused, after he had been apprised of his rights relative to testifying or remaining silent, took the stand in his own defense. No other witnesses were presented on his behalf. In reply to a question as to whether he had any of the missing "money left", he replied, "No, I don't". The rest of his testimony related to his absence without leave. When he awoke on 24 March 1944 after several nights of "considerable drinking", he "wasn't any too good shape to go to the office". He "was short" in his account, and "didn't know where to turn". His subsequent course of action was narrated by him as follows:

"I started driving, I drove to Oakley and to Stockton. I did considerable drinking all along the way. I went to Sacramento and I stayed there the balance of the day, that night and the next day. I was there the next day when I got up in the morning I wanted something to drink. I bought a pair of sports slacks and shirt so that I could go into the bars and get something to drink. I stayed there — I am rather hazy whether I drove out that day or whether I was there that day also but I know it was Sunday that I drove up to Reno. I never went to bed in Reno, I just stayed down around the main district of the town, gambling and drinking until the man, I found out later was a policeman, asked me if I had a Studebaker Sedan outside, and I told him I did."

He made no attempt to change the appearance of his car upon which a "Camp Stoneman officer's sticker" was affixed. It was never his intention to remain away permanently from the military service. In his own words, "When I started out from home I didn't know where I was going. In Sacramento I had some money left with me, not knowing what to do, I thought maybe I could have some luck in Reno, other people go to Reno, and maybe I could pay this back" (R. 39-40).

5. Specification 1 of Charge I alleges that the accused did, "between 1 December 1943 and 31 December 1943, feloniously embezzle by fraudulently converting to his own use money derived from the sale of subsistence items in the sum of * * * ($2308.62), the property of the United States, furnished and intended for the military service thereof, entrusted to him by virtue of his office". Specifications 2, 3, and 4 allege that the accused between 1 January and 31 January 1944, between 1 February and 29 February 1944, and again between 1 March and 31 March 1944 committed the same offense, in like manner, involving the respective sums of $1633.89, $970.14 and $701.85 . Specification 5 alleges that the accused did "between 1 March and 31 March 1944, feloniously embezzle by fraudulently converting to his own use money derived from the sale of clothing and equipage in the sum of * * * ($11,008.20), the property of the United States, furnished and intended for the military service thereof, entrusted to him by virtue of his office". These acts were set forth as violations of Article of War 94.

Embezzlement is defined in paragraph 149h of the Manual for Courts-Martial, 1928, as "the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come". The evidence adduced by the prosecution demonstrates beyond a reasonable doubt that the accused, as Sales Officer, received substantial sums derived from the sale of subsistence items and clothing and equipage and turned over only a portion of them to the Finance Department, converting and applying the difference to the satisfaction of his gambling losses and obligations. His own testimony on the stand confirms his misappropriations and his plea of guilty admits all of the allegations contained in the five Specifications under Charge I. His use of funds of the United States for his own private purposes and follies clearly constitutes the offense of embezzlement.

6. The Specification of Charge II alleges that the accused "did without proper leave, absent himself from his station at Camp Stoneman, California, from about 24 March 1944 to about 27 March 1944". This was stated as a contravention of Article of War 61.

The accused has pleaded guilty both to the Specification and the Charge. The record establishes that, without authority from anyone competent to give him leave, he drove away from Camp Stoneman in his automobile and spent the next three days gambling and drinking in several towns in California and Nevada, that he changed into civilian clothes, and that he returned to his station only after being apprehended by the military police. These circumstances clearly spell absence without proper leave within the meaning of paragraph 132 of the Manual for Courts-Martial, 1928.

7. The accused is about 32 years old. The records of the War Department show that he had enlisted service from 13 September 1935 to 14 May 1942; that he was appointed a warrant officer (junior grade) on 15 May 1942; that on 12 June 1942 he was discharged as warrant officer (junior grade); that effective 13 June 1942 he was appointed a first lieutenant; that he was promoted to captain on 30 March 1943; and that he has been on active duty as an officer since 13 June 1942.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61 or Article of War 94.

Abner E. Lipscomb, Judge Advocate.

Walton Shepherd, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

SPJGN
CM 257271

1st Ind.

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

27 JUN 1944

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Robert M. Allen (0-476644), Transportation Corps, Station Complement.

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 that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

Myron C. Cramer

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

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

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 424, 4 Aug 1944)

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

SPJGQ
CM 257369

26 JUN 1944

UNITED STATES	SECOND AIR FORCE
v.	Trial by G.C.M., convened at 224th Army Air Force Base Unit, Sioux City, Iowa, 30 May 1944. Dismissal.
Second Lieutenant ROBERT C. SAYLES(0-745190), Air Corps.	

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL 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 96th Article of War.

Specification: In that Second Lieutenant Robert C. Sayles, 224th Army Air Forces Base Unit (CCTS (H)), Training Section 4, did, at Army Air Base, Sioux City, Iowa, on or about 3 May 1944, in his testimony before a general court-martial at his own trial make under oath a statement in substance as follows: that he had signed the Officers' Sign-in Register at Base Headquarters, Army Air Base, Sioux City, Iowa, which statement he did not then believe to be true.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction for absence without leave in violation of Article of War 61, together with the sentence thereon of forfeiture of sixty five dollars ($65) of his pay per month for three months and to be restricted to the limits of his post for fourteen days, 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, shows that on 3 May 1944 the accused was tried by a general court-martial upon a charge of absence without leave from 8 April 1944 to 11 April

1944. In that trial he pleaded not guilty, elected to become a witness in his own behalf and testified under oath. He was found guilty. By stipulation a true copy of the record of this former trial was introduced and received in evidence in the instant case (R. 7; Pros. Ex. 1).

In his sworn testimony at the former trial he stated that on 7 April 1944, he arrived at the base at approximately 0500 and went into both the Base Headquarters and the Combat Crew Headquarters. In the former he checked the special orders of the day and, following the custom, signed in on the register. With regard to the latter incident the following testimony was elicited:

On direct examination:

"Q. You are certain you signed in at Base Headquarters?
A. Yes, sir".

On cross-examination:

"Q. When you went into Base Headquarters the morning of the 7th what book did you sign?
A. The big Sign-In Book that is on the stand right by the front door. It is on the left hand side as you are walking in."

* * * * *

"Q. When did you sign in?
A. Five O'clock the morning of the 7th."

* * * * *

"Q. Did you ever check later to see if you name was on that book?
A. Yes sir, six or seven times.
Q. Did you find it?
A. No, Sir, I did not." (Pros. Ex. 1; pp. 20-22)

Captain Harold W. Nieman, Base Personnel Officer, explained to the court the purpose of, and procedure involved in the use of, the officers' "Sign-in" book.

"In the corridor of Base Headquarters is placed a book known as the Officers' Register. It is the practice of long standing at military bases, and is governed by Army regulations and by Army Air Force regulations, that officers when reporting on the Base will officially sign this Register, which is the record that is retained to show the hour of arrival and date of arrival, and hour of departure and date of departure. From this record is taken the information for the morning reports, which is the permanent record kept of all activities concerning military personnel. The morning report is the record that is retained permanently of all the men - the movement of men - from duty to various status of absenteeism,

and when reporting from furlough, from leave, from sick in the hospital back to duty - any movement of men must be reported, and when men depart from this station on temporary duty or on leave, then the morning report will carry that entry, and the Officers' Section will record the fact that the officer departed on that date. If he is leaving on leave or for temporary duty, the special order will indicate the length of that duty - the length of that leave, and we will know when to expect the officer back to duty, which will be at the expiration of his leave or his temporary duty" (R. 15, 16).

Sergeant Roger L. Ellington, serving at Base Headquarters, had the duty of making out the morning reports of the base and on the morning of 7 April 1944 he was preparing morning reports of the officers of Section A (R. 9). These morning reports were compiled from examination of the special orders of the day, the "sign-in" register and promotion lists (R. 13). The "sign-in" register was located to the left of the hall way at the entrance to Base Headquarters and was invariably to be found there. It consisted of a loose leaf record from which, at 0800 daily the signed sheet or sheets were removed and filed in a permanent record book kept in the Personnel Office. Sergeant Ellington had custody of the permanent book during the month of April 1944 and testified that none of the pages had been lost (R. 10). Captain Nieman also testified that in his experience as Personnel Officer he had never known a page of the "Sign-out" book to have been missing or lost (R. 16). Sergeant Ellington identified the pages for 5, 6, 7 and 8 April 1944 as those which were taken from the "sign-in" register on the respective dates and placed in the permanent book. The name of the accused was on none of these pages and there was no other book located or kept in the vicinity of the "sign-in" book which could have been inadvertently signed by the accused (R. 9-11).

The pages of the "sign-in" book were not numbered and there was, therefore, no way of following the continuity of names signed on the register, if there was more than one page per day, except by the hours of signing in or out (R. 11, 12). There are 37 spaces for signatures and data on each page and none of ten pages introduced in evidence (Pros. Ex. 2, 3, 4, 5) contained more than 19 signatures. On the page for 5 April the first entry was a "sign out" at 0830 and the last entry a "sign in" at 1930; on 6 April the first entry is a "sign in" at 10:30 a.m. and the last a "sign-in" at 2100; on 7 April the first entry is a "sign-out" at 0900 and the last a "sign-out" at 1715; and, on 8 April the first entry is a "sign-out" at 1000 and the last a "sign-out" at 0630.

4. At the conclusion of the prosecution's case defense counsel moved "that a verdict of 'not guilty' be entered forthwith, stating as his reason that "we do not believe Prosecution has presented sufficient evidence to prove to this court that the accused is guilty of the Charge as alleged". Following argument by counsel the law member ruled as follows:

"Subject to objection by any member of the Court, the motion for a finding of 'not guilty' will not be sustained". The record does not show any objection (R. 24).

5. The accused, having been informed of his rights, elected to remain silent (R. 24). No oral evidence was offered by the defense but the testimony of two civilian girl companions of the accused, given at the prior trial, was read to the court by defense counsel (Pros. Ex. 1; pp. 14-16). Both these witnesses had testified that in the early morning of April 1943 they had accompanied the accused from Omaha, Nebraska to the base where they arrived at about 0500. They waited outside of the gates while the accused, who said he was going to sign in, went into Base Headquarters. He returned in about 20 minutes and rejoined them at the gate.

6. It is unnecessary to consider whether the evidence alleged to have been falsely given by the accused at the former trial was material to the issue then being tried inasmuch as he is not charged with perjury under Article of War 93 but with false swearing as a violation of Article of War 96. Depending on the circumstances and place of commission the acts of the accused may be punishable as a violation of the third clause of Article of War 96, or as conduct to the prejudice of good order and military discipline under the first clause, or as conduct of a discreditable nature under the second clause. It may consist, for example, in giving false testimony in a judicial proceeding or course of justice on other than material matters (Par. 152 (c), MCM 1928).

The elements of the offense herein charged and the proof required to support the Charge are:

> "(a) That accused was sworn in a proceeding or made an oath to an affidavit; (b) that such oath was administered by a person having authority to do so; (c) that the testimony given or the matter in the affidavit was false, as alleged; and (d) the facts and circumstances indicating that such false testimony or affidavit was willfully and corruptly given or made". (MCM 1928, p. 191).

It is clearly evident that the accused was properly sworn by the trial judge advocate as a witness before a general court-martial, a judicial proceeding, in which he was being tried for the offense of absence without leave. The conclusion is compelling that accused's testimony given at that trial with reference to signing the officers' register at his base headquarters on the morning of 7 April 1944 was false. At this trial defense counsel introduced the testimony of two female companions of the accused which was given at the former trial. The import of this evidence was to corroborate the accused's statement that he was present at the base on the morning of 7 April 1944 at 5 o'clock.

It does accomplish that purpose, but nothing more. Their statements that accused said "he was going into the Base to sign in" are no more probative of the fact of his signing the register than his own self serving declaration to them. Neither of them saw what he did during the interval between the time when he left them at the gate and the moment he rejoined them twenty minutes later.

The register was in evidence and its pages speak for themselves. The accused's name nowhere appears on the book during the period 5-8 April 1944, inclusive. It is apparent that the accused not only failed to sign in on the register but, by his own testimony at the former trial, the accused failed likewise to report his return to the proper officer until 10 o'clock a.m. on 11 April 1944 although he was due back on a duty status at midnight on 7 April 1944. It is evident from the nature of the cross-examination by defense counsel that the accused hoped to develop a reasonable doubt of his guilt in the minds of the court by showing the probability of a page being missing from the register. However, both the Captain, who was Personnel Officer for the base, and the Sergeant responsible for preparation of the morning reports of the organization of which the accused was a member, testified that they customarily checked the officers' register and were obliged to use the information therein contained in the preparation of the reports; yet neither had ever known of a sheet or page of the register being lost in their experience. The notion that a page, presumably signed by the accused on 7 April 1944 at 0500 was lost or missing is refuted by the register itself. There are 37 lines for signatures and data on each page of the register. An examination of pages for 5, 6, 7 and 8 April shows that only 7, 19, 16 and 19 officers signed respectively, on those dates. It is hardly conceivable that there had been 37 officers signing either "in" or "out" on 7 April, thus necessitating the use of a second page for that day. The natural and justifiable inference is that the 16 officers whose names are shown on the page for 7 April are the only ones who signed the register on that day. It is also a clear inference that, prior to the use of a new page at 0800 on 8 April 1944, only one page and no more was used on 7 April. It was also shown that there was no other book which the accused could inadvertently or mistakenly have signed in lieu of the official register. It is apparent, then, that the sworn statement of the accused that he had, in fact, signed the register, was false.

That he knew it was deliberately false and willfully and corruptly made, is a clear and reasonable inference to be drawn from his own testimony. When asked whether he had ever checked the permanent register to find the signature he said he placed upon it on 7 April 1944 he admitted that he had done so "six or seven times" but never found it. This should have put any reasonable man upon notice that either he had not signed the register or that the page upon which he had signed was missing. Yet nothing appears in the record to show that, after the six or seven searches he ever inquired further with a view to correction of the record if it was in error or to establish

his actual status by any official record on 7 April 1944. With a knowledge of the actual facts as he had found them after repeated efforts to learn them he nevertheless persisted in his claim that he had signed the register. The inevitable consequence, in the light of the circumstances, is that he must be deemed to have done so willfully and with a corrupt motive. The record of trial is, therefore, deemed legally sufficient to support the findings.

The ruling of the law member upon the motion of defense counsel for a "verdict of not guilty" was proper. It was, of course, considered as a motion for finding of not guilty in which case, if there be any substantial evidence which, together with all reasonable inferences therefrom and all applicable presumptions, fairly tends to establish every essential element of the offense charged or included in the Specification to which the motion is directed, the motion should not be granted. When the motion was made there was ample evidence then before the court which, together with all reasonable inferences flowing therefrom, tended to establish the offense charged.

7. Seven members of the court joined in a recommendation for clemency on the grounds that the accused had creditably completed the phases of training at the Combat Crew Training Station, Army Air Base, Sioux City, Iowa; that his youth was responsible for his lack of judgment; and that the interests of justice have been served by the imposition of the sentence. It is urged that "he be allowed to go into combat inasmuch as it is felt that the offense committed has no relationship to his efficiency as a pilot".

8. Records of the War Department disclose that the accused was born in Portland, Oregon and is 22 years of age. He was graduated from high school and attended the University of Portland for 1½ years, specializing in chemistry. He enlisted in the Air Corps on 13 April 1942 and after having completed the prescribed course of instruction as aviation cadet at Army Air Force Advanced Flying School, Douglas, Arizona, was commissioned a second lieutenant, Air Reserve, on 20 May 1943. On 15 January 1944 he was officially reprimanded under Article of War 104 by the Director of the 393rd Combat Crew Training School, Sioux City, Iowa, for failing to comply with Air Force Regulations 60-16. On 9 May 1944, by GCMO No. 181, Headquarters Second Air Force, Colorado Springs, Colorado, a sentence to forfeit $65.00 of his pay per month for three months and to be restricted to the limits of his post for fourteen days, imposed on 3 May 1944, for absence without leave from about 8 April 1944 to 11 April 1944, was approved and ordered executed.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of

trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War 96.

William A. Rounds, Judge Advocate.

William H. Gambrell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 5 - JUL 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 C. Sayles (0-745190), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but commuted to a reprimand, forfeiture of $75.00 of his pay per month for six months, and restriction to the limits of his post for a period of three months, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to a recommendation for clemency submitted by the seven members who comprised the general court by which the accused was tried.

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

Myron C. Cramer

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

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

(Sentence confirmed but commuted to reprimand, forfeiture of $75. pay per month for six months and restriction to post for three months. G.C.M.O. 406, 27 Jul 1944)

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

SPJGV
CM 257417

29 JUN 1944

UNITED STATES v. Second Lieutenant ALMON J. SIMS, JR. (0-678481), Air Corps.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Smyrna, Tennessee, 23 May 1944. Dismissal, total forfeitures and confinement for two (2) years.

- - - - - - - - - - - -

OPINION of the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, 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. Upon a rehearing the accused was tried upon the following Charges and Specifications:

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

Specification 1: In that Second Lieutenant Almon J. Sims, Jr., Headquarters and Headquarters Squadron 45th Pilot Transition Training Group (4 Engine), Smyrna Army Air Field, Smyrna, Tennessee, did, at Nashville, Tennessee, on or about 14 February 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Hermitage Hotel, Nashville, Tennessee, a certain check in words and figures as follows, to wit:

San Antonio, Texas, Feb. 14 1944 No._____
NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO
Pay to the order of Cash $25.00
Twenty five and no/100 DOLLARS

SAAF Smyrna, Tenn. (Signed) A. J. Sims, Jr.
Box 31 HQ 2nd Lt A.C.
0-678481

and by means thereof did fraudulently obtain from the said Hermitage Hotel, Nashville, Tennessee, twenty five dollars

($25.00), lawful money of the United States, in payment of said check, he, the said Second Lieutenant Almon J. Sims, Jr., 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 for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check drawn on same bank, 16 February 1944, payable to order of Cash and made and uttered to same hotel, at same place, and fraudulently obtaining thereby $50.00.

Specification 3: Same form as Specification 1, but alleging check drawn on same bank, 16 February 1944, payable to order of Cash and made and uttered to same hotel, at same place, and fraudulently obtaining thereby $40.00.

Specification 4: Same form as Specification 1, but alleging check drawn on same bank, 17 February 1944, payable to order of Cash and made and uttered to same hotel, at same place, and fraudulently obtaining thereby $50.00.

Specification 5: Same form as Specification 1, but alleging check drawn on same bank, 18 February 1944, payable to order of Cash and made and uttered to same hotel, at same place, and fraudulently obtaining thereby $30.00.

Specification 6: Same form as Specification 1, but alleging check drawn on same bank, 18 February 1944, payable to order of Cash and made and uttered to the Andrew Jackson Hotel, at same place, and fraudulently obtaining thereby $25.00.

Specification 7: Same form as Specification 1, but alleging check drawn on same bank, 26 February 1944, payable to order of Andrew Jackson Hotel and made and uttered to the Andrew Jackson Hotel, at same place, and fraudulently obtaining thereby $25.00.

Specification 8: Same form as Specification 1, but alleging check drawn on same bank, 15 February 1944, payable to order of Cash and made and uttered to the Hippodrome Motor Company, at same place, and fraudulently obtaining thereby $50.00

Specification 9: Same form as Specification 1, but alleging check drawn on Third National Bank, 29 February 1944, payable to order of Cash and made and uttered to the Smyrna Auto Company, at Smyrna, Tennessee, and fraudulently obtaining thereby $50.00.

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

Specification 1: In that Second Lieutenant Almon J. Sims, Jr., Headquarters and Headquarters Squadron 45th Pilot Transition Training Group (4 Engine), Smyrna Army Air Field, Smyrna, Tennessee, having been duly placed in arrest in quarters at Smyrna Army Air Field, Smyrna, Tennessee, on or about 3 March 1944, did, at Smyrna Army Air Field, Smyrna, Tennessee, on or about 4 March 1944, break his said arrest before he was set at liberty by proper authority.

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

Specification 1: In that Second Lieutenant Almon J. Sims, Jr., Headquarters and Headquarters Squadron 45th Pilot Transition Training Group (4 Engine), Smyrna Army Air Field, Smyrna, Tennessee, did, without proper leave, absent himself from his station at Smyrna Army Air Field, Smyrna, Tennessee, from about 4 March 1944, to about 5 March 1944.

He pleaded not guilty to Charge II and its Specifications, guilty to Charge III and IV and each Specification thereunder. 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 two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. In support of Specifications 1 to 5, inclusive, of Charge II it was stipulated by the prosecution, counsel for the defense and the accused that if William H. Caldwell were present he would testify that he was assistant manager of the Hermitage Hotel, Nashville, Tennessee and that, in such capacity, he approved the five checks described in Specifications 1 to 5, inclusive, of Charge II and that each of these checks, bearing the name of accused as maker, was cashed for the accused by the Hermitage Hotel, a total of $195 in cash being paid to him thereon. These checks may be summarized as follows:

Date	Amount	Payee	Drawee Bank
14 Feb 1944	$25	Cash	National Bank of Fort Sam Houston, San Antonio, Texas.
16 Feb 1944	$50	Cash	National Bank of Fort Sam Houston, San Antonio, Texas.
16 Feb 1944	$40	Cash	National Bank of Fort Sam Houston, San Antonio, Texas.
17 Feb 1944	$50	Cash	National Bank of Fort Sam Houston, San Antonio, Texas.
18 Feb 1944	$30	Cash	National Bank of Fort Sam Houston, San Antonio, Texas.

The checks were twice put through banking channels for collection and were returned unpaid on both occasions. Sometime subsequent to the first hearing of this case, the hotel was reimbursed the cash it had paid accused on these checks (R. 6-1; Pros. Ex. A). It was likewise stipulated that if W. L. Bailey were present he would testify that he was, and had been for some time prior to 27 November 1943, assistant cashier of the National Bank of Fort Sam Houston and that the bank statement appended to this stipulation was a correct statement of the condition of accused's account with this bank for the periods of time stated thereon (R. 6-3; Pros. Ex. F). The bank statement shows that accused's balance on 7 February 1944 was $7 and it never rose above that level until 8 March 1944 when a deposit brought the balance to $46.

In support of Specifications 6 and 7 of Charge II it was stipulated by the prosecution, counsel for the defense and the accused that if Zeb Brevard were present he would testify that he has been assistant manager and credit manager of the Andrew Jackson Hotel in Nashville, Tennessee, since sometime prior to 14 February 1944 and that, in such capacity, he approved the two checks described in Specifications 6 and 7 of Charge II and that each of these checks, bearing accused's name as maker, was cashed for the accused by the Andrew Jackson Hotel, a total of $50 in cash being paid to him thereon. These checks may be summarized as follows:

Date	Amount	Payee	Drawee Bank
18 Feb 1944	$25	Cash	National Bank of Fort Sam Houston, San Antonio, Texas.
26 Feb 1944	$25	Andrew Jackson Hotel	National Bank of Fort Sam Houston, San Antonio, Texas.

The checks were twice put through banking channels for collection and were returned unpaid on both occasions. Sometime subsequent to the first hearing of this case, the hotel was reimbursed the cash it had paid accused on these checks (R. 6-2; Pros. Ex. B). As stated above the accused's bank balance at the drawee bank was $7 on 7 February 1944 and did not rise above that level until 8 March 1944.

In support of Specification 8 of Charge II it was stipulated by the prosecution, counsel for the defense and the accused that if R. C. Spinks were present he would testify that he has been secretary and treasurer of the Hippodrome Motor Company of Nashville, Tennessee, since sometime prior to 15 February 1944 and that on or about that date acting on behalf of the company he cashed for the accused the check described in Specification 8 of Charge II which bore the accused's name as maker, giving the accused $50 in cash thereon. The check was dated 15 February 1944, was payable to cash in the amount of $50 and was drawn on the National Bank of Fort Sam Houston, San Antonio, Texas.

This check was twice put through banking channels for collection and was returned unpaid on both occasions. Sometime subsequent to the first hearing of this case, the company was reimbursed the cash it had paid accused on this check (R. 6-2; Pros. Ex. C). It was similarly stipulated that if Miss Rose Bianco were present she would testify that she has been cashier of the Hippodrome Motor Company since sometime prior to 15 February 1944 and that she observed accused make out this check and saw him receive $50 thereon from the company (R. 6-3; Pros. Ex. D). As stated above, the accused's bank balance at the drawee bank was $7 on 7 February 1944 and did not rise above that level until 8 March 1944.

In support of Specification 9 of Charge II, it was stipulated by the prosecution, counsel for the defense and the accused that if Sandeis E. Hibbett were present he would testify that he has been the owner of Smyrna Auto Garage, Smyrna, Tennessee, since sometime prior to 29 February 1944, and that on or about that date he, as such owner, cashed for accused the check described in Specification 9 of Charge II which accused wrote in his presence and gave accused $50 in cash thereon. The check was dated 29 February 1944, was payable to cash in the amount of $50 and was drawn on the Third National Bank, Nashville, Tennessee. This check was put through banking channels for collection and was returned unpaid. Sometime subsequent to the first hearing of this case, Hibbett was reimbursed the cash he had paid accused on this check (R. 6-3; Pros. Ex. E). W. L. Killebrew testified by deposition that he was assistant cashier of the Third National Bank; that the foregoing check was presented to his bank for payment on 3 March 1944 and was not paid because of insufficient funds; that on 22 February 1944 accused's account with this bank had a balance of $5.50 which was further reduced thereafter by seven service charges of 50 cents each and was finally closed on 8 April 1944 when the balance was but $2 (R. 6-4; Pros. Ex. G).

In view of the accused's pleas of guilty to Charges III and IV, after the effect of such pleas had been fully explained to him, the prosecution offered no evidence thereon.

4. After accused's rights had been fully explained to him, he elected to take the stand and testify under oath in his own behalf. He testified that he was 26 years old, was married and had two children, and that he had about five years and nine months of prior military service of which something less than two years was in the National Guard where he held a corporal's rating and two years of which were spent in the Marine Corps. He entered the Air Corps in July 1942. His father is editor of the Extension Course, University of Tennessee.

Accused admitted he cashed the checks described in Specifications 1 to 9, inclusive, of Charge II offering the following in explanation of his conduct. In the early part of February he had frequented a gambling house in Nashville and lost some $200. At the time he was also some $800 or $900 in debt (R. 6-8). About 23 February 1944,

he applied for a bank loan of $1200 and was informed that if he could obtain his father as a cosigner on the note the loan would be made (R. 6-8, 6-9). He had previously been refused a loan by another bank sometime between 18 and 20 February 1944 (R. 6-9). Accused phoned his father about the necessity of his signature as cosigner on the later loan, but his father was unable to attend to the matter because of the pressure of business engagements (R. 6-14). Believing he would obtain this loan, however, accused cashed checks at the Andrew Jackson Hotel, where he was known and where he had previously cashed numerous checks. He used a portion of the funds obtained from these checks to pay a hotel bill and the rest he gambled away in an effort to recoup his previous gaming losses. If he had won he intended to use his winnings to cover his checks and reduce his other indebtedness. On 3 March 1944 accused was informed that the bank refused to make the loans for which he had applied (R. 6-9).

After further efforts to borrow money he finally obtained a loan of $350 from his former employer, Fred Colby, and used this money to reimburse those who had cashed the checks described in the Specifications of Charge II. The balance of the loan was used to pay another check which accused had cashed and which had been dishonored (R. 6-11). Accused denied he ever intended that the checks should not be paid or that there should be insufficient funds on deposit to pay them. However, he admitted that he knew he did not have sufficient funds in the two banks to pay the nine checks described in the Specifications of Charge II at the time he cashed them (R. 6-12).

Accused testified he had allotted $100 of his monthly pay to the First National Bank of Fort Sam Houston of which $50 was applied to reduce a loan of approximately $500 he had obtained in October 1943 to pay doctor and hospital bills incurred at the birth of his youngest child, and the balance of which was placed to his account.

Accused also "owed some money" on his automobile and found himself unable to meet the schedule of payments due on its purchase price. He sold the automobile and the proceeds were used to pay other debts he had incurred (R. 6-14).

Accused testified he was placed in arrest on Saturday, 4 March 1944. Later on the same day he breached his arrest by traveling to Nashville, Tennessee, to see the manager of the gambling house to determine if he could obtain a loan or a refund of some part of his losses to cover his checks. He was unsuccessful and, after spending the night at the Andrew Jackson Hotel, solicited an automobile ride to camp with some officers, parting company with them as the auto neared one of the station gates. Accused then "came through the fence" and returned to his barracks, hoping his absence had passed unobserved (R. 6-10).

It was stipulated by the prosecution, counsel for the defense and the accused that if W. F. Norris were present he would testify that he is vice president of the Commerce Union Bank of Nashville, Tennessee;

that sometime in February 1944 accused applied for a loan, at the time owing the bank a balance of $200 on a previous loan, and informed the bank he needed the money to discharge outstanding obligations; and that the loan was refused (R. 6-6; Ex. H). It was likewise stipulated that if H. E. Baughman were present he would testify that he was manager of the Hotel Hermitage, Nashville, Tennessee, and that he had known accused favorably for a long time and that, although he had cashed some checks which were not honored, he promptly repaid the money he had obtained thereon (R. 6-6; Ex. I).

5. The evidence offered by the prosecution in support of the nine Specifications under Charge II demonstrates that accused cashed the various checks described in these Specifications at a time when his respective bank accounts were woefully insufficient to pay them. There is no evidence that any person other than accused had authority to draw on these accounts. Under such circumstances he is chargeable with knowledge of the insufficiency of these accounts to respond to the checks he had issued. Indeed, accused admitted on the stand that he knew he did not have sufficient funds on deposit to pay them. From his own testimony, it is apparent he was knowingly floating worthless checks to obtain funds to finance a further try at the vagaries of the gambling wheel. Accused denied that he ever intended that the checks should not be paid, intending, or rather hoping, to obtain funds to cover them either from further gambling or from a loan. However, the intent denounced in these Specifications is not the intent <u>never</u> to cover such checks but the intent not to have sufficient funds to pay them when they were presented in the ordinary course of business to the drawee bank. From all the evidence it is clear that accused knew he did not have sufficient funds on deposit to pay these checks when presented in the ordinary course of business and the court was eminently justified in concluding that he did not, at the time they were made and uttered, intend to have funds on deposit to pay them when presented. The evidence sustains the findings of guilty of all Specifications of Charge II and Charge II.

The accused's pleas of guilty to Charge III and its Specification and Charge IV and its Specification, plus the accused's testimony given at the trial, sustain the findings of guilty of these Specifications and Charges.

6. Accused is 26 years of age. He served as private in the Tennessee National Guard from June 1935 to March 1936 and from 7 April 1936 to 20 December 1937 in the United States Marine Corps. From June 1940 to January 1941 he served as corporal in the Tennessee National Guard. Currently, he enlisted 27 January 1941, was appointed aviation cadet 8 July 1942 and was commissioned second lieutenant, Air Corps, 22 April 1943, at Midland, Texas, as a bombardier.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 violation of Article of War 61, 69 or 96.

Thomas H. Tapp, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trueblood, Judge Advocate.

SPJGV
CM 257417

1st Ind.

War Department, J.A.G.O., 9 AUG 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 Almon J. Sims, Jr. (0-678481), Air Corps.

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 531, 26 Sep 1944)

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

(121)

22 JUN 1944

SPJGH
CM 257419

UNITED STATES v. Second Lieutenant EDWIN J. SIECHEN (0-1316933), Infantry.	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 1 Trial by G.C.M., convened at Fort George G. Meade, Maryland, 2 June 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 Charge and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Second Lieutenant Edwin J. Siechen, Company C, 4th Replacement Battalion, 1st Replacement Regiment (Inf), Army Ground Forces Replacement Depot No. 1, did, without proper leave, absent himself from his organization at Fort George G. Meade, Maryland from about 0001, 27 April 1944 to about 2345, 28 April 1944.

Specification 2: In that Second Lieutenant Edwin J. Siechen, Company C, 4th Replacement Battalion, 1st Replacement Regiment (Inf), Army Ground Forces Replacement Depot No. 1, did, without proper leave, absent himself from his organization at Fort George G. Meade, Maryland from about 0630, 1 May 1944 until he was apprehended at Indianapolis, Indiana, on or about 0045, 16 May,1944.

He pleaded guilty to and was found guilty of the Charge and the Specifications thereunder. 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: An extract copy (Ex. 2) of Paragraph 5, Special Orders No. 94, Headquarters 106th Infantry Division, Camp Atterbury, Indiana, dated 20 April 1944, showed accused assigned to the Army Ground Forces, Replacement Depot No. 1, Fort George G. Meade, Maryland, and directed him to report to his new station during daylight hours on 26 April 1944. An extract copy (Ex. 1) of the Official Incoming Replacement Officers' Register of Army Ground Forces Replacement Depot No. 1 showed that accused

signed in at the depot at 11:45 p.m. on 28 April 1944. Extracts (Exs. 3 and 4) of the morning reports of Company C, 4th Battalion, 1st Replacement Regiment, to which accused was assigned, showed accused absent without leave, having failed to join his organization, from 12:01 a.m. 27 April 1944, from absent without leave to duty at 11:45 p.m. 28 April 1944, and from duty to absent without leave 1 May 1944. It was stipulated (Ex. 5) that accused was apprehended by the military police on 16 May 1944 at Indianapolis, Indiana (R. 6-11).

On 29 April 1944 the accused, after being advised of his rights, signed a certificate (Ex. 6) explaining his delay in arriving at Fort George G. Meade, stating that he was granted a three day leave effective 22 April 1944, but could not leave Camp Atterbury because of lack of funds, that he left on 24 April but failed to make train connections out of Indianapolis until "25 March 1944", and that a roundabout trip to his home in Syracuse, New York, caused his delay. His wife was "in a family way" and as he expected imminent overseas shipment he wanted to see her home safely, as well as see his "folks" before leaving the United States (R. 11-13).

After accused reported to his new organization he was processed on 29 April 1944 and given a week-end "VOCO" which terminated at 6:30 a.m. on 1 May 1944. The name of accused did not appear on the company "sign-in register" at the termination of his "VOCO" and an official check of the company made at 7:30 that morning showed accused absent. Subsequent official checks were made on the days following and accused did not appear. Between 1 May and 10 May 1944 Captain Arla F. Hilgedick, the commanding officer of accused, personally conducted an unsuccessful search of the area for him. According to Captain Hilgedick, the accused was not on "leave status" during the period between 1 May and 16 May 1944 (R. 9-10).

4. No evidence was offered by the defense. The accused elected to remain silent (R. 13).

5. It is shown by the evidence and admitted by the pleas of guilty that the accused without proper leave absented himself from his organization from about 27 April to 28 April 1944 as alleged in Specification 1, and without proper leave again absented himself from his organization from about 1 May to 16 May 1944 as alleged in Specification 2 of the Charge.

6. The accused is 22 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 15 October 1940; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty 9 April 1943.

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

of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st Article of War.

Samuel M Driver, Judge Advocate.

[illegible], Judge Advocate.

H Lotthoz, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 27 JUN 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 Edwin J. Siechen (0-1316933), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The accused was absent without leave from his organization for nearly two days on one occasion (Spec. 1) and on another for about 15 days (Spec. 2). After reporting nearly two days late at Army Ground Forces Replacement Depot No. 1, Fort George G. Meade, Maryland, accused left his organization on a week-end pass the next day, and, instead of returning at the expiration of the pass, went to Indianapolis, Indiana, where he was apprehended after an absence without leave of about 15 days. 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.

(Sentence confirmed. G.C.M.O. 417, 27 Jul 1944)

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

SPJGK
CM 257467

28 JUN 1944

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Barksdale Field, Louisiana, 12 and 22 May 1944. Dismissal, total forfeitures and confinement for two (2) years.
Second Lieutenant LLOYD E. BAIR (O-701854), Air Corps.	

OPINION of the BOARD OF REVIEW
LYON, ANDREWS, MOYSE and SONENFIELD, 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: (Finding of not guilty).

Specification 2: (Nolle Prosequi by direction of reviewing authority).

Specification 3: (Finding of not guilty).

Specification 4: In that Second Lieutenant Lloyd E. Bair, Barksdale Field, Replacement Depot, did at Barksdale Field, Louisiana, on or about 15 April 1944, feloniously take, steal and carry away one leather billfold value about two dollars ($2.00) and the sum of about fifteen dollars ($15.00) in lawful United States currency, the property of one Hershel C. West, Major, Air Corps, Army of the United States.

Specification 5: In that Second Lieutenant Lloyd E. Bair, * * * did at Barksdale Field, Louisiana, on or about 17 April 1944, feloniously take, steal and carry away one leather billfold, value about one dollar ($1.00) and the sum of about fourteen dollars ($14.00) in lawful United States currency, the property of one Hershel C. West, Major Air Corps, Army of the United States.

Specification 6: In that Second Lieutenant Lloyd E. Bair, Barksdale Field Replacement Depot, did at Barksdale Field, Louisiana, on or about 18 April 1944, feloniously take, steal and carry away one leather billfold value about six dollars ($6.00) and the sum of about two dollars ($2.00) in lawful United States currency, the property of one Daniel Kasle, Second Lieutenant, Quartermaster Corps, Army of the United States.

Specification 7: In that Second Lieutenant Lloyd E. Bair, Barksdale Field Replacement Depot, did at Barksdale Field, Louisiana, on or about 17 March 1944, feloniously take, steal and carry away one leather billfold, value about five dollars ($5.00) and the sum of about six dollars ($6.00) in lawful United States currency, the property of one Hubert W. Webb, Warrant Officer Junior Grade, Army of the United States.

The accused pleaded not guilty to Specifications 1, 2 and 3 and guilty to the Charge and Specifications 4 to 7 both inclusive. By direction of the reviewing authority a nolle prosequi was entered with respect to Specification 2. He was found not guilty of Specifications 1 and 3 and guilty of the Charge and Specifications 4,5, 6 and 7. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures, and to be confined at hard labor for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. It will be noted that the accused pleaded guilty to the Charge and the Specifications of which he was found guilty. In view of this fact the Board of Review deems it unnecessary to summarize the evidence. Suffice it to state that a careful review of the record of trial discloses that the accused's pleas of guilty and the findings of guilty are confirmed and supported by competent, compelling, and undisputed evidence, as well as by a properly admitted confession of the accused (R. 15; Ex. G). The thefts occurred at different times and were made from the clothing of officers left in the officers' dressing room, Hangar 9, Barksdale Field, Louisiana, while the officers were attending training classes. The confession of accused includes not only the specific larcenies in this case in the total amount of $37 but other larcenies of small sums under similar circumstances.

4. War Department records show that accused is 25 years old. He did not attend college. He served as an aviation cadet from 15 February 1943 to 5 December 1943, on which latter date he was appointed and commissioned a temporary second lieutenant, Air Corps, Army of the United States.

5. 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 and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93.

Irving G. Evans, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

Herman Moyol, Judge Advocate.

(On Leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., 5 AUG 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 Lloyd E. Bair (O-701854), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted; 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 statement by Colonel Charles S. Brice in an Addendum to Review of the Record as the Staff Judge Advocate, that since his trial the accused on June 4 escaped from confinement but voluntarily surrendered himself on same date, and that on June 6 accused was caught attempting to escape.

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 453, 26 Aug 1944)

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

SPJGQ
CM 257469

10 JUL 1944

UNITED STATES	)	SEVENTH AIR FORCE
v.	)	Trial by G.C.M., convened at APO #953, 28-31 January 1944. Dismissal.
Major DONALD R. MACKAY (0-322324), Quartermaster Corps.	)	

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL 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 94th Article of War.

Specification 1: In that Major Donald R. Mackay, Quartermaster Corps, did, at Honolulu, Territory of Hawaii, on or about 12 September 1943, knowingly and wilfully apply to his own use and benefit one (1) 65-gallon Westinghouse electric water heater #111259 of the value of over $50, property of the United States furnished and intended for the Military service thereof.

Specification 2: In that Major Donald R. MacKay, Quartermaster Corps, did, at Honolulu, Territory of Hawaii, on or about 12 July 1943, knowingly and wilfully apply to his own use and benefit one (1) carpenter's wood joiner, complete with guard, motor and pulleys of the value of over $50, property of the United States furnished and intended for the Military service thereof.

Specification 3: In that Major Donald R. MacKay, Quartermaster Corps, did, at Honolulu, Territory of Hawaii, on or about 12 July 1943, knowingly and wilfully apply to his own use and benefit one (1) portable electric circle saw of the value of over $50, property of the United States furnished and intended for the Military Service thereof.

Specification 4: In that Major Donald R. MacKay, Quartermaster Corps, did, at Honolulu, Territory of Hawaii, on or about 7 September 1943, knowingly and wilfully apply to his own use and benefit about eleven hundred twenty-five (1125) board feet of lumber of the value of over $50, property of the United States furnished and intended for the Military service thereof.

Specification 5: In that Major Donald R. MacKay, Quartermaster Corps, did, at Honolulu, Territory of Hawaii, on or about 5 October 1943, knowingly and wilfully apply to his own use and benefit fifty (50) yards of blue denim of the value of about $22.50, property of the United States furnished and intended for the Military service thereof.

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

Specification: (Finding of not guilty.)

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

Specification 1: In that Major Donald R. MacKay, Quartermaster Corps, did, at Honolulu, Territory of Hawaii, on or about 12 August 1943, knowingly and willfully apply to his own use and benefit ten (10) sheets of ply-wood, 4 feet by 8 feet by 5/8 inches, of the value of about $20.00, property of the United States furnished and intended for the military service thereof.

Specification 2: In that Major Donald R. MacKay, Quartermaster Corps, did, at Honolulu, Territory of Hawaii, on or about 4 September 1943, knowingly and willfully apply to his own use and benefit five (5) gallons of linseed oil of the value of about $7.45, and one (1) quart of paint dryer of the value of about $0.25, of the total value of about $7.70, property of the United States furnished and intended for the military service thereof.

Specification 3: In that Major Donald R. MacKay, Quartermaster Corps, did, at Honolulu, Territory of Hawaii, on or about 29 August 1943, knowingly and willfully apply to his own use and benefit one (1) 6-volt Exide battery of the value of about $7.89, property of the United States furnished and intended for the military service thereof.

ADDITIONAL CHARGE II: Violation of the 95th Article of War.
(Finding of not guilty.)

Specification 1: (Order of nolle prosequi.)

Specification 2: (Finding of not guilty.)

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

Specification 1: In that Major Donald R. MacKay, Quartermaster Corps, did, at Honolulu, Territory of Hawaii, on or about 4 September 1943, for his own personal gain and benefit, wrongfully order and cause Staff Sergeant Norman Godley, Corporal Loring W. Stedman, and Corporal Everett V. Wall, all of the 927th Quartermaster Company, Boat, Aviation, to paint during their official duty-hours his, the said Major MacKay's home at Monterey and Lanipili Streets, Honolulu, Territory of Hawaii.

Specification 2: In that Major Donald R. MacKay, Quartermaster Corps, did, at Honolulu, Territory of Hawaii, on or about 15 August 1943, for his own personal gain and benefit, wrongfully order and cause Technician Third Grade Raymond Zimpel, 927th Quartermaster Company, Boat, Aviation, to construct, and Staff Sergeant Norman Godley, 927th Quartermaster Company, Boat, Aviation, to paint with Government materials and during their official duty-hours, one (1) plywood double bed, which the said Major MacKay thereafter removed to his, the said Major MacKay's home at Monterey and Lanipili Streets, Honolulu, Territory of Hawaii.

Specification 3: (Finding of not guilty.)

Specification 4: In that Major Donald R. MacKay, Quartermaster Corps, did, at Honolulu, Territory of Hawaii, during the period from about 12 July 1943 to about 5 October 1943, conduct himself to the prejudice of good order and military discipline, when, for his own personal gain and benefit, he, on numerous occasions during the said period, wrongfully ordered and caused to be used motor vehicles of the United States, furnished and intended for the military service thereof, in hauling persons and materials from Army installations and from business establishments in Honolulu, Territory of Hawaii, to his, the said Major MacKay's home at Monterey and Lanipili Streets, Honolulu, Territory of Hawaii.

Specification 5: In that Major Donald R. MacKay, Quartermaster Corps, did, at Honolulu, Territory of Hawaii, during the months of July, August, and September 1943, conduct himself to the prejudice of good order and military discipline when, for his own personal gain and benefit, he, during the said period, wrongfully ordered and caused Technician Fourth Grade Raymond A. Goodwin, Technician Fourth Grade George M. Dover, Corporal Roy E. Elliott, Technician Fifth Grade John C. Leese, Technician Fifth Grade Carlos A.

Leonard, Private First Class George N. Nicolaides, Private First Class Ernest I. Steiner, Private First Class Peter J. Mistretta, Private John R. Mills, Private John G. Downey, and other military personnel whose names are unknown, all of the 927th Quartermaster Company, Boat, Aviation, to work, individually or as a part of a detail of one or more persons, during their official duty-hours on and about the premises of his, the said Major's home at Monterey and Lanipili Streets, Honolulu, Territory of Hawaii.

Specification 6: (Order of nolle prosequi).

A nolle prosequi to Specification 1, Additional Charge II, and Specification 6, Additional Charge III, was entered by the prosecution pursuant to a direction of the convening authority. The accused pleaded not guilty to all other Specifications and to all Charges. He was found not guilty of Charge II and its Specification, Additional Charge II and Specification 2 thereof, and Specification 3 of Additional Charge III. He was found guilty of Specification 4, Charge I, after substituting therein the phrase "two hundred forty-four (244) board feet of lumber of the value of over $15" for the phrase "eleven hundred twenty-five (1125) board feet of lumber of the value of over $50"; guilty of Specification 5, Charge I, after substituting therein the phrase "of the value of about $20" for the phrase "of the value of about $22.50"; and guilty of all other Charges and Specifications. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the finding of guilty of Specification 5, Additional Charge III, as involves a finding that the accused did, during the time and at the place alleged, conduct himself to the prejudice of good order and military discipline when, for his own personal gain and benefit, he, during said period, wrongfully ordered and caused T/4 Raymond A. Goodwin, T/4 George M. Dover, Corporal Roy E. Elliott, T/5 John C. Leese, T/5 Carlos A. Leonard, Pfc. John N. Nicolaides, Pfc. Ernest I. Steiner, Pfc. Peter J. Mistretta, Pvt. John G. Downey, and other military personnel whose names are unknown, all of the 927th Quartermaster Boat Company, Aviation, to work, individually or as a part of a detail of one or more persons, during their official duty hours, on or about the premises of the accused's home at Monterey and Lanipili Streets, Honolulu, Territory of Hawaii, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

The accused was commanding officer of the 927th Quartermaster Boat Company, Aviation, from some time prior to July 1943 until 7 October 1943, when he was relieved of his command (R. 53, 146, 256). Throughout the period stated, the unit was stationed on Ala Moana Road, in the City of Honolulu, Territory of Hawaii (R. 52). It was stipulated on the record that the home of the accused referred to in the several Specifications, the construction of which was completed during the year 1943, is located at Monterey and Lanipili Streets, City of Honolulu (R. 37). References in this opinion to the "home" or "house" of the accused are intended to refer to that recently constructed, private residence.

For convenience of presentation, the balance of the evidence for the prosecution will be summarized under title references to the several Specifications to which it relates:

Charge I, Specification 1.

In the early part of September 1943 the accused caused Sergeant Benjamin R. Fleming and T/4 John J. Frank, both members of his Company, to take a 65 gallon Westinghouse electric water heater from the organization area to accused's house (R. 38, 39, 166, 167). Sergeant Frank took the serial number of the heater because he "figured" that he "might get in some trouble over it later on". The number so taken was 111259 (R. 166). He subsequently saw the heater in the accused's house and noticed that it had been connected up for use (R. 167). At this time he again checked the serial number to make certain that it was the same heater (R. 167). The heater was property of the United States furnished and intended for the military service thereof (R. 61). Its fair market value in September 1943 was in excess of $50 (R. 37). Having learned that a report respecting him had been made to the Inspector General of the Seventh Air Force, the accused went, at 7:45 A.M. on 6 October 1943, to the quarters of the Company supply officer (First Lieutenant Robert L. Gallaway) and said to the supply officer "Come over here close to the dry dock where we can talk". The two of them walked over to the dry dock and the accused said "Lieutenant Richey turned me into the I.G. Now there are certain things I want to get straightened up" (R. 57). The accused then proceeded to tell the supply officer that he had taken the water heater early in September, that no receipt had been given for it and that he desired the supply officer to prepare a memorandum receipt, ante-dating it to 2 September 1943. Accused added "I want you to do that personally, and not have one of your clerks do it" (R. 57). The requested receipt was prepared, dated 2 September 1943, was signed by the accused and was then filed among the official records of the supply office (R. 55, 59; Pros. Ex. C). At the time the accused requested the supply officer to prepare the receipt he "seemed quite upset. In other words he was very red in the face, and seemed highly nervous" (R. 58).

Charge I, Specification 2.

On or about 12 July 1943, the accused caused Private Daniel P. Gluck, a member of his Company, to take a "Walker Turner" wood joiner, complete with guard, motor and pulleys, from the organization area to the accused's house where it was applied by the accused to his own use and benefit (R. 104, 147-149). This implement, at the time, had a fair market value in excess of $50 (R. 140) and was the property of the United States furnished and intended for the military service thereof (R. 65, 103). The implement was returned to the organization area after an investigation by the Inspector General was commenced (R. 104).

Charge I, Specification 3.

On or about 12 July 1943, the accused caused Private Gluck to take a "Stanley" portable electric circle saw from the organization area to the accused's house where it was applied by the accused to his own use and benefit (R. 106, 147-149). The accused was at the house when the saw was delivered and personally gave directions respecting the unloading of the saw (R. 149, 150). At the time of such taking, the saw had a fair market value in excess of $50, and was the property of the United States, furnished and intended for the military service thereof (R. 65, 143).

Charge I, Specification 4.

On or about 7 September 1943, the accused caused S/Sgt. John P. Owens and Private John G. Downey, both members of his company, to take a load of No. 1 merchantable select lumber from the organization area to the accused's house where the accused applied it to his own use and benefit. The evidence as to the quantity of the lumber taken varies from 16 pieces to 50 pieces. The size of the pieces was approximately 1 x 12 x 12 (or 14) (R. 88-90, 107, 191, 221). The lumber so taken had, at the time, a fair market value in excess of $15 and was the property of the United States, furnished and intended for the military service thereof (R. 191, 208).

Charge I, Specification 5.

On or about 5 October 1943, the accused caused Corporal Clement Thomas, a member of his Company, who was at the time serving as the accused's chauffeur, to take a 50 yard bolt of blue denim cloth from the organization supply room and place it in the accused's car, in which it was subsequently transported to the accused's house where it was applied by the accused to his own use and benefit (R. 181, 189). An unused portion of this cloth was returned to the organization supply room by the accused, personally, after the investigation by the Inspector General was commenced (R. 73). The cloth so taken had, at the time, a fair market value of approximately $20 and was the property of the United States, furnished and intended for the military service thereof (R. 221, 223). It was purchased by the organization purchasing agent on the same day that it was taken by the accused, and was actually held in the supply room only about half an hour (R. 181, 184, 189, 221).

Additional Charge I, Specification 1.

On or about 12 August 1943, acting under instructions given to him personally by the accused, S/Sgt. Owens removed ten or more sheets of ply-wood, each measuring 5/8 x 48 x 96, from a stockpile in the organization area and transported them to the accused's house (R. 91). These sheets were smooth on one side and rough on the other (R. 91). A few days later the accused stated to Sergeant Owens that the ply-wood which the Sergeant had delivered to the accused's house "wasn't smooth on both sides" and instructed the Sergeant to return to the house, pick up the ply-wood and take it to Hickam Field and exchange it for ply-wood that

was smooth on both sides (R. 92). Pursuant to those instructions the Sergeant did pick up the ply-wood at the accused's house and did take it to Hickam Field and exchange it for ply-wood that was smooth on both sides, which latter ply-wood he promptly delivered to the accused's house (R. 92, 93). All of this transportation was effected by the use of Army trucks, and Sergeant Owens was accompanied by Pfc. Earl E. Dryden on the first trip to the accused's house and by three other enlisted men (McCord, Lee and Ford) on the trip to Hickam Field (R. 91, 93). The ply-wood so taken from the stockpile in the organization area had, at the time, a fair market value of approximately $20 and was the property of the United States furnished and intended for the military service thereof (R. 101, 109).

Additional Charge I, Specification 2:

On or about 4 September 1943, the accused brought approximately 75 pounds of white lead to the organization area in his private automobile and directed S/Sgt. Norman Godley, who was in charge of the organization's paint shop, to take the lead up to the paint shop and mix it (R. 122, 123). Sergeant Godley thereupon took the lead to the paint shop and, with the assistance of another painter in the shop (Corporal Loring W. Stedman), mixed it into paint, using in the process seven gallons of linseed oil and one quart of dryer, which at the time were property of the United States furnished and intended for use in the military service. The accused was aware of the amount of the Government owned ingredients that were to be used, as he had previously obtained from Sergeant Godley, a statement of the materials required to make the quantity of paint necessary to paint accused's house (R. 124, 125, 128). After the paint was mixed it was taken to the accused's house, where, under the supervision of the accused, it was used in painting the house (R. 127, 128, 203-204). The linseed oil and dryer used in mixing the paint had, at the time, a fair market value in excess of $7.70 (R. 145).

Additional Charge I, Specification 3.

On or about 29 August 1943, the storage battery in the accused's private car having become too exhausted to function satisfactorily, the accused caused Sergeant Harold H. Todd, a member of his Company, to remove the exhausted battery from the car and to install in its place a 6-volt Exide battery taken from the organization's supply room. The Exide battery was the property of the United States furnished and intended for the military service, and had, at the time, a fair market value in excess of $7.89 (R. 86, 216-219, 225). The Government battery, having been in the accused's car about six weeks, was returned to the organization's supply room after the investigation by the Inspector General had been commenced (R. 225-226, 231). S/Sgt. William F. Moehlman testified that the fact of the taking of the Government battery for use in the accused's car was twice brought to the attention of the accused by Moehlman, who twice requested the accused to sign a receipt for the battery. The accused neglected and failed to sign the receipt (R. 225).

Additional Charge III, Specification 1.

During the early part of September 1943, the accused, having theretofore caused two enlisted men in his Company's paint shop to mix several gallons of paint for the purpose, directed four enlisted men of his Company (Sergeant Godley, Corporal Stedman, Corporal Everett V. Woll and a Private Handwork) to paint his (the accused's) house, which was done during regular duty hours and on duty days and for which the enlisted men received no compensation from the accused (R. 123-128, 201-203).

Additional Charge III, Specification 2.

On or about 15 August 1943, T/3 Raymond H. Zimpel, a member of the accused's Company, constructed in the organization's carpenter shop, at the request of the accused, a ply-wood bed. The work was performed during regular duty hours and consumed approximately sixteen hours of the sergeant's time (R. 110). The accused told Zimpel that he desired the bed for use at his home (R. 112). When the construction of the bed had been completed the accused instructed Zimpel to have it delivered to the organization's paint shop and to have it painted (R. 111). These instructions were carried out, Sergeant Godley doing the painting during regular duty hours and using Government paint (R. 129-130). No compensation was received from the accused by either Zimpel or Godley for work done on the bed (R. 110, 130). The bed was subsequently seen at the accused's house, but after the Inspector General's investigation was started it was returned to the organization area (R. 186).

Additional Charge III, Specification 4.

In view of the holding of the Board of Review with respect to this Specification, as hereinafter set out, it is unnecessary to summarize the evidence adduced to prove the commission of the offense alleged in the Specification.

Additional Charge III, Specification 5.

During July, August and September, 1943, the accused, on four separate occasions, caused enlisted men of his Company to perform, in his presence and sight, manual labor on and about the premises of his house, as follows:

(1) On a Sunday, near the middle of July 1943, T/4 Raymond A. Goodwin and T/5 John C. Leese, performed clean-up work about the grounds preparatory to the commencement of the construction of the building (R. 236, 242). This was a duty day for Leese (R. 242), but it was an off day for Goodwin (R. 236). Each of them was paid $5 for the day's work (R. 236).

(2) Near the end of July or early in August 1943, Sergeant Goodwin and a detail of several other enlisted men of the accused's Company, on a regular duty day, went to the accused's house site and moved lumber,

piled up some lumber * * * and leveled the area off". They worked all day on this detail and received no compensation from the accused for it (R. 237-38, 243).

(3) On a regular duty day, on or about 20 September 1943, Sergeant Fleming and a detail of four other enlisted men of accused's Company performed police work about the accused's house and premises, removing trash and debris and carting scrap to a dump (R. 41, 155, 193-194, 232). They received no compensation from the accused (R. 155, 193).

(4) On a regular duty day, on or about 25 September 1943, Sergeant Goodwin and a detail of six other enlisted men of the accused's Company performed a variety of manual labor at the accused's house. Two of the men worked inside of the house, unwrapping dishes, moving and arranging furniture and performing other like chores. The other five men worked about the grounds surrounding the house, removing and hauling away trash and doing general clean-up work (R. 194-195, 210-211, 244). None of the men received any compensation from the accused (R. 245). Captain Walter E. Kahler testified that two of the enlisted men objected to working on this detail and went to see the accused personally about it (R. 211).

In the course of his testimony for the prosecution, Captain Kahler also testified that, prior to the investigation by the Inspector General, he had warned the accused with respect to the latter's taking of Government property, telling the accused that "he was sticking his neck out by doing it" (R. 211).

4. At the close of the prosecution's case the defense counsel made a number of motions, all of which were denied. The only one requiring consideration in this opinion is as follows:

> "The accused, at this time, moves the court to strike out all of the evidence which applies to Specification 4 of Additional Charge III, for the reason that the United States has not, by the presentation of any proper evidence, shown the accused to be guilty of any properly charged offense" (R. 253, 254).

A motion to strike the same Specification (Specification 4, Additional Charge III), made at the time of arraignment, on the ground generally of multiplicity and indefiniteness, was denied (R. 24-29).

5. Evidence for the defense.

The accused, after having his rights as a witness explained to him, elected to testify under oath in his own behalf. Before testifying with respect to the matters dealt with in the Specifications on which he was tried, he testified at some length (15 pages in the record) with respect to his background, his experience and employment in civil life, his assignments after being called to active duty in the Army and the recognition which his services in the Army had received. He has lived

in Hawaii since he was seventeen years old (1926). He had been a tile setter by trade and was engaged in that work from 1926 until 1933. He then worked for seven years for Standard Oil Company of California, handling cash and checks aggregating from $20,000 to $40,000 per month. His accounts were never questioned. He is married and has a daughter three years old (R. 255-257). He was called to active duty in April 1941, and was at once made commanding officer of the 39th Maintenance Company, stationed at Hickam Field, T.H. He developed some knowledge of marine transportation and suggested the formation of a Quartermaster boat company to engage in rescue work. As a result of this suggestion the 927th Quartermaster Boat Company was organized, and he was made commanding officer of it at the time it was activated on 8 August 1942. Numerous exhibits were offered in evidence commending the crash boat service (rescue work) which the boat company performed during the time the accused was in command (R. 258-269; Def. Exs. 8-19).

With respect to the offenses for which he was tried, the testimony of the accused corroborated in the main the testimony adduced by the prosecution. He denied, however, that he was aware, prior to the investigation by the Inspector General, that a Government battery had been placed in his car, and he denied that he had ever been requested by Sergeant Moehlman to sign a memorandum receipt for a battery (R. 314), but he conceded that he had directed a Sergeant Rains to go up to his house and bring his car to the organization area, telling him that the car had "a dead battery" and adding "You had better take a battery with you" (R. 312). The accused also denied that he ever told anyone that the bed which was constructed in the carpenter shop was for his use, and he further denied that he had ever directed anyone to paint the bed (R. 319).

Apart from the above denials, the accused's testimony dealt mainly with matter offered in extenuation or by way of explanation of his actions. Shortly after the attack on Pearl Harbor, he donated to Government use approximately 2000 board feet of pine lumber from his personal stock (R. 283). Also, he at this time gave the Government free use of a large quantity of building tools and equipment owned by him personally. This was offered as "matter in extenuation" and not as a defense (R. 284-285). The wood joiner and the portable saw were taken "in plain view" of all of the men in the Company. They were taken for temporary use only, and for the purpose of supplementing the building contractor's equipment. They were returned in good condition (R. 287-288). Accused intended to compensate the enlisted men for painting his house but failed to do so because "it sort of slipped my mind" (R. 311). Permission was obtained from superior authority to use enlisted men to paint the house "provided they were used after duty hours and with their consent" (R. 306-308; Def. Ex. 43). The bed was made for the purpose of training his men in the use of the swing saw (R. 316). Accused had had four efficiency ratings prior to being relieved of his command. They were "Excellent, excellent, superior and excellent" (R. 326, 327).

Colonel Kinsley W. Slauson, Quartermaster for the Seventh Air Force, testified that the accused had worked under his supervision since April 1941, that the efficiency of the accused compared favorably with that of other officers and that accused's reputation for truth

and veracity is good (R. 351-352).

Two other witnesses for the defense testified as to accused's good reputation for truth and veracity (R. 353-354, 355-356).

It may be added that, in his closing argument to the court, the defense counsel stated "I am entirely convinced that the accused has had a fair trial" (R. 370).

6. The offenses alleged in the five Specifications of Charge I and the three Specifications of Additional Charge I are all laid under the 94th Article of War. All of the elements of each offense are fully established by the competent and legal evidence of record. As to each offense alleged, the evidence is conclusive that the accused did, on or about the date alleged, knowingly and willfully apply to his own use and benefit the particular article alleged, that the then fair market value of such article was equal to or greater than the amount alleged and that such article was, at the time, the property of the United States, furnished and intended for use in the military service thereof. The fact that these articles were, in each instance, taken with the knowledge of one or more enlisted men of the Company and thus, to that extent, openly, as claimed by the accused, supplies no excuse or justification. The action of the accused in compelling enlisted men of his Company to assist in the commission of the offenses only serves to aggravate the noxious character of the offenses. This entire series of transactions reflects not only a callous disregard by the accused of his duty to conserve Government property (and to encourage his men to do so) but also a deliberate and willful attempt to defraud the Government, by converting to his own use a large number of articles of Government property. Accused's actions were so brazen and utterly defenseless as to evoke from a fellow officer the warning that he was "sticking his neck out". The Board of Review is of the opinion, therefore, that the conviction of each of these Specifications was not only warranted, but required, by the evidence.

7. Specifications 1, 2, 4 and 5 of Additional Charge III are laid under the 96th Article of War. Specifications 1 and 2 present no problems. The competent and legal evidence of record is clear and convincing that the accused did, on or about 4 September 1943, for his own personal gain and benefit, cause the enlisted men named in Specification 1 to paint his house, during their official duty hours, and did, on or about 15 August 1943, for his own personal gain and benefit, cause the enlisted men named in Specification 2 to construct and paint, with Government paint, during their official duty hours, a ply-wood bed, which upon completion was removed to the accused's house. Such conduct was clearly of a nature to bring discredit upon the military service, and hence was violative of the 96th Article of War. It not only involved a wrongful appropriation by the accused of the services of the enlisted men during their official duty hours, but, by reason of its nature, was conducive to personnel problems which would be highly prejudicial to good order and military discipline.

Specification 4, Additional Charge III, requires a more detailed consideration. An analysis of its provisions discloses that this Specification (1) alleges a number of distinct and separate offenses (2) does not allege or describe the various Government vehicles which the accused is contended to have used in the commission of the offenses, (3) does not allege the dates of the commission of the alleged offenses, and (4) does not allege any description of the persons or materials hauled, or the points between which they were hauled. Because of these defects it was not possible for the accused either to prepare his defense to the charges asserted in the Specification or to make his pleas to the various offenses attempted to be charged therein.

> "The omission of essential elements in Specifications cannot be overlooked or lightly passed over. This method of pleading is too uncertain and indefinite to acquaint the accused with the specific offense as to which he must defend, and might deprive him of the opportunity to offer a plea of former jeopardy in a subsequent trial for the same offense. The Specification is fatally defective" (Dig. Op. JAG 1912-1940, Section 428 (10), CM 125539, CM 128775).

The test has also been stated as follows:

> "The determining question in each case is whether the accused has sufficient notice of the offense with which he is charged" (Dig. Op. JAG 1912-1940, Section 428 (10)).

Likewise, it is well settled that one Specification should not allege several separate offenses. The Manual for Courts-Martial 1928 specifically provides:

> "One Specification should not allege more than one offense, either conjunctively or in the alternative" (par. 29b).

Under the circumstances, the Board of Review is of the opinion that Specification 4, Additional Charge III, is fatally defective, and that the court erred in not granting defense counsel's motion to strike it. Having denied defense counsel's motion to strike this Specification, the court erred again in denying the motion of defense counsel, made at the close of the prosecution's case, to strike all evidence applicable to it.

Over objection by the defense counsel, the court admitted at the trial an instrument relating to this Specification, loosely termed a "bill of particulars", which was offered by the prosecution "as a part of the pleading" (R. 28, 29), and which set out details respecting thirty separate instances of alleged "improper use of Government transportation" (R. 29-31). The admission of this instrument was error, there being no authority of law for it. The use of bills of particulars has never been authorized for court-martial procedure. A fatally defective Speci-

fication may not be cured by that means.

Specification 5 of Additional Charge III alleges that the accused did, during the months of July, August and September 1943, conduct himself to the prejudice of good order and military discipline by ordering and causing various named enlisted men of his organization to work, during their official duty hours, on and about the premises of his home, at Monterey and Lanipili Streets, Honolulu, T.H. The competent and legal evidence adduced by the prosecution under this Specification fully warranted the court's finding of guilty of the offense alleged. The accused not only failed to controvert this testimony, but, on cross-examination, expressly admitted the truth of it (R. 329). That such conduct on the part of the accused was violative of the 96th Article of War is too clear to require discussion.

8. There were presented to the reviewing authority clemency petitions signed by eight of the eleven members of the court who heard and decided the case. Notwithstanding such clemency petitions, however, the Acting Staff Judge Advocate recommended that the sentence be approved; and the reviewing authority, in forwarding the case for action under Article of War 48, made no reference to the clemency recommendations.

9. The records of the War Department show that the accused is 34 years of age. He was born in Toronto, Canada, and became an American citizen through the naturalization of his parents in Hawaii, in 1928, before accused became of age. He graduated from high school in Hawaii in 1927, and thereafter attended a trade school two years, specializing in building and tile and marble work. In civil life he spent five years in building and construction work and seven years in a clerical position with Standard Oil Company of California. He was commissioned a second lieutenant, QMC, Officers Reserve Corps, 29 September 1934; was promoted to first lieutenant 2 November 1940, to captain 30 May 1942, and to major 4 November 1943; and has been on active duty since 12 April 1941.

10. The court was legally constituted and had jurisdiction over the accused and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Specification 4, Additional Charge III, but is legally sufficient to support all other findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon either a conviction of a violation of Article of War 94 or a conviction of a violation of Article of War 96.

(On leave), Judge Advocate.

William H. Bamberger, Judge Advocate.

Herbert R. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O. 19 JUL 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 Donald R. MacKay (0-322324), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support all findings, except the finding with respect to Specification 4, Additional Charge III, and is legally sufficient to support the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Finding of guilty of Specification 4 of Additional Charge III disapproved. Sentence confirmed. G.C.M.O. 481, 2 Sep 1944)

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

SPJGN
CM 257531

16 JUN 1944

UNITED STATES	)	ARMY GROUND FORCES REPLACEMENT DEPOT NO I
v.	)	Trial by G.C.M., convened at Fort George G. Meade, Maryland, 2 June 1944. Dismissal.
Second Lieutenant ROBERT R. HURLBUT (0-467085), Company A, 5th Replacement Battalion, 2nd Replacement Regiment.	)	

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

---

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Robert R. Hurlbut, Company A, 5th Replacement Battalion, 2d Replacement Regiment (Inf), Army Ground Forces Replacement Depot No 1, did, at Fort George G. Meade, Maryland, on or about 0001 16 May 1944, absent himself without proper leave, from his organization, and did remain absent without proper leave until he was apprehended at Washington, D. C., on or about 1240 23 May 1944.

He pleaded not guilty to, and was found guilty of, both the Charge and

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

3. The evidence for the prosecution shows that by Special Order Number 75 issued on 27 April 1944 by the Commanding Officer of the 1st Headquarters & Headquarters Detachment, Special Troops, XIII Corps, the accused was relieved from assignment to the 541st Parachute Infantry, Camp Mackall, North Carolina, and was assigned to the Army Ground Forces Replacement Depot No. 1, Fort George G. Meade, Maryland. The time at which he was to arrive at his new station was specified as "during daylight hours of 15 May 1944". When he departed from Camp Mackall, he had a copy of the order in his possession and was aware of its contents (R. 6; Pros. Exs. 1, 2).

He arrived in Washington on the morning of 15 May 1944. After meeting some other parachute officers, he "started to do a little drinking". According to his statement to the Investigating Officer, he was in a despondent mood because of a combination of depressing circumstances. He was suffering from "marital troubles", brooding over his failure to obtain a promotion after almost two years in grade as a second lieutenant, and resentful of a previous transfer from a "crack parachute battalion" just before it went overseas. Apparently in an attempt to forget these woes, he drank heavily until by "the time I should have reported to camp I was too intoxicated to come back". When sobriety returned and he realized he was AWOL, he was "afraid to report to camp" and continued to imbibe. Seven days were spent by him in this manner (R. 7-8, 11-12; Pros. Ex. 3, 6).

On 23 May 1944 First Lieutenant Maurice M. Morgan of the 300th Military Police Company, Washington, D. C., was informed of the accused's unauthorized absence and was advised to search for him at the Ambassador Hotel. After inquiring of the hotel manager, Lieutenant Morgan went to the Hi-Hat Club. The accused entered that establishment some time later and was immediately placed under arrest. Upon being interrogated in his room, he stated that "he had been on a drunk" and that he had purchased a ticket to Fort Meade at the station from which "he had just come * * * a few minutes prior to his apprehension". He was taken to Fort Meade, and at 1830 o'clock he signed the "Incoming Register" (R. 7-10; Pros. Exs. 4, 5).

4. The accused, after he had been apprised of his rights relative to testifying or remaining silent, took the stand in his own defense. His account did not differ materially from that contained in his statement to the Investigating Officer.

Upon leaving Camp Mackall on 8 May 1944, he proceeded first to Waterloo, Iowa, then to Chicago, Illinois, and finally to Washington, D. C. When he parted from his wife in Chicago, they were "a little bit on the 'outs'", and she probably "went off * * * without expecting to make up". By the time he arrived in Washington his "spirits weren't exactly what they should be". In Washington he "just started to drink" in the company of several other officers. He "remembered that on May 18th /he/ would have been a second lieutenant for two years, and /he/ sort of made up /his/ mind" not to report until that date. That was not perhaps the exact reason for his conduct, but he "thought about it". He did not realize that he was AWOL until the next day. From 16 May to 22 May 1944 he appreciated the significance of his unauthorized absence but he "was just too afraid to come back to camp" (R. 13-18).

He decided to report on 23 May 1944. In his own words,

> "I had made up my mind * * * that I would return to camp right then and there, and I bought my ticket. First, I had called up as to information about train schedules, and so forth, and found that they ran very frequently, and when I had made that decision, I was rather close to the train station, I went up and bought my ticket, and was coming back to the hotel and I decided I would go in for a bottle of beer, go up; pack my bag, go back to the train station and come out to camp."

He was apprehended as he entered the bar (R. 17).

The ticket was introduced into evidence as a defense exhibit. It was stamped "May - 7 '44". The accused stated that on that date he was at Camp Mackall (R. 18-19, Def. Ex. 1).

5. The Specification alleges that the accused did "on or about 0001 16 May 1944, absent himself without proper leave until he was apprehended at Washington, D. C. on or about 1240 23 May 1944".

The proof required to sustain a conviction for absence without proper leave is "(a) That the accused absented himself from his command, guard, 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". The evidence is clear that the accused was transferred from a parachute unit at Camp Mackall to an organization at Fort Meade, Maryland; that he was directed to report to his new outfit on 15 May 1944;

and that, without permission from anyone competent to grant it, he remained absent from his duly assigned station until apprehended on 23 May 1944. His marital tribulations, his inability to obtain a promotion after long service, and his outraged feelings at being deprived of an opportunity to go overseas neither justify nor even extenuate his conduct. No soldier, whether an officer or an enlisted man, may leave his appointed place of duty without proper leave merely because of personal misfortune or private pique.

6. The accused is about 23 years of age. The records of the War Department show that the accused was commissioned a second lieutenant on 2 May 1942, effective 18 May 1942, and that since that last date he has been on active duty as an officer.

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

Abner E. Lipscomb, Judge Advocate.

Walter Shepherd, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 257531

1st Ind.

War Department, J.A.G.O. 23 JUN 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 R. Hurlbut (0-467085), Company A, 5th Replacement Battalion, 2nd Replacement Regiment.

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

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

Myron C. Cramer

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 of dismissal confirmed. G.C.M.O. 407, 27 Jul 1944)

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

SPJGQ
CM 257546

7 JUL 1944

UNITED STATES v. Second Lieutenant FRANKLIN R. LESLIE (0-1038727), Chemical Warfare.	65TH INFANTRY DIVISION Trial by G.C.M., convened at Camp Shelby, Mississippi, 29 May 1944. Dismissal.

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL 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: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Franklin R. Leslie, 153d Chemical Decontamination Company, did, at Camp Shelby, Mississippi, on or about 11 February 1944, wrongfully and unlawfully advise and encourage the preparation and forwarding to The Inspector General of 110 identical letters, each written and signed by an enlisted man of the 153d Chemical Decontamination Company, the body of each of said letters being in substance as follows:

> I have long felt it my patriotic duty to be a part of the army of the United States but when undo pressure and coercive measures are practiced against both men and officers, I can not but feel that corrective measures should be taken.
>
> I am therefore asking that the activities of my commanding Officer be investigated.

which said letters were designed to discredit Captain John E. Williams, then commanding the 153d Chemical Decontamination Company, with higher authority.

Specification 2: In that Second Lieutenant Franklin R. Leslie, 153d Chemical Decontamination Company, did, at Maneuver Director Headquarters, Lebanon, Tennessee, on or about 28 February 1944, with intent to deceive Major Horace F. Brown, officially state to the said Major Horace F. Brown that he had no knowledge of 110 identical letters, each written and signed by an enlisted man of the 153d Chemical Decontamination Company and addressed and mailed to The Inspector General, the body of each of said letters being in substance as follows:

> I have long felt it my patriotic duty to be a part of the army of the United States but when undo pressure and coercive measures are practiced against both men and officers, I can not but feel that corrective measures should be taken.
>
> I am therefore asking that the activities of my commanding Officer be investigated.

which statement was known by the said Second Lieutenant Franklin R. Leslie to be untrue in that he, the said Second Lieutenant Franklin R. Leslie, had advised and encouraged the writing of said letters.

Specification 3: In that Second Lieutenant Franklin R. Leslie, 153d Chemical Decontamination Company, did, at Camp Shelby, Mississippi, on or about 8 April 1944, with intent to deceive Lieutenant Colonel Roland E. Simms, officially state to the said Lieutenant Colonel Roland E. Simms, that he, the said Second Lieutenant Franklin R. Leslie, had never discussed promotions with the enlisted men of his company and that he had no knowledge of 110 identical letters, each written and signed by an enlisted man of the 153d Chemical Decontamination Company, and addressed and mailed to The Inspector General, the body of each of said letters being in substance as follows:

> I have long felt it my patriotic duty to be a part of the army of the United States but when undo pressure and coercive measures are practiced against both men and officers, I can not but feel that corrective measures should be taken.
>
> I am therefore asking that the activities of my commanding Officer be investigated.

which statement was known by the said Second Lieutenant Franklin R. Leslie, to be untrue in that he, the said Second Lieutenant Franklin R. Leslie, had discussed promotions with the enlisted men of his company and had advised and encouraged the writing of the above described letters.

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

Specification 1: In that Second Lieutenant Franklin R. Leslie, 153rd Chemical Decontamination Company, did, at Camp Shelby, Mississippi, on or about 11 February 1944, and at diverse times and places thereafter, wrongfully and unlawfully conspire with Private First Class Joseph C. Thomas to discredit Captain John E. Williams, then commanding the 153rd Chemical Decontamination Company, with higher authority, by procuring enlisted men of the 153rd Chemical Decontamination Company to write letters to The Inspector General impugning and censuring the official actions and policies of the said Captain John E. Williams, and by causing said letters to be mailed to The Inspector General.

Specification 2: In that Second Lieutenant Franklin R. Leslie, 153rd Chemical Decontamination Company, did, at Camp Shelby, Mississippi, on or about 11 February 1944, wrongfully and unlawfully advise, influence, and encourage Private First Class Joseph C. Thomas to procure enlisted men of the 153rd Chemical Decontamination Company to write letters addressed to The Inspector General impugning and censuring the official actions and policies of Captain John E. Williams, then commanding the 153rd Chemical Decontamination Company, thereby injuring, impairing, and interfering with the effectiveness of duly constituted military authority.

Before pleading to the general issue, accused, through defense counsel, contending that Specification 1 of the Charge and Specification 2 of the Additional Charge are in substance the same and allege the same offense, made a motion that the prosecution be required to elect upon which of these Specifications it would proceed to trial. The motion was denied. Thereupon, defense counsel made a motion that the prosecution be required to elect upon which charge (the original or the additional Charge) it would proceed to trial. This motion was also denied. Accused pleaded not guilty to, but was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced at the trial. Accused was sentenced to be dismissed the service. The reviewing authority disapproved so much of the finding of guilty of Specification 3 of the original charge as involves a finding of guilty of making a false official statement by asserting that he "had never discussed promotions with the enlisted men of his company", approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The accused, a colored officer, was assigned to and joined the 153rd Chemical Decontamination Company, commanded by Captain John E. Williams, a white officer, on 27 August 1943 (R. 12), and served as a platoon leader and as supply and executive officer of the company until

Lieutenant Charles H. Hainfeld (a white officer) reported for duty with the company on or about 18 October 1943, at which time the accused was relieved as executive officer and Lieutenant Hainfeld, who was senior in rank to accused, assumed those duties (R. 13).

During the latter part of December 1943 accused discussed promotions with Captain Williams his company commander. He mentioned the fact that he was from the North and that Captain Williams was from the South, and expressed the belief that colored officers would not be promoted, especially to the grade of company commander (R. 14). During the month of January 1944 (the exact date not being shown), Captain Williams recommended Lieutenant Hainfeld for promotion. Lieutenant Hainfeld received notification of his promotion on or about 2 February 1944 (R. 15). On 22 January 1944 and on 7 February 1944 the accused submitted to his company commander letters addressed to The Adjutant General, requesting transfer because of alleged "incompatibility" with his commanding officer (R. 15, 80, 81, Pros. Ex. A). Toward the end of February 1944 accused again discussed promotions with Captain Williams "very much in the same manner" as in December 1943. Captain Williams imparted to accused the information that he was advised that the 153rd had been designated as a colored company and would be commanded by a colored officer when it went overseas. He further expressed the opinion that the best qualified colored officer in the company would be promoted to the position of company commander (R. 15). Accused then stated that he did not believe he would ever command the company (R. 16).

Private First Class Joseph C. Thomas was the principal witness against accused. By direction of the commanding general of the 65th Infantry Division, he was granted immunity from prosecution on charges then pending against him, arising out of the same transactions as gave rise to the charges in the instant case, in consideration of his promise to testify truthfully and fully as to matters within his knowledge at the trial of accused (R. 18).

Private First Class Thomas was well acquainted with accused and prior to 11 February 1944 during the course of personal conversations with him (R. 21, 23) Thomas expressed his dissatisfaction with the distribution of ratings in the company (R. 22) and his belief that the company commander was "very small" and "quite biased" in some of his views (R. 24). Also accused was present at two meetings at which Thomas spoke. The first of these meetings was held in the company day room (R. 19) and the Company Commander was present as were also the company officers and enlisted men (R. 19). The members of the company were permitted to state their grievances against the Commanding Officer, Captain Williams (R. 20). The second meeting occurred during duty hours in January 1944 during the session of a class conducted by accused on military subjects (R. 24-25). Leslie permitted anyone present to say anything they had on their mind (R. 26). No other officer was present (R. 25). At the meeting in the Day room at which the company commander

was present, Thomas had expressed the view that the company commander should make a greater effort to understand the men and their problems and should be more accessible to the enlisted men of the company (R. 21). On the second occasion, when accused extended the class he was instructing the opportunity to express their views on matters affecting the company, Thomas expressed the belief that the low morale of the company was due to conflict among the officers (R. 24).

On 11 February 1944 accused was in charge of the pit detail on the rifle range (R. 26). This detail included, among others, Private First Class Thomas, Privates William Marks, Robert Johnson and Frank Diggs, and Sergeant John C. Allen. Thomas and Marks together operated one target (R. 27, 50). During the early part of the morning accused had a conversation with Thomas near this target which conversation lasted for five or ten minutes (R. 27, 51, 58). Accused asked Thomas what was wrong with the men and how they felt toward the colored officers of the company (R. 27). Thomas replied that he did not know what was wrong with the men but that they seemed to be "very low" (R. 27). Accused did not appear to be happy and Thomas asked him what, if anything, the men could do to "help remedy the situation" (R. 27). Accused asked Thomas if he thought he could get approximately two-thirds of the enlisted personnel to write a letter to The Inspector General in Washington, expressing the grievances of the men against their commanding officer (R. 27). The accused then further stated that if such a letter were written the Inspector General would conduct an investigation of the company, which would result in the relief of the commanding officer (R. 27). Thomas agreed to attempt to secure the writing of such letters (R. 27). The conversation terminated after accused told Thomas it was strictly in confidence and to "do the job very quickly" if he possibly could (R. 27).

Private Marks saw accused and Thomas engaged in conversation near the target he was working during the morning of 11 February 1944 (R. 51). Accused and Thomas were standing only a few feet away from him while they talked, but he did not hear their conversation (R. 51). However, immediately after accused had departed, Thomas told Marks that accused had suggested the writing of letters to The Inspector General by two-thirds of the men in the company, and asked Marks to assist in finding out whether the men would write such letters (R. 51). Thomas then also talked to Private Robert Johnson, who had seen him engaged in conversation with accused in the rifle pit (R. 56), stating to him, "it's been suggested that we get two-thirds of the company together to write letters to The Inspector General in Washington" (R. 56), without informing Johnson who had made the suggestion originally (R. 56-57). Johnson sanctioned this proposal and told Thomas to go ahead and see what he could do about it (R. 56). Thomas told Johnson to pass the word along to the men that there would be a meeting that evening but not to mention to them that letters were to be written (R. 57). Thomas also talked to Diggs in the rifle pits, told him there was going to be a meeting at the library that evening, and suggested that he attend and bring some other men (R. 30, 61, 62).

The company left the range at noon on 11 February 1944 (R. 30). During the course of the afternoon Thomas told Johnson that the meeting would be held at eight o'clock in the Service Club (R. 30). Thomas also spread word of the meeting among other members of the company (R. 30). Diggs and Johnson also told some of the men about the meeting (R. 57, 62).

At about eight o'clock p.m. on 11 February 1944, more than 100 men of the 153d Chemical Decontamination Company gathered at the Service Club at Camp Shelby, Mississippi (R. 30). Thomas was in charge of the meeting (R. 30), and Marks, Johnson and Diggs were among those present (R. 31). The meeting was thrown open for discussion and the men were told that they were there to write a letter and were invited to express their grievances (R. 31). Accordingly the enlisted men of the Chemical Decontamination Company stated their grievances against their company commander (R. 31), (Prosecution Exhibit B). Thomas made notes of these various complaints, and then himself composed a letter to The Inspector General (R. 31, Prosecution Exhibit B). This letter was then read to the assembled men and each of 110 of the men copied the letter (R. 32, Prosecution Exhibit C). Subsequently these letters were signed, addressed, sealed, and many were placed upon a table in the meeting room (R. 32). Diggs mailed his own letter (R. 62). Marks gathered up all of the letters which had been placed on the table in the meeting room and kept them in his barracks until 14 February 1944, on which date he mailed them in Hattiesburg, Mississippi (R. 53).

On Sunday, 13 February 1944, Thomas told accused that the letters in question had been written. Accused then asked Thomas if the officers had been mentioned in the letters and, upon receiving an affirmative answer, stated that the officers should not have been mentioned (R. 33). Thomas talked to the accused again on Monday, 14 February 1944, at about seven o'clock p.m. in the accused's hutment. At that time Thomas told the accused that less than two-thirds of the men had written letters and that he was sorry he could not secure more. The accused said, "It's okay, anyway" (R. 33).

On or about 17 February 1944, 110 letters, identical in content, and each signed by different enlisted members of the 153rd Chemical Decontamination Company, were received in the Office of The Inspector General, Washington, D. C. (Pros. Ex. C). The body of these letters, which were addressed to The Inspector General, were as follows:

> "I have long felt it my patriotic duty to be a part of the army of the United States, but when undue pressure & coercive measures are practiced against both men & officers, I cannot but feel that corrective measures should be taken. I am therefore asking that the activities of my commanding officer be investigated by your office" (Ex. B).

On or about 28 February 1944 an investigation into the affairs of the 153rd Chemical Decontamination Company was conducted by Major Horace F. Brown, Inspector Generals Department, Headquarters Second Army, in the Tennessee Maneuver Area (R. 9). Major Brown interviewed the accused and, after warning him of his rights under Article of War 24, asked the accused if he could give any information concerning the letters written to The Inspector General, Washington, D. C. (A letter identical with Prosecution's Exhibit B was shown to the accused at this time). The accused replied, "I had no knowledge of these letters whatever until the Inspector General came to our outfit the other day" (R. 10).

On or about 8 April 1944 the accused was questioned by Lieutenant Colonel Roland E. Simms, an Investigating Officer appointed under the provisions of Article of War 70 (R. 65). After advising the accused of his rights under the 24th Article of War, Colonel Simms asked him whether or not he had ever discussed promotions with enlisted men and whether or not he had any knowledge of certain identical letters written by enlisted men of the 153d Chemical Decontamination Company and not sent through channels. The accused denied discussing promotions with enlisted men and stated that he "had no knowledge of this letter writing" (R. 65).

Private Thomas admitted, on cross-examination, that he had given statements to two investigating officers in which he had not implicated the accused in the writing of the letters to The Inspector General (R. 44); that he had on a number of occasions expressed himself as being dissatisfied with the lot of the colored soldier (R. 91); and that he had frequently demonstrated his dissatisfaction with conditions in the 153d Chemical Decontamination Company (R. 21, 22, 24, 71).

4. Evidence for the Defense:

His rights as a witness having been explained to him, the accused elected to take the stand under oath. The accused denied having had any knowledge of or connection with the writing of 110 letters to The Inspector General, and denied having been responsible for anything which might bring discredit upon his company commander (R. 71). The accused maintained that he had rendered faithful service to his company commander; that he had frequently conferred with the company commander concerning policies in the company; and that he talked with the men concerning their personal problems only in his capacity as a company officer (R. 71, 72). The accused confirmed the fact that he talked with Thomas in the fall about OCS, transfer, and ratings (R. 75); that he had talked to him about his automobile in January (R. 76); and that he had heard Thomas express his views concerning the affairs of the company at a meeting held on 29 December 1943 (R. 76) and at a class session in January 1944 (R. 76). The accused asserted that he could not recall having had any conversation with Thomas in the rifle pits on 11 February 1944 (R. 72); that the conversation held on Sunday, 13 February 1944, had

concerned Thomas' automobile, no mention of the writing of letters to The Inspector General having been made (R. 79); and that the conversation which the accused had with Thomas on Monday, 14 February 1944, had also concerned Thomas' automobile and not the letters written to The Inspector General (R. 80).

During his cross examination, accused testified that the enlisted personnel of the company resented the aloofness of the company commander and that he also resented his Company Commander's attitude and actions in some things (R. 74). He, from time to time, discussed the enlisted men's problems with the company commander, but seldom got any satisfaction. Upon one occasion the company commander told accused, "This is my company; I'm running it and I'm not asking for suggestions". Accused "definitely" resented that statement (R. 74). Regarding his reasons for requesting transfer to a different organization, accused testified that he felt he could serve better with another unit because of "the captain's attitude, and difficulty, and problems between us, and so forth * * *" (R. 81).

The defense called a number of witnesses who testified in substance that they had served with the 153d Chemical Decontamination Company (R. 87, 90); that the accused performed his duties in an average or better than average manner (R. 87, 90); that they had never heard the accused discuss promotions or grievances against the company commander with the enlisted men of the company (R. 88); and that the accused had never mentioned to them anything in connection with the writing of letters to The Inspector General. (R. 88).

5. The motions by defense counsel to have the prosecution elect upon which of the charges and designated specifications it would proceed to trial were properly denied. Par. 71a, M.C.M., 1928, provides, in pertinent part, as follows: "A motion to elect - that is, a motion that the prosecution be required to elect upon which of two or more charges or specifications it will proceed - will not be granted".

The testimony of Private First Class Thomas, which, in its material phases, is in irreconcilable conflict with that of accused, must be relied upon if the findings are to be sustained. Without it, the evidence of record is not legally sufficient to prove that accused was instrumental in causing the letters in question to be written or, that he had knowledge that they had been written until he was questioned about the matter at a considerably later date. Private First Class Thomas is an accomplice witness, and his testimony should therefore be examined with more than ordinary caution. However, if, when weighed in connection with the evidence as a whole, it is deemed worthy of belief, his testimony may and should be given the same legal effect as would result if he were not an accomplice. It is expressly provided in par. 124a, M.C.M., 1928, that a conviction may be based on the uncorroborated testimony of an accomplice. There is no rule of law in the Courts of the United States that prevents conviction on the testimony of an accomplice alone if the jury believes him (Harrington v. US 267 US 97; Commonwealth v. US 242 US 470).

The testimony of Private First Class Thomas, when considered in the light of the other evidence of record, does not lack plausibility, and it is corroborated in important particulars by the testimony of other witnesses. Clearly, a harmonious relationship did not exist between accused and his commanding officer, Captain Williams. It may be reasonably inferred from statements made by him to Captain Williams in December 1943 that accused harbored the idea that Captain Williams had discriminated, or would in the future discriminate, against him in making recommendations for promotions because of sectional and race prejudice. Lieutenant Hainfeld, a white officer assigned to the 153rd Chemical Decontamination Company considerably later than accused, was recommended for promotion by Captain Williams in January 1944 and was promoted on 2 February 1944, a fact not calculated to have improved accused's condition of mind. On 22 January and 7 February 1944, respectively, the latter date being only four days before the enlisted men in his company wrote the letters here in question to The Inspector General, accused delivered to Captain Williams, to be forwarded through channels, two letters addressed to The Adjutant General, Washington, D. C., in each of which he requested that he (accused) be relieved from his present assignment because of "incompatibility" with the commanding officer of his organization (Captain Williams). It is reasonable to conclude that under these circumstances accused not only was not averse to, but was in all probability personally interested in, having Captain Williams relieved of command of this company.

The letters requesting a change of assignment, which accused wrote to The Adjutant General, Washington, D. C., demonstrate that he was relying upon the War Department at Washington as the logical source of relief from what he conceived to be his own inequitable and unhappy lot. Accused testified that he wrote the second letter to The Adjutant General on 7 February 1944 because the first one was not forwarded. His belief, or, if true, his knowledge, that his letters were not being forwarded to The Adjutant General, together with the idea which the testimony of record indicates he was harboring, namely, that he was being discriminated against because of the sectional and racial prejudices of his commanding officer, may, and by logical inference did, suggest to his mind the thought of a general investigation by the Inspector General's Department of the company commander's methods of administration. No great sagacity would have been necessary on his part for him to conclude that such an investigation would more surely follow as the result of a mass petition for relief of greviances from enlisted personnel of the company than from his own individual disgruntled complaints, and further that he would stand in a more advantageous position if such an investigation could be precipitated solely by the enlisted personnel of the company. Accused had repeatedly heard Private First Class Thomas express dissatisfaction with his own lot, as well as with the company and its commander, and had therefore ample reason to believe that Thomas entertained views similar and sympathetic with his own about their commanding officer. Private First Class Thomas,

who was also apparently a self appointed spokesman for the enlisted men in the company, was therefore the logical person for accused to approach with the suggestion that he initiate a sentiment among the enlisted personnel to write the Inspector General and request an investigation into the activities of the commanding officer.

Witnesses Marks and Johnson testified that they saw accused and Thomas talking together in the rifle pits during the morning of 11 February 1944. Marks testified that the conversation lasted five or ten minutes. Immediately following termination of this conversation, Thomas told Marks that accused had suggested that two-thirds of the company write the Inspector General and he also told Johnson that it had "been suggested" that the letters be written. In addition Thomas notified Private Diggs that there was to be a meeting of members of the company that evening. So far as the record of trial discloses, Thomas had not broached the subject of writing the Inspector General to anyone until after he conversed with accused in the rifle pits on 11 February. Not only did he broach the subject immediately afterwards but immediately went to work on the job of procuring the letters to be written and completed it with dispatch, as he testified he had been enjoined to do by accused. On Sunday, 13 February 1944, two days after their conversation in the rifle pit, he told accused that the letters had been written, and on Monday, 14 February 1944, he again mentioned the matter to accused and expressed his regrets at having been unable to procure letters from as many of the men as accused had suggested (two-thirds).

Accused admitted having talked to Thomas on Sunday and Monday (13 and 14 February) but denied that the letters in question were mentioned. He testified that he did not remember whether or not he talked to Thomas in the rifle pits on February 11th, but that if he did, he did not suggest or mention writing the letters in question. However, in view of all the testimony, the Board of Review is of the opinion that the testimony of Private First Class Thomas is worthy of belief and that the evidence, as a whole, is consistent with the guilt of accused in the particulars hereinafter mentioned and inconsistent with his innocence. This view is strenghtened rather than weakened by the fact that Thomas was granted immunity from further prosecution on charges pending against him upon condition that he would testify truthfully upon the trial of accused. His immunity from further prosecution was an accomplished fact at the time he testified. He had nothing to gain by a conviction of accused, while by testifying falsely he would have been inviting the penalties of perjury. The fact that through two prior investigations he had failed to disclose accused's connection with the letters in question is not considered to be of significant importance under the facts and circumstances of this case.

The evidence of record is legally sufficient, therefore, to prove beyond reasonable doubt, that on 11 February 1944, with the view of discrediting Captain Williams in the eyes of superior military authority and, in addition, with the stated plan of securing the removal of Captain

Williams as commanding officer of the 153rd Chemical Decontamination Company, accused suggested to Private First Class Thomas the idea of procuring approximately two-thirds of the enlisted personnel of that organization to write letters to the Inspector General, Washington, D. C., voicing discontent and dissatisfaction with their commanding officer and with his official policies and actions, and encouraged Thomas to undertake the execution of the project. Thomas agreed to undertake the task and did procure 110 enlisted men of the organization to write letters of the desired type to the Inspector General. These facts are within the scope and purview of Specification 1 of the Charge and Specification 2 of the Additional Charge and are sufficient to support the findings of guilty of those specifications. The acts and conduct of accused in thus fostering disaffection on the part of the enlisted men for the commanding officer, and in encouraging them to write the letters in question, were clearly subversive of, and contrary to, good order and military discipline and hence a violation of Article of War 96.

The above mentioned two specifications have reference to the same transaction and charge essentially the same offense. Specification 1 of the Additional Charge likewise grows out of the same transaction and is predicated upon the same overt acts of accused. About the only thing that distinguishes it from the two specifications last above mentioned is that it alleges a conspiracy between accused and Thomas to discredit Captain Williams with higher authority by the letters in question. Our Federal Courts have defined a conspiracy as a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. (Pettibone v. U.S., 148 U.S. 203, 13 S. Ct. 542, 37L. Ed. 419; United States v. Olmstead et al, 5 Fed. (2d) 712). In applying this definition to conduct charged as an offense under the Articles of War the legality of the purpose as well as of the means used to effect it may be tested by military law. In so far as accused, at least, is concerned, the means by which he sought to discredit Captain Williams with higher authority was, as has been already hereinabove held, a violation of Article of War 96 and therefore illegal. Thomas agreed to and did aid him in making use of these unlawful means. A conspiracy in violation of Article of War 96 is sufficiently shown.

Accused constituted Thomas his agent to procure the writing of the letters and the statements made by Thomas to Marks and Johnson in furtherance of this purpose and before it had been completed were admissible in evidence against accused.

Having concluded that accused instigated the writing of the letters in question and that he knew they had been written it naturally follows that the evidence is legally sufficient to support the findings of guilty of Specifications 2 and 3 of the Charge. His denials of any knowledge of the letters were made during the course of official

investigations, when, if he answered at all, he was in duty bound to answer truthfully the questions which were asked him. The making of a false official statement is a violation of Article of War 96.

While three of the Specifications grew out of the same transaction, it is presumed that the court had this in mind at the time sentence was imposed. Any one of the Specifications and Charges is sufficient to support the sentence and it does not appear that any substantial right of the accused was prejudiced by the multiplication of Charges.

6. War Department records disclose that this officer is 25 years of age and is single. He is a high school graduate and attended Milwaukee Vocational College for one year. He was a professional musician before entering the service as an enlisted man on 29 April 1942. He was graduated from the Chemical Warfare Officers Candidate School and commissioned a second lieutenant, Army of the United States, on 20 March 1943. He entered on active duty the same 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, as approved by the reviewing authority, and sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War 96.

(On leave), Judge Advocate.

William H. Gambrell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 24 JUL 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 Franklin R. Leslie (0-1038727), Chemical Warfare.

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 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 above 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. S/W.
Incl. 3 - Form of action.

(Sentence confirmed. G.C.M.O. 499, 13 Sep 1944)

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

SPJGQ
CM 257550

10 JUL 1944

UNITED STATES v. Private JOHN J. O'CONNOR (33556670), Receiving Company, First Parachute Training Regiment, The Parachute School, Fort Benning, Georgia.	THE INFANTRY SCHOOL Trial by G.C.M., convened at Fort Benning, Georgia, 9-10 May 1944. To be hanged by the neck until dead.

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

---

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

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

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

Specification: In that Private John J. O'Connor, Receiving Company, First Parachute Training Regiment, The Parachute School, (then a garrison prisoner), did, at Fort Benning, Georgia, on or about 25 March 1944 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Richard N. Campbell, a human being, by shooting him in the body with a gun.

CHARGE II: Violation of the 93rd Article of War.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

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

Specification: In that Private John J. O'Connor, Receiving Company, First Parachute Training Regiment, The Parachute School, (then a garrison prisoner), did, at Fort Benning, Georgia, on or about 25 March 1944, desert the service of the United States and did remain absent in desertion until he was apprehended by military authorities near Hartsville, South Carolina, and returned to Military control at Camp Mackall, North Carolina, on or about 26 March 1944.

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

Specification: In that Private John J. O'Connor, Receiving Company, First Parachute Training Regiment, The Parachute School, (then a garrison prisoner), did, at Fort Benning, Georgia on or about 25 March 1944, feloniously take, steal, and carry away one one quarter ton Ford truck, value about Nine Hundred dollars, property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to all Specifications and Charges. He was found not guilty of Charge II and the Specification but guilty of all other Specifications and Charges. No evidence of previous convictions was introduced at the trial. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. During the month of March 1944, Private Travis E. Blankenship and the accused were in confinement in the Post Detention Barracks at Fort Benning, Georgia. Blankenship had been in the guard house for 9 days and his mother had written him that she was ill and that she wanted him to come home. He had heard the accused on numerous occasions, state that he was going "to take off" so that when Blankenship spoke to him about it the accused said: "Let's go together". Accordingly, Blankenship and the accused agreed "to take off that Saturday morning" (which was 25 March 1944) (R. 137, 143, 144).

Sergeant Robert L. Foster, Corps of Military Police was on duty at the Post Stockade, Fort Benning, Georgia, as assistant provost sergeant. Among his responsibilities was that of assigning guards to certain prisoners and issuing weapons to such guards (R. 15, 16). On the morning of 25 March 1944 Private Richard N. Campbell (serial number 16176844), 4th ASTP, reported for duty as a guard and Sergeant Foster assigned a number to him, issued a single-barrelled, 12 gauge shot-gun and two type "double O" buck-shot shells to him. Campbell's name, serial number, organization and guard number were entered upon the "ammunition and tool check sheet" (R. 16, 17; Pros. Ex. 7). Two prisoners, the accused and Blankenship, were assigned to Campbell at 1:30 p.m. (R. 17, 18) and Sergeant Foster gave routine instructions to the guard respecting his tour of duty and his responsibilities (R. 23). The assignment was then entered upon the "work sheet" (R. 18; Pros. Ex. 8) and Private Campbell thereupon marched the two prisoners out of the gate at the Post Stockade in the presence of Sergeant Foster (R. 19). Under the supervision of Campbell the prisoners, acting as a paper-picking detail, policed a designated area and then went into the woods behind Russ Pool to take a break.

Blankenship testified that the guard, Campbell, then gave each of them a cigarette, and while they were smoking they watched an airplane (R. 137). Suddenly the accused said "O.K." and Blankenship grabbed the guard, throwing his arms around his shoulder. At the same time the accused said, "This is it" and seized the guard's shotgun (R. 137, 142, 163, 166). Blankenship was between the guard and O'Connor grappling with Campbell (R. 137). While making the plans to escape O'Connor had told Blankenship to take a handkerchief from the guard and stuff it in his mouth while O'Connor tied him up (R. 155). Mindful of this suggestion, while tussling with Campbell, Blankenship pulled a handkerchief and wallet from Campbell's right hip pocket and put them in his own pocket (R. 142, 155). Meanwhile he saw the accused cock the hammer of the shotgun as he stood holding it alongside of his right hip with both hands. The guard probably saw what the accused had done for he struggled, broke loose from Blankenship, pushed him away toward O'Connor and started running (R. 142, 143, 147, 156, 166, 167).

The terrain consisted of a lightly wooded, steep slope downward from where the accused stood toward the direction in which the guard ran (R. 34, 166, 167). The accused made no attempt to follow the guard nor did he move from his original position as he cocked the gun (R. 143, 146); then, as Blankenship who was 15 or 20 feet from O'Connor, stepped out of the way of the gun (R. 156), the accused shot the fleeing guard (R. 137), who was then 15 or 20 paces from O'Connor (R. 157). The accused neither stumbled, lost his balance, nor fell, but remained standing all the while he had the gun (R. 168). Blankenship saw the accused fire the gun from his hip (R. 160). Campbell cried "Oh!", fell down, and the accused took four or five steps and then dropped the gun; but neither he nor Blankenship went near the body of Campbell after he fell (R. 143). O'Connor noticed that Blankenship was frightened and told him "he was in up to (his) neck and might as well continue on with him" (R. 137, 143).

When O'Connor threw down the shotgun he said "Let's go"! and both he and Blankenship started running, side by side; but soon Blankenship was leading as they neared the woods (R. 161). When they stopped in the woods Blankenship began to cry and suggested to the accused that they go back to "see about the guard". O'Connor then threatened Blankenship and Blankenship accordingly continued on with the accused to Harmony Church (R. 137). It was already dark. Blankenship then gave the accused the wallet taken from the guard because O'Connor planned to take a jeep which he discovered parked on the street and said "the driver's license and social security card in it would help him a lot". The accused removed a picture from the wallet and tore it up (R. 145). The accused then took the jeep and advised Blankenship that if he "must turn in to tell the M.P.s that he was going to Memphis" although he actually planned to go to Savannah. The accused again threatened Blankenship and told him that if he (O'Connor) was apprehended and "put back" where he "could get to" Blankenship he would take the necessary steps to get rid of him. He told Blankenship to walk from Harmony Church to the Main Post before notifying any military police because that would give him a two-hour start (R. 137, 138, 151).

However, within 5 to 7 minutes after the accused had taken the jeep and gone off, Blankenship went into a building known as "4216" and called the military police. It was then about 9:00 p.m. and at approximately 9:10 p.m. Corporal Watkins, from Military Police Headquarters at Harmony Church came to the building and took Blankenship into custody. He took him to the office of the desk sergeant at Harmony Church headquarters where Sergeant Graf questioned him and asked him to guide them to the scene of the crime (R. 138).

Corporal Jesse F. Watkins, of the Corps of Military Police at Fort Benning, Georgia, testified that Blankenship then took him and Sergeant Graf to the woods above Russ Pool and led them to the body of a man lying flat on the back with arms outstretched over the head. It lay at the bottom of a slope and thirty yards up the slope they found a single-barrelled shot-gun. The body was dressed in O.D. trousers and a field jacket. Neither Watkins nor Graf touched the gun (R. 33, 34, 39). Sergeant Henry Joseph Graf, special investigator with the Corps of Military Police at Fort Benning, Georgia, who had accompanied Watkins and Blankenship to the scene examined the body and felt the face and arm. Finding the arm stiff he concluded the body was dead and that rigor mortis had set in (R. 36, 37). They then went to the Provost Marshal's Office and returned to the scene with Captain Berry, Lieutenant Nelson and a photographer. The body was then in the same position as it was in when they had first seen it. Photographs were then taken of the body while prone on its back and also when turned over (R. 38, 39; Pros. Ex. 142). Sergeant Graf also examined the gun, putting his finger in and smelling the barrel from which he determined that it had been fired (R. 39, 40). He did not open the gun but turned it over to Captain Berry (R. 40).

Captain Francis W. Berry, assistant Provost Marshal at Fort Benning, Georgia, testified to substantially the same facts as Corporal Watkins and Sergeant Graf regarding the locale of the crime, the position of the body and the gun. He cut a "niche" in the stock of the gun in order to be able to identify it later (R. 49) and he did identify the gun when it was shown to him at the trial (R. 54; Pros. Ex. 10).

Second Lieutenant William R. Nelson, Assistant Police and Prison Officer, Fort Benning, Georgia, testified that he was with the party headed by Captain Berry when an investigation was conducted at the scene of the crime on 25 March 1944. He saw the dead body of Campbell turned over and described the appearance of the back of the deceased's field jacket. "From the belt up it was one solid mass of blood about 18 inches in diameter" (R. 57). When the shot gun was found Captain Berry instructed Lieutenant Nelson to pick it up by the muzzle which he did. He then broke the gun and found a fired shell in the chamber. The hammer of the gun was down against the firing pin. Lieutenant Nelson retained possession of the gun until it was delivered by him to the Provost Marshal's Office and he identified the gun at the trial (R. 59, 60; Pros Ex. 10).

Lieutenant Nelson and Captain Berry examined the identification tags which were on the dead body and noted the name "Richard N. Campbell" and a serial number (R. 49, 65).

Captain Berry had directed that an ambulance be sent for the body and upon its arrival the body was carried on a stretcher to the top of the hill where the ambulance was parked. From there it was taken to the station hospital in the ambulance while Sergeant Graf followed in another car (R. 42, 48, 49).

Major Clarence F. Neve, Medical Corps, was administrative officer of the day at the station hospital Fort Benning, Georgia, on 25 March 1944. At about 11:30 p.m. on that day a body was brought to the receiving office of the station hospital. He then requested Major Tabb Davidson, Medical Corps, who was medical officer of the day on that date, to accompany him to the ambulance where, after an examination of the pulse, heart beat and respiration and a corneal reflex test, Major Davidson pronounced the body dead. They viewed the identification tags which were on the body and Major Davidson testified that he recalled seeing the name "Campbell" but could not recall the rest of the name (R. 66-68).

Major Neve then ordered the body to be taken to the morgue and he accompanied it there. At the morgue every article of clothing was removed from the body and tagged for identification. The field jacket was covered with blood stains and contained from 6 to 8 holes in the region of the left kidney spot. This jacket was identified by Major Neve at the trial and was received in evidence (R. 68-70; Pros. Ex. 11). Photographs were again taken of the body in two positions before it was completely disrobed. They were admitted in evidence and identified by Sergeant Graf as pictures of the body of the soldier found lying on the ground at Russ Pool (R. 42-44; Pros. Ex. 384). Among the articles found on the dead body was an unstamped letter ready for mailing. This letter was marked "free" in the upper right hand corner and in the upper left corner was the name "Campbell", with the rank "Corporal" and a serial number. The identification tags on the body were also examined and the witness recalled the name "Campbell" thereon but was confused with regard to the first name (R. 73).

Captain Charles H. Daffin, Medical Corps, pathologist at the Station Hospital, Fort Benning, Georgia, was directed to make a post mortem examination of the body of the deceased. He performed the autopsy at 9:20 a.m. on 26 March 1944 with the assistance of Sergeant Eldee L. Brown of the Medical Detachment. Upon opening the body he found the chest full of blood and both lungs punctured. Blood and fecal matter were in the abdomen. There were multiple openings in the intestines and a rupture of the vena cava. There were lacerations of the lungs, kidney, intestines and vena cava. He found a metallic pellet loose in the right chest cavity and another in the abdomen; another was found in the right arm in front of the elbow joint and a fourth in the intestines. Death was due to "shotgun wounds", the pellets having done great damage by

rupture in the chest and abdominal cavities. There was a total of eleven puncture lacerations all of which ranged from the back and downward from the right. The four pellets were placed in an envelope which was sealed and marked. At the trial Captain Daffin identified the envelope and the pellets and the latter were received in evidence (Pros. Ex. 13). He likewise identified Prosecution Exhibits 3 and 4 as accurate photographs of the body upon which he performed the autopsy. He identified the body as that of "Richard N. Campbell" by a mortuary tag attached thereto (R. 75-85).

Sergeant Eldee Brown, laboratory technician and medical attendant at the morgue, and who had assisted in performing the autopsy, delivered the body to Mr. Weaver representing the Averitt Funeral Home, Columbus, Georgia, at 1:00 p.m. on 26 March 1944. At the time of delivery to Mr. Weaver the body had morgue identification tags upon it, one on the right big toe and one on the wrist. The one on the toe remained with the body when it was later encased for shipment but the other was removed by Mr. Weaver, retained by him and delivered to the trial judge advocate immediately prior to trial. This tag was admitted in evidence. It bore thereon: "Name: Campbell, Richard N. Rank: Pvt. Serial No. 16176844. Org. 2nd. Co. 1st Battalion 4th Tr. Reg. A.S.T.P." (R. 85, 86). Sergeant Graf was present in the morgue at the time the mortuary tag was placed on the wrist of the body found near Russ Pool on 25 March 1944 (R. 87, 89).

After the body was embalmed at the Averitt Funeral Home, placed in a casket and prepared for shipment it was delivered to Sergeant Carlton R. Petty who had been assigned the duty of escorting the remains of Private Campbell to Imlay City, Michigan. Sergeant Petty was Private Campbell's platoon sergeant and had seen him every day while on duty with his organization. On 28 March 1944, he reported to the Averitt Funeral Home and was taken to the chapel where, after the casket was opened, he recognized the body of Private Campbell therein. The casket was then closed, encased in a box which was sealed and after being placed upon the train was transported to Imlay City, Michigan. Just prior to the funeral services there the casket was again opened and Sergeant Petty and members of the deceased's family saw and recognized the body as that of Private Campbell (R. 93-97).

On 26 March 1944 Private William M. Rine, Corps of Military Police, was on duty in Hartsville, South Carolina. His suspicions were aroused when he saw the accused, accompanied by several other soldiers, drive past him in a jeep. He reported the matter and later in the evening, while cruising in a patrol car with Corporal Howard T. Parks, they found the accused driving the jeep and stopped him. Upon questioning, the accused produced a pass indicating his name was "Richard N. Campbell". He produced the card from a pocketbook in his possession. Later, at the police station he was searched and the pocketbook containing the purported pass, an identification card and a social security card were taken from him. At the trial both Private Rine and Corporal Parks identified the accused, the pocketbook and the cards (Pros. Ex. 9, 16). The trip ticket issued for the use of the jeep found in the possession of the accused was taken up by the police and at the trial was admitted in evidence (Pros. Ex. 17). The ticket was made out in the name of "Lieutenant Landforce" as driver and the motor number of the vehicle covered by the ticket was "20406094". Upon inspection by Corporal Parks the jeep being driven by the accused was found to have the identical motor number. Both the accused and the jeep were taken to Camp Mackall, North Carolina, where the accused was held in confinement until his release to the authorities at Fort Benning, Georgia (R. 101-118; Pros. Exs. 9, 16, 17).

Two statements of the accused were admitted in evidence. The first was made to First Lieutenant John J. Zabek, acting police and prison officer at Camp Mackall, North Carolina, on 26 March 1944 shortly after the accused's apprehension and after warning under Article of War 24 (R. 119-121; Pros. Ex. 18). The second was made to Sergeant Leonard A. Spector, special investigator in the office of the Provost Marshal, Fort Benning, Georgia on 30 March 1944 and was sworn to before Major W. D. Veal, Provost Marshal and Summary Court officer. The latter was likewise made after warning of accused's rights under Article of War 24 (R. 98-100, 195-197; Pros. Ex. 17). Both are substantially the same.

According to the accused's first statement he and Blankenship had planned to escape from the guardhouse on 25 March 1944. At about 1545 on that date, they were on detail under guard of Private Richard

Campbell. They had gone into the woods and had been there about 45 minutes talking and smoking. He thought "this chaser appeared like a pretty good fellow". The guard had put his single barrelled shot gun by a tree. Suddenly Blankenship grabbed the guard and the accused figured they would "have to go through with the deal". He heard the guard cry out so he reached for the gun and told the guard to turn around so he could grab him by the throat and knock him out. Blankenship was still holding the guard and trying to stuff a handkerchief in his mouth. "The chaser was pleading, telling us that he had been good to us, saying that he had never made us work hard, which he didn't". Blankenship was in front of the guard and the accused was to the side covering both of them. He did not, however, have the gun cocked. At this point the guard grabbed Blankenship by the shoulder and shoved him toward the accused. The guard then turned around and ran. The accused yelled for him to stop and ran after him trying to catch him. When he got to within 35 or 40 feet of him the accused's right foot caught on something and he fell. He had been carrying the gun at "port arms" and as he fell to the ground on his left side the gun went off as he hit the ground. Though he saw the guard fall he did not know whether he had hit him or not. He thereupon dropped the gun and he and Blankenship "took off over the side of the hill" heading toward Harmony Church. There they waited until dark hoping to get a car. When he could not find a car he took a jeep which was parked near the officers quarters. Then Blankenship got scared and wanted to "turn in" so the accused told him "to show me the way off the post and then he could turn in." (Pros. Ex. 15, 18). He did not want Blankenship to surrender before 2400 because he "wanted to get a little start". He told Blankenship to tell the police he (the accused) had "headed toward Memphis" though he intended to and did go in an opposite direction. He went through Macon and Savannah, Georgia, but as he passed through Hartsville on his way to Fayetteville, North Carolina, he was stopped and when questioned said he was headed for Fort Oglethorpe instead of Fort Bragg. Since he was going in the wrong direction he was arrested and confined. He admitted getting the guard's wallet from Blankenship. He did not know he had shot the guard, did not go near him to find out and did not know he was dead until he was told by a sergeant on the morning of 27 March 1944. He claimed that it "was all an accident" and he "never intended to kill the chaser" (Pros. Ex. 18).

In his second statement the accused stated that he "might have" cocked the hammer of the shot gun before the shooting but he was "not sure". With regard to the killing of the guard he said: "The gun went

off and the next thing I saw the man fall. I didn't go back to the body. I looked around and at the time I didn't know I killed him. I knew I hit him, but I didn't think he was dead" (Pros. Ex. 1).

Dr. C. J. Rehling, Senior Toxicologist with the Alabama Department of Toxicology and Criminal Investigation, examined and made tests with the shot gun, the fired shell and the four lead pellets found in the body of the deceased. He conducted tests with reference to the shot pattern of the gun in order to estimate the distance from which the gun was fired at the field jacket worn by the deceased. Using the same type of shells as those with which Private Campbell had been provided, he determined that the gun had been fired at a distance of 60 or 65 feet from the deceased. The lead pellets found in the deceased's body were identified by him as "Double-O buckshot". He testified that it would be very difficult to discharge the shotgun accidentally by striking it against an object or letting it fall to the ground or by accidentally striking the uncocked hammer or by the uncocked hammer accidentally striking any other object and that it required considerable force to pull the hammer back to the required firing position. He was of the opinion that the fired shell which had been removed from the shotgun had been fired with the hammer of the gun fully retracted and in a cocked position (R. 168-177).

First Lieutenant Edward J. Dempsey, Motor Officer of the 3735th Quartermaster Truck Company, Fort Benning, Georgia, testified that on 25 March 1944, he dispatched a jeep bearing War Department number "20406094" to Lieutenant Leonard H. Slaybard. The jeep was a government vehicle then in the motor park at Fort Benning, Georgia (R. 177-180). Lieutenant Slaybard testified that he obtained the jeep on 25 March 1944 and had possession of it until 7:30 p.m. on that date when he parked in front of the Bachelor Officers' Quarters at Harmony Church. He recalled that the War Department number of the jeep ended in the numbers "094" and the company marking was "3735th Truck 54". He did not see the jeep again after parking it until a week or so later (R. 180-182). Lieutenant Dempsey obtained the return of the identical jeep from Sergeant Spector at Military Police Headquarters on 31 March 1944 (R. 178). Sergeant Spector had obtained the jeep at Camp Mackall, North Carolina when he went there to take custody of the accused (R. 194, 195). It was stipulated that the value of the jeep was approximately $900 (R. 199).

In connection with the charge of desertion and to establish the initial unauthorized absence of the accused, the original signed, extract copy of the morning report of the Post Detention Barracks, Fort Benning, Georgia, was admitted in evidence (R. 199; Pros. Ex. 20).

4. The accused, having had his rights explained to him, elected to make an unsworn statement.

In substance he maintained that he "never intended to shoot Private Richard N. Campbell, let alone kill him. As far as the shooting, or the actual killing, it was all an accident. The gun went off by itself, without any of my power or knowledge * * * It was an accident

and I never intended to kill him. I never intended to kill any body" (R. 203).

Regarding the charge of desertion he asserted that he "never intended to desert the United States forces". He had gone "over the hill" sometime prior to his confinement in the stockade in order to see and marry his girl, who was pregnant; but he was caught before he had a chance to do so. After his apprehension and return to Fort Benning he was worried about her and her position because of letters he received from her and he wanted to be with her. He intended to come back as soon as he had seen her. He "never intended to take (his) uniform off or stay out only until (he) got things straightened up at home".

With regard to the larceny of the jeep he felt that he "only used it for transportation". At first, before he took it into South Carolina he just intended to take it outside the post"* * * right off the Main Post over in Harmony Church, and leave it there so it could be picked up". Then he began to "think about this thing, about what happened here". He just "figured" he would keep the jeep and drop it off at some other Army post, "so it would still go back to the Army". He "never did try to sell it or paint it or hide it in any way at all".

5. The accused stands charged in this case with the murder of a guard perpetrated in the execution of a premeditated plan to escape from confinement and also with the subsequent larceny of a government jeep, and desertion.

It clearly appears from the testimony of an accomplice that the accused and his confederate, Blankenship, did plan to escape from the custody of the guard placed on them and that, on the afternoon of 25 March 1944, in keeping with the plan, they accomplished their purpose. At that time, while there was a temporary pause in their work, the accused and Blankenship, both prisoners in the Post Detention Barracks, were in the custody of Private Richard N. Campbell, who was assigned to guard them. The guard had given them each a cigarette and while smoking and idly watching an airplane, Blankenship jumped upon the guard, throwing his arms about him. At this moment the accused, saying "O.K." and "This is it", grabbed the shotgun which the guard had momentarily set against a tree.

In the struggle that followed, Blankenship managed to remove a handkerchief and wallet from the guard's hip pocket. He placed the wallet in his own pocket and, according to a statement of the accused, tried to stuff the handkerchief in the guard's mouth. Blankenship testified that the accused had advised him to take a handkerchief and attempt to gag the guard, if possible, when the time for escape arrived, and that he had taken the handkerchief from the guard with that intent but he could not recall whether he did try to gag the guard.

The guard eventually broke loose from Blankenship and, while fleeing from the scene downward over the sloping terrain, was shot in the back by the accused who stood holding the guard's shotgun at his right hip pointed in the direction of the guard.

There is no dispute regarding the manner in which the guard came to his death. The accused, in two statements made after his apprehension, admitted that the shotgun was fired while in his possession but insists that the shooting was accidental and took place when the accused stumbled and fell while he was chasing the fleeing guard. Blankenship an eye witness, however, denied that the accused had moved from his position when he first seized the gun and stated that he did not stumble or fall at any time thereafter but, instead, cocked the hammer of the shot gun and fired it from the right hip while it was pointed at the guard.

Even without other evidence to corroborate and support the story told by Blankenship, his version of the fatal episode is the more plausible of the two. What possible reason could the accused have had to chase after the guard? He said he wanted to catch him and make him return. This is an utterly ridiculous and incongruous explanation. Both the accused and Blankenship sought merely to evade the guard and make good their escape. Nothing could have been more advantageous to their plans than the disarming of the guard and his flight. They were then free to make good their escape without restraint or hinderance of any kind from the guard and it would have been folly, after successfully driving the guard away through fear, to follow him in the hope of causing him to return.

The tale told by Blankenship is undoubtedly true. The accused, whatever may have been secretly in his mind at the moment, stood where he was after he had seized the shotgun and, deliberately cocking the gun, shot the guard in the back as he was running down the slope in an effort to escape the harm which befell him. An expert criminal investigator, after making careful tests with the shotgun used in the homicide, testified that it would be very difficult to cause the gun to fire a shell in the chamber accidentally, whether by allowing it to fall to the ground, or by striking the hammer or by the hammer striking another object; furthermore, the chance of the gun being pointed directly at the small of the guard's back at the moment of an accidental firing due to a fall is too remote to persuade belief in the accused's defense even though an accidental discharge were a probability. The pattern of wounds caused by the buckshot in the back of the deceased indicates clearly that the weapon with which the killing was accomplished was purposely and successfully aimed. But, conceding for the moment that the gun was accidentally discharged while the accused was chasing the unarmed guard who had every reason and right under the circumstances to seek safety through escape, the resultant homicide could not be deemed justified on the ground of accident. Excusable homicide is that committed by one doing a lawful act without intention to hurt, or in self defense (26 Am. Jr. 157); as where a man doing a lawful act, without intention to hurt, nonnegligently kills another (Wharton's Criminal Law, 12th Edition, Vol. I, par. 428). Having been, at the moment of the shooting, engaged in the unlawful act

of attempting an escape from a disarmed guard, by force and violence, the accused cannot be heard to plead accident and misadventure either in excuse or mitigation of the consequences which naturally followed his unlawful acts and which he must be deemed to have voluntarily assumed.

Having thus concluded that the killing was unlawful has it been shown to have been perpetrated with malice aforethought and premeditation?

> "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 the 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 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 where death is inflicted in the heat of 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 or by a wish that it may not be caused * * * " (par. 148, MCM 1928).

As was ably stated in the oft-quoted case of Commonwealth v. Webster (5 Cush. 296, 52 Am. Dec. 711):

> "Malice, in this definition, is used in a technical sense, including not only envy, 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 by such circumstances as carry in them the plain indication of a heart regardless of social duty and fatally bent on mischief * *. Moreover, when in a prosecution for homicide, it is shown that the accused used a deadly weapon in the commission of the homicide which is the subject of the prosecution, the law infers or presumes from the use of such weapon, in the absence of circumstances of explanation or mitigation, the existence of the mental element - intent, malice, design, premeditation, or whatever term may be used to express it - which is essential to culpable homicide"(26 Am. Jur. p. 360; par. 305).

"The principle is well settled that where a killing with a deadly weapon is admitted or proved, in the sense that it is established as a fact in the case, malice may be implied, inferred, or as said in some cases, presumed"(Ibid, p. 362, par. 308).

Tested by these principles the conduct of the accused on the afternoon of 25 March 1944, as he put into execution the preconceived plan to evade restraint and escape from his confinement, plainly evidences a malicious disregard of social duty and a heart fatally bent on mischief. Every step in the process by which the guard was killed clearly demonstrates premeditation. The accused willfully seized the gun; he knowingly cocked the hammer; and, as the guard ran from him, he deliberately shot him in the back. It was an unprovoked, cowardly and brutal killing.

The guard was pronounced dead before midnight of the day on which he was killed; an autopsy upon the body of the deceased disclosed that death resulted from the gunshot wounds; and the body was definitely identified through every stage of the tragedy from the shooting to the burial services, as that of Private Richard N. Campbell. Thus the record discloses abundant proof of every element of the crime of murder and every essential allegation of the Specification charging the same.

It is unnecessary to give serious discussion to the charge of larceny of the government "jeep". The accused, by his own testimony, admitted that he "waited around Harmony Church area until dark in hopes of getting a car". He "couldn't find a car so (he) took a jeep that was parked near the officers quarters". When asked where he was going at the time of his arrest in Hartsville, South Carolina, while still in possession of the "jeep", he answered: "Anywhere". Certainly, under such circumstances it is only reasonable to infer that he had taken the jeep with larcenous intent and was then engaged in the active asportation of the stolen vehicle.

It is equally clear that the accused intended to desert the service as alleged in the Specification of Charge III. Had he effected his escape from the guard without the untoward incident of the homicide and had furthered his plans by the larceny of the jeep, all these circumstances when taken in connection with his apprehension at a place distant from his duty station, would have justified the inference of an intent not to return. When his grave responsibility for the brutal murder of the guard is added to all else the conclusion that the accused would never return voluntarily is inescapable.

6. On 6 April 1944 the accused was subjected to a neuropsychiatric examination for the purpose of determining his mental condition. Captain Daniel Luttinger, Medical Corps, a neuropsychiatrist, certified that he had found no evidence of any neurotic or mental disorder and that the accused was sane.

7. The accused is 19 years and 6 months of age. Records of the War Department show that he finished three years of high school education but his entire youth reflects a picture of delinquency and maladjustment. Neither his parents nor the institutions to which he was committed when he was no longer amenable to home discipline were able to cope with the problem he constantly presented. He was inducted at Baltimore, Maryland, on 11 February 1943 and has had no prior service. At the time the accused committed the offenses of which he stands convicted herein he was confined in the Post Detention Barracks, Fort Benning, Georgia, charged with having deserted the service at Fort Benning, from 5 August 1943 until his apprehension in Syracuse, New York on 4 December 1943. This desertion took place immediately after his transfer to the Receiving Company, First Parachute Training Regiment, The Parachute School, Fort Benning, Georgia.

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 and the sentence and to warrant confirmation of the sentence. A sentence of death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92. In time of war, a sentence of death, or such other punishment as a court-martial may direct, is authorized upon conviction of a violation of Article of War 58. Fine or imprisonment, or such other punishment as a court-martial may adjudge, or any or all of such penalties, are authorized for a conviction of a violation of Article of War 94.

William A. Pounds, Judge Advocate.

William H. Lambrecht, Judge Advocate.

Herbert B. Fredericq, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 2 SEP 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private John J. O'Connor (33556670), Receiving Company, First Parachute Training Regiment, The Parachute School, Fort Benning, Georgia.

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

3. On 10 August 1944 eight of the original eleven members of the court-martial which tried the accused reconvened in revision proceedings and amended the record of trial to show that at the previous session all the members present at the time the vote was taken concurred in the findings of guilty of the Specification and the Charge alleging murder. Of like effect are certificates from the three members of the court who were absent from the revision proceedings because of duty at other stations.

Accordingly, any possible objection to the execution of the sentence because of the Federal court decision in Hancock vs. Stout referred to in my memorandum to you of 18 July 1944 under the title "Execution of the Death Penalty" has been removed and there is no reason why the sentence may not be confirmed or such other action taken as is deemed proper.

4. Consideration has been given to the attached letter addressed to the President from Miss Mary O'Connor, sister of the accused, dated 15 May 1944.

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

Myron C. Cramer

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

4 Incls.
1 - Record of trial
2 - Dft. ltr. for sig. S/W
3 - Form of Executive action
4 - Ltr. from Miss Mary O'Connor to the President dated 15 May 1944

(Sentence confirmed. G.C.M.O. 631, 24 Nov 1944)

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

SPJGV
CM 257572

23 JUN 1944

UNITED STATES	)	SECOND AIR FORCE
v.	)	Trial by G.C.M., convened at Baton Rouge, Louisiana, 24 and 26 May 1944. Dismissal, total forfeitures and confinement for five (5) years.
Second Lieutenant FRANCIS J. BOTTHOF (0-1110941), Corps of Engineers.	)	

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

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

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

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

Specification: In that Second Lieutenant Francis J. Botthof, Corps of Engineers, 263rd Combat Crew Training School (Fighter), Section A, formerly a member of the 2065th Engineer Aviation Fire Fighting Platoon, did, at Harding Field, Baton Rouge, Louisiana, on or about 5 October 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Pittsburgh, Pennsylvania, on or about 12 February 1944.

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

Specification: In that Second Lieutenant Francis J. Botthof, * * *, having been duly placed in arrest at Harding Field,

Baton Rouge, Louisiana, on or about 20 September 1943, did, at Harding Field, Baton Rouge, Louisiana, on or about 5 October 1943, break his said arrest before he was set at liberty by proper authority.

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

Specification 1: In that Second Lieutenant Francis J. Botthof, * * *, did, at Baton Rouge, Louisiana, on or about 25 August, 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Hotel Heidelberg, Baton Rouge, Louisiana, a certain check in words and figures as follows, to wit: "Baton Rouge, La., Aug. 25, 1943, Pay to the order of Hotel Heidelberg, 'Consistently Moderate Prices', $15. no/100, Fifteen no/100 Dollars. The Drawer Certifies that He Has on Deposit the Above Amount and Guarantees this Draft will Be Paid Upon Presentation. To Capital City Bank, Tallahassee, Fla. Francis J. Botthof, 01110941, 3rd EAUTC Harding Field, La.", and by means thereof, did fraudulently obtain from the Hotel Heidelberg, Baton Rouge, Louisiana, the sum of fifteen dollars ($15.00), he the said Second Lieutenant Francis J. Botthof, then well knowing that he did not have and not intending that he should have sufficient funds in the said Capital City Bank for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check dated 3 September 1943, payable to the order of Hotel Heidelberg, made and uttered to the Hotel Heidelberg, Baton Rouge, Louisiana, and fraudulently obtaining thereby the sum of $15.

Specification 3: Same form as Specification 1, but alleging check dated 4 September 1943, payable to the order of Hotel Heidelberg, made and uttered to the Hotel Heidelberg, Baton Rouge, Louisiana, and fraudulently obtaining thereby the sum of $15.

Specification 4: Same form as Specification 1, but alleging check dated 7 September 1943, payable to the order of Hotel Heidelberg, made and uttered to the Hotel Heidelberg, Baton Rouge, Louisiana, and fraudulently obtaining thereby the sum of $10.

Specification 5: Same form as Specification 1, but alleging check dated 7 September 1943, payable to the order of Hotel Heidelberg, made and uttered to the Hotel Heidelberg, Baton Rouge, Louisiana, and fraudulently obtaining thereby the sum of $15.

Specification 6: Same form as Specification 1, but alleging check dated 11 September 1943, payable to the order of Harding Field Exchange, made and uttered to the Harding Field Post Exchange, Baton Rouge, Louisiana, and fraudulently obtaining thereby the sum of $25.

Specification 7: Same form as Specification 1, but alleging check dated 14 September 1943, payable to the order of Harding Field Exchange, made and uttered to the Harding Field Post Exchange, Baton Rouge, Louisiana, and fraudulently obtaining thereby the sum of $15.

Specification 8: Same form as Specification 1, but alleging check dated 15 September 1943, payable to the order of Harding Field Exchange, made and uttered to the Harding Field Post Exchange, Baton Rouge, Louisiana, and fraudulently obtaining thereby the sum of $10.

Specification 9: Same form as Specification 1, but alleging check dated 16 September 1943, payable to the order of Harding Field Exchange, made and uttered to the Harding Field Post Exchange, Baton Rouge, Louisiana, and fraudulently obtaining thereby the sum of $15.

Specification 10: Same form as Specification 1, but alleging check dated 17 September 1943, payable to the order of Harding Field Exchange, made and uttered to the Harding Field Post Exchange, Baton Rouge, Louisiana, and fraudulently obtaining thereby the sum of $25.

Specification 11: Same form as Specification 1, but alleging check dated 24 September 1943, payable to the order of Harding Field Exchange, made and uttered to the Harding Field Post Exchange, Baton Rouge, Louisiana, and fraudulently obtaining thereby the sum of $10.

Specification 12: Same form as Specification 1, but alleging check dated 23 September 1943, payable to the order of Officers Mess Harding Field, La., made and uttered to the Officers' Mess, Harding Field, Louisiana, and fraudulently obtaining thereby the sum of $5.

Specification 13: Same form as Specification 1, but alleging check dated 29 September 1943, payable to the order of Stroube Drug Co., made and uttered to Stroube Drug Company, Baton Rouge, Louisiana, and fraudulently obtaining thereby the sum of $10.

Specification 14: Same form as Specification 1, but alleging check dated 30 September 1943, payable to the order of Stroube Drug Co., made and uttered to Stroube Drug Company, Baton Rouge, Louisiana, and fraudulently obtaining thereby the sum of $15.

Specification 15: Same form as Specification 1, but alleging check dated 2 October 1943, payable to the order of Stroube Drug Co., made and uttered to Stroube Drug Company, Baton Rouge, Louisiana, and fraudulently obtaining thereby the sum of $15.

Specification 16: In that Second Lieutenant Francis J. Botthof, * * *, being indebted to the Officers' Mess, Harding Field, Louisiana, in the sum of Forty-seven dollars and fifteen cents ($47.15) for subsistence and quarters, which amount became due and payable on or about 5 October 1943, did, at Harding Field, Baton Rouge, Louisiana, from 5 October 1943 to 21 April 1944, dishonorably fail and neglect to pay said debt.

Specification 17: In that Second Lieutenant Francis J. Botthof, * * *, being indebted to the Hotel Heidelberg, Baton Rouge, Louisiana, in the sum of Seventy-one dollars and twenty-five cents ($71.25), for service, which amount became due and payable on or about 10 September 1943, did, at Baton Rouge, Louisiana, from 10 September 1943 to 21 April 1944, dishonorably fail and neglect to pay said debt.

He pleaded guilty to all Charges and Specifications except Charge I and its Specification, to which he pleaded not guilty, but by proper exceptions and substitutions guilty of absence without leave and guilty of violation of Article of War 61. No evidence of previous convictions was introduced. He was found guilty of all Charges and Specifications except Charge I and its Specification, of which he was found not guilty, but guilty of absence without leave, in violation of Article of War 61. 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 the sentence but reduced the period of confinement to five years and forwarded the record of trial for action under Article of War 48.

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

a. Charge I and Specification thereunder and Charge II and Specification thereunder.

It was stipulated that if Major Russell D. Hartz were present he would testify that he duly placed accused in arrest to the limits of Harding Field, Louisiana, on 20 September 1943. It was further stipulated that accused was never released by proper authority from this arrest (R. 11; Ex. C). It was also stipulated that accused absented himself without leave from Harding Field, Louisiana, on 5 October 1943 (R. 11; Ex. D). The accused's unauthorized absence beginning on 5 October 1943 was also established by accused's sworn statement made to the investigating officer (R. 14; Ex. I).

The accused's return to military control was shown by an extract copy of morning report of the Pittsburgh Military Police Detachment, Pittsburgh, Pennsylvania, showing accused's confinement by military police in Pittsburgh on 12 February 1944, after being apprehended in a hotel room in downtown Pittsburgh (R. 11; Exs. E, I).

b. Charge III and Specifications 1-17 thereunder.

It was stipulated that the accused wrote and uttered the checks described in Specifications 1-15 of Charge III, all drawn on the Capital City Bank, Tallahassee, Florida, photostatic copies of such checks being attached to the stipulation; that accused received merchandise or currency for same, and that the checks were returned to the payees named on each check because of insufficient funds in the bank on which said checks were drawn. It was further stipulated that if the cashier or a duly authorized representative of the Capital City Bank, Tallahassee, Florida, were present he would testify that the accused maintained a checking account at said bank and that the four bank statements attached to the stipulation for the months of August, September, October and November 1943 represent the true status of accused's account with said bank from 29 July to 9 November 1943 (R. 11; Ex. F). The fifteen checks described in Specifications 1-15 of Charge III were made and uttered by accused between 25 August and 2 October 1943. Eight of these checks were for $15 each, four for $10 each, two for $25 each, and one for $5.

It was stipulated that if the credit manager of the Heidelberg Hotel, Baton Rouge, Louisiana, were present he would testify that the

accused was a guest of the hotel from 26 August 1943 until 9 September 1943, and that he left said hotel without checking out, leaving unpaid his hotel bill of $71.25 (R. 12; Ex. G).

It was stipulated that if the officer in charge of the Officers' Mess, Harding Field, Louisiana, were present he would testify that accused is indebted to the Officers' Mess in the amount of $47.15, which became due and payable 5 October 1943, and that said bill is still unpaid (R. 12; Ex. H).

A sworn written statement made by accused to Captain John W. Martin, investigating officer, after accused had been fully advised of his rights and without any threats or promises being made or any coercion exercised, was received in evidence (R. 14; Ex. I). In this statement accused admitted specifically that he wrote each of the checks described in Specifications 1-15, that he received cash for such checks, and that at the time of giving each check he knew he did not have sufficient funds on deposit in the drawee bank for the payment of the check. Accused also admitted that he had breached his arrest at Harding Field, Louisiana, on 5 October 1943 and had absented himself without leave from that date until he was apprehended in the William Penn Hotel in Pittsburgh, Pennsylvania, on 12 February 1944.

4. For the defense.

After an explanation of his rights as a witness accused elected to make an unsworn statement through counsel. He said that inactivity after his arrest so affected his nerves that he left Harding Field on 5 October 1943 with the intent of going to his home in Philadelphia where he thought he could straighten out his affairs, and then return to duty with a fresh start. However, a few days after leaving "the enormity of this action became clear and with the help of the bottle" he ill-advisedly put off his return. During his entire absence he represented himself as an officer, wore his uniform, and gave his address as Harding Field. He never for a moment had a thought of deserting, and "a troubled mind and shame were the contributing factors which drove me to such an inglorious act" (R. 14).

5. The evidence is conclusive that accused was placed in arrest at Harding Field, Louisiana, pending court-martial proceedings, and that on 5 October 1943 he breached this arrest and absented himself without leave until he was apprehended in a hotel in Pittsburgh, Pennsylvania.

The evidence is also conclusive that accused during the period between 25 August 1943 and 2 October 1943 made and uttered fifteen checks in amounts of $5 to $25, which were dishonored by the drawee bank because of insufficient funds. The evidence further shows that accused has dishonorably failed to pay a bill owed the Officers' Mess, Harding Field, Louisiana, which bill was payable 5 October 1943 in the amount of $47.15. Accused also dishonorably failed to pay his bill in the amount of $71.25 due to the Heidelberg Hotel, Baton Rouge, Louisiana, leaving the hotel around 9 September 1943 without checking out, and leaving his bill with the hotel unpaid.

6. War Department records show that accused is 39 years of age. He attended Villanova College for three years. He entered military service 24 August 1942, and after attending Engineer Officer Candidate School, Fort Belvoir, Virginia, was commissioned second lieutenant, Army of the United States, on 3 March 1943.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, 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 Article of War 61, 69 or 96.

Thomas H. Tappy, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trevithick, Judge Advocate.

SPJGV
CM 257572

1st Ind.

War Department, J.A.G.O., 1 - JUL 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 Francis J. Botthof (O-1110941), Corps of Engineers.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, to support the sentence as approved by the reviewing authority, and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution 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. sig. of S/W.
3 - Form of action.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 431, 4 Aug 1944)

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

(187)

24 JUN 1944

SPJGH
CM 257615

UNITED STATES	)	INFANTRY REPLACEMENT TRAINING CENTER FORT MCCLELLAN, ALABAMA
v.	)	
Second Lieutenant HENRY M. LEE (0-1302250), Infantry.	)	Trial by G.C.M., convened at Fort McClellan, Alabama, 23 May 1944. Dismissal and total forfeitures.

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Henry M. Lee, Infantry, Infantry Officers Replacement Pool, Infantry Replacement Training Center, Fort McClellan, Alabama, did, without proper leave, absent himself from his organization and station at Fort McClellan, Alabama, from about 0730, 8 May 1944 to about 1115, 12 May 1944.

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

3. Evidence for the prosecution: An extract copy (Ex. 1) of the morning report of Infantry Officers' Replacement Pool, Infantry Replacement Training Center, Fort McClellan, Alabama, showed accused from temporary duty to absent without leave, 8 May 1944. The accused did not have the permission of his battalion commander to be absent 8 May 1944 but had been granted a "VOCO" by his company commander 6 May 1944. Accused was not in his hut at 9:30 p.m. or at taps on 9 May 1944, nor was he present at reveille the following morning, and his bed did not appear to have been occupied (R. 6-8).

On 12 May 1944 Second Lieutenant G. C. Roberts, Military Police Detachment, apprehended accused in a cafe in Birmingham, Alabama. Lieutenant Roberts waited while accused finished his breakfast. The accused readily

identified himself and admitted to Lieutenant Roberts that he was "AWOL". He stated that he had arrived in Birmingham 6 May 1944, that he became "very sick" after eating a shrimp cocktail that evening, and that he remained in his room at the Bankhead Hotel until the morning he was apprehended. Accused was in "full uniform" when arrested and did not look as though he had been drinking (R. 9-10).

On 15 May 1944 the accused, after being advised of his rights, made a statement under oath (Ex. 2) to Major Michael J. Barry, the investigating officer, that he left Fort McClellan, Alabama, Saturday, 6 May 1944, by authority of a "VOCO" and went to Birmingham, Alabama. He became so ill as a result of eating a shrimp cocktail that evening that he returned to his room at the Bankhead Hotel and remained there "without leaving" the room until 10:00 a.m. on 12 May 1944, the day he was apprehended, returned to Fort McClellan and placed in arrest in quarters (R. 11-12).

The court took judicial notice of Army Regulations No. 605-115, providing that officers authorized to grant leaves of absence may grant oral permission for absence over Sundays, holidays, and other similar periods (R. 12).

4. For the defense: The accused testified that he received a "VOCO" on 6 May 1944 and went to Birmingham, Alabama. He ordered dinner that evening, and after he had eaten about half of a shrimp cocktail his stomach "reacted". Feeling nauseated he immediately returned to his room in the Bankhead Hotel and started vomiting blood. His head was "going around and around" and he ordered some ice, which he placed "around" his head. He stated that during the entire period he remained in the hotel room he did not eat nor drink anything except ice water. He was "nauseated, vomiting, in a semi-conscious condition" and "so weak" he did not get out of bed. He did not call a doctor or telephone Fort McClellan because he was "too weak to realize" he should do so. On Friday, 12 May 1944, he was feeling better and intended to go to the Air Base Hospital in Birmingham, Alabama. He left the hotel and was eating his first food since the preceding Saturday when he was arrested by the military police. The accused further testified that he had the same illness about a year before, at which time he was confined in LaGarde General Hospital for over a month and received treatment for stomach ulcers (R. 13-15).

On cross-examination the accused testified that he was "supposed" to return to duty from his "VOCO" on Monday morning (8 May 1944). He stated that he did not have a drink of intoxicating liquor during the entire period he was in Birmingham, nor did he purchase any liquor. A pint bottle containing about one-half inch of liquor was on the dresser when he rented the hotel room and remained there the "whole time" he occupied the room, but he did not take a drink of it. He further stated that he told the bell captain that he was sick and told the maid who came to clean his room that he was "too

sick to move", but he did not request either of them to summon medical aid (R. 15-19).

Mr. Pat Third, bell captain at the Bankhead Hotel, Birmingham, Alabama, testified that on three different occasions while accused was staying at the hotel he received calls through the telephone operator to bring ice to accused. He noticed nothing "in particular" about accused except that he would be in bed when the ice was delivered. Twice when he entered the room the accused was "dressed" and the third time he was wearing his pants only. He did not observe any whiskey or signs of liquor in the room and accused did not appear to be drinking. Accused complained to him about eating "something" that made him sick and he looked as though he "didn't feel well". The clothes of accused were on hangers, the room was in order and there were no indications that accused had received visitors. Accused did not request anything but ice as far as Mr. Third could remember (R. 20-24).

On further direct examination the accused testified that at the time he was apprehended in the cafe on 12 May 1944 he gave his room key to an enlisted man accompanying Lieutenant Roberts and that the enlisted man checked him out of the hotel while he finished eating. The remainder of the pint bottle of whiskey was in his room when he left the hotel that morning and he next saw it when it was being poured into the sink at the "MP" station. He further testified, when recalled as a witness, that when he first rented the room the whiskey was in a desk drawer and it remained there until he left the hotel on 12 May. His bank book was in the same drawer and when he reached for his bank book that morning he took the bottle out and left it on the dresser (R. 19-20, 24-26).

5. It is shown by the evidence and admitted in the testimony of accused at the trial that the accused without proper leave absented himself from his organization from about 8 May to 12 May 1944 as alleged in the Specification of the Charge.

The accused in explaining his absence stated that due to his illness he did not realize that he should notify military authorities he was unable to return to his organization nor that he should call for medical attention. The evidence shows, however, that accused carried on conversations with the maid and bell captain in the hotel, that he made use of the telephone to order ice, and that he knew what transpired during his stay at the hotel, all leading to the inescapable conclusion that the illness of accused did not render him incapable of recognizing his absent status nor interfere with his ability to get in touch with military authorities had he desired to do so.

6. The accused is 25 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 1941; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 2 December 1942.

The accused stated that he had 21 months enlisted service.

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

Samuel M. Davis, Judge Advocate.

(On Leave), Judge Advocate.

F. J. Lotthuhos, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 30 JUN 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 Henry M. Lee (0-1302250), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The accused was absent without leave from his organization and station for four days. It appears from the staff judge advocate's review that accused was on a previous occasion punished under the 104th Article of War for passing a bad check for $30 on 30 March 1943 and for being drunk and disorderly in uniform in a hotel on the same date. 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,
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. 412, 27 Jul 1944)

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

28 JUL 1944

SPJGH
CM 257634

UNITED STATES	)	63RD INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Van Dorn, Mississippi, 26 May 1944. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.
Private QUENTIN H. FRIEND (37518431), 508th Medical Collecting Company (Separate).	)	

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

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

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

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

Specification: In that Private Quentin H. Friend, 508th Medical Collecting Company, did, at Baton Rouge, Louisiana, on or about 20 April 1944, feloniously take, steal, and carry away a 1941 Ford Coach, value more than $50.00, the property of T.E. Nesom, Clinton, Louisiana.

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

Specification: In that Private Quentin H. Friend, 508th Medical Collecting Company, having been restricted to the limits of Company Area, 508th Medical Collecting Company, did, at Camp Van Dorn, Mississippi, on or about 20 April 1944, break said restriction by going to Baton Rouge, Louisiana.

He pleaded not guilty to and was found guilty of the Specifications and Charges. Evidence of three previous convictions of absence without leave was considered. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years. The reviewing authority approved the sentence and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The record of trial has been forwarded for action under Article of War 50½.

3. a. The Specification, Charge II: First Lieutenant Charles F. Spieler, 508th Medical Collecting Company, Camp Van Dorn, Mississippi, the organization of accused, was summary court officer while the company was in the Louisiana Maneuver Area during the first part of April 1944. On 9 April a sentence of restriction to the company area for 30 days was imposed on accused and approved. There was no

modification of the sentence. Lieutenant Spieler explained to accused what the company area was on maneuvers, but did not explain what the company area was at Camp Van Dorn. First Sergeant Marvin C. Ward testified that accused was absent from the company at reveille on 21 April, and had left at some time after retreat the night before. Extract copies (Exs. A and B) of the company morning report show accused absent without leave "2400 21 April 1944". Sergeant Ward testified that the morning report shows the absence as of that time "Because all I could report him - before I can report a man AWOL he has to be gone 24 hours" (R. 4-12).

b. The Specification, Charge I: Mr. T. E. Nesom parked his maroon 1941 Ford sedan, license number 300-055, in front of a friend's house in Clinton, Louisiana, at about 7:45 p.m. on 20 April 1944. When he was returning from "the corner", where he had gone for a bottle of beer, about 8:15 or 8:30 p.m., he saw his car being pushed away by a jeep. Three men in Army uniform took the car. The car was of a stipulated value (Ex. C) in excess of $50, and Mr. Nesom gave no one permission to use the car. He reported to the sheriff that his car was missing. Mr. Nesom next saw his car on the following day at "Headquarters, State Highway Patrol". He testified that there are two routes from Camp Van Dorn to Baton Rouge, Louisiana, and one of them passes through Clinton (R. 18-21).

About 8:30 or 9:00 p.m. on 20 April Mr. O. C. Anderson and Mr. Earl Seguin of the Louisiana State Police, who were on patrol near Baton Rouge, received a radio call notifying them of the theft of the Nesom car. Later in the evening when they were parked and headed south on Highway 61, north of Baton Rouge in the direction of Camp Van Dorn, they observed a car similar to the stolen car traveling north. They turned around and "chased" this car about a mile and a half, and caught up with it as it "checked up and pulled into a filling station" at Scotlandville. Anderson stated that when the car passed them it "wasn't traveling at a very high rate of speed", not over 15 or 20 miles an hour. He could not say whether the driver of the car noticed that they were "after him", but he did "get up to a high rate of speed" before they caught him. Seguin stated that the car was traveling at 35 or 40 miles an hour when it passed them, and later "drove up pretty fast" so that the policemen had to drive about 70 miles an hour to catch it. When the police car had been turned around to follow the other car, the latter was a quarter of a mile ahead. The policemen arrested the occupants of the car at about 10:45 p.m. immediately upon reaching the filling station. Accused was driving the car and Private Carl Walker was with him. The gasoline tank was one-fourth full. The license plate, Number 300-055, was found "kind of bent together in the back of the car, in back of the front seat". Accused "might have been drinking" but was not under the influence of liquor (R. 12-17).

4. a. The Specification, Charge II: Accused testified that on 20 April he and Walker went to "the beer garden", drank some beer, decided to go to

Baton Rouge, and went there by hitch-hiking. They left camp at about 5:00 or 5:30 p.m. and reached Baton Rouge about 7:00 or 7:30 p.m. In a statement (Ex. D) to the investigating officer accused stated that he began drinking beer at the post exchange at about 3:30 p.m. and that he and Walker decided to go to Baton Rouge at 5:00 p.m. Accused testified that he did not know whether he was under restrictions on 20 April, that he was supposed to be restricted "to the company area on maneuvers" for a period of 30 days, but that he did not think he was under restriction "whenever we come to the garrison". He was told that he was restricted for 30 days "to the area while we are here on maneuvers" (R. 21, 24-26, 28, 30).

b. The Specification, Charge I; Accused testified that he and Walker hitch-hiked from Camp Van Dorn to Norwood and there caught a ride to Baton Rouge. They went to a bar and started drinking. They met a soldier there and went to the "USO" with him. The soldier asked accused if he would "go drive his car up to the filling station and I told him I would provided he'd give us a ride to camp. He was going out with some girl, that is why we went - And we got caught there by the police". When they came down from camp to Baton Rouge they did not pass through Clinton, but followed the other route (R. 21).

On cross-examination accused identified a statement (Ex. D) which he had made to the investigating officer. He denied that the 24th Article of War was read to him, but admitted that he signed the statement after reading it, that he was not threatened, that he made the statement of his "own free will", that it was true except "about the keys" and the name of "that garage", that he was not forced to sign it, and that he was told that he did not "have to make a statement". Exhibit D is substantially the same as the testimony of accused on direct examination, and adds that the soldier, whose name was unknown, said he would meet them at the garage in about an hour, and that the soldier was at the time in a car with a girl (R. 24-27).

The accused was cross-examined at length by the prosecution and the court, but continued to assert the truth of his direct testimony. He arrived in Baton Rouge that night at about 7:00 or 7:30. He did not know the soldier who loaned him the car, and had never seen him before. Accused had been drinking with this soldier. He stated that he had no idea that "it was a hot car", and did not know the police were following him (R. 22-23, 27-40).

Private First Class Carl Walker testified that on the afternoon of 20 April he was off duty, went to the "PX" to drink beer, met accused, and drank with him. They decided to go to Baton Rouge, so hitch-hiked there. They caught a ride to Norwood, and then one from there to Baton Rouge. They did not go through Clinton. He thought they arrived in Baton Rouge about 8:00 p.m. They went to a bar, and had a few drinks with another soldier there. Later they went to the "USO", where Walker was ill and went to the latrine. When he came out accused said he had a ride for them. They entered a Ford car and drove out of Baton Rouge. When they stopped at a filling station, they were

arrested. Walker testified that he was intoxicated that evening (R.44-57).

5. On cross-examination of accused the prosecution stated that it was proposed "to bring out the previous character of the witness", to "impeach the witness, attack the credibility of his testimony", and to "prove poor character on the part of the man". Accused admitted, that he had been in the Missouri State Penitentiary once only for eight or ten months. He denied that he had ever taken a car "out of" Jackson, Mississippi, and admitted that he had been in Missouri in March 1944. Accused then identified a statement (Ex. E) which he signed in Springfield, Missouri. He testified that no threats were made, he was not told that he could remain silent, "They asked for it, that's all", and he "wouldn't say just exactly it was my own free will". After questioning by the president of the court accused conceded that the statement was of his "own free will". The statement was read to the court, which took "cognizance of the fact" that it was submitted "for the purpose of impeachment only". Exhibit E is summarized as follows: About 1 March 1944 accused left his organization without leave, went to Jackson, Mississippi, stole a Pontiac sedan, and drove it to Missouri. He was arrested in Springfield about 15 March. He had been in trouble twice before in his life, the first time in 1938 when he was sentenced to the Missouri State Penitentiary for two years on a charge of drunken driving, and the second time in 1941 when he was sentenced to confinement in the same penitentiary for forgery (R. 40-44).

6. The Board of Review is of the opinion that the admission of the evidence last stated (par. 5) was erroneous and injuriously affected the substantial rights of accused.

Although an accused, as a witness, may be impeached, his credibility may be attacked only according to the established methods, one of which is to show conviction of a crime involving moral turpitude or such as to affect the credibility of the witness. Evidence of the commission of such a crime without showing conviction thereof is not admissible, nor is proof of the making of an inconsistent statement relating only to a collateral fact and not to any issue in the case (MCM, 1928, par. 124b). Although the court stated that Exhibit E was submitted "for the purpose of impeachment" it is clear that it went far beyond legitimate impeachment, and disclosed guilt without showing conviction of an offense with which accused was not charged. It is fundamental that the prosecution may not evidence the doing of an act by showing the bad moral character of accused or former misdeeds, except in certain instances not pertinent here (MCM, 1928, par. 112b). In the instant case accused was charged with the theft of an automobile on 20 April 1944 (Spec., Chg. I). The erroneous admission in evidence of his statement (Ex. E) in which he admitted that he had stolen a different automobile on 1 March 1944 clearly prejudiced the substantial rights of the accused unless the legal evidence is such as practically to compel in the minds of conscientious and reasonable men a finding of guilty (CM 211829, Parnell, 10 B.R. 137, 142; CM 240788, Johnson; CM 255083, Hargrove; Dig. Op. JAG, 1912-40, sec. 395(7)).

Accused testified to facts which, if true, rebut the inference of guilt of larceny arising from his possession of a recently stolen automobile, and he was corroborated by his companion. Likewise, there was some conflict in the testimony with respect to the breach of restriction, as accused stated that he was told he was restricted while "on maneuvers". In the opinion of the Board of Review the competent evidence properly admitted and in the record is not of such probative force as virtually to compel a conviction.

7. The court was legally constituted. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Samuel M. Drew, Judge Advocates.

Robert J. Glover, Judge Advocate.

(On leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., 27 JUL 1944 - To Commanding General, 63rd Infantry Division, Camp Van Dorn, Mississippi.

1. In the case of Private Quentin H. Friend (37518431), 508th Medical Collecting Company (Separate), attention is invited to the foregoing holding by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty and the sentence. I concur in the holding by the Board of Review and for the reasons therein stated recommend that the findings of guilty and the sentence be vacated.

2. Under the provisions of Article of War 50½ the record of trial is transmitted for vacation of the sentence in accordance with the foregoing holding and for a rehearing or such other action as you may deem proper.

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

(CM 257634).

Myron C. Cramer

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

1 Incl.
Rec. of Trial.

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

SPJGN
CM 257646

30 JUN 1944

UNITED STATES	)	8TH ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Camp Polk, Louisiana, 24 May 1944. Dismissal.
First Lieutenant LEWIS B. SHORT (O-1300538), Company C, 58th Armored Infantry Battalion, 8th Armored Division.	)	

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

---

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 1st Lt. Lewis B. Short, 58th Armored Infantry Battalion, did, at Camp Polk, Louisiana, on or about 28 April 1944, in an official investigation being conducted by Lt. Col. Harold G. MacAdams, Inspector General, 8th Armored Division, make under oath a statement in substance as follows:

That he did not see Tec 5 Joseph O. Belanger, 58th Armored Infantry Battalion, with Lieutenant's bars on his shirt on the evening of 16 March 1944; that he did not loan his shirt and cap to Tec 5 Joseph O. Belanger, 58th Armored

Infantry Battalion, on the evening of 16 March 1944; and that he has never identified Tec 5 Joseph O. Belanger, 58th Armored Infantry Battalion as being an officer which statement he did not then believe to be true.

Specification 2: (Finding of not guilty).

Specification 3: In that 1st Lt. Lewis B. Short, 58th Armored Infantry Battalion, did, at Oakdale, Louisiana, on or about 16 March 1944, willfully, unlawfully and falsely identify Tec 5 Joseph O. Belanger, 58th Armored Infantry Battalion, as being a Commissioned Officer of the United States Army, to Military Policeman Wilfred D. Davis, Military Police Platoon, 84th Infantry Division.

The accused pleaded not guilty to the Charge and all Specifications thereunder and was found guilty of the Charge and of Specifications 1 and 3 but not guilty of Specification 2. 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 First Lieutenant Paul J. Malarkey, the Company Commander of Company "C", 58th Armored Infantry Battalion, 8th Armored Division, authorized the accused and Technician Fifth Grade Joseph O. Belanger on 16 March 1944 to drive to Oakdale, Louisiana, in an Army peep. The purpose of the trip was to "answer * * * a telegram". Upon arriving at Oakdale, the accused and Belanger proceeded to a house at 512 Seventh Avenue where they joined some ladies. Belanger stayed only a short while. After taking a shower, he was "persuaded" by the accused and the ladies to put on the accused's shirt, overseas cap, and appurtenant insignia of branch and rank. Thus attired, Belanger went to the Pine Grove Night Club located about a mile away (R. 8-9, 12, 15, 17, 19, 22; Pros. Ex. "B").

A staff sergeant recognized him as an imposter and pointed him out to Sergeant Wilford D. Davis of the Military Police. Sergeant Davis immediately escorted Belanger outside and asked him for his AGO officers' identification card. Belanger "didn't know what [the sergeant] was talking about", but upon being pressed for "some kind of identification" represented that there was another officer in town who could vouch for his status. The Sergeant and Belanger entered an Army jeep driven by Private First Class Harry R. Boehm and, following Belanger's directions, arrived at the Seventh Avenue address (R. 8-9, 13).

Leaving the other two men behind in the vehicle, Sergeant Davis walked onto the well-lighted porch and knocked. The accused came to the door dressed in "O.D." trousers, a white undershirt, and boots. In response to the Sergeant's questions, he stated that he had had an officer with him that night and gave a description of him which fitted Belanger. The latter was then brought up on the porch. The accused identified him as the officer to whom reference had been made (R. 9-14).

Sergeant Davis apologized and withdrew. He was followed by Belanger who wanted a ride back to the night club. All three reentered the jeep and returned to that establishment. After a short interval Sergeant Davis and Boehm decided to go to the house on Seventh Avenue a second time to obtain the names and organization of the accused and Belanger. Upon again reaching the porch some forty-five minutes after his first visit, Sergeant Davis looked through the glass in the door and saw "Belanger sitting in the room with his Corporal stripes on". The Sergeant has given the following account of the events which then occurred:

> "When I knocked some lady came to the door. She turned the light on. I could see Corporal Belanger sitting in the room with Lieutenant Short. When the lady turned the light on, Corporal Belanger got up out of his seat and went into another room. I asked the two M.P.'s that were working with me that night to go to the back of the house because maybe he might try to go out the back of the house. When Lieutenant Short came to the door I asked him to bring the soldier, that he had identified as an officer, to me. He called Corporal Belanger. I asked Corporal Belanger why he had this officer's uniform on down at the night club. He told me that he was not down there but that his brother was. I placed Corporal Belanger under arrest and had the driver take him to the jeep.* * * After Corporal Belanger was put in the jeep I asked him why had he told me the first time that he was an officer. Lieutenant Short told me that he knew the Corporal was in the wrong and was trying to cover up for him."

Belanger was released the following day "on his own accord". He was subsequently reduced to the grade of private. Although he asserted at the trial that he was drunk "enough not to know what I was doing" on the night of 16 March 1944, he was considered sober by Sergeant Davis

both when first interrogated and on the occasion of the arrest (R. 9-16, 21).

An investigation of Belanger's imposture and the accused's misrepresentations to Sergeant Davis was conducted by Lieutenant Colonel Harold G. MacAdams, Inspector General, 8th Armored Division. On this last date the accused testified as follows:

"95. Q - * * * Were you in Oakdale on the night of the 16th of March 1944?

A - Yes, Sir. I believe I was.

* * *

122. Q - Did you at any time on this particular evening see Belanger with bars on his shirt?

A - No, Sir.

122. Q - Did you loan Belanger your shirt and cap at any time that evening?

A - No, Sir. I did not.

123. Q - Did you at any time identify Belanger to the M.P. as an officer?

A - I did not.

* * * *

125. Q - The statements made there relative to your identifying Cpl. Belanger as a lieutenant are false?

A - I never identified the man as an officer, Sir.

* * * *

156. Q - Did you, the first time Lieutenant, identify him as an officer and then retract your statement on the second visit and say that he was a corporal?

A - I never did identify the man as an officer, Sir." (R. 6-7; Pros. Ex. "A").

4. The accused did not take the stand in his own behalf. The only witness called by the defense was Major Paul L. Fowler of the 58th

Armored Infantry Battalion. He testified that the accused had been under his command for approximately one year, had never been punished or reprimanded, and had been consistently rated "superior" (R. 22-23).

5. Specification 1 alleges that the accused "on or about 28 April 1944, in an official investigation being conducted by Lt. Col. Harold G. MacAdams, Inspector General, 8th Armored Division, make under oath a statement * * * which statement he did not then believe to be true". Specification 3 alleges that the accused did "on or about 16 March 1944, willfully, unlawfully and falsely identify Tec 5 Joseph O. Belanger, 58th Armored Infantry Battalion, as being a Commissioned Officer of the United States Army, to Military Policeman Wilfred D. Davis, Military Police Platoon, 84th Infantry Division". Both acts were set forth as violations of Article of War 96.

In all probability, the loan of the accused's shirt, overseas cap, and insignia to Belanger was initially only a youthful prank. The mischevious spirit which inspired it came in bottles, and its immediate object was to impress some susceptible female. The deception did not extend to anything more sinister.

What was in the beginning only an escapade, albeit an unlawful one, was transformed into a more serious offense by the accused's scant regard for the truth. One of the violations of Article of War 96 listed in paragraph 152a of the Manual for Courts-Martial, 1928, is "making false statements to an officer in regard to matters of duty". The accused's answers at the investigation quoted above appear to have been deliberate falsehoods. He had lent his shirt and cap to Belanger and had identified him as an officer. In denying both acts in the course of an official investigation the accused clearly brought himself within the orbit of the offense defined by the Manual.

The false identification of Belanger as a commissioned officer also contravenes Article of War 96 but is an offense of a somewhat different nature. Dig. Op. JAG, 1912-40, sec. 454 (49) states that:

> "A staff sergeant was accosted by a member of the military police while entering a theater on a military post, and, to the end of determining whether or not the staff sergeant had violated orders with respect to wearing civilian clothes on the post, asked if he was a soldier. He falsely stated that he was not a soldier. He was found guilty of having made a false official statement to the military police.

"Held, That since the statement was not made to an officer, and the accused was not on duty status at the time, the act in question did not constitute the offense usually known as 'false report or statement', as listed in paragraph 152a, M.C.M., 1928.

"Held further, That a false answer made by a soldier to questions asked by a military policeman in the performance of his duty under instructions of competent authority, whether or not the soldier be on a duty status at the time, is obviously a hindrance to the performance of his duty by the questioner and to the accomplishment of the purpose to which the questions were directed, and is, therefore, in essence, a disorder or neglect to the prejudice of good order and military discipline punishable under A. W. 96. 250.1, June 16, 1928."

This holding is controlling here.

6. The accused is about 25 years of age. The records of the War Department show that he had enlisted service from 24 March 1939 to 18 November 1942; that he was commissioned a second lieutenant on 19 November 1942 and promoted to first lieutenant on 13 August 1943; that he has been on active duty as an officer since 19 November 1942.

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

Walter Shufford, Judge Advocate.

(On Leave), Judge Advocate.

SPJGN
CM 257646

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Lewis B. Short (0-1300538), Company C, 58th Armored Infantry Battalion, 8th Armored Division.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. 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 of dismissal confirmed. G.C.M.O. 458, 26 Aug 1944)

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

(207)

SPJGH
CM 257706

27 JUN 1944

UNITED STATES	)	38TH INFANTRY DIVISION
	)	
v.	)	Trial by G. C. M., convened at APO #38, 24 May 1944. Dismissal.
	)	
First Lieutenant HERMAN H. SPAETH (0-402489), Infantry.	)	

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

---

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that First Lieutenant Herman H. Spaeth, Infantry, Headquarters, 38th Infantry Division, Army Post Office Number 38, did, at Army Post Office Number 953, on or about 6 April 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Army Post Office Number 953 on or about 15 May 1944.

The accused pleaded guilty to the specification except the words "desert the service of the United States and did remain absent in desertion" substituting therefor the words "absent himself without proper leave, and did remain absent without leave", to the excepted words not guilty, to the substituted words guilty, and pleaded not guilty to the Charge but guilty of a violation of the 61st Article of War. The court, by exceptions and substitutions, found the accused guilty of absence without leave at the place and for the time alleged in violation of the 61st Article of War, in accordance with the pleas of the accused. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Articles of War 48 and 50½.

3. The evidence for the prosecution shows that the accused, by orders issued by Headquarters, U. S. Army Forces, Central Pacific Area, APO 958, 1 March 1944, was relieved from his former organization at

APO 915 and assigned to the 38th Infantry Division at APO 38; and that he did not report for duty at his new station on 5 April 1944 when the other officers and enlisted men on the same "shipment" reported. The accused was found and placed under arrest at Hickam Field on 15 May 1944, when he returned to Hickam Field from Honolulu after a telephone call had been made to him. He was registered in Air Transport Command Transient Barracks at Hickam Field, Oahu, Territory of Hawaii, APO 953, from 5 April 1944 until 15 May 1944 (R. 6-10; 13-16).

On or about 17 May 1944, after he had been warned "of his rights as provided under paragraph 35a, of the Manual for Courts-Martial", the accused executed a statement to the investigating officer to the effect that he had received orders to travel by air to Canton, then to Honolulu and to report to the 38th Division Headquarters; that he left APO 915 on April 1st and arrived at Canton the same day; that lack of transportation delayed him two days at Canton; that he left Canton on April 5th and landed at Hickam Field that night; that he planned to report to the Chemical Warfare officer, inquire about his transfer and give him the chemical warfare situation of APOs 915 and 914; that after "finishing" his business at Fort Shafter he started to return to Hickam Field but met some friends and during the "reunion" became intoxicated in which state he remained for three days; that he then returned to Hickam Field and ascertained that the boat with the rest of his relief would not arrive "for a week or so"; that he thought it safe to continue his efforts to get transferred into Chemical Warfare Service or Engineers; that before he "realized, and after a few more 'reunions', several weeks had gone by"; that he was worried as to how to report to his new unit without getting into great difficulties; and that on May 15th he was told to report to barracks for transportation and did so (R. 10-12; Pros. Ex. 2).

4. For the defense, Major James R. Humphrey, Quartermaster Corps, testified that he had known the accused for 2½ years and that his reputation was "of the finest character" and that he was an officer in good standing during this period (R. 16, 17).

The accused, who stated that he understood his rights as to testifying under oath, remaining silent, or making an unsworn statement, testified that he had enlisted in the National Guard in 1932 and had been on "active duty" since 1940. In 1941, he went to Hawaii where he was Special Service Officer for approximately a year. In February 1943 he was transferred to the 102d Infantry at APO 915 at Christmas Island and remained there until April 1944. While there he "had the duty of Chemical Warfare Officer and Provost Marshal". In civil life the accused was a chemist. Since he was "inducted" he has been trying to get into the Chemical Warfare Service. He tried "about fifteen times", two of the attempts having been made on Christmas Island. His first stop after arriving on the island of Oahu was at the Chemical Warfare office at Fort Shafter. He had no ideas of not returning to military service. A chronological history of accused's military service was introduced in evidence (R. 17-20; Def. Ex. A).

On cross-examination the accused stated that he was 31 years of age, that although registered at the Transient Barracks at Hickam Field from April 5th to May 15th he stayed a number of nights at hotels in Honolulu (R. 20, 21).

On redirect examination the accused was asked whether during all the time on Oahu after returning from Christmas Island he stayed at Hickam Field and he made an affirmative reply. He also said that after being informed that the 38th Division would have transportation for him at Hickam Field he returned there (R. 21, 22).

On examination by the court the accused stated that he made no effort to carry out his orders to report to the 38th Division, that he reported to the Chemical Warfare Service instead of the 38th Division, and that he "accidentally" stayed away from the Division (R. 22).

5. The Specification alleges that the accused "did, at Army Post Office Number 953, on or about 6 April 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Army Post Office Number 953 on or about 15 May 1944". By exceptions and substitutions he was found guilty of the offense of absence without leave from APO No. 953 for the time alleged and not guilty of a violation of Article of War 58 but guilty of a violation of Article of War 61, as he had pleaded.

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 accused pleaded guilty to the offense of which he was convicted by the court. He stated to the court that he understood the meaning of a plea of guilty and that he wished his plea to stand. His testimony at the trial and the statements made to the investigating officer were not materially inconsistent with the plea. The plea is therefore deemed to be providently entered (See Dig. Op. JAG, 1912-1940, sec. 378 (2) and (3)). This plea, coupled with the supporting evidence, shows beyond a reasonable doubt that the accused committed the offense of absence without leave for the alleged period and amply supports the findings of the court.

6. The accused is 31 years of age. War Department records show that accused enlisted in the 106th Infantry on 31 October 1932; was transferred to the 107th Infantry on 12 April 1935; was commissioned second lieutenant and entered active service on 23 December 1940; and was assigned to Fort McClellan, Alabama, on 8 January 1941. The record

indicates that accused left for foreign service 30 March 1942; was Special Service Officer, 105th Infantry from 19 May 1942 to 15 February 1943; and was Task Force Chemical Officer, APO 915, from 15 February 1943 to 1 April 1944.

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. Dismissal is authorized, although not mandatory, upon conviction of a violation of Article of War 61.

Abner E. Lipscomb, Judge Advocate.

Walton Shepherd, Judge Advocate.

(On Leave), Judge Advocate.

SPJGH
CM 257706

1st Ind.

War Department, J.A.G.O., 3 - JUL 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 Herman H. Spaeth (0-402489), 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. 433, 10 Aug 1944)

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

SPJGQ
CM 257739

6 JUL 1944

UNITED STATES	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND
v.	Trial by G.C.M., convened at Cochran Field, Macon, Georgia, 29 May 1944. Dismissal.
Second Lieutenant NEWELL MECARTNEY, JR. (0-824685), Air Corps.	

- - - - - - - - - - - - - - - - -

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

- - - - - - - - - - - - - - - - -

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Newell (NMI) Mecartney, Jr., 2nd Lieutenant, Air Corps, Cochran Field, Georgia, did, on or about 4 May 1944, at Lumberton Army Air Field, about 3 miles west of Lumberton, North Carolina, violate the written provisions of paragraph 1a, AAF Regulation 60-16A, to which he was subject and which provides as follows:

"1. General:

a. Reckless Operation. An AAF pilot will not operate 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."
* * *

by piloting and flying a Basic Training Airplane described as a BT-13B in a reckless and careless manner, to wit: crossing Lumberton Army Air Field from a southwesterly to a northeasterly direction at an altitude of approximately 20 feet, and while at such altitude, attempting to execute a steep turn to the left, causing the left wing of the aircraft to come into contact with the runway resulting in the destruction of the aircraft.

Specification 2: In that Newell (NMI) Mecartney, Jr., 2nd Lieutenant, Air Corps, Cochran Field, Georgia, did, on or about 4 May 1944, at East Lumberton, North Carolina, violate the written provisions of paragraph 16a, AAF Regulation 60-16, to which he was subject and which provides as follows:

"16. Minimum Altitudes of Flight:

a. Except during take-off and landing, aircraft will not be operated:

(1) Below the following altitudes:

(a) 1,000 feet above any building, house, boat, vehicle, or other obstructions to flight.

(b) At an altitude above the congested sections of cities, towns, or settlements to permit an emergency landing outside of such sections in the event of complete power failure.

(c) 1,000 feet above any open air assembly of persons.

(d) 500 feet above the ground elsewhere than as specified above."

* * *

by piloting and flying a Basic Training Airplane described as a BT-13B less than 1,000 feet above houses and buildings of the city of East Lumberton, North Carolina, and other obstructions to flight, when he was neither taking off nor landing.

Specification 3: In that Newell (NMI) Mecartney, Jr., 2nd Lieutenant, Air Corps, Cochran Field, Georgia, did, on or about 4 May 1944, at Lumberton Army Air Field, about 3 miles west of Lumberton, North Carolina, violate the written provisions of paragraph 16a, AAF Regulation 60-16, to which he was subject and which provides as follows:

"16. <u>Minimum Altitudes of Flight</u>:

a. Except during take-off and landing, aircraft will not be operated:

(1) Below the following altitudes:

(a) 1,000 feet above any building, house, boat, vehicle, or other obstructions to flight.

(b) At an altitude above the congested sections of cities, towns, or settlements to permit an emergency landing outside of such sections in the event of complete power failure.

(c) 1,000 feet above any open air assembly of persons.

(d) 500 feet above the ground elsewhere than as specified above.

by piloting and flying a Basic Training Airplane described as a BT-13B less than 500 feet above the ground when he was neither taking off nor landing.

Specification 4: In that Newell (NMI) Mecartney, Jr., 2nd Lieutenant, Air Corps, Cochran Field, Georgia, did, without the authority required by AR 95-90, dated 24 July 1942 and changed as follows: Change 1, dated 24 August 1942; Change 2, dated 6 October 1942; Change 3, dated 11 May 1943; and Change 4, dated 25 August 1943, on or about 4 May 1944, at Lumberton Army Air Field, North Carolina, pilot and fly a United States AAF training airplane having therein as a passenger permitted by him Lonnie W. Coleman, a civilian.

Specification 5: In that Newell (NMI) Mecartney, Jr., 2nd Lieutenant, Air Corps, Cochran Field, Georgia, did, without the authority required by AR 95-90, dated 24 July 1942 and changed as follows: Change 1, dated 24 August 1942; Change 2, dated 6 October 1942; Change 3, dated 11 May 1943; and Change 4, dated 25 August 1943, on or about 4 May 1944, at Lumberton Army Air Field, North Carolina, pilot and fly a United States AAF training airplane having therein as a passenger permitted by him James B. Coleman, a civilian.

He pleaded guilty to Specification 1, except the words "reckless and careless", and of the excepted words, not guilty and guilty to all other Specifications and the Charge. He was found guilty of all Specifications and the Charge. 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 substantially as follows:

By stipulation it was agreed that the accused, on 4 May 1944, while in the military service, left Cochran Field, Macon, Georgia, accompanied by Corporal Herman B. Coleman as a passenger, on an authorized

cross-country flight in a BT airplane, further described as a BT-13B and identified by the Cochran Field designation C-158. His destination was Maxton Army Air Base, Laurinburg, North Carolina. He had permission to secure a local clearance at Laurinburg for further flight to the Army Air Field at Lumberton, North Carolina (R. 6a).

The accused and Corporal Coleman took off from Cochran Field at 9:30 a.m. on 4 May 1944 and flew directly to the Maxton Army Air Base where, after landing and refueling, the accused obtained a local release and they continued their flight to Lumberton, North Carolina arriving there at approximately 1:45 p.m. (R. 6b).

Before landing at Lumberton they flew over East Lumberton in a straight and level flight according to the testimony of Corporal Coleman who described the incident as follows:

> "We approached (East Lumberton) from the south and went over my home to the north and he (the accused) didn't attempt any turn at all until we were a good 500 feet after we came over the house. He turned to the right and flew 3 or 4 miles. I would say and then came back over the house." (R. 6c, 6d).

However, by depositions of James Boyd Coleman, a textile worker in the Cotton Textile Plant, East Lumberton, North Carolina, and Lonnie W. Coleman, supervisor of the same plant, it was shown that a BT-13 airplane was seen "flying low over East Lumberton". James Coleman said it "was cutting up stunts" over the City of East Lumberton, about 100 feet above the housetops. Lonnie Coleman testified that when he "first saw it, it was about 6,000 feet over the buildings. He kept getting lower and lower until he was about 500 feet. He flew straight down the railroad and came over toward the Lumberton Air Base" (R. 6; Exs. 4, 5).

After landing at the Army Air Base, Lumberton, North Carolina, the accused and Corporal Coleman proceeded to Coleman's home for dinner after which they went to the textile mill and met a number of Coleman's friends returning thereafter to the house. During his stay in the home Corporal Coleman's brothers begged the accused to "take them up" and after persistent requests (R. 6b; Exs. 4, 5) he agreed to accommodate them and they met at the Lumberton Army Air Field for that purpose.

According to the testimony of Corporal Coleman, he then "preflighted" the ship,

> "* * * got out of the ship and Lieutenant Mecartney got into the front cockpit. Lonnie W. got in the rear cockpit and Lieutenant Mecartney asked me to see that his safety belt was fastened securely. I did so and then they took off into the southwest. They left the field going to the east but I do not know where they went because I wasn't paying any attention. They were gone about fifteen minutes

before they returned. They buzzed the field, circled it, then left, came back and circled the field again. They buzzed the field a second time from the southwest. They then made a 180 degree turn and landed. I went out on the runway and ran the wingtips to the front of the fire station and then the plane stopped. I got up on the wing and I asked Lieutenant Mecartney if he knew what time it was and he said 'Yes' and James Boyd came running up to the ship and Lonnie got out. When he got out James Boyd got in the rear cockpit and I also fastened his safety belt and put his shoulder harnesses on and tied them. They took off into the southwest and I would say Lieutenant Mecartney gained an altitude of about 1,000 feet after he took off. He then made another approach to the field and buzzed it. I believe he then made a left turn and came back around the edge of the field and back of the firehouse. He started losing altitude just back of the fire house and leveled out. He looked as though he was going to buzz the field again and he came down to an altitude of about 30 feet from the fuselage of the ship to the ground. At that time he was going into the northeast. When he leveled the ship off I didn't know he was going to make a turn, but he did, and just as soon as he did it looked as though the ship was slipping in the turn and that was when it crashed. The left wing hit the ground." (R. 6b).

As to the flight with Lonnie Coleman as a passenger, Corporal Coleman further testified:

"* * * he was going due East and he turned and I didn't notice him again until he came back. He was over a thousand feet when I saw him coming back. * * * He buzzed the field into the northeast at an altitude of about 50 feet * * * He made a turn to the left, went around the field and then buzzed the field again at about the same altitude * * * The second time Lieutenant Mecartney came at the field with Lonnie he did land. His landing gear and also his tail wheel were on the runway * * * The second time he came in from the northeast and he did hit the runway and it looked like he came in too far on the runway and he gave it the gun and took off again" (R. 6e).

With regard to this flight, James Coleman testified that "* * * he (the accused) took the plane over East Lumberton. He kept diving down and coming back up. He buzzed the field twice at an altitude of about 45 or 50 feet. Then he landed and my uncle got out" (Ex. 4).

Lonnie Coleman, the passenger on the first flight, testified that at about 6:30 or 7 o'clock p.m. he had gone, with his three brothers, his nephew, and the accused to the Lumberton Army Air Field to see the accused off. In his own words:

"* * * he warmed up the ship and I got in. We taxied from the runway and took off. We went directly over East Lumberton, flying about 500 feet over East Lumberton. We flew around for fifteen minutes and then came back to the Lumberton Army Air Base. The pilot buzzed the field once at about 100 feet * * * ". (Ex. 5).

Corporal Coleman further described the second flight at the Lumberton Army Air Field under cross-examination, as follows:

> "They took off into the southwest and he buzzed the field * * * at about 40 or 50 feet and went straight up and made another turn to the left, but it wasn't a turn of 180 degrees. He then came around the field and just as he got to the southwest end of the field he made another turn * * * (at) about 3 or 4 hundred feet * * * He then started losing altitude after he levelled off from the turn. He came down the field at about 50 feet and then attempted another turn * * * He slipped in the bank * * * The left wing hit the ground and after that there was so much dust I couldn't see" (R. 6f).

According to James Coleman, an eye-witness of the first flight and a passenger on the second:

> "Well I got in and we took off. We circled over the air base, flew over East Lumberton, then came back. We buzzed the air base once, then circled and buzzed it again. This time we were coming in from a southwesterly to a northeastly direction, banking left. As we came in I imagine the plane was about 40 feet. It was losing altitude, but the pilot still kept it in a left bank until the left wing struck the runway. I saw the wing break off, but I don't remember any of the details of what happened to us until Lt. Mecartney crawled under the wreckage and released my safety belt so I could climb out. We both proceeded to the ambulance at once. The plane was a complete wreck and had begun to burn" (Ex. 4).

Lonnie W. Coleman, the passenger on the first flight witnessed the second flight and subsequent accident when his nephew, James Coleman, was the passenger and Johnnie B. Coleman and Ralph Freeman were eye-witnesses to both flights and the attendant incidents (Pros. Exs. 5, 6, 7). Freeman testified that at the end of the second flight the plane was on its back, the motor was thrown about 100 feet, and the tail was broken (Ex. 7).

On 5 May 1944, Major William F. Crowley, Air Corps, Section B, 2128 Army Air Force Base Unit, Macon, Georgia, was detailed to proceed to Maxton Army Air Base, Lumberton, North Carolina, for the purpose of investigating the accident to the accused and the plane he was piloting. Upon arrival at Lumberton he proceeded at once to the hospital and interviewed the accused. After being warned of his rights the accused stated that he wanted to tell the truth and then submitted a statement in detail about the accident which occurred to him on 4 May 1944.

In this statement, regarding the two flights from Lumberton Army Air Field, the accused said:

"* * * I took a brother of Corporal Coleman up — William or Lonnie was his name, I think. During this flight I went over the town at about 100 feet, and buzzed the field, during which time I got down to about 10 or 15 feet altitude. I landed and taxied back. Lonnie got out, and I picked up this nephew, James B. Coleman, I think. I took off into the south, made a 180° right turn, came back down into the north, buzzed the field, pulled up, made a left turn, wide sweeping turn over a wooded area letting down, continued the turn and let down towards the fire station, levelled out of that about 20 feet off the ground, then started a left turn, continued at that level, getting a little bit lower, when I decided to level out and pulled up; the wing hit the ground and threw the plane.

"After the airplane hit it went end over end a couple of times and stopped on its back facing the opposite direction, sliding backwards. I hit my switch in there; it was jammed. I flipped my safety belt catch and dropped out of the plane, crawled back next to the fuselage, and got this James Coleman out of the cockpit (rear). He was hanging by his safety belt, dazed but not unconscious. I got him out, dragged him away, went back to the front cockpit to try the switch again and found it was jammed. I noticed a small spot of fire on the ground right next to the plane and put that out. I looked up through the instrument panel, and I could see fire on the other side of the fire wall, so I got out of there. At that time the crash car drove up with a foam fire extinguisher, and they put out the fire that was around the fire wall. Right after that the ambulance drove up. They put James Coleman in the ambulance and I got in with my chute, and they drove us to Baker Sanitorium in Lumberton.

"I was aware of the fact that William (or Lonnie) Coleman and James Coleman, the two men I took for a ride, were civilians. I was aware that the flying I did just previous to the crash was in direct violation of existing regulations" (R. 6j; Ex. 8).

Major Crowley then proceeded to view the wreckage of the plane at Lumberton North Carolina. He testified that the body of the fuselage was on its back resting on the crash bar. The tail section was knocked off. Both wings, landing gear, right and left, and the nose section were also knocked off. Just the main body of the fuselage from the back compartment up to the fire wall was left intact. There were indications that the airplane had slipped on its back approximately 20 to 30 feet (R. 6h-61).

Army Air Force Regulations 60-16, 6 March 1944 and Army Air Force Regulations 60-16A, 15 April 1944 were admitted in evidence (R. 6; Exs. 1, 2). The pertinent portions are set forth in Specifications 1, 2 and 3, respectively. There were also admitted in evidence Army Regulations 95-90,

War Department, 24 July 1942 and Changes 1 to 4, inclusive, dated, 24 August 1942, 6 October 1942, 11 May 1943, and 25 August 1943, respectively, which by implication, forbid the carrying of civilian passengers in Army aircraft except under certain specified conditions or by designated authority (R. 6; Ex. 3).

4. The accused elected to be sworn as a witness and testified in detail regarding his early life and education as well as his employment in civilian life. Respecting the offenses with which he stood charged he reaffirmed the facts contained in the statement he had made to Major Crowley and reiterated them with one exception. He corrected a misstatement regarding the plane's action after it struck the ground by saying that the airplane slid on the lower side of its engine and front section of the fuselage, tail high. It nosed over and left the ground and lit on its back and slid (R. 6m-6s).

5. In pleading to Specification 1 of the Charge the accused admitted his guilt, excepting the words "reckless and careless". This was clearly a contradictory plea which, in effect, constituted a plea of "not guilty" for, without the excepted words, the Specification, which alleged a violation of Army Air Force Regulations, stated no offense. Since the court found the accused guilty of the Specification as charged upon sufficient evidence to sustain the finding, it must be assumed that they properly proceeded as though the accused's plea to the Specification was, in fact "not guilty". No substantial right of the accused was in any way affected by the failure of the record to show affirmatively that such was the action of the court.

6. No extended discussion of the evidence is required in this case for the reason that the accused pleaded guilty to all, except one, of the Specifications and ample evidence was adduced by the prosecution to fully support all of the findings of the court.

In brief summary, the accused by his own admissions, willfully violated basic and fundamental regulations of the Army Air Forces which had been promulgated for the purpose of governing the operation of aircraft so as to secure safety for personnel and materiel in the air and on the ground.

In an authorized, but purely personal flight, which the accused made to Lumberton, North Carolina, from Macon, Georgia, on 4 May 1944 and later, on the same day, when he was preparing to make the return flight, the accused knowingly and willfully breached rules and regulations with which, according to his own statement, he was fully familiar.

Before arriving at Lumberton, North Carolina, he was obliged to fly over East Lumberton where, according to Specification 2, he violated the provisions of paragraph 16a, Army Air Force Regulations 60-16 by flying less than 1,000 feet above houses and buildings of that community. Although his flight companion, Corporal Coleman was hesitant in testifying as to the altitude at which they flew over East Lumberton, two civilian witnesses, James and Lonnie Coleman, stated that they saw a BT-13 plane doing "low

altitude flying" over East Lumberton on 4 May 1944. James said that the plane dropped to an altitude of about 100 feet above the housetops and Lonnie saw it at about an altitude of 500 feet. Inasmuch as flying below an altitude of 1,000 feet "above any building, house, boat, vehicle or other obstruction to flight", "except during take off and landing" is specifically forbidden by the regulations, there was sufficient evidence of his guilt of this offense, above and beyond his plea, to support the findings as to this Specification.

The offenses set forth in Specification 1, 3, 4 and 5 all arose out of the accused's conduct at the Lumberton Army Air Base at about 6:30 or 7 o'clock in the evening of the same day just prior to his contemplated return trip to Macon, Georgia. The evidence discloses that he had been importuned by members of Corporal Coleman's family, to take them up in the plane. Notwithstanding his familiarity with the Army Regulations which forbade his doing so, he did take both James and Lonnie Coleman on short flights in the airplane and it was during these flights that the misconduct with which he is charged occurred. Neither of the Coleman boys who became passengers in the plane piloted by the accused on these occasions were such personnel as were permitted by the regulations to become passengers and no higher authority had authorized their transportation as passengers, nor was there any such emergency as would, under the circumstances, have warranted the accused in transporting them. The flights were mere escapades undertaken by the accused at the behest of the boys and in plain violation of law.

The graphic descriptions of what transpired on both flights as given by the civilian passengers and by three other eye-witnesses of the events which transpired leave no doubt about the reckless, careless and grossly negligent manner in which the accused piloted the ship on these occasions and, as heretofore stated, the accused admitted his guilt of all the offenses charged except the "reckless and careless" operation of the plane alleged in Specification 1. It is clear that, on both flights, the accused buzzed the field twice at extremely low altitudes and that on the last flight according to his own statement, he "buzzed the field, pulled up, made a left turn over a wooded area letting down, continued the turn and let down towards the fire station, levelled out of that about 20 feet off the ground, then started a left turn, continued at that level, getting a bit lower, when I decided to level out and pulled up; the wing hit the ground and threw the plane". As a result the plane was wrecked and the lives of both the accused and his passengers were gravely imperilled.

The court which sat in the trial of this case was composed of officers of the Air Corps, who may be presumed, because of training and experience, to be peculiarly qualified to pass upon the facts and circumstances incident to the accident and arrive at a proper decision upon the question of negligence involved. They concluded that the accused's conduct was "reckless and careless" and in the light of all the testimony the Board of Review is of the opinion that the record supports their findings.

7. Records of the War Department disclose that the accused was born in Chicago, Illinois, and is 22 years 6 months of age. He was graduated from high school and attended Northwestern University for one year thereafter. He was a member of the enlisted reserves from 28 November 1942 to 30 January 1943. He was appointed an aviation cadet in March 1943. After completion of the prescribed course of instruction in the Advanced Single-Engine School at Marianna Army Air Field, Marianna, Florida, he was commissioned a second lieutenant on 8 February 1944.

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

(On leave), Judge Advocate.

William H. Gambrell, Judge Advocate.

Herbert R. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 31 JUL 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 Newell Mecartney, Jr. (0-824685), Air Corps.

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

3. Consideration has been given to the attached memorandum from General H. H. Arnold, Commanding General of the Army Air Forces, dated 29 June 1944. He recommends that the sentence of dismissal be confirmed and ordered executed. I concur in that recommendation.

4. Inclosed are a draft of a letter for your signature, transmitting the record of trial to the President for his action, and a form of Executive action designed to carry into effect the above 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. S/W.
Incl 3 - Form of action.
Incl 4 - Ltr. fr. Gen. Arnold.

(Sentence confirmed. G.C.M.O. 472, 1 Sep 1944)

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

(225)

SPJGV
CM 257761

8 JUL 1944

UNITED STATES	INFANTRY REPLACEMENT TRAINING CENTER
v.	Trial by G.C.M., convened at Camp Joseph T. Robinson, Arkansas, 3 June 1944. Dismissal.
Second Lieutenant THOMAS D. HAMMETT (0-1300164), Infantry.	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant Thomas D. Hammett, Company B, 117th Infantry Training Battalion, 78th Infantry Training Regiment, formerly Headquarters, Infantry Replacement Training Center, Camp Joseph T. Robinson, Arkansas, did, at Camp Joseph T. Robinson, Arkansas, on or about 17 May 1944, with intent to deceive Captain Homer C. Hood, officially report to the said Captain Homer C. Hood that there were no women carried as passengers in an official vehicle driven by him on or about 16 May 1944 in the City of Little Rock, Arkansas, which report was known by the said Second Lieutenant Thomas D. Hammett to be untrue in that women were in fact carried as passengers by the said Second Lieutenant Thomas D. Hammett in an official vehicle driven by him on or about 16 May 1944 in the City of Little Rock, Arkansas, the date and place covered by the said official report.

He pleaded guilty to the Specification except the words "with intent to deceive", substituting therefor the word "wrongfully"; of the excepted words, not guilty, of the substituted word, guilty, to the Charge, not guilty, but guilty of a violation of the 96th Article of War. He was found guilty of the Specification and the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

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

Captain Homer C. Hood, assistant S-4 in charge of transportation, accused's immediate superior officer, on 17 May 1944 received a written report that jeep #13 had been seen on 16 May being driven at excessive speed by a lieutenant and occupied by three noncommissioned officers, and later with the lieutenant and three hilarious and boisterous women as occupants (R. 6). Captain Hood handed the report to the accused and required him to explain by indorsement. The accused replied by indorsement that he drove the jeep to a ball game, that the only speeding done was to pass the convoy to get ahead of it after blocking the street for the convoy to pass, giving the names of the three noncommissioned officers, and stating "There were no women in this vehicle that I know of". This indorsement was signed by the accused, dated 17 May 1944 (R. 7). The document was introduced in evidence (R. 8; Ex. A). Captain Hood admonished the accused to be sure the statement he made was true and advised him to change it if it was false, before it went forward to higher authority (R. 8). There was a memorandum out stating that Army vehicles were to be used for Army transportation only. This memorandum was in the files in Captain Hood's office but had been posted on the bulletin boards. Captain Hood did not recall that accused had been given a copy. Captain Hood had told the accused in the presence of others that he would be better off without him and the accused had requested his transfer (R. 13-15).

Technician Fourth Grade Russell J. Hetrick was one of the noncommissioned officers in the jeep with accused. Three girls asked Lieutenant Hammett for a ride. The three noncommissioned officers got out, the girls got in, and accused took the girls for a ride around the block, after which they got out and the noncommissioned officers got back in (R. 17-18).

Major Jerome P. Knight (R. 20) investigated the report as headquarters commandant, and interviewed the personnel concerned. Accused said that to the best of his knowledge no women were in the car, but returned voluntarily the next day and said that he wanted to change his statement, that there were women in the quarter-ton vehicle under his command that night (R. 23).

4. The accused testified in his own behalf. The purport of his testimony was that he wrote and signed the indorsement, Exhibit A, by himself, at the request of Captain Hood, took it and placed it in the basket on Captain Hood's desk. He had no conversation with Captain Hood about it. He did not know there was any memorandum or regulation against carrying women in Government vehicles. He thought about it after he picked them up and before he was asked to explain by indorsement. He made the statement in his indorsement to keep down trouble. He had had friction with Captain Hood and did not want anything else to happen (R. 25-32).

Chief Warrant Officer Harvey Thayer was present when Captain Hood stated that he would be better off if Lieutenant Hammett and the witness were not assigned to him. Further testimony sought to be elicited from this witness, apparently to show that there was trouble in Captain Hood's command, was excluded by the court (R. 35, 37).

5. The evidence introduced by the prosecution amply establishes the commission by the accused of the offense charged. The substance of the defense presented was a full admission of the fact that accused made the false statement but contended that he made it not with the intent to deceive, but only wrongfully, and that he was motivated by the desire to avoid further trouble with his commanding officer, with whom his relations had not been pleasant (R. 12). This constitutes no defense and little extenuation, even if the defense had succeeded in proving sound reason for unusual apprehension by the accused of unjust treatment at the hands of his commanding officer, which was not established by the evidence presented, though it appears that his commanding officer held him in low regard. The only purpose for making the false statement in question would be to deceive the inquirer as to the fact, whatever the basis of the wish to deceive. The belated retraction made the following day is somewhat creditable to the accused, at least better than no sign of repentance, but is entitled to no great weight in view of the fact that the falsity of the statement was readily susceptible of proof otherwise than by the accused's retraction. The offense was complete when the false statement was made.

6. The accused is 28 years of age. He enlisted in the Mississippi National Guard 2 October 1939 and was inducted into Federal service as an enlisted man, 25 November 1940, later becoming a sergeant. He was commissioned a second lieutenant, Infantry, Army of the United States, 17 November 1942 at Fort Benning, Georgia, where later he also completed the Officers' Motor Maintenance Course, 20 April 1943. He has three and one half years high school education and three years civil experience as a mechanic. No indication of previous misconduct appears.

7. 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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty, legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War.

Thomas N. Jaffe, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trueblood, Judge Advocate.

SPJGV
CM 257761

1st Ind.

War Department, J.A.G.O., 5 AUG 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Thomas D. Hammett (0-1300164), 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, legally sufficient to support the sentence and to warrant confirmation of the sentence. In view of the previous good record of this officer, the circumstances of the case and the relatively trivial character of the subject matter of the inquiry in which the false statement was made, I recommend that the sentence be confirmed but commuted to a reprimand and that the sentence as thus commuted be carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed but commuted to reprimand. G.C.M.O. 447, 23 Aug 1944)

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

SPJGH
CM 257806

19 JUL 1944

UNITED STATES	)	ARMY AIR FORCES
	)	EASTERN TECHNICAL TRAINING COMMAND
v.	)	
	)	Trial by G.C.M., convened at
Captain WILLIAM ENGELS	)	Greensboro, North Carolina,
(0-917413), Air Corps.	)	1-8 May 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.
(Finding of not guilty but guilty of a violation of the 96th Article of War).

Specification 1: (Motion for finding of not guilty sustained).

Specification 2: In that Captain William Engels, Air Corps, Headquarters and Headquarters Squadron, having a lawful wife, did, at Greensboro, North Carolina, from about 22 November 1943 to about 15 March 1944, wrongfully, dishonorably, and unlawfully, live and cohabit with one Jackie Crawford, a female person not his wife.

CHARGE II: Violation of the 96th Article of War.
(Finding of not guilty).
Specifications 1-4: (Findings of not guilty).

He pleaded not guilty to all Charges and Specifications. The court sustained a motion for a finding of not guilty of Specification 1, Charge I. He was found guilty of Specification 2, Charge I, not guilty of Charge I but guilty of a violation of the 96th Article of War, and not guilty of the remaining Charge and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one (1) 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. The evidence for the prosecution in pertinent part may be summarized as follows: It was stipulated (Ex. 5) between the prosecution, defense counsel and accused that from 1 November 1943 to 1 April 1944, Lucy Virginia Engels, residing at 632 Harrison Street, Petersburg, Virginia, was the lawful wife of accused, that they were not legally separated, and that during the month of January 1944 she was not in New York City nor outside of the State of Virginia (R. 135).

During the period between November 1943 and April 1944 the accused was Assistant Provost Marshal at Basic Training Center No. 10, Greensboro, North Carolina. Prior to 22 November 1943 he was a guest at the O'Henry Hotel in Greensboro, but was not registered at the hotel after that date. On 22 November 1943 a guest registered (Ex. 9) at the O'Henry Hotel under the name of "Miss Jackie Crawford" and was assigned room number 445, which she occupied until 20 December 1943. She then moved to room number 153, where she resided until 17 February 1944. Miss Crawford was described by the assistant manager of the O'Henry Hotel as being about 26 or 27 years of age, blonde haired, five feet and six or seven inches tall, and weighing about 120 pounds. A "Paid Out" receipt (Ex. 8) shows that on 12 December 1943 a cash advance of $10 was made to accused and charged to the account of "Jackie Crawford", room 445. A similar receipt (Ex. 6) shows that on 23 December 1943 the hotel advanced $20 in cash to accused and charged it to the account of "Jackie Crawford", room 153. Another receipt (Ex. 7) shows a $20 cash advance to accused on 13 January 1944, charged to the account of "Capt. Engels", room 153. All of the receipts were signed by accused. On 6 January 1944 the accused paid $62.77 to the hotel on account for room 153 and on 17 January 1944 paid $15.19 on the same account. Final payment of the account was made by Miss Crawford at the time she checked out of the hotel on 17 February 1944 (R. 135-148).

Leon A. Nelson, a bellboy at the O'Henry Hotel, saw the accused on several occasions about December 1943 and January 1944 in the hotel lobby and in "his room", number 153. The accused was always dressed on the occasions when Nelson went to the room. He also saw a "blonde" lady in the room with accused. Peter Kennedy, another bellboy in the hotel, saw accused twice in room No. 153. The first time a blonde woman was ironing and another soldier was in the room. He delivered some beer to room 153 two or three nights later, and the accused, who was fully dressed, was the only person he saw in the room. Mae Lee, a maid in the O'Henry Hotel, working on the mezzanine or "100" floor, saw the accused in room 153 "many times" during December 1943 and January 1944 when she was cleaning the room. Her hours were from 8:00 a.m. to 4:30 p.m. and it was usually in the afternoon when the accused would be present. On some of her visits to the room accused was dressed and at other times would be wearing a robe. A blonde haired woman who

was present part of the time was usually dressed but on one occasion was in a robe at the same time accused was in his bathrobe. At one time the accused asked the maid how often she changed the linen and, upon being told twice a week, stated that he would "ask the manager if he could have it done more than that". On another occasion she furnished additional towels at the request of accused. She had provided towels for one person as it was her understanding that one person occupied the room (R. 148-150, 156, 158-167).

William J. Carlton, also a bellboy at the O'Henry Hotel, saw the accused in the lobby of the hotel and "in his room", number 153, during the month of December 1943. On his calls to the room, the accused and "his wife", a blonde haired lady were present. The accused would ask him "to bring up so and so for him and his wife". Carlton ran errands for accused and had taken the uniform of accused from room 153 to be cleaned. On cross-examination Carlton testified that he had been convicted of the sale and possession of whiskey and of aiding and abetting in prostitution. He stated that he liked accused because he was a "good tipper". It was usually at night when he saw accused at the hotel. Sometime during December 1943 or January 1944, Vander C. Toomer, captain of bellboys at the O'Henry Hotel, delivered sandwiches to accused in room 143 or 153 between 1:00 and 3:00 a.m. The accused, dressed in uniform except for a robe or smoking jacket, met him at the door. Toomer "thought" he saw a woman in the room (R. 212-221, 233-234).

About 16 February 1944 First Lieutenant Jesse H. Webb went to the O'Henry Hotel at the request of accused to confer with him. They met in "Captain Engel's room", number 153 (R. 276-277, 282).

Private Dominick Plumeri, also known as Don Palmer, lived in a room at the O'Henry Hotel with Sergeant Dominick LaPlaca during the month of January 1944. Plumeri saw accused on three or four occasions in room 153 when he called for a girl who was a friend of "Mrs. Crawford". He also had telephoned accused at the hotel on extension "Number 153". On 13 January 1944 Sergeant LaPlaca, Private Plumeri, "Mrs. Crawford" and the accused drove to New York City in the Lincoln-Zephyr automobile of Sergeant LaPlaca. The following morning Plumeri left the car in Trenton, New Jersey, to visit his family. He met LaPlaca at Madison Square Garden that evening and saw the accused and Mrs. Crawford sitting across the ring at the fights. They all went to the Belmont Plaza Hotel at about 11:30 p.m. after the fights and the enlisted men went to their room. Private Plumeri did not see where accused and Mrs. Crawford went. At 11:00 a.m. the following day Private Plumeri again saw Mrs. Crawford and accused at breakfast in the hotel breakfast shop. After breakfast Plumeri returned to his home in Trenton, New Jersey, where he remained until Sergeant LaPlaca, accused and Mrs. Crawford called for him on 16 January for the return trip to Greensboro. When they arrived at Greensboro between 4:00 and 5:00 a.m. on 17 January, Plumeri and LaPlaca went to their room, leaving accused and Mrs. Crawford at the car where

accused was taking care of the baggage. On cross-examination Plumeri testified that the accused did not want to take Mrs. Crawford on the trip to New York but she had obtained permission from Sergeant LaPlaca to go along. He stated that accused made the trip to New York to see "Warden Thompson" and told them on the return trip that he stayed with "Warden Thompson" the two nights they were in New York. He observed no "immorality" on the part of Mrs. Crawford or accused (R. 169-176, 178, 187-189, 193, 197-199).

The deposition (Ex. 21) of Mr. Carl F. Johnson, manager of the Belmont Plaza Hotel, New York, shows that the records of that hotel made under his supervision contain a registration card (Ex. 22) showing that on 14 January 1944 a "Capt. Wm. Engels & Wife" of Greensboro, North Carolina, registered at the hotel and were assigned room 1130. A guest bill (Ex. 23) paid on 16 January 1944 shows a statement for the occupancy of room 1130, in the name of "Engels Capt. William & Mrs.", Greensboro, North Carolina, for 14 and 15 January 1944. The account paid on 16 January 1944 included a charge for valet service for pressing of two dresses (Exs. 25 and 30) and for the overnight storage of a Lincoln automobile (Exs. 24 and 31). The records of the hotel (Exs. 26, 27, 28, 29) show that on 14 January 1944, room 1142 was rented for one night to Sergeant Don LaPlaca and Private Don Palmer of Greensboro, North Carolina. Mr. Johnson further stated that he had no personal knowledge as to who occupied room 1130 on 14 and 15 January 1944 but did know that the room was physically occupied by some guest or guests and the records of the hotel did not show a "Jackie Crawford" registered during that period (R. 244-253).

Mrs. Joseph M. Sears, living in Apartment A at 305 East Bessemer Avenue, Greensboro, North Carolina, met accused in January 1944 in "Mrs. Johnson's" apartment at the same address. She saw "Mrs. Crawford", a blonde haired lady, in Apartment B during the month of February and also would see accused enter the apartment "around noon" and about 6:30 in the evening. On two occasions she saw him leave Apartment B about 7:30 or 8:00 a.m. On one occasion two soldiers came to the door of her apartment and asked for accused and at another time an express man with a package asked for "Captain Engels' apartment". Mrs. Sears further stated that it was her habit to retire about midnight and she would not know who entered and left the apartment house while she was asleep. Major Furman E. Jordan, chaplain at Basic Training Center No. 10, also resided at 305 East Bessemer Street in Greensboro. He was acquainted with accused and knew Mrs. Jacqueline Crawford or Jackie Crawford by sight. Apartment B, according to Major Jordan, was the apartment of accused. He observed accused going in and coming out of the apartment a few times. The last time he saw accused enter the apartment was after 5:00 p.m. during the first part of March 1944. He also saw accused leave the apartment on one occasion at about 7:00 o'clock in the morning (R. 236-238, 329-331).

Private Plumeri testified that he saw accused "a couple of times" when he called for his girl friend at an apartment at East Bessemer and Elm Streets. Mrs. Crawford and her three year old son were present on these occasions. Mrs. Crawford's son addressed the accused as "Daddy" and also called Plumeri "Daddy". Mrs. Crawford's sister was at the apartment when he called and Plumeri believed she lived with Mrs. Crawford. Plumeri stated that on occasions when he wanted to get in touch with accused he had telephoned him at "Bessemer" (R. 175-179, 188-189).

4. For the defense: Captain Merton J. Clark occupied room number 143 in the O'Henry Hotel from September 1943 for approximately seven months. He took a five-day leave in October 1943, a five-day leave in early January 1944 and was absent from his room for about five days during the latter part of January or early in February 1944, during which absences he left the key to his room with accused. Captain Clark stated that accused had stayed with him in the room on numerous occasions, which he estimated to be between thirty and forty times. Accused "might" have stayed with him more frequently around the holidays than at other times. He never observed accused in any other room in the hotel and to the best of his knowledge accused did not live there. Captain Clark further testified that Jackie Crawford had been pointed out to him, but he did not know her and never saw her in the O'Henry Hotel, although he understood she lived there. He never saw accused in the company of any woman at the hotel (R. 343-349).

Mr. C. F. Moore, house officer at the O'Henry Hotel, testified that prior to his present position he had been employed as civilian assistant to accused in the provost marshal's office. The accused had told him that if he needed any assistance to call on accused in Captain Clark's room. On two occasions he went to Captain Clark's room for accused and telephoned accused a "few times" in the same room. Mr. Moore stated that he did not know Mrs. Crawford or the name of the guest who had occupied room 153. Mr. Moore was employed by the hotel to prevent "immorality" and had never observed any "immorality" on the part of accused. Mr. William Black, manager of the O'Henry Hotel, had been acquainted with accused for over two years. Neither Mr. Black nor Mr. W. R. Pladgett, the night clerk, had ever received any unfavorable reports about accused. Mr. Black had no knowledge of accused ever cohabiting with Mrs. Crawford. He did not recall whether he had ever authorized accused to draw money and charge it to the account of room 153, but stated that accused could have obtained money from him at any time he desired. Mr. Black further testified that a Mr. and Mrs. Moncure occupied the room adjoining number 153 for about fifteen years and had never made any complaints relative to occupants of room 153 (R. 349-352, 356-360).

Major Leland W. Crews, the immediate commanding officer of accused, testified that in January or February 1944 he was ordered by Colonel H. R. Woodruff to make a complete investigation of a report that accused was living with a lady at a hotel. During the course of his investigation

he interrogated the manager and assistant manager of the O'Henry Hotel, and talked to the accused and others. The accused was indignant when Major Crews informed him of the charge and denied any wrongdoing. He told Major Crews that he was in love with Mrs. Crawford and was going to marry her. On completing his investigation Major Crews concluded there was no foundation for the accusations against accused. Major Crews further testified that accused was his "right hand man", next in command under him, and that he depended on accused "very largely" (R. 361-365).

Mr. Edward E. Thompson, warden of Federal Detention Headquarters, New York City, testified by deposition (Ex. J) that accused had worked under him for six or seven years at the Petersburg, Virginia, Reformatory and that he had attempted to have the accused transferred from Petersburg to New York before accused entered the Army. He stated that accused visited him about three or four months before the taking of the deposition (21 April 1944) and stayed with him two nights. He did not know how long accused was in New York on that occasion but accused had told him he was going back to Greensboro with "somebody". Accused had visited him "possibly twice" in the past six months and he placed the date of the last visit before 20 February 1944 as that was the date "Lepke" was transferred from Detention Headquarters to Sing Sing to await execution and he recalled that accused was "perturbed" at the time of his visit because they allowed "Lepke" to sleep late in the morning. He further stated that on one of the nights accused stayed with him they went out and had "a couple of drinks", and he recalled that accused had breakfast with him on one morning during the visit. He did not know what accused did during the daytime while he was in New York (R. 392-396).

An extract (Ex. K) of paragraph 50, Special Orders No. 195, Headquarters Basic Training Center No. 10, Greensboro, North Carolina, dated 22 September 1943, shows the accused assigned to room number "A-1" of Building T-27, Bachelor Officer Quarters (R. 395-396).

In an unsworn statement the accused said that before entering the Army he was employed by the Department of Justice and had fifteen years of Federal service to his credit. He was commissioned a first lieutenant in October 1942 directly from civil life and completed Officers' Training School at Miami Beach, Florida, on 15 November 1942. He was then stationed at Sedgefield as provost marshal, commanding officer of the guard squadron and special service officer until January 1943, when he was assigned to Basic Training Center No. 10 as assistant provost marshal under Major Crews. His efficiency rating was never below excellent and on the recommendation of Major Crews and the commanding officer of the post he was promoted to captain in August 1943 (R. 397).

With reference to his relations with Mrs. Crawford the accused stated that she was employed as a cashier at the post exchange, earning approximately $100 a month, and had an independent income of $80 a month. She was well able to support herself and except for an occasional meal at the officers' club he never spent any of his money in her behalf.

He had no private income and supported a family of three besides himself from his salary. He made payments on Mrs. Crawford's account at the O'Henry Hotel at her request and with her money. When he drew money on her hotel account he did so as an accommodation to her and immediately turned the money over to her. Accused denied that his relations with Mrs. Crawford were "morally improper". He did not live with her at any time and any suggestion of cohabitation was "frankly absurd" (R. 398).

The accused further stated that in January 1944 he was granted five days leave and when he learned that Sergeant LaPlaca was driving to New York he decided to take advantage of the ride to see Warden Thompson about obtaining employment on his release from the Army. He did not want Mrs. Crawford on the trip as he was going on business and had intended to stop in Petersburg, Virginia, on the return trip to talk to his wife about the divorce they had under consideration. As Mrs. Crawford obtained the consent of Sergeant LaPlaca to go along he could not raise any further objections. On arriving in New York they saw the fights and then proceeded to the Belmont Plaza Hotel, where he registered while Mrs. Crawford went to the ladies room. After Mrs. Crawford and the enlisted men went to their rooms the accused had a drink or two and telephoned Warden Thompson from the cocktail lounge. Warden Thompson joined him and they went several places for drinks before going to Warden Thompson's penthouse at Detention Headquarters, where he stayed all night. The following morning between 10:00 and 11:00 o'clock he telephoned Mrs. Crawford and met her at the hotel for breakfast or lunch. After walking around for a while she went to a theater and he returned to Detention Headquarters. He spent the rest of the afternoon and that night with Warden Thompson and called for Mrs. Crawford the next morning. She gave him the money to pay the hotel bill and they left for the return trip to Greensboro. Accused stated that at no time during the New York visit was he upstairs in the Belmont Plaza Hotel (R. 399).

The accused further stated that shortly before he was placed in arrest Colonel Woodruff gave him an opportunity to resign his commission. He declined as he was not guilty of any wrongdoing and would not resign with "this stigma" on his name (R. 397).

5. It is shown by the evidence that for some time prior to 22 November 1943, the accused, a married officer, resided at the O'Henry Hotel in Greensboro, North Carolina, but was not registered at the hotel after that date. On 22 November Mrs. Jacqueline Crawford registered at the O'Henry Hotel as "Miss Jackie Crawford" and resided there until 17 February 1944. On three occasions during the months of December 1943 and January 1944 the hotel advanced cash to accused in the amounts of $10, $20 and $20, respectively, and charged the same to the room account of Mrs. Crawford. In the month of January 1944 the accused paid $62.77 and $15.19 on the account of Mrs. Crawford. During December 1943 and

January 1944, while the accused was not registered at the hotel he was observed in Mrs. Crawford's room on a number of occasions during the day, at night and in the early morning hours. Accused was usually in uniform but sometimes was dressed in only his bathrobe. On one occasion when the hotel maid entered the room both accused and Mrs. Crawford were in their robes. The maid had seen accused in the room "many times" and on one of her visits accused wanted the linen changed more often and at another time requested additional towels for the room. (Two of the bellboys who had been in the room when accused and Mrs. Crawford were present referred to the room as "his room" in their testimony). One bellboy "thought" Mrs. Crawford was the wife of accused as the accused would ask him "to bring up so and so for him and his wife". Accused had also sent his uniform from Mrs. Crawford's room to be cleaned.

On 13 January 1944 the accused and Mrs. Crawford made an automobile trip to New York with two enlisted men. Accused registered at the Belmont Plaza Hotel as "Capt. Wm. Engels & wife" and on 16 January he paid the hotel bill which included a charge for valet service for the pressing of two dresses.

After Mrs. Crawford left the O'Henry Hotel on 17 February 1944 she resided in Apartment B at 305 East Bessemer Street in Greensboro. According to one of the tenants in the same building, Apartment B was the apartment of accused. Accused was observed entering and leaving the apartment and on three occasions was seen leaving between 7:00 and 8:00 o'clock in the morning. Two soldiers inquired of one of the tenants where accused lived. On another occasion an expressman asked for "Captain Engels apartment". Private Dominick Plumeri, one of the enlisted men who made the trip to New York with accused and Mrs. Crawford saw accused "a couple of times" in the apartment with Mrs. Crawford, her three-year old son and her sister. Mrs. Crawford's son called the accused "Daddy" and also addressed Private Plumeri as "Daddy".

Evidence offered by the defense showed that on 22 September 1943 the accused was assigned quarters in the bachelor officers' barracks. Although he was not registered at the O'Henry Hotel after 22 November 1943 he occupied the room of Captain Merton J. Clark on numerous occasions, between "thirty and forty" times when Captain Clark was present and for three, five-day periods when Captain Clark was on leave. The house detective at the hotel talked to accused in Captain Clark's room and reached him there by telephone on a number of occasions when he wanted the assistance of accused in keeping order among the soldiers. The manager, assistant manager and hotel clerks received no unfavorable reports about accused and were not aware of any immoral conduct on his part.

In his unsworn statement accused denied any immoral relations with Mrs. Crawford or that he had cohabited with her. He stated that he made payments on her account at her request and with her money. When he

drew money on her account he did so as an accommodation to her and immediately gave her the money. He made the trip to New York in January 1944 for business reasons and although he registered at the Belmont Plaza Hotel he did not stay there. He stated that he was never above the first floor of the hotel but stayed the two nights in New York at the residence of Warden Edward E. Thompson. Mr. Thompson recalled that accused had visited him the last time around Christmas but prior to 20 February 1944, at which time accused stayed with him for two nights.

To cohabit is to live together (Bishop, Marriage and Divorce, 6th Ed., Vol. 1, Sec. 777). It has also been said that cohabitation is not a sojourn, nor a habit of visiting, or even remaining for a time, but the term implies continuity (14 C.J.S. 1312).

Cohabitation has also been defined as -

> "The act or state of a man and woman, not married, who dwell together in the same house, behaving themselves as man and wife." (Bouvier Law Dictionary, Rawles 3d revision, vol. 2, p. 1868).

Continuity in the ostensible relationship of man and wife must therefore be shown. The evidence shows that accused and Mrs. Crawford carried on a relationship over a period of two months during which time the accused was seen on numerous occasions in Mrs. Crawford's room at the O'Henry Hotel, during the day, at night and in the early morning hours. By words and actions on those occasions he gave certain hotel employees grounds for believing that Mrs. Crawford was his wife. He assumed dominion over the occupancy of the hotel room by issuing orders, by paying on the hotel account and by drawing cash advances from the hotel that were charged to the account of Mrs. Crawford. During the month of January 1944 accused and Mrs. Crawford registered at a hotel in New York City as man and wife. This relationship apparently continued when Mrs. Crawford left the O'Henry Hotel on 17 February 1944 and moved into an apartment, as the evidence shows that accused would enter and leave the apartment and on occasions was seen leaving between 7:00 and 8:00 o'clock in the morning. Visitors would inquire where the apartment of accused was located.

The Board of Review is of the opinion that the continued course of conduct exhibited by accused over a period of time, indicating an intimate relationship with Mrs. Crawford, together with his representations that they were man and wife, constituted cohabitation and was conduct to the prejudice of good order and military discipline in violation of the 96th Article of War.

6. a. Individual counsel for accused requested a continuance for a week on the grounds that the additional time was required in order to prepare its defense properly. It appears that accused was represented

by counsel from 8 or 9 April 1944 or more than twenty days before trial. This counsel, together with two assistants, was appointed the regular defense counsel by special orders dated 11 April, and represented accused at the trial along with individual counsel. Charges were served on accused 15 April. The individual counsel arrived from a distant station on 24 April for the express purpose of defending accused and for a period of seven days before trial, which commenced 1 May, was presumably without duties other than preparing the case for trial. The record clearly shows that the individual counsel was familiar with the facts of the case. It does not appear that any additional evidence could have been obtained, or any other valid purpose served by a continuance. The matter of a continuance was within the discretion of the court, and in the opinion of the Board of Review the ruling of the court in this regard was not an abuse of its discretion.

b. The defense challenged the jurisdiction of the court to try the case on the ground that a proper investigation of the Charges was not made before trial in compliance with the 70th Article of War. Major Wesley A. Smith conducted an investigation prior to 1 April 1944, the date charges were preferred. He was then designated and acted as investigating officer until 2 April when he was relieved and Major Merle K. Harvey was appointed. Although the papers accompanying the record of trial contain no indorsement formally appointing Major Smith or relieving him as investigating officer, it appears from the testimony of Colonel Victor R. Woodruff the post commander, Major Smith and Major Harvey that Colonel Woodruff did in fact appoint and relieve Major Smith. On 5 April, Major Harvey as investigating officer, submitted his report of investigation, which, for the most part contained numerous statements taken from witnesses by Major Smith either prior to or while he was investigating officer. Major Harvey interviewed approximately six witnesses and obtained statements from four of them. He interviewed accused and on two occasions the accused read the statements of all the witnesses interviewed. On each occasion the accused, although given the opportunity to do so, declined to cross-examine any of the witnesses, to make any statement himself, or to call any witnesses in his behalf. Accused informed Major Harvey that he did not desire to do anything until he obtained counsel. The accused was not entitled as a matter of right to representation by counsel at the investigation of the Charges (CM 199315, Dig. Op. JAG, 1912-40, Sec. 428 (3)). The record shows that the Charges were adequately investigated by the two investigating officers. The accused was informed of the offenses charged and read the statements of witnesses who would appear against him. He was given the opportunity to cross-examine these witnesses as well as to call witnesses in his own behalf. Under these circumstances the Board of Review is of the opinion that the investigation substantially complied with the requirements of the 70th Article of War. Moreover, if any deficiencies in the investigation existed, it would not constitute fatal error under the circumstances of the present case and the holding in CM 229477, Floyd, 17 B.R. 149, that the provisions of Article of War 70 concerning pre-trial

investigation are not jurisdictional and that failure to comply with the provisions of that article is not per se an error injuriously affecting the substantial rights of the accused.

c. Defense counsel suggested that Second Lieutenant George Becker withdraw from the trial as assistant trial judge advocate on the ground that before he was appointed assistant trial judge advocate he had rendered legal advice to accused, in that he advised accused to refrain from making any statements or signing any papers with respect to the Charges. Lieutenant Becker was sworn and testified that he was asked to represent the accused but told accused he did not think he could do so in view of his position as post judge advocate. He did, however, advise accused not to make any statements until accused obtained counsel. A request by defense counsel that accused be allowed to testify was denied by the court. Accused should have been permitted to testify in order that the court might determine whether for any reason including bias, prejudice, or hostility, Lieutenant Becker was disqualified from properly performing his duties as an assistant trial judge advocate (MCM, 1928, par. 41a). The regularly appointed trial judge advocate conducted the major part of the prosecution of the case. From the statement of defense counsel and the testimony of Lieutenant Becker it is apparent that Lieutenant Becker did not agree to act as defense counsel for accused, and only advised him not to make any statements with reference to the Charges until he obtained counsel. Under the circumstances the Board of Review is of the opinion that the substantial rights of accused were not prejudiced.

7. The accused is 40 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service, United States Navy 1921 to 1923; appointed temporary first lieutenant, Army of the United States, 8 September 1942, accepted 11 September 1942; and active duty, 1 October 1942; temporarily promoted to Captain, Army of the United States, 21 August 1943.

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

Samuel M. Drewes, Judge Advocate.

Arthur J. Clauser, Judge Advocate.

(On leave)
_____, Judge Advocate.

(242)

1st Ind.

War Department, J.A.G.O., 8 AUG 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 Engels (0-917413), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused having a lawful wife, from about 22 November 1943 to about 15 March 1944, wrongfully lived and cohabited with a woman not his wife. I recommend that the approved sentence to dismissal be confirmed but in view of all of the circumstances 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 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. of ltr. for sig. S/W.
Incl. 3-Form of Action.

(Sentence as approved by reviewing authority confirmed but execution suspended. G.C.M.O. 449, 23 Aug 1944)

12 JUL 1944

UNITED STATES v. First Lieutenant CHARLES STIEHL (0-1579179), Quartermaster Corps, 1580th Service Unit.	CAMP CAMPBELL ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Campbell, Kentucky, 10, 11, 12 May 1944. Dismissal and confinement for ten (10) years.

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD 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 94th Article of War.

Specification 1: In that First Lieutenant Charles Stiehl, QMC, 1580th Service Unit, Camp Campbell, Kentucky, being at the time an officer charged with the safekeeping and transfer of public money, did, at Camp Campbell, Kentucky, between 7 May 1943 and 31 December 1943, feloniously embezzle, by fraudulently converting to his own use, Twenty-five Dollars, ($25.00), lawful money of the United States, the property of the United States, intended for the military service thereof, which money was entrusted to him by virtue of his office as the officer in charge of the Quartermaster Clothing Sales Warehouse, Camp Campbell, Kentucky.

Specification 2: In that First Lieutenant Charles Stiehl, QMC, 1580th Service Unit, Camp Campbell, Kentucky, being at the time an officer charged with the safekeeping and transfer of public money, did, at Camp Campbell, Kentucky, on or about 31 July 1943, feloniously embezzle, by fraudulently converting to his own use, Twenty Dollars ($20.00) lawful money of the United States, the property of the United States, intended for the military service thereof, which money was entrusted to him by virtue of his office as the officer in charge of the Quartermaster Clothing Sales Warehouse, Camp Campbell, Kentucky.

Specification 3: In that First Lieutenant Charles Stiehl, QMC, 1580th Service Unit, Camp Campbell, Kentucky, being at the time an officer charged with the safekeeping and transfer of public money, did, at Camp Campbell, Kentucky, on or about 1 November 1943, feloniously embezzle, by fraudulently converting to his own use, Six Hundred Dollars ($600.00), lawful money of the United States, the property of the United States, intended for the military service thereof, which money was entrusted to him by virtue of his office as the officer in charge of the Quartermaster Clothing Sales Warehouse, Camp Campbell, Kentucky.

Specification 4: In that First Lieutenant Charles Stiehl, QMC, 1580th Service Unit, Camp Campbell, Kentucky, being at the time an officer charged with the safekeeping and transfer of public money, did, at Camp Campbell, Kentucky, from about 7 May 1943 to about 18 April 1944, feloniously embezzle by fraudulently converting to his own use sums of public money aggregating One Thousand Six Hundred and Forty-One Dollars and Ninety-Four Cents ($1,641.94), lawful money of the United States, the property of the United States, intended for the military service thereof, which money was entrusted to him by virtue of his office as the officer in charge of the Quartermaster Clothing Sales Warehouse, Camp Campbell, Kentucky.

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

Specification: In that First Lieutenant Charles Stiehl, QMC, 1580th Service Unit, Camp Campbell, Kentucky, being at the time an officer of the United States, having received public money, namely funds obtained from the sales of Quartermaster clothing at the Quartermaster Clothing Sales Warehouse, Camp Campbell, Kentucky, which money he was not authorized to retain as salary, pay or emolument, did, at Camp Campbell, Kentucky, from about 1 November 1943 to about 18 April 1944, fail to render his accounts for the same as provided by law, this in violation of RS Section 5491.

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

3. The evidence for the prosecution shows that the accused, a first lieutenant in the Quartermaster Corps stationed at Camp Campbell, Kentucky, had had numerous duties delegated to him. He was the Warehouse Officer, the Clothing Classification Officer, and the Budget and Sales Officer.

Some seventeen enlisted men and approximately fifty civilians were under his supervision. As Budget and Sales Officer he was charged with the responsibility of receiving the daily proceeds of the Officers' Clothing Sales Store and turning them over to Major C. H. Robinett, the Sales Officer. It was in this capacity that the accused performed the acts for which he has been tried by court-martial (R. 21, 28-30, 32-41, 64-66, 121, 123, 134).

The first deposit by him of funds derived from the operation of the Officers' Clothing Sales Store was made on 23 April 1943. Between 3 and 6 May 1943 he was on leave, and each day's proceeds were turned in by Captain (then Lieutenant) Heaton N. Haynes, who substituted for him. From 7 May 1943 to 18 April 1944 the receipts were deposited solely by the accused (R. 32-34, 40, 82-86, 92, 144).

His predecessor as Budget and Sales Officer had never fully and precisely explained to him the standing operating procedure for the handling of the store's funds. Apparently it was not based on any Army Regulation, nor had it ever been issued in published form. The accused construed it, in the absence of any Army Regulation to the contrary, as permitting him to retain several days proceeds in his possession and as requiring deposits on an average of only once every week. On one occasion he made no deposit for twenty-two days (R. 25, 34-36, 38, 44, 171).

After pointing out that all purchases at the store were recorded on sales slips, Major Earl L. Moon, the Property Officer at Camp Campbell, succinctly summarized the standing operating procedure as follows:

> "This officer who is purchasing the goods then signs the sales slip that he had received them and pays cash for them. At the end of the day when the Sales Store closes, Mr. /Bernie/ Black /a civilian employee/ totals all of these sales slips up on his adding machine, places the ribbon in his pocket, and brings the sales slips up to the clothing section. Miss /Hedy/ Adams in that section totals all these slips on her adding machine, then compares her adding machine slip with the one Mr. Black has. If they total _____ that is, if they correspond, Mr. Black then turns over the amount of money that those sales slips call for to the officer who has been authorized to receive that money /that is to the accused as Budget and Sales Officer/, and then this is usually late in the afternoon. The next morning, Miss Adams extracts all articles on those sales slips to the shipping ticket. When she has finished with the sales tickets, she staples them all together and gives them a voucher number and this same voucher number is put on the shipping ticket, and at the same time she makes out * * * a hand receipt inserting the amount of money on that that is on the shipping ticket and gives it the same voucher number * * *. The amount of these sales tickets, Mr. Black turns over that much money to the officer authorized to receive it /that is, the accused/. The officer signs this receipt to Mr. Black that he has received that mount /sic/ of money, and then this shipping ticket and the hand receipt and the money are taken over by this officer to the Sales Officer. The Sales Officer signs the hand receipt that he has received that amount of money."

Occasionally Mr. Black would pay over the funds to the accused's secretary Miss Mary Nance, instead of to the accused directly (R. 15-18, 22-23, 173; see also R. 12-14, 32-33, 42-44, 48-49, 57, 123-124, 142, Pros. Exs. A, B, C).

The sales slips were issued in books, which Miss Adams "numbered by volume" from one to three hundred. Those which had been used were delivered to her by Mr. Black at the conclusion of each day's business. The following morning their contents were checked by her for errors against an abstract sheet on which the correct prices were listed. If the sales slip books and abstract sheets corresponded, three per cent would be added to the total receipts reported and a shipping ticket prepared. In the event that an error was discovered, Mr. Black would be "notified * * * and he would dig that much out of his own pocket". Ordinarily, a shipping ticket represented one day's sales. It would be retained by Miss Adams until called for by the accused. When he decided to make a deposit he would instruct her as to how many shipping tickets he wished to "pick up", and she would prepare a hand receipt for the number specified. In at least one instance a single deposit covered ten shipping tickets aggregating $8,614.56 (R. 12-15, 22-23, 38, 42-50, 52-57, 60-65, 95, 113).

Prior to the commencement of his leave between 3 May and 6 May 1943 the accused suggested to Lieutenant Haynes that the sales proceeds be paid over every two or three days. Lieutenant Haynes, however, had "preferred to deposit every day". On 18 April 1944, shortly before departing for detached service elsewhere, the accused requested Second Lieutenant Ruby H. Jernigan, the Assistant Warehouse Officer, "to take care of the money, to put five days at a time in the bank". After consulting with Major Moon and with Lieutenant Colonel Harold S. Dean, the Camp Quartermaster, Lieutenant Jernigan undertook to handle the funds. The first deposit made by him on 20 April 1944 covered seven shipping tickets. He personally counted the required funds out of a money box which Miss Nance removed from the safe and handed to him. Later that afternoon she handed him her personal check for $472.92 for inclusion with the other sales proceeds of the store. He called upon her the next day for a sum adequate to meet seven more shipping tickets. Being busy, she said "Open the safe and get the money". Since the door was open, he "just reached in" and drew out the money box (R. 66-67, 69-70, 72-73, 78-79, 82-85, 87-88).

Upon examining the contents he discovered that the cash available was $180.00 less than the aggregate amount of the seven shipping tickets. This deficit was compensated for by three government salary checks found in the box payable to Miss Nance. These were indorsed by her and cashed at a bank by him. Sufficient of the proceeds were used to complete the deposit satisfying the second batch of seven shipping tickets. He inquired of her as to the number of shipping tickets still outstanding. She replied: "I have four more; three of them here, and there was one for the 21st that I haven't added up yet." These were in the respective sums of $927.11, $839.87, $485.80, and $855.11. Since a shortage

obviously existed, he reported the matter to Lieutenant Colonel Dean, who promptly directed Major Moon to inventory the contents of the money or cash box (R. 68-70, 72-82, 97, 102, 130).

In the "forenoon" of 22 April 1944 Major Moon proceeded to carry out his instructions. In the box he found $1396.30 in cash and checks and an instrument reading "Chas. Stiehl IOU 20.00". In the safe itself was another check for $25.00 executed by the accused. It bore no date, was drawn upon the Planters Bank & Trust Co. of Hopkinsville, Kentucky, and was payable to the order of "Treasury of United States". Major Moon "dumped" the check for $25.00 with the other cash and instruments and returned the box to the safe. Two days later on 24 April 1944 he turned the box over for examination to Captain George M. Cohen, who had been appointed to make "a preliminary investigation of the status of the Officers Sales account". The captain finished his inventory within some thirty minutes. Additional funds accruing from sales having been added since 22 April 1944, the cash alone amounted to $1378.38. This increase was offset by a fifth shipping ticket for 22 April 1944 in the sum of $462.61. Captain Cohen returned the box to Major Moon and requested him "to seal it up". That same day a board of officers was appointed by Special Order 99 "to investigate and report on alleged discrepancies in the funds of the Officers' Sales Store, QM Br.". Captain Cohen was one of the members designated and acted as its Recorder. It twice examined the contents of the money box (R. 97-102, 104-112, 130-131, 140; Pros. Exs. D, E, F).

In the meantime Miss Nance had offered to redeem her personal check by the payment of $472.92 in cash. Major Moon rejected the proposed arrangement. A day later Miss Nance inquired whether a certified check would be accepted in lieu of the instrument in the box. Upon contacting the Investigating Board, Major Moon was directed by Colonel Joseph L. Tupper, the president, to make the exchange. Her personal check was forthwith returned and a certified check received in its place (R. 114-117).

As a result of his preliminary investigation, Captain Cohen arrived at the following conclusions concerning the status of the Officers' Clothing Sales Store account:

> "Totaling the amounts [of the five unpaid shipping tickets], I established the accountability of the Officers Sales Officer to the Sales Officer, showed to be $3,570.50. Returning again to the cash, the total cash being $1,378.38, it appeared there was a shortage, subtracting the total cash from the figure reflected by the shipping tickets. But in inventorying the other contents of the cash box, I noted apparently $77.26 had been turned over to Mr. Black, then known to be the civilian in charge of Officers Sales. Assuming the $77.26 could be accounted for, I added the $77.26 to the total cash. At that point, there was a check noted in the contents for $472.92 apparently signed by Miss Nance. On the assumption that Miss Nance was accountable, or could explain the $472.92, that was added to the two figures previously mentioned. From those three figures was subtracted the sum of $3,750.50. If I may clarify this, the $3,750.50 minus

$472.92, representing Miss Nance's check; also minus $77.26 representing Mr. Black's cash; also minus $1,378.38 representing the actual cash which I counted, left a net shortage of $1,641.94."

If the accused's personal check payable to the Treasurer of the United States were a bona fide instrument, the deficiency would of course be slightly reduced to $1616.94. No allowance of any kind was made for the IOU in arriving at this figure (R. 107-112, 130-131).

When called before the investigating board as one of several witnesses, the accused was not immediately advised as to his right to counsel. Only after he proceeded to make a number of damaging admissions, and it appeared that "his commission would be 'jeapordized'", was he asked whether he desired legal representation. The question was put to him twice, and in each instance his reply was "No" (R. 141, 156, 166).

The admissions referred to were in brief as follows:

1. He had "received money from the cash box in exchange for the [$25.00] check" bearing his signature and payable to the Treasurer of the United States. It was his impression that he had returned the money. When asked "Where is the check?" he replied "I tore it up".

2. With reference to the IOU he said, "That was taken out - the exact date I can't say, and replaced the very same date". He had used the money to pay a personal bill.

3. $600 in cash had been withdrawn by him from the store fund in November 1943. Part of this money had been applied by him to the expenses of a return trip from California. When first interrogated as to his disposition of the sum, he had stated that "I think that is a personal matter". In February of 1944 he had reimbursed the store fund for the full $600 with the proceeds of certain pension money to which he had become entitled by reason of seventeen years of service as a mail carrier.

4. Upon returning from his leave in January of 1944 he had noted another shortage of $700 or $750 in the store's funds. In March 1944 about $125 of this amount had been restored by him and by April another $225, or a total of $350. He had failed to notify anyone of the state of his accounts because he "believed he could make it up * * * himself".

5. "He was asked whether in his opinion he had exercised due care for the care of the fund, and he answered 'No'. He was asked whether he was guilty of negligence in the handling of the fund, and he replied 'Yes'. He was asked if he was guilty of gross negligence in handling of the fund, whereupon he again replied 'Yes'. He was asked further 'Do you believe it was criminal negligence?', whereupon he replied, 'That I couldn't say'" (R. 146-149, 151-152, 154, 156-160, 175-178).

When required to account for any part of the net shortage determined, his answer was "I couldn't explain a bit of it". He "did doubt Miss Nance at one time". Upon further reflection he "figured she was above reproach". His opinion of Mr. Black was equally high. The practice of accumulating shipping tickets was initiated by him. He realized that "it did give rise to a risk which eventually might lead to a shortage". He accepted full responsibility for everything missing (R. 156, 158, 173, 175).

5. The accused did not take the stand in his own defense. The several witnesses called on his behalf did not explain his deficiency but, in the main, merely attempted to excuse his conduct and to shift the responsibility.

At least one other check had been cashed out of the store's receipts. One day, after banking hours, Major William L. Steele had been in need of twenty-five dollars, and the accused had accomodated him. About two or three weeks later the accused requested that the check be redeemed. Since the major regarded the transaction as a personal loan, he "carried the money down to him" (R. 187-188, 194-195).

The standing operating procedure for the handling of the store's funds had been established by custom and was in effect before Lieutenant Colonel Harold S. Dean became Camp Quartermaster in September, 1943. He was informed that it had been published but he had never seen it in printed form. It was his understanding that the receipts were to be turned in daily. No report concerning the accumulation of shipping tickets had ever come to him (R. 184, 186, 189-A, 196-197).

When Miss Nance presented the check for $472.92 to Lieutenant Jernigan, she remarked that it was "for a shortage in the box". He immediately inquired whether "you mean you took money out of this cash box?" Her answer was "Yes, * * * and this check is to cover it". At the time Lieutenant Jernigan had not yet determined that a deficiency existed (R. 204, 206).

At the hearing before the investigating board the accused not only claimed that he had replaced part of the $750 shortage, but asserted that "he did not take any part of that money". In reply to an inquiry as to his conversion of any sums other than the $600, he said "None that I know of". When apprised of the extent of the actual shortage he did not act surprised or state that he was (R. 207).

The $600 had been repaid out of the proceeds of a "Civil Service Retirement check" in the sum of $1058.00. Lieutenant Jernigan had cashed it at the bank for the accused and remembered receiving "nine $100.00 bills and the rest in smaller change" (R. 208-209).

After presenting its last witness, the defense introduced six exhibits. One was a copy of section 11, Circular 214, 15 September 1943, providing, among other things, that "cash only, as a general rule, will be accepted in payment of purchases by individuals from sales commissaries

and clothing sales stores", and that personal "checks ordinarily will not be accepted". The remaining exhibits were copies of various orders assigning the accused to duty and granting him leave (R. 210-212; Def. Exs. 1-6).

In conclusion counsel for the defense read certain excerpts from Army Regulation 35-6660, 29 August 1942, and from change 7 thereto dated 8 July 1943. This dealt with the accountability of Sales Officers. The change referred to amended paragraph 12 of Army Regulation 35-6660 to state that:

> "A sales officer will deposit funds with a disbursing officer as follows:
>
> "(1) Daily, wherein the cash on hand at the end of the day (excluding the amount advanced by a disbursing officer for making change * * *), exceeds $200.
>
> "(2) On the last business day of each month, the total cash on hand, excluding any amount advanced for making change" (R. 213).

6. Lieutenant Colonel Harold S. Dean was recalled as a rebuttal witness by the prosecution. He rendered the opinion that "sub-paragraph a, paragraph 12, Army Regulation 35-6660 * * * applies to all officers of the Post, not to the sales alone" (R. 214-216).

7. Specification 1 of Charge I alleges that the accused, "being at the time an officer charged with the safekeeping and transfer of public money, did * * * between 7 May 1943 and 31 December 1943, feloniously embezzle, by fraudulently converting to his own use * * * ($25.00), lawful money of the United States, the property of the United States, intended for the military service thereof, which money was entrusted to him by virtue of his office as the officer in charge of the Quartermaster Clothing Sales Warehouse, Camp Campbell, Kentucky". Specifications 2, 3, and 4 allege that the accused committed the same offense, in like manner, on the following dates and with respect to the following amounts:

31 July 1943	$ 20.00
1 November 1943	$ 600.00
7 May 1943 to 18 April 1944	$1641.94

These acts were laid under Article of War 94.

No useful purpose would be served by a discussion of all the questions raised by the defense, for many of them are not material and tend only to obscure and confuse the true issue. The evidence has established beyond a reasonable doubt that a shortage of $1641.94 exists in the funds which were entrusted to the accused, and that he has not offered any explanation for it. This in itself, without proof of any additional circumstances, is sufficient to sustain a conviction for embezzlement. To

quote from II Bull. September 1943, p. 341, section 451 (17), the "accused received money entrusted to his care and he failed to account for it. The logical inference of misappropriation is justified by the evidence". The following holdings in Dig. Op. JAG, 1912-1940, sec. 451 (17) are much to the same effect:

> "Any adult man who receives large sums of money from others for which he is responsible and accountable, who wholly fails either to account for or to turn them over when his stewardship terminates, cannot complain if the natural presumption that he has spent them outweighs any explanation he may give, however plausible, uncorroborated by other evidence. C. M. 123488 (1918); 203849 (1935).
>
> "An officer in charge of trust funds who fails to respond with them or account for them when they are called for by proper authority cannot complain if the natural presumption that he has made away with them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting. * * * C. M. 123492 (1918)."

The accused in this case was charged with the duty of turning over the receipts accruing from the operation of the Officers' Clothing Sales Store. His failure to do so, in the absence of a reasonable explanation, condemns him as an embezzler. Whether or not Army Regulation 35-6660 applies to him is immaterial. He was entrusted with public funds, he was responsible for their delivery to the Sales Officer, and he converted a substantial portion of them to his own use. The capacity in which public monies are received affect the responsibility of the holder but little. He is bound to return them to their rightful owner upon demand, or, in the alternative, subject himself to the penalties for embezzlement imposed by law.

He has admitted that he obtained full face value out of the store's funds for his check and IOU, and that he applied the respective sums of $25.00 and $20.00 to his own personal needs. His contention that he returned the money finds no support in the record. His taking is established by his own words. "While some corroborative evidence is prerequisite to the introduction of a confession, full proof of the corpus delicti, independent of the confession is not required. All that is required is some corroborative evidence." Dig. Op. JAG, 1912-1940, sec. 395 (11), CM 210693 (1938). The check and the IOU constitute such corroborating evidence.

The taking of the $600 has also been freely conceded by the accused. That he may have restored the sum does not excuse or justify his offense. As was said in Dig. Op. JAG, 1912-1940, section 451 (18), CM 192530 (1930), "the act of a custodian of company funds in borrowing them for even temporary personal use constitutes the offense of embezzlement".

The defense has made much of the fact that Miss Nance had ready access to the accused's safe, and that she has made restitution for a deficiency which she personally created. This attempt to divert suspicion to her must be given short shrift. The accused has assumed full responsibility for the state of the fund and has absolved her from all possibility of blame. She was apparently at all times subject to the jurisdiction of the court and could have been called as a witness on his behalf. The omission of the defense to do so casts the gravest doubt upon the sincerity of any innuendoes cast against her.

The suggestion was made that the shortage might well have been attributable to an accumulation of errors by Mr. Black in charging for the various items sold at the store. Proof of a deficiency of $1.27 in one day's proceeds delivered by him was adduced in support of this hypothesis. Counsel for the defense deduced "the probability that some differential of $423 and $11,000 could have been the result of the fact that there was a minor shortage that resulted day after day from the money to be brought in by Mr. Black". Evidence of a single error does not logically, however, lead to an inference of incessant error. And even if Mr. Black were daily guilty of mistaken entries or calculations, the evidence clearly indicates that he would immediately be required to "dig" the amount of his deficiency "out of his own pocket". After a full consideration of this and all the other issues raised by the defense, the Board of Review is impelled to the conclusion that the record is legally sufficient to sustain Charge I and all the Specifications thereunder.

8. The Specification of Charge II alleges that the accused, "being at the time an officer of the United States, having received public money * * * which money he was not authorized to retain as salary, pay or emolument, did, at Camp Campbell, Kentucky, from about 1 November 1943 to about 18 April 1944, fail to render his accounts for the same as provided by law, this in violation of RS Section 5491." This was set forth as a violation of Article of War 96.

Although "RS Section 5491" was repealed on 4 March 1909 by 35 Stat. 1153, judicial notice will be taken of a substitute measure in almost the same words which was adopted on the same day as Section 90, 35 Stat. 1105. This latter enactment provides that:

> "Every officer or agent of the United States who, having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render his accounts for the same as provided by law shall be deemed guilty of embezzlement and shall be fined in a sum equal to the amount of the money embezzled and imprisoned not more than ten years."

This statute by its express terms describes a particular misconduct in regard to public monies for which a person "<u>shall be deemed guilty of embezzlement</u>."

Although the Specification of Charge II apparently sought to allege the failure of the accused to render his accounts from 1 November 1943 to 18 April 1944, as a distinct offense from embezzlement, the Specification alleges that the accused's failure was "in violation of RS Section 5491". In other words, the Specification in effect alleges a failure to render accounts which is in substance, under the statute relied upon in the Specification, an offense for which the accused "shall be deemed guilty of embezzlement". Although the evidence as previously analyzed is legally sufficient to support the findings of guilty of the Specification, Charge II, and Charge II, the offense in question is but a part of the transactions involved in the alleged embezzlements in the Specifications of Charge I. Accordingly, the accused's punishment should be limited to the more serious aspects of his offenses as set forth under Charge I.

9. The accused is about 37 years of age. The records of the War Department show that he had enlisted service in the National Guard of New Jersey from 27 September 1934 to 25 September 1940 and in the Army of the United States from 6 January 1941 to 2 September 1942; that he was commissioned a second lieutenant on 25 September 1942 and promoted to first lieutenant on 5 August 1943; that he has been on active duty as an officer since 25 September 1942.

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

Abner E. Lipscomb, Judge Advocate.

(On Leave), Judge Advocate.

Gabriel W. Golden, Judge Advocate.

SPJGN
CM 257882

1st Ind.

War Department, J.A.G.O., 10 AUG 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 Charles Stiehl (0-1579179), Quartermaster Corps, 1580th Service Unit.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the period of confinement be reduced to five years, that the sentence as thus modified be ordered executed and that the United States Penitentiary, Leavenworth, Kansas, be designated as the place of confinement.

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

Myron C. Cramer

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

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

(Sentence confirmed but confinement reduced to five years. G.C.M.O. 532, 26 Sep 1944)

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

SPJGN
CM 257939

29 JUN 1944

UNITED STATES	SAN FRANCISCO PORT OF EMBARKATION
v.	Trial by G.C.M., convened at Camp Stoneman, California, 11 and 17 May 1944. Dishonorable discharge and confinement for life. Penitentiary.
Private RALPH W. SHORTER (35797484), Casual Detachment, Camp Stoneman, California.	

REVIEW by the BOARD OF REVIEW
LIPSCOMB, SHEPHERD and GOLDEN, Judge Advocates

---

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

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

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

Specification: In that Private Ralph W. Shorter, Casual Detachment, Camp Stoneman, California, did, at or near Antioch, California, on or about 29 April 1944, forcibly and feloniously, against her will, have carnal knowledge of Dolores Noack.

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

Specification: In that Private Ralph W. Shorter, Casual Detachment, Camp Stoneman, California, did, without proper leave, absent himself from his station at Camp Stoneman, California, from about 26 April 1944, to about 30 April 1944.

He originally pleaded not guilty to all Charges and Specifications, but

changed his plea from not guilty to guilty of "Charge 2, Specification 1". He was found guilty of all Charges and Specifications. Evidence of two previous convictions by special courts-martial for absence without leave in violation of Article of War 61 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, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. As to Charge I and its Specification alleging rape, the evidence for the prosecution shows that prior to 29 April 1944 the accused became acquainted with the oldest daughter of Mr. and Mrs. Theodore A. Noack and after he had "met the family he came to the house every day after that for about a week." On the evening of 29 April 1944 the accused and two other soldiers, Privates William Williamson and Clifton I. DeMarsh were supper guests in the Noack home in Antioch, California. After supper, the accused took Dolores Noack, ten-year-old daughter of the Noacks, for a ride on a bicycle (R. 8, 9, 12, 17, 19, 39, 40, 44).

The victim of the alleged rape, Dolores Noack, testified that she was ten years of age, that her birthday was December 7, that she was in the fifth grade at Antioch Grammar School, that if a little girl lied she would not go to heaven, and that she knew the meaning of being sworn to tell the truth. She said that the accused took her riding on a bicycle at the time above stated to see her "daddy's boat near the Fulton Shipyard". He held her around her "tummy" when she became cold and told him she wanted to go home. She cried and was told to "shut up" if she did not "want to get hurt". They went down Wilbur Avenue to the "sand hills near the shipyard" and accused left the bicycle "near the tracks". Witness again told accused that she wanted to go home but accused pulled her by the left arm, hurt her, and she cried. He took her "to a hill" and made her "lay down". When two automobiles passed he hid her by sitting by her side. The accused made her "lay" on the ground and took off her slacks and panties. He was holding her on the ground with his knees. This hurt her but "not very much". She was crying (R. 11, 12, 13, 14, 16).

With respect to the actual commission of the crime, the record is as follows:

> "Q. Were you crying?
> "A. Yes sir.
> "Q. Dolores, what did he do when he had you on the ground and was holding you?

"A. He unbuttoned his pants.
"Q. When he unbuttoned his pants, what did you say?
"A. I said to quit it.
"Q. How did he hold you?
"A. With his knees and hands.
"Q. Did he have his hands on your body?
"A. Yes sir.
"Q. When he had unbuttoned his pants, what did he do?
"A. He put it on mine.
"Q. Did he put his private in your private?
"A. Yes sir.
"Q. Did it hurt?
"A. Yes sir.
"Q. What did he say to you when you said it hurt?
"A. He said to just let it there until it snaps.
"Q. Did he say anything else?
"A. He said that it would only take a few minutes. I tried to get away, but he would not let me. He would not let me get up, and said that if I didn't want to get hurt to shut up.
"Q. Then when he was finished what did you do?
"A. I put my clothes on.
"Q. How did you walk after you got dressed?
"A. With my legs spread apart.
"Q. Did it hurt real hard?
"A. Yes sir.
"Q. Where did it hurt?
"A. In my private.
"Q. How do you know he had his private in your private?
"A. I could feel it.
"Q. Did it hurt real hard? Will you tell these men how it hurt?
"A. I could hardly breath." (R. 14-15)

She also said that the accused told her that he would kill her if she informed her mother (R. 15).

They returned on the bicycle to Dolores' home. Her hair was a "mess" and she told her mother that "Ralph took me out to the sand dunes and he did something to me". The accused denied that he had done anything to the child and suggested that Mrs. Noack call the military police. She said that she intended doing so. Dolores began crying and was taken to a bedroom by her mother and undressed. The child was "bleeding pretty bad", "around the vagina" and "sperm and blood /were/ running down her legs".

Her panties were "bloody and stained". She told her mother that accused had raped her by force and that he had put his hand over her mouth. In response to his wife's call, Mr. Noack came into the bedroom and exclaimed, "Jesus Christ". The accused heard the exclamation, ran into the front room, grabbed his field jacket and ran out of the house. Dolores was bathed, "disinfected" and put to bed. She was in such a nervous state that she "just quivered and cried all night long" (R. 9, 10, 15, 16, 18, 20, 21, 40-42, 45).

On 1 May Dolores was medically examined at the station hospital, Camp Stoneman, California, by Lieutenant Colonel Earl M. Anderson, Medical Corps, in the presence of Major George Kaplan, Medical Corps, and two lieutenants of the Army Nurse Corps. Her hymen was found to be ruptured with a laceration of about one-fourth to five-eights of an inch, not more than three or four days old, and an abrasion of the vagina. Her entire vagina as far as the internal portion of the labia minora and labia majora was inflamed. She was found to be suffering from acute gonorrhea which could have been contracted within two or three days. The child's condition "could very well be the result of rape" (R. 22-28).

The accused was medically examined on 2 May 1944 and was discovered to be suffering from gonorrhea. On cross-examination the doctor who made the examination testified that in his opinion the case was a new one, "possibly a few weeks old"; that the germs were not "infectious", and that "secondary infections are rarely transmitted" (R. 36, 37).

The clothes worn by the accused when apprehended on 30 April 1944 were examined. A part of the fly of the trousers was found to be stained with blood. The undershirt and shorts were without positive results but the accused had washed the shorts a short time prior to the examination (R. 29-35; 49-52).

4. As to Charge II and its Specification alleging absence without leave, the evidence for the prosecution, in addition to the accused's revised plea from not guilty to guilty "on Charge 2, Specification 1", consists of an extract copy of the morning report of accused's former organization evidencing his change of status from "duty to AWOL" on an unspecified date, which copy is certified by the organization commander under date of 26 April 1944, and of the testimony of Second Lieutenant Durward W. Hamilton showing that he "picked up" accused in Brentwood, California, on 30 April 1944 (R. 47, 48; Pros. Ex. "D", "E").

5. For the defense, no evidence was introduced. The accused stated that he understood his rights as to testifying, making an unsworn statement and remaining silent, and his counsel stated that the accused chose to remain silent (R. 53, 54).

6. The Specification under Charge I alleges that the accused "did, at or near Antioch, California, on or about 29 April 1944, forcibly and feloniously, against her will, have carnal knowledge of Dolores Noack". This language alleges the crime of rape, one of the two crimes made punishable under Article of War 92.

Rape is defined as "* * * the unlawful carnal knowledge of a woman by force and without her consent" (M.C.M., 1928, par. 148b). The Manual for Courts-Martial, in discussing this definition, states that:

> "Force and 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.
>
> "Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent.
>
> "It has been said of this offense that 'it is true that rape is a most detestable crime * * *; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent'" (M.C.M., 1928, p. 165).

When the evidence is examined in the light of the above definition, it becomes apparent that the accused is guilty of rape as charged.

The testimony of Dolores Noack shows that the accused took her off the road to some sand hills, made her lie down, took off her panties, and against her will forced his penis into her private parts, hurting her so much she "could hardly breath". Her testimony shows that when accused unbuttoned his pants she told him "to quit it", that he held her with his knees and hands, that she tried unsuccessfully to get up, that she was crying and that the accused told her to shut up if she did not want to get hurt. The testimony of Dolores Noack is corroborated by her informing her mother promptly upon reaching her home as to what had happened, by the bloody condition of her private parts, and by her nervous and distressed appearance. Moreover, the action of the accused in running from the house while Dolores was being examined by her mother is not consistent with the action of a person unjustly accused. Further corroboration exists

in the fact that she developed a gonorrhea infection within a few days after the intercourse and that her hymen had been ruptured within that period of time which rupture could have been "caused by rape" (CM 236464, Dewa).

That the accused had gonorrhea at the time of the alleged rape is well established. When accused was examined several days after the offense occurred, the germs were not "infectious", but this opinion does not preclude the possible inference that the germs were infectious when the act was committed as indicated by the facts.

7. The Specification under Charge II alleges that the accused absented himself without leave "from his station at Camp Stoneman, California, from about 26 April 1944, to about 30 April 1944". Although the change in the plea of not guilty to guilty of "Charge 2, Specification 1" could more appropriately have been expressed as being to "Charge II and its Specification", it is clear that the accused intended and did in fact plead guilty of this Charge and Specification. The plea is corroborated, although not required to be, by the extract copy of the morning report of accused's former organization showing the initial unauthorized absence of the accused on an unspecified date on or prior to 26 April 1944, and by testimony evidencing the date of termination of the unauthorized absence as alleged. The plea and supporting evidence show beyond a reasonable doubt that the accused absented himself without leave as alleged.

8. Although the issue of accused's sanity and mental responsibility for the crime of rape was not raised during the trial, two neuropsychiatric examination reports accompany, but do not form a part of, the record of trial. On 2 May 1944, Major Louis S. Lipschutz, Medical Corps, Chief of Neuropsychiatric Section, Camp Stoneman, California, stated in his report that accused had a "Mental Deficiency, Moron, mental age 11 years" and "is legally sane, able to assist counsel and understands the nature and consequences of his alleged offenses". On 16 May 1944 the report of First Lieutenant George Tarjan, Medical Corps, Neuropsychiatric Section, Camp Stoneman, California, which indicates that the examination was made at the request of accused's defense counsel, states that accused "is sane, he is responsible for his actions, and he knows the difference between right and wrong".

9. The record shows the accused to be 19 years of age, and that he was inducted into the service on 30 March 1943.

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

the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. A sentence of death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92.

Abner E. Lipscomb, Judge Advocate.

Walton Shepherd, Judge Advocate.

(On Leave), Judge Advocate.

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

SPJGQ
CM 257946

29 JUN 1944

UNITED STATES v. First Lieutenant MARSHALL DeLANEY (01551189), Ordnance Department, Air Corps.	FAIRFIELD AIR SERVICE COMMAND Trial by G.C.M., convened at Bowman Field, Kentucky, 8 June 1944. Dismissal, total forfeitures, and confinement for three years.

OPINION of the BOARD OF REVIEW
ROUNDS, GAMERELL 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 61st Article of War.

Specification: In that First Lieutenant Marshall Delaney, Ordnance Department, 808th Army Air Forces Base Unit, Section A (General), did, without proper leave, absent himself from his duties and station at Bowman Field, Kentucky, from about 21 March 1944, to about 28 April 1944.

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

Specification: In that First Lieutenant Marshall DeLaney, Ordnance Department, 808th Army Air Forces Base Unit, Section A (General), did, at Bowman Field, Kentucky, on or about 24 February 1944, feloniously take, steal and carry away four (4) automobile tires, size 700 x 15, of the total value of about thirty-eight ($38.00) dollars, property of the United States, furnished and intended for the military service thereof.

He pleaded guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced at the trial. Accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five (5) years. The reviewing authority approved the sentence but reduced the period of confinement to three (3) years, and forwarded the record of trial for action under Article of War 48.

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

Charge I and its Specification:

A duly authenticated extract copy of the morning report of his organization was introduced in evidence, showing that accused went from duty to AWOL at Bowman Field, Kentucky, as of eight o'clock a.m. on 21 March 1944 (R. 7, Ex. 2). He was apprehended and returned to military control at Albuquerque, New Mexico, on 28 April 1944, by First Lieutenant J. R. Wrinkle (R. 7, Ex. 1).

Charge II and its Specification:

On or about 24 February 1944, accused, who was on duty at the Base Ordnance garage, Bowman Field, Kentucky (R. 11), forged the name of Captain Giles G. Green, Maintenance Officer in charge of trailers at the Sub-Depot, Bowman Field (R. 7), to a "Request for Job Order" (Form O.O. #7362) for four 700 x 15 tires (R. 7, 8, 22, Ex. 3). The tires were requested for use on Government trailer #O-17042 (Ex. 3). The sub-depot at Bowman Field had no trailer bearing that number (R. 8). Based on the forged "Request for Job Order", a "Job Order" was issued (R. 9, Ex. 5), and accused, in his capacity as assistant Base Ordnance Officer, Bowman Field, signed a requisition to the Ordnance Branch, ASF, Fort Knox, Kentucky, for four 700 x 15, 6 ply tires (R. 8, Ex. 6). Accused went to Fort Knox in a staff car on or about 24 February 1944 (R. 16) and personally presented the requisition and received four new tires of the size and kind specified in the requisition (R. 9, 22). He again signed his name to the requisition at the time the tires were issued to him (R. 9, 22, Ex. 6). Accused next forged the name of Sergeant Arch Stallard to a "Tally-In" slip showing receipt by the Base Ordnance Garage, Warehouse No. T-17, Bowman Field, of the four tires in question (R. 11, 22, Ex. 7), but he did not in fact deliver the tires to the Base Ordnance Garage or to any other Government agency (R. 22). Instead, he placed the four tires on his own privately owned automobile, a 1941 model Packard Sedan (R. 12, 14, 15, 22). Sergeant Stallard (R. 12), Pfc. McEntee (R. 14), and Charles D. Hillhouse (R. 16) saw new tires on accused's car before accused sold it. Accused sold his car, together with the four tires in question, to Francis B. Greenwell, Louisville, Kentucky, on 29 February 1944 (R. 17, 22). He did not produce a tire inspection certificate at the time he made the sale (R. 18). Greenwell resold the car with the same tires on it to John H. Noe within a few days after purchasing it from accused (R. 18, 19). The tires which were on the car at the time Noe purchased it were still on it at the time of the trial (R. 20). They were inspected by the court (R. 20) and pictures of each of them were introduced in evidence (R. 20, Ex. 9). They are Goodyear, size 700 x 15, 6 ply tires (Ex. 9).

Each of the four tires which accused obtained from the Ordnance Branch, ASF, Fort Knox, Kentucky, was property of the United States intended for military use and was of the value of $9.69 (R. 10).

4. Having had his rights explained to him the accused elected to remain silent. He offered no evidence.

5. Charge I and its Specification (AWOL - AW 61):

The evidence, together with his plea of guilty, clearly establishes accused's guilt of being absent without leave from 21 March 1944 to 28 April 1944 as charged in the Specification. Further discussion is deemed unnecessary.

Charge II and its Specification (Larceny of military property - AW 94):

Accused also pleaded guilty to this Charge and Specification. There is no dispute about the facts. Accused acquired the four tires by fraud and deceit. He did not come into lawful possession of them. He intended to convert them to his own use and benefit at the time he presented the unauthorized requisition which the Ordnance Branch, ASF, at Fort Knox honored. Under these circumstances, even though the tires were knowingly delivered to accused by a person who had authority to honor valid requisitions, his conversion of them constitutes larceny. Par. 149g, M.C.M. 1928. The tires were property of the United States intended for the military service thereof, and the offense falls squarely within the provisions of Article of War 94.

6. War Department records disclose that this officer is 32 years of age. He attended high school for two years and has taken a correspondence course as a shop mechanic and foreman. He was employed in a machine shop prior to entering the service on 29 March 1942. He attended the Ordnance School, Aberdeen Proving Ground, Md., and was commissioned a second lieutenant, Army of the United States, for non-combatant duty with the Supply Services only, on 21 November 1942. He entered upon active duty the same date. He was promoted to the rank of first lieutenant on 22 December 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of either Article of War 61 or Article of War 94.

William H. Arends, Judge Advocate.

William H. Bamberger, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 5 JUL 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 Marshall DeLaney (O-1551189), Ordnance Department, Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. 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 above 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. S/W.
Incl 3 - Form of action.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 430, 4 Aug 1944)

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

SPJGV
CM 257969

4 JUL 1944

UNITED STATES v. Second Lieutenant GEORGE T. HARTELL (0-1587306), Quartermaster Corps.	MOBILE AIR SERVICE COMMAND Trial by G.C.M., convened at Nashville, Tennessee, 11 and 12 May 1944. Dismissal, total forfeitures and confinement for three (3) years and six (6) months.

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

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

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

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

Specification 1: In that Second Lieutenant George T. Hartell, Quartermaster Corps, Nashville Army Air Center, Nashville, Tennessee, did, at or near Nashville, Tennessee, on or about 29 January 1944, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to wit: "Nashville, Tenn., 29 Jan 1944, Commerce Union Bank, Main Office, Pay to the order of Cash . . . . $35.00, Thirty-five dollars and xx/xx Dollars, Warren C. Greenwald, Capt., A.C.", which said check was a writing of a private nature which might operate to the prejudice of another.

Specification 2: In that Second Lieutenant George T. Hartell, * * *, did, at or near Nashville, Tennessee, on or about 29 January 1944, with intent to defraud falsely make in its entirety a certain check in the following words and

figures, to wit: "Nashville, Tenn., 29 Jan. 1944, American Nat'l Bank, Main Office, Pay to the order of Cash, $45.00, Forty-five Dollars and oo/xx dollars, George Von Gault, 2nd Lt., M.C.", which said check was a writing of a private nature which might operate to the prejudice of another.

Specification 3: In that Second Lieutenant George T. Hartell, * * *, did, at or near Nashville, Tennessee, on or about 19 February 1944, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to wit: "Nashville, Tenn. 19 February 1944, Pay to the order of Cash, $25.00, Twenty-five Dollars & 00/xx dollars, for ....., Third National Bank in Nashville, Nashville, Tenn., Lt. Robert Brooks, O-1596479", which said check was a writing of a private nature which might operate to the prejudice of another.

Specification 4: In that Second Lieutenant George T. Hartell, * * *, did, at or near Nashville, Tennessee, on or about 20 February 1944, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to wit: "Nashville, Tenn. Feb. 20, 1944, 808 Broadway Branch, The American National Bank, Pay to Cash or order $50.00, Fifty dollars & 00/xx Dollars, Capt Joseph Wilson A.C.", which said check was a writing of a private nature which might operate to the prejudice of another.

Specification 5: In that Second Lieutenant George T. Hartell, * * *, did, at or near Nashville, Tennessee, on or about 24 February 1944, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to wit: "Nashville, Tenn. February 24 1944, Pay to the order of Cash, $25.00/xx, Twenty five Dollars & 00/xx Dollars, FOR VALUE RECEIVED, I REPRESENT THAT THE ABOVE AMOUNT IS ON DEPOSIT IN SAID BANK SUBJECT TO THIS CHECK AND IS HEREBY ASSIGNED TO PAYEE, To First National Bank, New York City, Capt Warren C. Stanford, O-1387908 NAAC Nashville Tenn", which said check was a writing of a private nature which might operate to the prejudice of another.

Specification 6: In that Second Lieutenant George T. Hartell, * * *, did, at or near Nashville, Tennessee, on or about

1 March 1944, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to wit: "Nashville, Tenn. 1 March 1944 First National Bank of New York, New York, Pay to the order of Cash $50.00 Fifty dollars & 00/xx Dollars Capt William H. Thompson Capt. A.C." which said check was a writing of a private nature which might operate to the prejudice of another.

Specification 7: In that Second Lieutenant George T. Hartell, * * *, did, at or near Nashville, Tennessee, on or about 1 March 1944, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to wit: "March 1 1944, First National Bank, New York, New York, Pay to the order of Cash $33.00 Thirty-three dollars & 00/xx Dollars, William B. Thompson, Capt, A.C." which said check was a writing of a private nature which might operate to the prejudice of another.

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

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

Specification 3: In that Second Lieutenant George T. Hartell, * * *, being indebted to The American National Bank, Nashville, Tennessee, in the sum of $175.00 lawful money of the United States loaned to the said Lieutenant Hartell by said The American National Bank, which amount became due and payable on or before 5 March 1944, did, at or near Nashville, Tennessee, from about 5 March 1944 to about 19 April 1944, dishonorably fail and neglect to pay said debt.

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

Specifications 1 and 2: (Findings of guilty disapproved by the reviewing authority).

Specification 3: In that Second Lieutenant George T. Hartell, * * *, did, at or near Nashville, Tennessee, on or about 19 February 1944, with intent to defraud, willfully, unlawfully and feloniously utter as true and genuine a certain check in the following words and figures, to wit: "Nashville, Tenn. 19 February 1944, Pay to the

order of Cash, $25.00, Twenty-five Dollars & 00/xx dollars, for ....., Third National Bank in Nashville, Nashville, Tenn., Lt. Robert Brooks, O-1596479", a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Lieutenant Hartell, then well knew, falsely made and forged.

Specification 4: In that Second Lieutenant George T. Hartell, * * *, did, at or near Nashville, Tennessee, on or about 20 February 1944, with intent to defraud, willfully, unlawfully and feloniously utter as true and genuine a certain check in the following words and figures, to wit: "Nashville, Ten. Feb. 20, 1944, 808 Broadway Branch, The American National Bank, Pay to Cash or order $50.00, Fifty Dollars & 00/xx Dollars, Capt Joseph Wilson A.C.", a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Lieutenant Hartell, then well knew, falsely made and forged.

Specification 5: In that Second Lieutenant George T. Hartell, * * *, did, at or near Nashville, Tennessee, on or about 24 February 1944, with intent to defraud, willfully, unlawfully and feloniously utter as true and genuine a certain check in the following words and figures, to wit: "Nashville Tenn. February 24 1944, Pay to the order of Cash, $25.00/xx, Twenty five Dollars & 00/xx Dollars, FOR VALUE RECEIVED, I REPRESENT THAT THE ABOVE AMOUNT IS ON DEPOSIT IN SAID BANK SUBJECT TO THIS CHECK AND IS HEREBY ASSIGNED TO PAYEE, To First National Bank, New York City, Capt Warren C. Stanford, O-1387908 NAAC Nashville Tenn", a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Lieutenant Hartell, then well knew, falsely made and forged.

Specification 6: In that Second Lieutenant George T. Hartell, * * *, did, at or near Nashville, Tennessee, on or about 1 March 1944, with intent to defraud, willfully, unlawfully and feloniously utter as true and genuine a certain check in the following words and figures, to wit: "Nashville, Tenn. 1 March 1944 First National Bank of New York, New York, Pay to the order of Cash $50.00 Fifty dollars & 00/xx Dollars Capt William H Thompson Capt. A.C.", a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Lieutenant Hartell, then well knew, falsely made and forged.

Specification 7: In that Second Lieutenant George T. Hartell, * * *, did, at or near Nashville, Tennessee, on or about 1 March 1944, with intent to defraud, willfully, unlawfully and feloniously utter as true and genuine a certain check in the following words and figures, to wit: "March 1 1944, First National Bank, New York, New York, Pay to the order of Cash $33.00 Thirty-three dollars & 00/xx Dollars, William B. Thompson, Capt. A.C.", a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Lieutenant Hartell, then well knew, falsely made and forged.

Specifications 8, 9, 10, 11: (Motion for findings of not guilty sustained by the court).

Specification 12: (Finding of guilty disapproved by the reviewing authority).

Specifications 13 and 14: (Motion for findings of not guilty sustained by the court).

Specification 15: (Finding of guilty disapproved by the reviewing authority).

Specification 16: In that Second Lieutenant George T. Hartell, * * *, did, at or near Nashville, Tennessee, on or about 4 March 1944, unlawfully pretend to Hermitage Hotel, Nashville, Tennessee, that he had sufficient funds in his account in the Morris Plan Bank of New York, New York, to satisfy in full his check drawn on said bank in the sum of $25.00, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from said Hermitage Hotel, said sum of $25.00 in lawful money of the United States.

Specifications 17 and 18: (Motion for findings of not guilty sustained by the court).

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and the seven Specifications thereunder, guilty of Charge II and Specification 3 thereunder, guilty of Charge III and Specifications 1, 2, 3, 4, 5, 6, 7, 12, 15 and 16 thereunder, and not guilty of Specifications 1 and 2 of Charge II. A motion by defense for findings of not guilty of Specifications 8, 9, 10,11,13, 14, 17 and 18 of Charge III made at the close of the prosecution's case was granted by the court. No evidence of previous convictions was introduced. He was

sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three and one half years. The reviewing authority disapproved the findings of guilty of Specifications 1, 2, 12 and 15 of Charge III, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. After arraignment of the accused the defense filed a plea in abatement to Specifications 1-7, Charge I and Specifications 1-7, Charge III, on the grounds that Specifications 1-7, Charge I, alleged forgery of certain instruments, and Specifications 1-7, Charge III, alleged the uttering of these same instruments, thereby compelling accused to defend separate offenses arising out of the same transaction, contending that if the accused were convicted of both Charges and their Specifications he would be punished twice for the same offense (R. 6; Certificate of Correction, p. 1). This plea was denied by the court (R. 6).

The Board of Review is of the opinion that the passing or uttering of a forged instrument is not chargeable under the 93rd Article of War (MCM, 1928, par. 149i); that forging an instrument is a separate and distinct offense from uttering such an instrument (Dig. Op. JAG, 1912-40, sec. 451 (25)), and that the action of the court in denying the plea in abatement was correct.

4. The evidence pertaining to Specifications 1 and 2, Charge II, Specifications 8, 9, 10, 11, 13, 14, 17 and 18, Charge III, under which there were findings of not guilty, and Specifications 1, 2, 12 and 15, Charge III, of which the findings of guilty were disapproved by the reviewing authority will not be discussed except as it may pertain to the Specifications of which the findings of guilty were approved by the reviewing authority.

5. Evidence for the prosecution is substantially as follows:

a. Specifications 1-7, Charge I:

It was stipulated that if Lieutenant Colonel John Heilich were present he would testify that he was commanding officer of accused from 15 June 1943 to 15 April 1944, and that on or about 3 March 1944 he spoke to accused concerning his financial difficulties. After being fully advised as to his rights under Article of War 24 the accused subsequently furnished to Lieutenant Colonel Heilich a signed statement in his own handwriting as to his financial obligations. This statement was received in evidence as Exhibit A (R. 6-1; Ex. A).

It was admitted by counsel for defense that the signature appearing on Exhibits marked for identification A, I, J, K, L, M and N is the signature of the accused (R. 6-6). These exhibits consist of the statement given by accused to Lieutenant Colonel Heilich and six checks drawn by accused on the Morris Plan Bank of New York, which were received in evidence as Exhibits A, I, J, K, L, M and N (R. 6-9; 6-10).

Roy L. Erickson, Special Agent of the Federal Bureau of Investigation, employed as examiner of questioned documents in the laboratory of the Federal Bureau of Investigation in Washington, D.C., was qualified as an expert on handwriting and testified that he examined the checks described in Specifications 1-7, Charge I (R. 6-9, 6-10; Exs. B, C, D, E, F, G and H), and compared the writing on such checks with the known writing of accused on Exhibits A, K, L, M and N (R. 6-7). As a result of such examination he was of the opinion that the checks described in Specifications 1-7 were written by the accused (R. 6-9, 6-12).

b. Specification 3, Charge II:

On 14 January 1944 accused borrowed $225 from the American National Bank, Nashville, Tennessee, repayable $50 per month on the fifth of each following month, and $25 payable as the last installment. The accused signed a promissory note evidencing this indebtedness, said note providing that if any installment was not paid when due, then the entire amount unpaid shall be due and payable at the election of the holder (R. 6-39; Ex. R). One installment was paid on 31 January 1944 and the balance had not been paid at time of trial. All efforts by the bank to contact accused by telephone proved unavailing (R. 6-39, 6-40; Ex. R).

c. Specification 3, Charge III:

The accused requested Felix H. Schmidt, manager of the Center Cafe, Nashville Army Air Center, to cash the check described in Specification 3, Charge III, and received in evidence as Exhibit H, this being the check in amount of $25, bearing the forged signature of "Lt. Robert Brooks" and drawn on the Third National Bank of Nashville, Tennessee. This check was also the basis of Specification 3, Charge I. Schmidt cashed this check as he "had always had every confidence in the world in an officer". Payment on the check was refused by the drawee bank on the ground that the bank had no such account (R. 6-36, 6-37).

W. J. Diehl, vice-president and cashier of the Third National Bank, Nashville, Tennessee, testified that he had searched the records of said bank and such search revealed that the bank had never had an account in the name of Robert Brooks (R. 6-38).

d. Specification 4, Charge III:

It was stipulated that if Wendell Phillips, formerly assistant cashier of the Third National Bank, Nashville, Tennessee, were present he would testify that on 20 February 1944 he, at the request of the accused who identified himself by his AGO card, approved for cashing a check presented by accused. This check was received in evidence as Exhibit D. This check, which was also the same check described in Specification 4, Charge I, in the amount of $50, was drawn on the American National Bank, Nashville, Tennessee, signed by Captain Joseph Wilson, Air Corps, and was endorsed by accused. This witness approved the check for cashing by writing on the back thereof below the endorsement by accused the letters "O.K." and his initials "W.P." (R. 6-27).

This check was later presented to the Commerce Union Bank, Nashville, Tennessee, by the Post Exchange, Nashville Army Air Center, for credit to its account. When forwarded through channels to the drawee bank, American National Bank of Nashville, it was returned with the notation "No such account" (R. 6-31).

Andrew B. Benedict, Jr., assistant vice-president of the American National Bank, Nashville, Tennessee, testified that a search of the records of that bank revealed that the bank had never had an account in the name of Captain Joseph Wilson, A.C. (R. 6-25).

"Uttering" is defined in Section 910, Wharton's Criminal Law, 12th Edition, as offering as good a document directly, or indirectly, by words or actions. Paragraph 152c, Manual for Courts-Martial, 1928, provides:

> "To constitute this offense [uttering] there must be a knowledge that the instrument is a forgery, and there must be an intent to defraud. The intent to defraud may be implied where knowledge of the falsity of the document is shown. It is not necessary that the instrument actually be passed. A mere offer coupled with a representation that it is good is a sufficient uttering." (words in brackets supplied).

e. Specification 5, Charge III:

Clyde B. Dunlap, teller for the American National Bank, Nashville, Tennessee, testified that on 25 February 1944 he cashed for the accused the check described in Specification 5, Charge III, and received in evidence as Exhibit E. This check, which is also the same check described in Specification 5, Charge I, is in the amount of $25, drawn on the First National Bank of New York, and signed by "Capt. Warren C. Stanford". The check is payable to cash and endorsed by the accused (R. 6-20).

Walter F. Kearns, cashier, First National Bank of New York, testified by deposition that Captain Warren C. Stanford had never had an account with said bank (R. 6-23; Ex. Q).

f. Specification 6, Charge III:

Orville Zickler, assistant cashier, American National Bank, Nashville, Tennessee, testified that he approved to be cashed the check described in Specification 6, Charge III, which check was received in evidence as Exhibit G. This check, which is also the same check as described in Specification 6, Charge I, is in the amount of $50, drawn on the First National Bank of New York, and signed by "Capt. William H. Thompson". The check is payable to cash and endorsed by the accused. After having the check approved by witness accused cashed same at Teller Window #1 of witness' bank (R. 6-32).

Walter F. Kearns, cashier, First National Bank of New York, testified by deposition that Captain William B. Thompson never had an account with said bank (R. 6-25; Ex. Q).

g. Specification 7, Charge III:

H. T. O'Callaghan, assistant cashier, American National Bank, Nashville, Tennessee, testified that on 3 March 1943 accused identified himself to witness by his AGO card and requested that a check be cashed for him. Accused endorsed the check and same was approved by witness for cashing, after which accused cashed the check in the bank (R. 6-34). This check, which is also the same check described in Specification 7, Charge I, and received in evidence as Exhibit F is in the amount of $33 drawn on the First National Bank of New York and signed by "William B. Thompson, Capt., A.C."

Walter F. Kearns, cashier, First National Bank of New York, testified by deposition that Captain William B. Thompson had never had an account with said bank (R. 6-25; Ex. Q).

h. Specification 16, Charge III:

William Woodrow Wilson, room clerk, Hermitage Hotel, Nashville, Tennessee, testified that on 4 March 1944 a lieutenant requested that he cash a check for him. After comparing the signature on the check with that on the lieutenant's AGO card the check was cashed. This check, signed by accused, is in the amount of $25, payable to cash, and drawn on the Morris Plan Bank of New York (R.6-47; Ex. I). This check was deposited, but payment on same has never been made (R. 6-51).

It was stipulated that if an official of the Morris Plan Bank of New York were present he would testify that accused's account in the Morris Plan Bank of New York was closed during the period between 2 February and 4 March 1944 (R. 6-46).

6. The defense offered no evidence, and after accused's rights as a witness were explained to him the defense rested (R. 6-61).

7. The evidence shows that the accused between the dates of 29 January and 1 March 1944 forged fictitious signatures to seven checks in amounts from $25 to $50, and that he uttered five of these forged checks, obtaining the face amount of each check in cash. Accused also dishonorably failed to pay a debt owed the American National Bank, Nashville, Tennessee, in the amount of $175. The evidence further shows that on 4 March 1944 accused fraudulently obtained $25 from the Hermitage Hotel, Nashville, Tennessee, by means of a check drawn on the Morris Plan Bank of New York, without having sufficient funds in the said bank for payment of the check.

The testimony of the officials of the various banks, on which the seven forged checks were drawn, that the purported signers of the checks had never had an account in any of the respective banks on which they were drawn, sufficiently establishes the fictitious character of the alleged drawer of the checks. The fact that the name of a fictitious person was signed to the checks having been thus established, the court could reasonably infer lack of authority in the accused to sign such names to the checks in question, thus obviating proof of want of authorization to sign the alleged forged signature which is ordinarily an essential element in the proof of forgery.

The Board of Review is of the opinion that the evidence is legally sufficient to sustain the findings of guilty of Specifications 1-7 of Charge I and Charge I; Specification 3 of Charge II and Charge II; and Specifications 3-7 and 16 of Charge III and Charge III.

8. War Department records show that accused is 25 years of age and a high school graduate. He was a member of the New York National Guard from December 1936 to October 1939. Accused entered military service in March 1942. After completion of the officer candidate course, The Quartermaster School, Camp Lee, Virginia, he was appointed second lieutenant, Army of the United States, on 29 January 1943.

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 as approved by the reviewing authority, to support the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93 or 96 and mandatory upon conviction of a violation of Article of War 95.

Thomas N. Jappy, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trevithick, Judge Advocate.

SPJGV
CM 257969

1st Ind.

War Department, J.A.G.O., 19 JUL 1944 To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant George T. Hartell (O-1587306), 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, legally sufficient to support the sentence and to warrant confirmation of the sentence. 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. Consideration has been given to the inclosed letter dated 26 June 1944 from accused in which he requests clemency.

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

Myron C. Cramer

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Ltr fr accused dated 26 June 1944.
Incl.3-Dft ltr for sig S/W.
Incl.4-Form of action.

(Sentence confirmed. G.C.M.O. 483, 7 Sep 1944)

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

SPJGH
CM 258011

14 JUL 1944

UNITED STATES v. Second Lieutenant CLAYTON E. HENLEY (O-770268), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Merced Army Air Field, Merced, California, 29 May 1944. Dismissal and total forfeitures.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lt. Clayton E. Henley, Air Corps, Section B, 3026th AAF Base Unit, (Pilot School, Basic), did, on or about 12 May 1944, at or near the Merced Municipal Airport #1, Merced, California, wrongfully pilot a PT 17 airplane at an altitude of approximately 15 feet, in violation of AAF Regulation 60-16, Par. 16.

Specification 2: In that 2nd Lt. Clayton E. Henley, Air Corps, Section B, 3026th AAF Base Unit, (Pilot School, Basic), did, on or about 12 May 1944, wrongfully perform acrobatics in a PT 17 airplane, at or near the Merced Municipal Airport #1, Merced, California, at an altitude of less than 1500 feet, in violation of AAF Regulation 60-16, Par. 10.

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

3. The evidence for the prosecution: At about 6:00 p.m. on 12 May 1944 the accused took off in a "PT 17" airplane from Municipal Airport Number 1, located between Merced Army Air Field and the town of Merced, California. After the airplane left the ground accused started a "shallow, climbing turn" to the left and continued climbing until he reached an altitude of approximately fifty feet. The airplane was then observed to go into a dive and disappear from view behind a long, low hangar located along the southern boundary of the field. It came from behind the hangar in a steep climb, missing the hangar by probably thirty or forty feet, and continued in a steep turning climb until it reached an altitude estimated at two hundred to three hundred feet. At this point the airplane was directly over the "landing mat" and proceeded northwesterly over the top of the "landing mat" in a power dive, "not a steep dive", and picked up considerable air speed. When the airplane was at an altitude between one hundred and two hundred feet the accused executed the start of a "slow roll". The airplane went into an inverted position but did not continue its roll in a "normal manner". It "seemed" that accused did not have sufficient air speed and the airplane fell out of its roll, "veered" to the right and dived toward the ground. The accused was able to bring the airplane to an upright position but did not return to "exactly" the same position it was in at the start of the roll and the airplane hit the ground in a straight and level position. It bounced from four to eight feet back off the ground and accused regained sufficient control to fly off. It was apparent to observers that the left landing gear of the airplane was damaged. There were no other airplanes in the immediate vicinity while accused was flying over the airport (R. 5-10).

The court took judicial notice of Army Air Forces Regulation 60-16 (R.10).

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

5. It is shown by the evidence and admitted by the plea of guilty that on 12 May 1944, the accused after taking off from Merced Municipal Airport Number 1, Merced, California, in a PT 17 airplane and reaching an altitude of about fifty feet, placed the airplane in a dive until he was flying at an altitude so low that the airplane disappeared from view behind a hangar located on the southern boundary of the field. Coming out of the dive he went into a steep climb to an altitude of approximately two hundred to three hundred feet and from there went into a power dive over the field. At between one hundred to two hundred feet he executed the start of a "slow roll", turning the plane into an inverted position. The plane fell out of the roll and dived toward the ground hitting in an upright position and bouncing back into the air. In operating the plane in this manner accused violated paragraph 16a (1) (d) Army Air Forces Regulation No. 60-16, 6 March 1944, which pro-

vides a minimum flight altitude of 500 feet above the ground except in certain specified instances not pertinent here, as alleged in Specification 1 of the Charge, and violated Paragraph 10 (d) of the same regulation, prohibiting the performance of acrobatics in an airplane "unless the maneuvers can be completed and the aircraft under control at or above 1,500 feet", as alleged in Specification 2 of the Charge.

6. The accused is 22 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 19 February 1943; aviation cadet from 24 June 1943; appointed temporary second lieutenant, Army of the United States, and active duty 12 March 1944.

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

Samuel M. Lewis, Judge Advocate.

Robert Allanson, Judge Advocate.

(On leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., 20 JUL 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 Clayton E. Henley (0-770268), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused in violation of Army Air Forces regulations piloted an Army airplane at an altitude of approximately 15 feet (Spec. 1) and on the same occasion, wrongfully performed acrobatics in an Army airplane at an altitude of less than 1500 feet (Spec. 2).

Attached to the record of trial are recommendations of clemency signed by the commanding officer of Merced Army Air Field, Defense Counsel and one of the members of the court.

In a memorandum to me, dated 1 July 1944, the Commanding General, Army Air Forces, recommends that the sentence be confirmed and ordered executed. 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.

4 Incls.
Incl.1-Rec. of Trial.
Incl.2-Drft. of ltr. for sig. S/W.
Incl.3-Form of Action.
Incl.4-Memo. fr. CG, AAF, 1 July 1944.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 470, 1 Sep 1944)

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

SPJGK
CM 258020

24 JUL 1944

UNITED STATES	FOURTH SERVICE COMMAND ARMY SERVICE FORCES
Second Lieutenant MARION R. PALOMERA (O-569684), Air Corps.	Trial by G.C.M., convened at Camp Murphy, Florida, 12 and 13 May 1944. Dismissal, total forfeitures, and confinement for life.

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, 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 92nd Article of War.

Specification: In that Second Lieutenant Marion R. Palomera, Air Corps, a casual at Ream General Hospital, Palm Beach, Florida, did, at or near Palm Beach, Florida, on or about 22 March 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Charlotte Huber, a human being, by strangling her and by hitting her on the head with an instrument, the further description of which is unknown.

He pleaded not guilty to and was found guilty of the Charge and Specification. There was no evidence of any previous conviction. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. At approximately 1000 on Thursday, 23 March 1944, the nude body of a woman was found about two feet east of the high-tide mark on the beach of the Blossom Estate in Palm Beach, Florida, at a point not accessible by automobile (R. 8,9,47,53). There were bruises around the neck of the deceased, a gash on her chin, a small hole over her upper lip, discoloration over both eyes, three gashes in the rear of her head, and blood in

her hair (R. 9, 35,45 and Pros. Exs. 11,12,13,14). A subsequent autopsy held at 2330 that day disclosed a small amount of sand in the air passages to the lungs and in the vagina. There was no semen in the vagina nor any indication of trauma on the genitalia. Death had resulted from strangulation and not from drowning, within 24 hours prior to the autopsy, but it was not possible to determine whether the head wounds had been inflicted prior or subsequent to death (R. 60,61,62,64). The body was later identified as that of Mrs. Charlotte Huber (R. 11,115).

At about the same time that the body was found, a patrolman, making his first round for the day, discovered a red or maroon Chevrolet coupe seven tenths of a mile south of the Blossom Estate at the edge of the Smith Estate, which also fronts the Atlantic Ocean. The car was about nine feet east of Ocean Boulevard, facing the ocean, with its rear wheels stuck in the sand (R. 12,31,54,55,56 and Pros. Exs. 14,28). It was towed away by a wrecker (R. 55). There was litter around the car, indicating that a party had been going on there (R. 55). In the body of the car were found numerous articles, including a half full bottle of Bacardi Rum, a bottle of beer, several Coca-Cola bottles, some full and some empty, two bottles of olives, some packages of chewing gum, an earring with a strand of black hair attached, an opened package of Player cigarettes, napkins, a wine glass, several items of ladies' new wearing apparel, paper napkins, including one marked "Casablanca, Palm Beach", a copy of Time magazine for March 20, 1944, a copy of the February 1944 Readers' Digest, sundry other articles, and an envelope addressed to Lieutenant M. R. Palomora, postmarked San Antonio, Texas, March 3, 1944 (Pros. Ex. 2). This envelope was under the front seat and just a corner of it was sticking out. The car bore a 1943 North Carolina license No. 735-138, but in the trunk in the rear of the car was found a 1944 North Carolina license No. 597-317, which belonged to a Captain Block stationed at Ream General Hospital, Palm Beach, and which had been missing from the car of Captain Block since 10 March 1944. In this trunk, which was locked, there were found, among other items, a radio aerial, a pair of men's black shoes, an old suitcase, and two boxes of ladies' clothes (R. 13,14,17,18,19,54,57-59; Pros. Ex. 29)

Various items, identified as belonging to the deceased woman, were found in the vicinity of the car. A red pocketbook was lying under the trunk of a leaning cocoanut tree almost six feet north of the car. Seventy-five feet from the car, toward the ocean, was a lady's white slip or petticoat, near which was a piece of "2x8", and 117 feet northwest of where the slip was located, and about 80 or 90 feet north of the car were found a white dress and a pair of lady's red and white shoes, stockings and garters (R. 28,29,30,32; Pros. Exs. 15,16,17,27 and 28). On the shoes there were sand and a discolored substance subsequently identified by the Federal Bureau of Investigation as human blood (R. 35, Def. Ex. 10). There were spots on the dress that were not further identified (R. 29).

At the point where the slip was found there was a spot in the sand, which was soaked with blood to a depth of one inch to one and one-quarter inches. A "drag mark" in the sand ran from the bloody spot towards the ocean a distance of 19 feet to a point "which would be at the high water mark", or "the mark of high tide". At a short distance to the north of the bloody spot was a partially imbedded concrete post (Pros. Exs. 17 and 27) on the west end of which were blood stains. About a foot from the concrete post was a small burnt spot where a long black hair was found. Other strands were found at the bloody spot, some short and some long, ranging from two to five inches. These strands and a specimen taken from the corpse were subsequently examined by the Federal Bureau of Investigation and were found to be similar to each other (R. 27-35,48,49, 52,57; Def. Ex. 10). About 95 feet from the car (approximately 22 feet southeast of the bloody spot) was a shallow hole. There was no blood at this spot, nor were any clothes found there (R. 34).

According to the "Certificate of Lawful Entry" issued by the United States Department of Justice (Pros. Ex. 30) deceased was born on 27 October 1900 and entered the United States in 1923. Various witnesses estimated her apparent age as from thirty to forty (R. 40, 92,96). Her hair was black (R. 92,96). On the evening of 22 March 1944, she was wearing a red and white costume and carried a red pocketbook. She wore no hat (R. 38,39,40,69,92).

Mrs. Huber had been in the vicinity of Palm Beach for at least four years. She and her husband had run a restaurant but he was not living there at the time of her death (R. 39,41,115). Between 0900 and 0930 Mrs. Huber was in the Casablanca, a night club located in Palm Beach. Accused, a patient in the Ream General Hospital in Palm Beach, was seated at the bar. Next to him was Corporal Gibson, also a patient at the Ream General Hospital, who had returned from a furlough that evening, but had not finally checked in. Deceased, who gave an indication of having drunk freely, approached the bar and got into an argument with Corporal Gibson concerning the seat next to accused which he was occupying. Corporal Gibson had never seen her before. Upon accused's statement to Corporal Gibson that it was deceased's seat, the argument terminated. Corporal Gibson later danced with her, had a drink with her and the accused, and sometime shortly prior to 2300, on the invitation of accused, was driven to the hospital by accused. Deceased was likewise in the car, seated between accused and Corporal Gibson, who kissed her during the short trip, and whom, she suggested, she would meet at the Casablanca on the following Sunday. On the evening of 22 March deceased was not with Corporal Gibson but with accused, who "asked her to take a walk and suggested he give me a ride home" (R. 67-71,72,73,80-86).

After accused and deceased let him out at the main door of the hospital, Corporal Gibson checked in at the "A & D Office" at the hospital at 2300, spent a half hour in that office, went to the third

floor, where he reported to the nurse on duty, Lieutenant Forsythe, at about 2330 and was assigned and sent to a room, which he did not leave thereafter during the night. A bed-check was conducted by Lieutenant Forsythe every half hour (R. 81,82,85,87-90).

Ream General Hospital is a government hospital, operated in what formerly was the Breakers Hotel located along the Atlantic Ocean in Palm Beach. The Casablanca lies a few blocks northwest of it, opposite the Palm Beach postoffice and another nightclub or cafe, the Taboo Club, lies a few blocks southwest of it. The distance from the Casablanca to the Taboo Club by way of the Ream General Hospital is 1.7 miles, requiring about seven minutes in traveling by auto at the rate of 25 miles per hour. The distance from the Taboo Club to the Smith Estate, the scene of the crime, is 3.2 miles and requires ten minutes, proceding at the same rate (R. 49,50,81,90,141; Pros. Ex. 33, Map of Palm Beach).

At about 2300 accused and deceased appeared at the Taboo Club, where they had a drink. Deceased was antagonistic and very irritable and intoxicated to such an extent that the bartender, Mr. Armstrong, "meant to be sure she would not get another drink". Accused was "very quiet" and was not intoxicated. At about 11 o'clock deceased bought a package of Player cigarettes from Miss Albright, the cigarette girl. That was the only package of that particular brand of cigarettes which Miss Albright sold that night, and Miss Albright left just after the sale as her work ended at 2300. The cigarettes were paid for by a man in uniform who was with the deceased. Miss Albright could not say that accused was the man.

Accused and deceased remained in the club for about 20 minutes. The club closes at midnight but those who have bought drinks before that time are allowed to finish them. The bartender, Mr. Armstrong, definitely fixed the hour of arrival at almost eleven o'clock because "We close at 12 o'clock on the dot and anytime after 11 o'clock we start checking the watch". He was interviewed and "shown a picture" by the police the following day and had no trouble in identifying accused and deceased (R. 90-96).

Palm Beach is separated from West Palm Beach by Lake Worth. The Southern Boulevard Bridge is the first bridge north of the scene of the crime (the Smith Estate) spanning the lake, and is about three quarters of a mile from it. The next bridge to the north is the South (Royal Palm) Bridge, the road leading to which is approximately two miles from South Boulevard Bridge. Ocean Boulevard is the only street or road which borders the Smith Estate. To reach the first bridge (Southern Boulevard Bridge) from that point it would be necessary for a pedestrian to take this road, travel along the beach or pass thru intervening estates, some of which, at least, were inclosed by walls. At this bridge one part of Ocean Boulevard becomes Southern Boulevard and proceeds over the bridge to West Palm Beach where it intersects various streets. The other part of the boulevard swings almost a half block to the east and continues for

several miles north. At about a half-mile north of the Southern Boulevard Bridge, a fork branches to the west and connects with the southern end of County Road which then proceeds in a general northerly direction practically parallel to Ocean Boulevard but at a slightly increasing angle. The most direct route to the Ream General Hospital from the scene of the crime would be by Ocean Boulevard and then by County Road, the distance over that route being between 3-1/2 and 4 miles (R. 22,36,37,49, 50,51; Pros. Ex. 33).

About a mile, almost due west of the Ream General Hospital in West Palm Beach, is located Hotel George Washington. Near it is the bus station where is located the Acme Taxi stand. At 0143 on 23 March, accused, dressed in the usual woolen clothes that an officer wears, of a greenish or brownish color, and wearing a cap "with a peak", approached the first taxi in line and had the driver, Mr. McCloy, to take him to the Ream General Hospital. The trip required only seven or eight minutes. When he got out of the car at the hospital accused handed Mr. McCloy a dollar bill, although the fare was only fifty cents. As accused started off the driver called accused's attention to the overpayment, but accused advised him that it was "all right" and went on. Mr. McCloy had never seen accused before that night, but at the time of the investigation by Major Farris had no difficulty in recognizing him after he had put on a garrison cap. The light was adequate at the time that accused hired the taxi for Mr. McCloy to see accused clearly. He kept a record of all trips, and that which he made with accused was the only "single" he had up to 0143 to the hospital. Accused did not appear to be intoxicated and his clothes were not "deranged" (R. 96-102).

At about 0230 or 0240 on 23 March, Mr. Carl A. Pike, elevator operator at the Ream General Hospital, took the accused up in the elevator without talking to him. He could not say whether accused was drunk or whether his clothes were "deranged". He fixed the time definitely by reason of the fact that "From 12:00 until 2:00 there are quite a few going up and he didn't go up until the rush was over". While he had taken accused up and down on other occasions in the elevator he did not know his name on 23 March, but clearly recognized him (R. 103-106).

The car which was found at the Smith Estate was identified by the Military Police on guard duty at the hospital gate as one driven on numerous occasions by accused (R. 109,110). It was also identified by Miss Ocie May Taylor of Miami as her car which had been missing since 26 December 1943, at which time it bore a 1943 North Carolina license No. 735-138. Since its return to her by Sheriff Baker in Palm Beach she had bought a Florida license (R. 111-112).

On the night of 23 March, Mr. W. E. Roebuck, County Solicitor of Palm Beach County, was present when accused was taken to the morgue on the second floor of a funeral home where the body of deceased, with a sheet pulled up to her breasts, was resting on a slab. Three other

civilian officers and four Army officers were also in the morgue. Accused was taken upstairs, in the dark, with a flashlight on the floor at his feet. When he was about two feet from the head of the body the lights were flashed on. Accused turned an ashen gray, weaved a little, and in a meek and weak voice declared: "That's the girl". He denied that he had killed her (R. 117-118). Mr. Catts, also a witness for the prosecution, testifying in rebuttal, verified this description of the scene at the morgue, but stated that accused's exclamation was in answer to a question by Major Gasch whether that was the woman who was with him (R. 186). During the night of 23-24 March scrapings were taken from accused's fingernails (R. 15,23,24). An examination by the Federal Bureau of Investigation disclosed the presence of human blood in the scrapings (Def. Ex. 10).

Sheriff Baker of Palm Beach County accompanied accused and Army officers to various places in Palm Beach on the night of 23 March for the purpose of having accused identified. Accused's right hand was "all puffed up here with an abrasion on the back of it" which accused claimed resulted from injuries while playing volley ball (R. 20-22). Accused was not in the custody of the civilian authorities but the defense developed on cross-examination that Sheriff Baker conducted an extensive investigation in an effort to solve the murder, doing "everything humanly possible that I knew to do". Among other means resorted to by him he caused to be printed in the local papers and to be broadcast over radio, subsequent to accused's arrest by the military authorities, an urgent request that any one who on Wednesday night or early Thursday morning had "picked up a soldier on the South County Road in Palm Beach or possibly near the Southern Boulevard Bridge or in the vicinity of Palm Beach and gave him a ride into West Palm Beach" report the fact immediately to the sheriff. Sheriff Baker explained that the reasons for this announcement were accused's statement that he had gotten back to the hospital at midnight, the information obtained by the authorities that accused had taken a taxi to the hospital at the bus station at 0143, and the hope that while "it was reaching in the dark" he "would find someone who had brought him from the scene down there" (R. 19-22, Def. Ex. 9).

It was impossible to obtain fingerprints from any part of the car or any of the articles in the car because of exposure "to the atmosphere of salt water" and a rain which took place shortly afterwards (R. 44,46, 47).

It was stipulated and agreed that any part of the letters from the Federal Bureau of Investigation, dated 22 April 1944 and 10 May 1944, might be received in evidence without further proof from the technicians (R. 116, Pros. Ex. 32). It was further stipulated that on 22 March 1944, inlet high tides were at 0842 and 2104, and inlet low tides at 0209 and 1447, and that on 23 March 1944 inlet high tides were at 0935 and 2157 and inlet low tides at 0306 and 1537 (R. 116, Pros. Ex. 31).

When the prosecution rested, accused made a motion for a finding of not guilty which was refused.

For the defense.

Major Herman Selinski, Medical Corps, stationed at Ream General Hospital, did not see accused until 30 December 1943, but testified that accused was admitted to the hospital on 28 December 1943 for observation because he was found there in a parked car and "stated that he was confused and did not know where he was, where he came from or where he was supposed to be going" (R. 122). As a result of subsequent observation there was a diagnosis of "hysteria, conversion type, manifested by an alleged memory defeat and speech defect". A diagnosis of "amnesia" was made by the medical officer who admitted accused, but witness explained that he avoided using that term both because it is much abused and misunderstood and because in accused's case there was some very definite doubt as to the memory defect. In consequence witness used the expression "apparent memory defect" in referring to accused's symptoms. This "apparent memory defect" seemed to have been present for several hours before accused's admission to the hospital and to continue with gradual improvement for a period of one to two weeks. Witness expressed the views that it is difficult to distinguish between "an apparent" and "a real" memory defect, and that there may be a recurrence of "apparent memory defect in this type of individual (accused)" (R. 122-124).

Witness defined "hysteria, conversion, severe" as a nervous disorder, characterized by symptoms, usually transitory in their nature, which indicate that the individual is not suffering from an organic disease of the brain or a pyschosis (R. 122). Because accused manifested this condition a disposition board on 20 January 1944 recommended that accused be placed before a Retiring Board. On 13 March 1944 a Retiring Board found that accused was permanently incapacitated for active service; that the cause of the incapacity was "hysteria, conversion, severe, due to inherent personality defect"; and that the incapacity was not an "incident of service". Witness served on both boards (R. 122-124).

Witness was cross-examined without any objections being raised by defense counsel to any questions asked. He testified that he had used the term "apparent" in referring to accused's memory defect, because of accused's statements at the time of admission and because "There was considerable doubt in our minds, those of us who had examined him repeatedly, that his memory defect was genuine. We felt that this officer had a personality disorder, that is, that he was a neurotic individual who had certain psycopathic tendencies and would not hesitate to distort the truth if it suited his purposes" (R. 124). Accused impressed the board as being highly erotic ("a term referring to the love impulses and passion of the individual") "indicating that he had

gone out a number of times with women" (R. 125-126). In giving the history of his case, accused told the board conflicting stories, particularly with reference to his leave of absence (R. 125).

Witness had occasion to observe accused's right hand within 24 to 48 hours after the discovery of Mrs. Huber's body, and found it swollen (R. 126).

On redirect examination witness stated that the board had reached its conclusion after an exhaustive examination of accused. In answer to a question by defense counsel whether it was not true that psycopathic findings could be determined only from the case history and personal observations and examination of the patient, the witness replied:

> "Sir, we had this officer under observation for several months and during the course of that time we gained the impression that he was an individual who was inclined to drink excessively at times and we felt that this officer should retire from the service for the good of the service and for that purpose he was put before the retiring board" (R. 126-127).

At the conclusion of witness's testimony defense offered in evidence as its Exhibit 1 a copy of the proceedings of the Retiring Board, containing both the testimony offered at the hearing and the findings reached (R. 127). In testifying before the board accused acknowledged having made conflicting statements to Major Selinski relative to the means employed by him in making his trip to Miami, imputing this error to his "state of confusion". In answer to a question by Major Selinski, accused insisted that he had left his station on 18 December 1943 on an emergency leave to visit his seriously ill father in San Antonio, and denied that he had been granted a leave "prior to being assigned to overseas duty". He testified that while proceeding to San Antonio he had begun drinking in Savannah, Georgia, and "just went to Miami". He did not go to San Antonio at all. He was advised by his sister that his father had died in December (Pages 5-9, Def. Ex. 1). Major Selinski then had read into the record of the proceedings a communication from accused's home station to the effect that accused had been granted an emergency leave from "November 11 to 20, 1943, due to the death of his father * * * whose address was * * * Yoakam, Texas", and a "10 day leave Dec. 18, 1943, to visit family before leaving for overseas duty. Address while on leave * * * Miami, Fla." (Pages 8-9, Def. Ex. 1).

Following accused's arrest by the military authorities on 23 March 1944, Lieutenant Colonel Connor, Executive Officer of the Ream General Hospital, recovered from the laundry clothing that had been taken there that day by accused. Among other items were a handkerchief with lipstick

(Def. Ex. Q-11), another white handkerchief (Def. Ex. Q-8), a pair of very damp white shorts (Def. Ex. Q-6), and a pair of socks with a half cupful of sand in them (Def. Ex. Q-12). A towel was found in accused's room, which he shared with one or two other officers, and was eventually turned over to the Federal Bureau of Investigation. A pair of "officers' pink trousers", which accused had delivered to the dry cleaning establishment that day, was recovered by witness (R. 127-131).

There were also offered in evidence a tube of lipstick and a compact, found in deceased's pocketbook (Def. Ex. Q-9 and Q-10), and sand collected, respectively, from the scene of the crime and the beach in front of the hospital (Def. Exs. K-3 and K-4, R. 131).

The report of the Federal Bureau of Investigation, dated 22 April 1944, offered as Defense Exhibit 10, in addition to the other conclusions before referred to, contained the following results of the examination conducted by that bureau:

a. The lipstick on accused's handkerchief was not the same as that of deceased's.

b. The stains on the other handkerchief, belonging to accused and on the towel found in his room were of human blood. Because of insufficient quantities it was impossible to group, by tests, the blood found on these objects or on the shoes, in the scrapings from accused's fingernails and in the sand taken from the scene of the crime.

c. There was no indication that the shorts had been in sea water.

d. The strand of accused's hair was dissimilar to the three specimens (which were similar to each other) taken from the bloody spot and from near the cement post at the scene of the crime and from deceased's head.

e. The sand from the two beaches were similar, but that taken from accused's socks differed from them "in color shade and percentages of minerals present". The report continues, "These differences may indicate different sources for the specimens or that Q-12 (the sand found in the socks) was adulterated subsequent to the time of the crime while still within the subject's shoes". There was also a small amount of sand in the scrapings from accused's nails, insufficient for comparison purposes.

Defense offered as its Exhibit 11 a report from the Federal Bureau of Investigation dated 10 May 1944 showing that the hair on the earring found in the car was similar to those taken from the scene of the crime and from deceased's head; that it was not similar to the hair specimen

taken from accused and that taken from Corporal Gibson; and that neither of the latter was similar to the hairs found at the scene of the crime or that taken from deceased's head.

Mr. Ripoll, a bartender at the Palms Club, located "alongside the Florida Theatre", about two blocks from the Washington Hotel in West Palm Beach, was on duty from 1600 to 2400 on the night of 22 March. He saw accused seated close to the door at the entrance of Palms Club between 2250 and 2300 that night, but did not know whether there was a woman with him. There was a large crowd present but witness, who is a native Spaniard, remembered accused because of his dark complexion, which led witness to conclude that accused was "some kind of Latin man" (R. 137,138). On cross-examination witness stated that he did not recall having made the statement in the presence of accused to the sheriff and some officers on the night of 23 March that accused had been in the Palms Club "last night or the night before, or the night before that, I can't be sure", nor did he recall having told Mr. Roebuck, the county solicitor, later that night that accused had been in the club alone on 22 March not later than 2130 (R. 139,140).

The investigating officer, Major Farris, computed the distance from the scene of the crime to the taxi stand at Washington Hotel by South Bridge (that is, the second bridge north of the Smith Estate) to be 4.7 miles (R. 141). He made a number of trips to the beach on the Smith Estate and found that it had the general appearance of a playground. On Monday or Tuesday night after the crime he noticed the concrete slab, which had a brown spot on it about the "size of a silver dollar" (R. 142).

It is the custom for the police to patrol South County Road and Ocean Boulevard every hour, and to report all unusual incidents. It would not be unusual to find a car parked off the road on or near a beach on a private estate, but if an officer saw one so parked for several hours it was his duty to make inquiry (R. 144-145). The officer who was on duty from 1600 to 2400 on 22 March made his last trip to the Smith Estate at about 2300. The officer who relieved him at midnight had left Palm Beach and his whereabouts could not be ascertained (R. 145,147,148). At night buses operate southward from Palm Beach toward the town of Lake Worth (which is south of the Smith Estate) only as far as the Bath and Tennis club, which is north of the Smith Estate. The last bus leaves Palm Beach at 2300. The northbound bus from Lake Worth travels over the Dixie Highway in West Palm Beach about three blocks west of the west end of the South Bridge, and about one mile west of the Bath and Tennis club. The last bus leaves Lake Worth at 2340 (R. 149,150).

Private Lawrence, lifeguard at the hospital, saw accused playing volley ball almost every day on the hospital courts (Def. Exs. 3,4,5 and 6). The last time was on 22 March. Accused made no complaint about

his hand (R. 132,135). When Staff Sergeant Stoll took accused's finger prints on 23 and 24 March he noticed no scratches, abnormalities, or bruises on either of accused's hands (R. 134-135).

Private First Class Clifton, in charge of laundry supplies of officers at the hospital, testified from his records that accused sent in laundry "pretty well every other week". The last entry was for the second week in March. Entries were made when laundry was ready for delivery to the patient so that if accused's laundry was taken out before it went through the laundry the orderly would have no record of it at all (R. 135,136).

Accused, after an explanation of his rights, elected to testify in his own behalf. Accused had been in the Army for about 3-1/2 years. After about two years as an enlisted man, accused attended Officer Candidate School at Miami Beach and received a commission as a second lieutenant in the Air Corps. After four months, at his request, he received an appointment to go to flight school in Nashville, Tennessee. He was eliminated at Basic school at Shaw Field, Sumter, South Carolina. From Nashville he went to primary and basic school in Orangeburg, South Carolina, for two months and was eliminated there. He arrived at Hunter Field, Savannah, Georgia, in September 1943. On 18 November 1943 he obtained an emergency leave to go to San Antonio because of the illness of his father, and later procured a ten-day leave, ending 28 December 1943, to visit Miami. He drove in his car to Miami. On the morning of 28 December, suffering physical pains and experiencing a complete lack of memory he found himself in a car in front of the Ream General Hospital. He was given limited medical treatment, played volley ball every day except Sunday, hiked, swam, slept a great deal, was under "mental observation", and was finally called before a retiring board. There were a number of trees near the volley ball courts and the playing was rough. He hurt his hand but made no report of it (R. 151-154).

On the afternoon of 22 March accused had supper early at the hospital, between 1630 and 1700. He drove to the Florida Theatre in West Palm Beach and after the performance went to several bars and clubs. Deciding to turn in early he headed back to Palm Beach and in accordance with his usual custom stopped at the Casablanca. This was about 2100. Accused had no date that night and had never previously known or seen deceased. While accused was seated at the bar, Corporal Gibson took the stool next to him. Deceased, who was of the type that did not appeal to accused and who "seemed old enough to be my mother" engaged in an argument with Corporal Gibson about the seat. Accused patched up matters between them, both he and Corporal Gibson danced with deceased, and after a while the three of them left together. Upon arriving at the Taboo Night Club, there was an enlisted man in the car but it could not have been Corporal Gibson for "when I saw Corporal Gibson a day after that, his description did not fit the description I had given of the enlisted man who had been with us at the Taboo night club and the Palm Club at West Palm Beach". Mrs. Huber

was with him in the Taboo Club when they had a drink but the enlisted man was not. The three of them then proceeded across the bridge to the Palms Club in West Palm Beach. Accused hoped to get rid of them there. He preceded them and went to the restroom. Returning to the bar, he could not find deceased or the soldier, took a drink, and still not locating them, went out to where he thought he had parked his car. Unable to find it, he looked around for a while and then took a taxi to the hospital. Accused had to attract the attention of the driver by bumping him on the back as he appeared to be busy cleaning the back end of the car. Upon arrival at the hospital at about midnight, he gave the driver a dollar, proceeded in the elevator to his room on the seventh floor and did not leave the hospital that night.

Accused followed his normal program on 23 March, until he was placed in arrest in the afternoon by the military authorities. During the morning he took his soiled clothes to the laundry and a pair of "pink trousers", not the ones he had worn the day before, to the dry cleaning establishment. It was his custom to send out laundry every other week. About six o'clock a group of Army officers and civilian officers came to his quarters, and, after an explanation of his rights by Major Gasch, proceeded to interrogate accused. They took him to various places, including the morgue, and finally returned him to the hospital at about 0400 on the 24th. Accused agreed with the description given by witness for the prosecution that the lights were suddenly flashed on in the morgue (R. 154-161).

Accused himself took the fingernail scrapings from his left hand, there being none to take from his right hand. Accused has a mole on his leg which he scratches, without thinking, and causes to bleed. Accused cuts himself almost daily while shaving (R. 162).

Accused had never been on Ocean Boulevard as far south as the Smith Estate prior to 23 March, as his activities were mostly around night clubs. (On cross-examination accused admitted going to the beaches in West Palm Beach with girls (R. 181). He denied any knowledge of the crime (R. 163).

Cross-Examination of accused.

Accused described Corporal Gibson as very blond and light complexioned, slightly taller than accused, with auburn or blond hair. He declined to say whether in the course of his interrogation by Major Rasch he had described the soldier with whom Mrs. Huber had had the argument and with whom they had had a drink at the Casablanca and whom he later took with them from the Casablanca as a man about accused's height, "with a swarthy complexion, dark hair, dark eyes and dark eyebrows". He admitted that the description that he had given did not fit Corporal Gibson, but did not know where he had picked up the swarthy enlisted man. The latter

did not go into the Taboo Club with accused and deceased because of an argument with deceased, nor could accused state where this soldier was when accused let Corporal Gibson out at Ream General Hospital. Accused admitted that he had never told the investigating authorities about taking Corporal Gibson to the hospital (R. 172). He also admitted that he had stated that the soldier who had been with him and deceased at Casablanca had gone with them to West Palm Beach and to the Taboo Club.

With regard to the car in which he had been driving on 22 March and for several months prior thereto, accused admitted that he had first told the authorities that it was one which he had bought in California, because at the time he identified it the North Carolina license was covered, and he was badly confused. He claimed that he had a North Carolina license when he was stationed for a month at Camp Davis, North Carolina, and explained the presence of Captain Block's license in the locked trunk apparently on the theory that it had been placed there by an enlisted man to whom he had loaned the car. He was positive that he had driven in his own car to Miami and did not know that Miss Taylor's car, in which he arrived at the hospital on 28 December, was not his own. He did not know what was in the trunk but had placed a pair of new civilian's shoes in it. (R. 168, 169).

In reply to the question whether accused suffered his first lapse of memory after he had been informed that he was slated for overseas duty, accused denied any knowledge of any such contemplated movement and explained his two leaves within a month by the fact that the first was an emergency leave and that he had never had any leave before that.

At the conclusion of accused's cross-examination defense offered a telegram from the Division of Registration, Sacramento, California, dated 10 May, which as corrected by Western Union on 11 May reads as follows (Def. Exs. 13 and 14):

> "According to field records to date license 20HB45 validated by sticker 2725065 Marion R. Palomera 220 Golden Gate Avenue San Francisco California Ford Sedan Engine 54281795 first sold 1937 Herbert Palmber 2804 Alum Rock Avenue San Jose Legal Owner."

Rebuttal.

Mr. Sidney J. Catts, Acting States Attorney, was present when Mr. Ripoll, the waiter at the Palms, stated on 23 March that accused had been there the night before or the night before that, but that he was not certain or definite (R. 182,183). Mr. Roebuck, County Solicitor, was also present on this occasion and later that night called a second time, talking to both Mr. Ripoll and the other bartender. At this second interview, 2130 the preceding night was definitely fixed as the hour

at which accused had visited the Palms. This cafe is located less than a half block from the theatre which accused testified he attended early that night (R. 189).

Mr. Catts was present also on the night of 23-24 March when accused was interrogated by Major Gasch. He heard accused describe the man who had had the argument with Mrs. Huber at the Casablanca and who had accompanied them to the Taboo Club as "a man of approximate height of five feet four inches, weighing possibly ten pounds more than he (accused) did, of dark complexion, dark eyes, dark hair"(R. 184). Accused made different statements of what he did on 22 March, but persisted in his contention that he had not returned to the Casablanca and had picked up no soldier other than the one he had described (R. 184,185).

When examined about the car, Mr. Catts heard accused claim that he had bought it in some town in Northern California, had driven it from California to Savannah and then to Miami. He could not tell where and how he had purchased it, to whom he made payments nor to what town the payments were mailed (R. 185).

Mr. Catts stated on cross-examination that one of the statements made by accused, after his erroneous description of the soldier who had been with him, had been of assistance to the authorities, namely, that the soldier "had been returning from a furlough"(R. 188).

In connection with specific questions asked accused there was also offered in rebuttal as Prosecution's Exhibit 34 the report by Major Gasch on the statements made to him by accused. The description of the soldier, given by accused to Major Gasch, was as testified to by Mr. Catts. No mention was made of any other soldier that accompanied accused and deceased, nor was there any reference to accused's having taken Corporal Gibson to the hospital (Pros. Ex. 34).

4. The circumstantial evidence, considered particularly in the light of accused's conflicting and at times clearly false testimony, is so strong as to lead to the inevitable conclusion that accused was guilty of the murder of Mrs. Huber.

Three night clubs play a part in the events preceding the murder, the Casablanca, located a few blocks northwest of Ream General Hospital, the Taboo, located about the same distance southwest of the hospital, and the Palms, located about a mile west of the hospital, across Lake Worth, in West Palm Beach, less than a half block from the Florida Theatre.

Accused, a second lieutenant in the Air Corps, stationed at Hunter Field, Savannah, Georgia, had been admitted to the Ream General Hospital at Palm Beach on the morning of 28 December, the last day of a ten-day leave granted to him before going overseas. He claimed at that time

that he had suffered a complete lapse of memory. He remained at the hospital for observation and was still there on 22 March 1944. During this long stay, accused swam, hiked, played volley ball, slept a great deal, visited night clubs, and had been on the Lake Worth beaches in West Palm Beach with girls. On 20 January 1944 a disposition board recommended that his case be referred to a Retiring Board, which was duly convened and on 13 March 1944, found accused incapacitated for active service by reason of hysteria, conversion, severe, a permanent incapacity, not an incident of service. After an early supper at the hospital on 22 March accused drove to the Florida Theatre to witness a performance. While his statement of what occurred thereafter does not agree with our conclusions, it is apparent that he then went to the Palms, where he had a drink alone at about 2130. From that place he proceeded to the Casablanca where he met Corporal Gibson and Mrs. Huber. Shortly before 11 o'clock he left the Casablanca with them for the nearby Ream General Hospital, and, after letting Corporal Gibson out at that place, next stopped at the Taboo Club around 11 o'clock. Mrs. Huber was never seen alive again, her nude body being found about 1000 the following day near the high tide mark on the Blossom Estate. Identification was unequivocal.

At 0143 on 23 March accused appeared at the Acme Taxi stand in West Palm Beach, approximately 4.7 miles from where Mrs. Huber's clothes were found on the beach at the south end of the Smith Estate. Accused proceeded by taxi to the Ream General Hospital and was taken to his room on the seventh floor by elevator between 0200 and 0230.

It is over four miles from the Smith Estate to the taxi station. A pedestrian may reach the stand by proceeding a part of the way through Palm Beach and then crossing over one of the bridges spanning Lake Worth to West Palm Beach where any one of several streets may be followed. Leaving the Smith Estate there is only one road, Ocean Boulevard, as far as the nearest bridge. Unless that road is followed, a pedestrian would have to walk along the beach or cut across some of the inclosed estates that border the ocean.

The car, which accused had been driving for three months and in which he claims to have awakened in front of the Ream General Hospital on 28 December, was found eight or nine feet off Ocean Boulevard on the beach at the Smith Estate stuck in the sand. Accused had made no report to the military or civil authorities that his car was missing. At various spots near the car were found articles of clothing belonging to deceased. A bloody spot in the sand connected with the high tide mark on the beach by a clearly defined line over which the body had very apparently been dragged. Hair which was similar to that taken from Mrs. Huber's head was found at and near the bloody spot. In the car was found a varied collection of articles, including an empty envelope addressed to accused.

The car, as a matter of fact, was not the property of accused but of a Miss Taylor of Miami, who had missed it since 26 December. It was a red Chevrolet coupe with a North Carolina license. Accused contended that it was his car which he had acquired in some unexplained way from some one in some place in northern California, and which he had driven from that state to Savannah and later to Miami. Later he attempted to account for his false statements by his lack of recollection of what had occurred in Miami prior to his awakening in the car in front of the Ream General Hospital on 28 December. Just prior to closing the case for accused, defense counsel offered a telegram from the Division of Registration, Sacramento, California, in no way connected with any inquiry, to the effect that a certain license had been validated for 1944 "by sticker 2725065, Marion R. Palomera, 220 Golden Gate Avenue, San Francisco, California, Ford Sedan, Engine 54281795, first sold in 1937 to Herbert Palmber 2804 Alum Avenue, San Jose, legal owner". No proof was offered to show when accused purchased the sticker, nor whether he was the registered owner of any car. Suffice it to say there is nothing in the record which justifies a conclusion that accused could have mistaken Miss Taylor's maroon Chevrolet coupe for a 1937 Ford Sedan, assuming that he at one time owned such a car.

Accused was placed under arrest by the hospital authorities on the afternoon of 23 March. That morning he had taken a bundle of clothes and a pair of "pink" trousers to the hospital laundry and dry cleaning establishment. A handkerchief removed from the laundry and a towel found in the room which he shared with one or two other officers showed blood stains. Scrapings from his fingernails also showed the presence of blood and a little sand. His right hand was swollen with a slight abrasion. A half cupful of sand was found in a pair of socks recovered from the laundry. While the sand did not match that taken from the beach at the Smith Estate or the hospital beach (which matched each other) the adulteration, according to the Federal Bureau of Investigation experts, could have occurred while the socks were being worn by accused.

When questioned by Major Gasch on the night of 23-24 March, after an explanation of his rights, accused stated that the soldier who had had an argument at the Casablanca with Mrs. Huber, and whom he later took to the Taboo Club and the Palms, was dark-complexioned, with dark eyes and hair. This description in no way fits Corporal Gibson, who is blond, with auburn or blond hair. He could in no way account for the swarthy soldier whom he described but insisted that only one soldier had accompanied him. He failed to tell Major Gasch about having driven Corporal Gibson to the hospital.

While the most direct route from the Smith Estate to the hospital was through Palm Beach over Ocean Boulevard and County Road, accused, who claimed that he had never gone as far south as the Smith Estate

on Ocean Boulevard before 23 March, chose a route through West Palm Beach. Various reasons for making this choice may have existed, including his greater familiarity with the route, his hope of obtaining transportation more readily, or the belief that it might afford the best opportunity for escaping detection.

The testimony shows that on the night of the crime Mrs. Huber was drunk. Accused appears to have been sober and made no defense of insanity or of drunkenness. On 13 March 1944 a Retiring Board had found no indication of insanity, but had found him incapacitated for active service by reason of "hysteria, conversion, severe". However, accused did not contend that a recurrence of amnesia had obliterated the details of a crime which he may have unwittingly committed, but stoutly maintained the position that he could account for all of his actions.

There were no witnesses to what occurred that night on the Smith Estate beach. The autopsy did not disclose that sexual intercourse had taken place. There were indications in and near the car that there had been a party. There were liquor, Coca-Colas and olives in the car, together with paper napkins, a wine glass and other items, and deceased's clothes were scattered in the vicinity of the car. Accused did not return for the stranded car, and it is a significant fact that, although according to his testimony the car could not be located by him after his alleged visit to the rest room in the Palms Cafe on the night of 22 March, he made only a casual search for it and made no report of its loss to either the civil or military authorities.

Deceased was unquestionably strangled to death, and received at least three severe cuts in her head. In the opinion of the Board the testimony shows beyond a reasonable doubt that accused was the murderer.

5. While all elements of an offense must be proved, it is well established that the proof may be by circumstantial evidence. It is equally well established that while absolute certainty is not essential, circumstantial evidence creating a mere conjecture or a mere probability of guilt is not sufficient. The guilt of an accused must be founded upon evidence, which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except that of a defendant's guilt. The circumstances must not only be consistent with guilt but inconsistent with innocence (16 C.J. 766, CM 233766, Nicholl, CM 238435, Rideau).

With respect to the weight to be given such evidence, the Manual states:

> "There is no general rule for contrasting the weight of circumstantial and direct evidence. The assertion of an eyewitness, who is absolutely trustworthy in every respect may be more convincing than the contrary inferences that appear

from the circumstances. Conversely, one or more circumstances may be more convincing than a plausible witness" (MCM, 1928, par. 112b).

In the exercise of its function of determining whether the established circumstantial facts justify the conclusion reached by the court, and in arriving at its own conclusion that the accused is guilty as charged, the Board of Review has applied the basic principles above quoted to the closely wrought and unbroken chain of circumstances. It finds that the circumstantial facts exclude every reasonable hypothesis except that of accused's guilt and are not only consistent with guilt but inconsistent with innocence. The testimony of accused, both because of the established falsity of the statements made by him on most of the important aspects of the case, his unconvincing excuses and his illogical actions, constitutes no force with which to destroy the positive testimony offered against him.

Motive is not an essential element of the crime of murder (Wharton's Criminal Law, 12th Ed., sec. 420, Underhill's Criminal Evidence, 4th Ed., sec. 559, MCM, 1928, par. 148a). It is necessary to establish malice aforethought, but this element is presumed in a homicide such as has been established in the present case (Wharton's Criminal Law, 12th Ed., sec. 419) and may likewise be established by circumstantial evidence (Underhill's Criminal Evidence, 4th Ed., sec. 557).

In discussing this topic in his Military Law and Precedents, 2d Edition, page 673, Colonel Winthrop expresses the following views:

"In every case of apparently deliberate and unjustifiable killing, the law presumes the existence of the malice necessary to constitute murder and devolves upon the accused the onus of rebutting the presumption. In other words, where in the fact and circumstances of the killing as committed no defence appears, the accused must show that the act was either no crime at all or a crime less than murder; otherwise it will be held to be murder at law".

The brutal method used to kill deceased fully justifies the conclusion that the crime was committed with malice aforethought (MCM, 1928, par. 148a).

When the prosecution closed, defense made a motion for a finding of not guilty. It is the opinion of the board that the evidence adduced was sufficient to establish accused's guilt and that the motion was properly denied.

The defense offered as its first witness Major Selinski, whose testimony, as summarized in paragraph 4 of this opinion under the section entitled "For the defense", was received without any objection from the defense or prosecution. Some of the answers that were adduced

by questions submitted to witness, both by the prosecution and the defense, are susceptible of being considered hearsay and, in part, an attack on accused's good character prior to any evidence on that score by the defense. However, viewed in the light of the purpose for which Major Selinski's testimony was offered, his answers are found not to be inadmissible. Accused made no contention that he was insane nor that an attack of amnesia may have wiped out his recollection of his having murdered deceased. On the other hand he very clearly relied on the existence of a state of amnesia and the probability of its recurrence in order to explain some of the conflicting statements made by him and to justify some of his otherwise unaccountable conduct. The findings of the boards, of which Major Selinski was a member, ostensibly bore out the defense's contention as to his neurotic condition, and, in the opinion of the Board of Review, it was proper for the prosecution to interrogate witness as to the basis for these findings. That some of the answers given reflect on accused's credibility and appear to be conclusions not only of the witness but of others serving with him does not prevent their admission, particularly as the witness had been interrogated initially by the defense as to the board's findings. It will also be noted that a part of the testimony reflecting on accused was given in response to a question by defense counsel and that the proceedings of the Retiring Board were offered in evidence by the defense.

Even conceding that Major Selinski's testimony was inadmissible the record is so replete with competent testimony to establish accused's lack of veracity, and his guilt of the offense charged that the Board of Review is of the opinion that accused's rights were not substantially injured by its admission.

6. War Department records show that the accused is 27 years of age. He enlisted 5 November 1940 and attained the grade of temporary staff sergeant. His character as an enlisted man was excellent and his Service Record contains a notation that he had been favorably considered for the Good Conduct Medal. This record also contains an entry of his being entitled to monetary allowance in lieu of quarters by virtue of his marriage on 7 June 1942. He was honorably discharged 8 December 1942, after attending Officer Candidate School, to accept a commission as Second Lieutenant, and entered on active duty as such 9 December 1942. Findings of the Retiring Board that accused was incapacitated for active service by reason of hysteria, conversion, severe, were not concurred in by the Surgeon General, because of the scantiness, inadequacy and insufficiency of the evidence. Recommendation was made that the record be returned for further study and clarification of diagnosis, but action on this recommendation was withheld by the War Department, pending final action on the findings of the court martial, held in the interim.

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 death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92.

Judge Advocate.

Judge Advocate.

Judge Advocate.

1st Ind.

War Department, J.A.G.O., 11 AUG 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 Marion R. Palomera (0-569684), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and duly executed, and that the United States Penitentiary, Atlanta, Georgia, 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-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.

(Sentence confirmed. G.C.M.O. 570, 16 Oct 1944)

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

SPJGK
CM 258062

24 JUN 1944

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Venice Army Air Field, Venice, Florida, 29 May 1944. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.
Private TOM L. SANG (42047800), 2121st Quartermaster Truck Company (Aviation), 14th Service Group (Chinese), Venice Army Air Field, Venice, Florida.	

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

---

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

2. There is no need to set forth the Specifications in full, except Specification 1, Charge III. In summary they are as follows:

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

Specification 1: Disrespect by accused toward his superior officer on 16 April 1944.

Specification 2: Disrespect by accused toward his superior officer on 19 April 1944.

CHARGE II: Violation of the 65th Article of War.

Specification: Willfully disobeying the order of a non-commissioned officer then in the execution of his office, on 20 April 1944.

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

Specification 1: In that Private Tom L. Sang, 2121st Quartermaster Truck Company (Aviation), 14th Service Group (Chinese), did, at Venice Army Air Field, Venice, Florida, on or about 20 March 1944, wrongfully make and utter the following disloyal statement against the United States of America, to wit: "I don't trust the white people and I don't see why you do either", or words to that effect.

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

Accused pleaded not guilty to and was found guilty of all Specifications and Charges. There was no evidence of previous conviction. Accused was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for three years. The reviewing authority disapproved the finding of guilty of Specification 2, Charge III, approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence supports the findings of guilty of Charges I and II and their Specifications, and there is no question as to those findings. With reference to Specification 1, Charge III, the proof shows that accused used the words as alleged. Accused is a member of the Chinese race, and addressed his remarks to three or four Chinese members of his organization while they were at the driving range (R. 9-11). In the opinion of the Board of Review the language used does not amount to a disloyal statement against the United States of America. For an enlisted man to state that he does not trust the white people is no more a disloyal statement against the United States of America than for him to state that he does not trust any other group or class of citizens of the United States as such. Neither the Specification nor the proof supported the offense intended to be charged.

4. Since we are holding the record of trial legally insufficient to support Specification 1 of Charge III, we are confronted with the problem of the legality of the sentence. According to the Table of Maximum Punishments the remaining offenses carry a maximum confinement of 1-1/2 years (MCM, 1928, p. 98).

5. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge III and Specification 1 thereof 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 1-1/2 years.

Percy G. Fox, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

Thomas W. Hoyt, Judge Advocate.

(On Leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., 30 JUN 1944

TO: Commanding General,
Third Air Force,
Tampa, Florida.

1. In the foregoing case of Private Tom L. Sang (42047800), 2121st Quartermaster Truck Company (Aviation), 14th Service Group (Chinese), Venice Army Air Field, Venice, Florida, 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 Charge III and Specification 1 thereof 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 1-1/2 years. Upon vacation by you of the findings of guilty of Charge III and Specification 1 thereof 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 1-1/2 years, you will have authority to order the execution of the sentence.

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

(CM 258062).

James E. Morrisette,
Brigadier General, U. S. Army,
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.

(309)

20 JUL 1944

SPJGH
CM 258105

UNITED STATES v. Private ODOS S. CROSLIN (39857603), Attached Unassigned, DEML Section, SCU 1924, Fort Stevens, Oregon.	NORTHWESTERN SECTOR WESTERN DEFENSE COMMAND Trial by G.C.M., convened at Fort Stevens, Oregon, 9 June 1944. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private ODOS S. CROSLIN, Attached Unassigned, DEML Section, Service Command Unit Number 1924, did, at Astoria, Oregon, on or about 14 May 1944, in violation of Section 23-1034 of the Public Laws, State of Oregon, wilfully, unlawfully and feloniously contribute to the delinquency of a minor child, to wit, Maxine Louise McCallister.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five (5) years. The reviewing authority approved the sentence, reduced the period of confinement to two (2) years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that on the evening of 14 May 1944 the accused entered the Reviera Theatre in Astoria, Oregon and sat in a seat beside Maxine McCallister, nine years of age. He "scooted down" in his seat and placed his legs "around in front" of the child. The accused was shaking. He reached over and placed his hand on her left leg above the knee. Maxine felt something wet on her coat which was identified as human seman. Spots of semen were also found on the cap of accused and on his shorts (R.5-25).

4. For the defense. The accused testified that he had been drinking from about 1 o'clock in the afternoon until he went to the theatre at about 8 o'clock that evening. He fell asleep and discovered when he awakened that he had been "sleeping on" a little girl sitting next to him. Accused could not explain the spots of semen but stated that he "might have had dreams" when he fell asleep. Then accused also made an unsworn statement (Ex. 2) that he habitually masturbated three or four times a day, and that if it was dark or if he were alone he would succumb to his desires regardless of the place where he happened to be and regardless of any people that may be in his vicinity (R. 29-31).

5. The accused was charged with the violation of a criminal statute of the State of Oregon and the case was tried on the erroneous theory that the laws of the State of Oregon were applicable. The violation of a state law is not necessarily a violation of an Article of War unless the acts which constitute the offense would also constitute an offense under the Article of War regardless of the state statute (MCM, 1928, par. 152c; Dig. Op. JAG 1912-40, sec. 454(1)).

The question therefore remains for consideration, without reference to the laws of the State of Oregon, whether the accused committed an offense in violation of the 96th Article of War. There is no question that the acts committed by accused constituted conduct of a nature to bring discredit upon the military service, but as the accused was not charged in the Specification with the specific acts constituting his misconduct it is necessary to decide whether the evidence is sufficient to show that he contributed to the delinquency of a minor, the offense charged in the Specification.

This offense is entirely a creation of statute unknown at common law, and what constitutes delinquency and contributing to delinquency is variously defined under the different statutes. It is, however, a generally recognized offense.

Any act which manifestly tends to cause any child to become delinquent is contributing to the delinquency of that child (31 Am.Jur. 809). A delinquent child is an infant of not more than a specific age who has violated any law or who is incorrigible (Black's Law Dictionary, 3rd ed.). The term "delinquent children" has also been defined as those "who have committed offenses against the law, or who are found to be falling into bad habits", (14 R.C.L., sec. 48, p. 277). Juvenile delinquency is a generic term, like crime. It embraces everything from murder to habitual truancy from school. Generally delinquent children are children who have committed some offense against the law, or who are found to be falling into bad habits, or to be incorrigible, or who knowingly associate with vicious or

immoral persons, or who are growing up in idleness and crime (31 Am. Jur. 791).

Under these accepted definitions it is clear that in order for a person to contribute to the delinquency of a minor child it is necessary that his acts in some way affect the minor adversely, such as tending to make the child immoral, less law abiding or incorrigible.

The evidence in this case shows that accused placed his hand on the leg of a nine year old girl and masturbated while he was sitting beside her in a motion picture theater. She felt some wet spots on her coat which were later identified as semen but the evidence fails to show that she knew what accused was doing or that she was in any way affected by his actions. In the opinion of the Board of Review under the circumstances it was not shown that the acts of accused did contribute to or would manifestly tend to cause the minor to become delinquent.

6. The Board of Review is, therefore, of the opinion that the record of trial is legally insufficient to support the finding of guilty and the sentence.

Samuel M. Davis, Judge Advocate.

Kilburn Glenn, Judge Advocate.

(On leave), Judge Advocate.

(312)

1st Ind.

War Department, J.A.G.O., 1 Aug 1944 - To Commanding General, Northwestern Sector, Western Defense Command, Fort Lewis, Washington.

1. In the case of Private Odos S. Croslin (39857603), Attached Unassigned, DEML Section, SCU 1924, Fort Stevens, Oregon, attention is invited to the foregoing holding by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. For the reasons stated in the holding by the Board of Review I recommend that the findings of guilty and the sentence be vacated.

2. Under the provisions of Article of War 50½, the record of trial is transmitted for vacation of the sentence in accordance with the foregoing holding and for a rehearing or such other action as you may deem proper.

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

(CM 258105).

Myron C. Cramer

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

1 Incl-
Rec. of trial.

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

SPJGN
CM 258108

7 JUL 1944

UNITED STATES	)	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Keesler Field, Mississippi, 5 June 1944. Dismissal.
Second Lieutenant ELMER E. PERLMAN (O-583463), Section C, 2121st Army Air Forces Base Unit.	)	

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

---

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant Elmer E. Perlman, Section C, 2121st Army Air Forces Base Unit (Emergency Rescue School), did, at Keesler Field, Mississippi, on or about 14 May 1944, feloniously take, steal, and carry away Eighty-Four Dollars ($84.00), United States Currency, the property of Warrant Officer Junior Grade William S. Curran.

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 on the night of 13-14 May 1944 the accused and Warrant Officer William S. Curran were quartered on the lower floor of B.O.Q. 13 at Keesler Field. Their rooms were opposite each other and they were the only ones quartered on the lower floor. When Warrant Officer Curran retired he had $84 in his wallet. The next morning the money was missing and his wallet had been placed in a different pocket of his trousers. He reported the loss of the money to the Military Police, who instigated an investigation in an effort to find the culprit. On the evening of 14 May 1944 he announced his loss in the card room of the Officers' Club where the accused was engaged in playing cards and stated that progress was being made in apprehending the thief by means of fingerprints left on the wallet. The same night, about 0200 o'clock, when the accused and the Warrant Officer were alone, the accused told him that he, the accused, had taken the money and that he would return it. The accused thereupon returned $50 and said he would later return the balance, which he asserted to be $25. This last sum was returned to him at the end of the month. Subsequently on the same morning the accused voluntarily admitted to the organization's intelligence officer that he had taken the money and that he had returned it because he was sorry and his conscience was hurting him. The intelligence officer denied that any hope for a minor punishment had been extended to the accused (R. 6-13, 13-17).

Thereafter on 18 May 1944 the accused, after he had been apprised of his right to speak or remain silent under the 24th Article of War, executed a sworn statement admitting his guilt which he sought to mitigate by showing that he had been drinking and that, although he had secreted the money under the porch of the barracks for a while, he had sought to return it as soon as he realized what he had done. This statement was given to the organization's provost officer who made no indication to the accused that he would receive a minor punishment (R. 17-22; Pros. Ex. 1).

4. The evidence for the defense was adduced through the testimony of the accused who, after explanation of his rights as a witness, testified that on Saturday night, 13 May 1944, he had drunk about eight bottles of beer by midnight; that thereafter he went to a night club where he drank about "six or eight" drinks of bourbon whiskey; that he returned to the barracks shortly after 0200 o'clock 14 May 1944; that he there extracted from the warrant officer's wallet $75 in currency, which he hid under the steps of the barracks in order to evade detection in the event of a "shakedown"; that he then retired for the night; that the next morning he recalled with difficulty where he had placed the money; that he was unacquainted with the warrant officer but endeavored to locate him; and that, after he had interrupted a search of his room he had gone to the Officers' Club where he played cards during the evening, losing several

dollars and paying a debt of $10 for which he used part of the money he had taken. During the game he had heard the warrant officer mention his loss and thereby ascertained the identity of the person from whom he had taken the money but did not hear him say anything about the military police having any clues as to the identity of the thief. Under the pretext of waiting for a long distance telephone call, he remained at the club until he and the warrant officer were alone when he told his story to the warrant officer and returned $50 to him and promised to return the balance. He had admitted his dereliction to the warrant officer and returned part of the money because his conscience was bothering him and not because he was apprehensive of being detected. He had made his voluntary admissions and sworn statement because of his conscience and also because he had received the impression that by so doing he would receive a minor punishment although the offense was not of a minor character. He had not taken the money because he was in debt as he owed only $25 and had some of his own money in his possession. He was unable to give any reason for his taking the money and did not contend that his drinking had rendered him intoxicated to the extent of drunkenness (R. 22-37).

Four letters from acquaintances attesting to his prior good character were admitted into evidence without objection. Evidence of his honorable discharge from enlisted service with a character rating of "excellent", dated 12 November 1943, was also received into evidence without objection as was a copy of his officer's qualification card showing a rating of "excellent" for the only period for which he had been assigned to a specific assignment and for which he had been rated (R. 38-39; Def. Ex. "A"-"F").

5. The Specification alleges that the accused at Keesler Field, Mississippi, on or about 14 May 1944 feloniously took, stole, and carried away $84, United States currency, the property of Warrant Officer Junior Grade William S. Curran. The offense alleged is that of larceny which is defined as follows:

> "Larceny is the taking and carrying away by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein. (Clark).
>
> "Once a larceny is committed, a return of the property or payment for it is no defense to a charge of larceny. * * *" (M.C.M., 1928, par. 152g).

While the offense is ordinarily charged as violative of Article of War 93, it is also violative of Article of War 95 since it is a crime in-

volving moral turpitude and as such inherently amounts to conduct unbecoming an officer and a gentleman (M.C.M., 1928, par. 151).

The evidence for the prosecution shows that the accused at the time and place alleged deliberately stole the sum of $84 in cash from Warrant Officer Curran. He secreted the stolen money and used part of it for his own purposes. From these acts his intention permanently to deprive the owner of his property therein is inescapably impelled. Whether his return of the greater part thereof was motivated by qualms of conscience or fear of apprehension is immaterial because in neither event is the offense obliterated. The accused's own testimony fully corroborates that of the prosecution and sounds weakly only in mitigation. The evidence, therefore, establishes beyond a reasonable doubt the accused's guilt and fully supports the court's finding of guilty of the Charge and its Specification.

6. The accused is about 22 years old. The War Department records show that he had enlisted service from 11 June 1942 to 12 November 1943; that he was commissioned a second lieutenant on 13 November 1943; and that he has been on active duty as an officer since that date.

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

Abner E. Lipscomb, Judge Advocate.

Walter Shephard, Judge Advocate.

Gabriel H. Goldin, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 20 JUL 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 Elmer E. Perlman (O-583463), Section C, 2121st Army Air Forces Base Unit.

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. Consideration has been given to a letter concerning the accused from the Honorable Albert W. Hawkes, United States Senate, urging clemency for the accused.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action 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. ltr. for sig. S/W.
Incl. 3 - Ltr. dated 23/6/44.
Incl. 4 - Form of action.

(Sentence confirmed. G.C.M.O. 477, 1 Sep 1944)

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

SPJGQ
CM 258165

- 7 JUL 1944

UNITED STATES v. Second Lieutenant LEVI B. THOMAS, JR. (O-1103966), War Department Unassigned, (formerly 1312th Engineer General Service Regiment).	ARMY SERVICE FORCES 8TH SERVICE COMMAND Trial by G.C.M., convened at A.S.F. Training Center, Camp Claiborne, Louisiana, 7 June 1944. Dismissal, total forfeitures and confinement for ten (10) years.

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

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

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

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

Specification 1: In that Second Lieutenant Levi B. Thomas, Jr., War Department unassigned, Camp Claiborne, Louisiana, formerly 1312th Engineer General Service Regiment, did, at Camp Claiborne, Louisiana, on or about 3 November 1943, with intent to defraud, wrongfully and unlawfully make and utter to Officers' Club No. 3, Camp Claiborne, Louisiana, a certain check, in words and figures as follows, to wit: "Alexandria, La., Nov. 3, 1943, Miners and Merchants Bank, Ft. Huackuca, Ariz. Pay to the order of Officers Club #3, $30.00, Thirty & 00/100 Dollars, signed L. B. Thomas, Jr.", and by means thereof, did fraudulently obtain from Officers' Club No. 3, the sum of $30.00, lawful money of the United States, then well knowing that he did not have and not intending that he should have sufficient funds in the Miners and Merchants Bank for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check drawn on same bank, dated 3 November 1943 payable to order of Officers' Club No. 3, made and uttered to

Officers' Club No. 3, at Camp Claiborne, Louisiana, and fraudulently obtaining thereby $40.00.

Specification 3: Same form as Specification 1, but alleging check drawn on same bank, dated 9 October 1943 payable to order of Cash, made and uttered to the Post Exchange, at Camp Claiborne, Louisiana, and fraudulently obtaining thereby $10.00

Specification 4: Same form as Specification 1, but alleging check drawn on same bank, dated 1 November 1943 payable to order of Cash, made and uttered to the Post Exchange, at Camp Claiborne, Louisiana, and fraudulently obtaining thereby $10.00

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

Specification 1: In that Second Lieutenant Levi B. Thomas, Jr., War Department unassigned, Camp Claiborne, Louisiana, formerly 1312th Engineer General Service Regiment, did without proper leave, absent himself from his station at Camp Claiborne, Louisiana, from about 5 November 1943, to about 6 December 1943.

Specification 2: In that Second Lieutenant Levi B. Thomas, Jr., War Department unassigned, Camp Claiborne, Louisiana, formerly 1312th Engineer General Service Regiment, did, without proper leave, absent himself from his station at Camp Claiborne, Louisiana, from about 4 January 1944, to about 10 May 1944.

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

Specification: In that Second Lieutenant Levi B. Thomas, Jr., War Department unassigned, Camp Claiborne, Louisiana, formerly 1312th Engineer General Service Regiment, having been duly placed in arrest at Camp Claiborne, Louisiana, on or about 2 October 1943, did, on 5 November 1943, break his said arrest before he was set at liberty by proper authority.

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

Specification 1: In that Second Lieutenant Levi B. Thomas, Jr., War Department unassigned, Camp Claiborne, Louisiana, formerly 1312th Engineer General Service Regiment, did, at Baltimore, Maryland, on or about 18 November 1943, willfully and feloniously present for approval and payment a claim against the United States to Lieutenant Colonel William J. McManus, Finance Department, an officer of the United States duly authorized to approve and pay such claims, in the amount of $170.00, as a partial payment

for pay and allowances alleged by the said Second Lieutenant Levi B. Thomas, Jr. to be due him as an officer of the Army of the United States for the month of November 1943, which claim was false and fraudulent in that the said Second Lieutenant Levi B. Thomas, Jr. was absent without proper leave from his station from about 5 November 1943, to about 6 December 1943, and was not entitled to claim or receive any pay and allowances during said period of time, and which claim was then known by the said Second Lieutenant Levi B. Thomas, Jr. to be false and fraudulent.

Specification 2: Similar to Specification 1, but alleging presentation of false claim at Columbus, Ohio, 9 November 1943, to Colonel John L. Scott, Finance Department, in the amount of $85 for partial payment for pay and allowances due for month of November 1943.

Specification 3: In that Second Lieutenant Levi B. Thomas, Jr., War Department unassigned, Camp Claiborne, Louisiana, formerly 1312th Engineer General Service Regiment, did, at Fort Jay, New York, on or about 11 November 1943, willfully and feloniously present for approval and payment a claim against the United States to Captain John S. Schulte, Finance Department, an officer of the United States duly authorized to approve and pay such claims, in the amount of $286.70, for pay and allowances alleged by the said Second Lieutenant Levi B. Thomas, Jr. to be due him as an officer of the Army of the United States for the month of October 1943, which claim was false and fraudulent in that the said Second Lieutenant Levi B. Thomas, Jr. had previously been paid all of the pay and allowances due him for said month and was not entitled to claim or receive any further pay and allowances for said period of time, and which claim was then known by the said Levi B. Thomas, Jr. to be false and fraudulent.

Specification 4: Similar to Specification 1, but alleging presentation of false claim at Philadelphia, Pennsylvania, 17 November 1943, to Colonel A. C. Harden, Finance Department, in the amount of $60 for partial payment for pay and allowances due for month of November 1943.

Specification 5: Similar to Specification 3, but alleging presentation of false claim at Fort Dix, New Jersey, 23 November 1943, to Lieutenant Colonel T. P. Gilmore, Finance Department, in the amount of $286.70 for partial payment for pay and allowances due for month of October 1943.

Specification 6: Similar to Specification 1, but alleging presentation of false claim at Fort Belvoir, Virginia, 26

November 1943, to Lieutenant Colonel P. H. Lawrence, Finance Department, in the amount of $230.00 for partial payment for pay and allowances due for month of November 1943.

Specification 7: In that Second Lieutenant Levi B. Thomas, Jr., War Department unassigned, Camp Claiborne, Louisiana, formerly 1312th Engineer General Service Regiment, did, at Boston, Massachusetts, on or about 30 November 1943, willfully and feloniously present for approval and payment a claim against the United States to Captain L. H. Malley, Finance Department, Agent Finance Officer at Boston, Massachusetts, acting for Lieutenant Colonel H. S. Ruth, Finance Department, an officer of the United States duly authorized to approve and pay such claims, in the amount of $285.30, for pay and allowances alleged by the said Second Lieutenant Levi B. Thomas, Jr. to be due him as an officer of the Army of the United States for the month of November 1943, which claim was false and fraudulent in that the said Second Lieutenant Levi B. Thomas, Jr. was absent without proper leave from his station from about 5 November 1943, to about 6 December 1943, and was not entitled to claim or receive any pay and allowances during said period of time, and which claim was then known by the said Second Lieutenant Levi B. Thomas, Jr. to be false and fraudulent.

Accused pleaded guilty to, and was found guilty of, all of the Charges and all of the Specifications thereunder. 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 twenty years. The reviewing authority approved the sentence but reduced the period of confinement to ten years and forwarded the record of trial for action under Article of War 48.

3. Accused's pleas of guilty to all of the Charges and all of the Specifications thereunder constitute a judicial confession of guilt. Although no further presentation of evidence was required under these circumstances the prosecution properly introduced certain admissible and undisputed evidence into the record of trial so that the court might have before it a detailed elaboration of the various facts material to the bare Charges and Specifications for consideration, either in mitigation or aggravation of the offenses involved, in assessing an appropriate sentence.

It was established that accused was in the military service of the United States both at the time the offenses here alleged were committed and also at the time of the trial (R. 21-43).

4. As to Charge II (AW 61 AWOL) and Charge III (AW 69 Breach of arrest). Accused, who was then assigned to the 1312th Engineer General Service Regiment at Camp Plauche, New Orleans, Louisiana, had been legally placed in arrest in quarters on 2 October 1943 (Pros. Ex. L). Without being released by proper authority he breached this arrest on 5 November 1944 (Pros. Ex. L, K). On 6 December 1943 he is recorded as in arrest at the Army Air Base, Jackson, Mississippi (Pros. Ex. L) and is shown as returned to arrest in quarters at the Engineer Unit Training Center, Camp Claiborne, Louisiana, on 11 December 1943 (Pros. Ex. H, M). This absence covers a period of five weeks and one day.

On 4 January 1944 he again went absent without leave (Pros. Ex. M, N, P) and so remained until he was arrested by the Provost Marshal of Camp Plauche, New Orleans, Louisiana and returned to Camp Claiborne, Louisiana as shown by the morning report of the latter camp on May 10th, 1944 (Pros. Ex. O). The total period covered by both absences is about five months, one week and a day.

5. As to Charge I (AW 95 - making and uttering worthless checks on four separate occasions - 4 Specs.). On 9 October 1943, accused made and secured payment from the Post Exchange, Camp Claiborne, Louisiana, of a check in the amount of $10.00, drawn on the Miners and Merchants National Bank, Fort Huachuca, Arizona (R. 16, Ex. G). The check was returned by the bank with the notation "not sufficient funds" (R. 16, Ex. G). On 1 November 1943, accused repeated his action, obtaining a like amount from the same source, the check being drawn on the Miners and Merchants Bank, Fort Huachuca, Arizona, the second draft being returned by drawee bank for a like reason as the first (R. 15, 16; Ex. F). On 3 November 1943, accused made and secured payment from Engineers Officers' Club No. 3, Camp Claiborne, Louisiana, of two checks drawn on the Miners and Merchants Bank, Fort Huachuca, Arizona, one in the amount of $44.00 and the other for $30.00 (R. 10, 11; Ex. A, B). After about one week both checks were returned to the Officers' Club unpaid, marked "NSF" (R. 11, Ex. A, B). At the time these checks were uttered, the accused knew that he did not have sufficient funds in the bank for the payment of the checks (Ex. HH3A).

6. As to Charge IV (AW 94 - presenting seven false claims against U.S. seven specs.). During the month of November 1943, and while accused was in an absent without leave status, he presented to various Finance Officers false leave orders indicating that he was on official leave from his station, Camp Claiborne, Louisiana (Ex. T, Z, AA, CC, FF). As a result of these orders and upon such other representations as accused was able to make, the several Finance Officers were induced to prepare for accused seven false claims made on WD Form No. 336-Revised, and accused received payment in the aggregate sum of $1403.70 (Ex. S, W, Z, AA, CC, DD, EE). Payments were received as follows:

At Baltimore, Maryland, $170.00, 18 November 1943 (R. 33);
At Columbus, Ohio, $85.00, 9 November 1943 (R. 33);
At Fort Jay, New York, $286.70, 11 November 1943 (R. 33);

At Philadelphia, Pennsylvania, $60.00, 17 November 1943 (Ex. AA);
At Fort Dix, New Jersey, $286.70, 23 November 1943 (Ex. BB);
At Fort Belvoir, Virginia, $230.00, 26 November 1943 (Ex. DD);
At Boston, Massachusetts, $285.30, 30 November 1943 (Ex. FF).

7. The accused having been instructed by the Law Member in open court as to his rights as witness in his own behalf elected to testify under oath (R. 37).

In substance his testimony may be summarized as follows:

He had no reason for obtaining the partial payments during the month of November or for the giving of the worthless checks (R. 40, 41). He expressed concern about the checks he gave to the Post Exchange (R. 40, 41). He offered no evidence inconsistent with his plea of guilt. By inference he attempted to attribute his offenses to family difficulties and to his disappointment in his failure of assignment to a noncombat outfit as a result of disposition board proceedings at Beaumont General Hospital. He stated that under orders published by the War Department he either would have been discharged or placed on inactive duty status; that neither would be satisfactory to him in view of his six years of Army service; that he had accepted the Army as a career and that he did not wish to return to civilian life. A burst ear drum resulting from an explosion, his fear that he could not perform combat duty, and domestic difficulties were circumstances and conditions at the time he committed the offenses which he felt had produced such a mental condition that he did not consider himself capable of distinguishing between right and wrong (R. 38-43).

No other witnesses were called or other oral testimony or documentary evidence offered by the defense. The evidence presented by the prosecution consists in the main of exhibits, depositions, oral testimony and stipulations. These last were signed by accused and his counsel. Accused's confession was not received in evidence until its voluntary character had been established. Aside from his pleas there is sufficient evidence of record to justify accused's conviction.

8. Although no evidence of previous convictions was presented the following circumstance is related by the Staff Judge Advocate, Eighth Service Command, in his review of this case.

> "Accused has had one previous trial by general court-martial for the offense of being drunk in camp on 15 September 1943 in violation of Article of War 96. Trial was had 18-25 October 1943, 5 November 1943. He pleaded not guilty to the specification of the charge and to the charge. He was found guilty and sentenced to be dismissed the service. Before execution of the sentence, however, the findings and sentence were disapproved for the reason that the sentence was considered too severe for the offense proved, and a rehearing was ordered by the appointing authority. The offense for which the accused was here convicted followed shortly."

9. War Department records disclose that this officer is 26 years of age and is single. He is a high school graduate but has had no college training. He entered the regular army on 10 December 1937 as an enlisted man and attained the grade of technical sergeant. He was appointed and commissioned a second lieutenant, Army of the United States, on 16 September 1942 after having completed the prescribed course at The Engineer School, Fort Belvoir, Virginia.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of Article of War 95 and is authorized upon conviction of a violation of either Article of War 61, 69, or 94.

(on leave), Judge Advocate.

William H. Gaunt, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 7 - AUG 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 Levi B. Thomas, Jr. (O-1103966), War Department Unassigned (Formerly of 1312th Engineer General Service Regiment).

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution, and that the Federal Reformatory, El Reno, Oklahoma, 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 above 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. of S/W.
3 - Form of action.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 460, 26 Aug 1944)

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

SPJGV
CM 258171

6 JUL 1944

UNITED STATES v. First Lieutenant JOHN S. LUCAS (0-728294), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Midland Army Air Field, Midland, Texas, 30 May 1944. Dismissal and total forfeitures.

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

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

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

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

Specification 1: In that First Lieutenant John S. Lucas, Air Corps, did, at Decatur, Alabama, on or about 15 March 1944 with intent to defraud, wrongfully and unlawfully make and utter to the Cornelian Hotel a certain check in words and figures as follows:

San Antonio, Texas, 3/15/1944 No. 30-65
NATIONAL BANK OF FORT SAM HOUSTON
at San Antonio

Pay to the Order of Cornelian Hotel $ 45.76
Forty-five and 76/00 DOLLARS
0-728294
John S. Lucas 1st Lt. A.C.

and did fraudulently pass said check to the said Cornelian Hotel in payment of a hotel bill due by him to said hotel in the amount of $45.76, 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, Texas, for the payment of said check.

Specification 2: Alleges similar offense to that set forth in Specification 1, the check being dated 17 March 1944 and payable to cash in the amount of $150.

Specification 3: Alleges similar offense to that set forth in Specification 1, the check being dated 17 March 1944 and payable to cash in the amount of $90.

Specification 4: Alleges similar offense to that set forth in Specification 1, the check being dated 20 March 1944 and payable to Gayso Hotel in the amount of $75.

Specification 5: Alleges similar offense to that set forth in Specification 1, the check being dated 26 March 1944 and payable to the Officers Mess in the amount of $10.

Specification 6: Alleges similar offense to that set forth in Specification 1, the check being dated 26 March 1944 and payable to the Officers Mess in the amount of $10.

Specification 7: In that First Lieutenant John S. Lucas, Air Corps, did, at Odessa, Texas, on or about 7 April 1944, commit an aggravated assault and battery upon Fay Henderson by wrongfully striking her on the face and body with his hands, the said Lieutenant Lucas then and there being an adult male, and the said Fay Henderson then and there being a female.

CHARGE II and Specifications 1-5: (Withdrawn by direction of appointing authority).

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

Specification: In that First Lieutenant John S. Lucas, Air Corps, did, at Midland Army Air Field, Midland, Texas, on or about 7 May 1944, knowingly and willfully apply to his own use and benefit one Command Reconnaisance vehicle, value about one thousand dollars ($1,000.00), property of the United States, furnished and intended for the military service thereof.

ADDITIONAL CHARGE II: Violation of the 96th Article of War.
Specification 1: Withdrawn by direction of appointing authority.
Specification 2: In that First Lieutenant John S. Lucas, Air Corps, having been restricted to the limits of Midland Army Air Field, Midland, Texas, did, at Midland Army Air Field, Midland, Texas, on or about 7 May 1944, break said restriction by going to the city of Midland, Texas.

Charge II and its five Specifications and Specification 1 of Additional Charge II were withdrawn by the prosecution at the commencement of trial by direction of the appointing authority. The accused pleaded not guilty to and was found guilty of all Specifications and 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 the sentence and forwarded the record of trial for action under Article of War 48.

3. All of the evidence offered by the prosecution in support of the first six Specifications of Charge I was by stipulation of fact entered into by the prosecution, defense counsel and the accused (R. 9; Pros. Ex. 1). The evidence so stipulated is substantially as follows:

Specification 1. On 15 March 1944, the accused made and uttered a check to the order of Cornelian Hotel, Decatur, Alabama, in the amount of $45.76, drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, which was tendered to the payee in payment of a hotel bill. When the check was presented for payment to the drawee bank, the accused had insufficient funds on deposit to pay it and it was dishonored (Pros. Ex. 1).

Specification 2. On 17 March 1944, the accused made and uttered a check to the order of cash in the amount of $150, drawn on the National Bank of Fort Sam Houston, which was delivered by accused to one Ralph Prichard in payment of a gambling debt. When the check was made and also when it was presented for payment to the drawee bank, the accused had insufficient funds on deposit to pay it and it was dishonored (Pros. Ex. 1).

Specification 3. On 17 March 1944, the accused made and uttered a check to the order of cash in the amount of $90, drawn on the National Bank of Fort Sam Houston, which was delivered to some person, name unknown, in payment of a gambling debt. The check was negotiated to the Gayoso Hotel Company, Memphis, Tennessee, which

paid the face amount thereon to the holder. When the check was written and also when it was presented for payment to the drawee bank, the accused had insufficient funds on deposit to pay it and it was dishonored (Pros. Ex. 1).

Specification 4. On 20 March 1944, the accused made and uttered a check to the order of "Gayso Hotel" in the amount of $75, drawn on the National Bank of Fort Sam Houston, which was delivered to the Gayoso Hotel. The hotel applied a portion of the funds represented by the check in payment of a hotel bill and paid the balance of it in cash. When the check was written and also when it was presented for payment to the drawee bank, the accused had insufficient funds on deposit to pay it and it was dishonored (Pros. Ex. 1).

Specification 5. On 26 March 1944, the accused made and uttered a check to the order of the Officers' Mess, Midland Army Air Field, Midland, Texas, in the amount of $10, drawn on the National Bank of Fort Sam Houston, which was cashed by the Officers' Mess. When the check was made and also when it was presented for payment to the drawee bank, the accused had insufficient funds on deposit to pay it and it was dishonored (Pros. Ex. 1).

Specification 6. The facts stipulated under this Specification are identical in all respects with those set forth above under Specification 5, the accused having cashed two checks for the same amount on the same day payable to the same payee and drawn on the same bank (Pros. Ex. 1).

It was similarly stipulated that a bank statement annexed to the stipulation of fact accurately reflected the condition of accused's account with the National Bank of Fort Sam Houston for the dates shown thereon (Pros. Ex. 1). An examination of this statement reveals that the account is in the name of the accused and that on 15 March 1944, accused had the sum of $53.50 on deposit which, on 17 March 1944, was reduced to $13.50 after payment of a check for $40. A steady succession of 50 cent charges against the account gradually reduced the balance to $6.90 on 31 March 1944. It remained at this figure until 5 April 1944 when a deposit of $100, less withdrawals totaling $70 made the same day, fixed the balance at $36.90. On 6 April 1944 the balance was reduced to $6.90 following further withdrawals of two checks of $15 each.

In support of Specification 7 of Charge I the prosecution introduced evidence to show that between three and four o'clock on the afternoon of 6 April 1944, the accused called at the home of Mrs. Faye Henderson in Odessa, Texas. She was a married woman and the

mother of a sixteen months old baby. Her husband was serving in Italy with the United States Army (R. 10, 18, 19). She had met accused the latter part of the previous month and had permitted him to call at her home some four times during which he had always conducted himself as a gentleman (R. 19). On this day accused had been drinking and informed Mrs. Henderson that he and a friend had been engaged in a beer drinking contest (R. 21). At accused's request she accompanied him downtown where he purchased a quart or two of liquor and they then returned to her home about 7 p.m. Later that evening Mrs. Henderson left accused at her home when she went to work at the Ace of Clubs, apparently a local night club (R. 10-11). When she finished work for the night sometime shortly after midnight she found accused at the Ace of Clubs awaiting her. She drove him downtown but, when they arrived there, he refused to leave the auto. She agreed to drive him to her home if, after they arrived there, he would promptly call a cab and leave. When they reached her home, accused mixed himself a drink and inasmuch as he made no effort to call a cab Mrs. Henderson did so. However, when it arrived accused paid the driver and dismissed it. Although accused had been drinking, he was not drunk. Apparently aroused because accused refused to leave, Mrs. Henderson slapped him whereupon accused retaliated and slapped her several times while she dealt him at least one more similar blow. Any further fracas was prevented by the arrival of some six couples who stopped at the house about 2 a.m. to visit Mrs. Henderson (R. 11). Accused left upon their arrival and, in turn, these visitors departed within an hour whereupon Mrs. Henderson retired (R. 12).

Sometime later Mrs. Henderson was awakened by a noise in the living room and discovered that accused had returned, effecting an entrance through a window by unlatching a screen. Mrs. Henderson berated accused, advising him "the next time to knock and not tear my screen off, and I would let him in". Accused refused to leave and would not permit Mrs. Henderson to call a cab for him, slapping her face and pushing her when she attempted to do so. Accused was now even more sober than he had been earlier in the night (R. 12). For sometime thereafter accused and Mrs. Henderson fought and wrestled throughout her four room house, part of the fracas taking place on the floor to which Mrs. Henderson had been beaten or pushed by the accused (R. 13). She cried out to her neighbors but was unable to arouse them (R. 12). Her baby eventually began to cry and apparently accused refrained from interfering while she prepared its bottle. She then lay upon the bed with the baby, the accused meanwhile taking up a

position at the head of the bed between her and the telephone, pushing and slapping her every time she tried to use it. Eventually she fell off to sleep (R. 13).

She awoke the next morning about seven or eight o'clock and found accused sleeping on the same bed with her. She arose and left the house with her baby, going to her sister-in-law's and then to the home of a girl friend whom she asked to return with her to her house. However, her friend was unable to do so. Eventually Mrs. Henderson returned home about noon thinking accused would have departed by then but found he was still there. After tending her baby she commenced putting her house in order. Accused came to the kitchen and took the baby into the yard to play, stating he would leave when he got ready (R. 14). Soon she sought to call a cab for accused and in retaliation he pushed her into a chair so vigorously as to break the back of it. From about one o'clock until four o'clock that afternoon, accused was battling with Mrs. Henderson. He was continually slapping her and at one stage of the proceedings he tore all of the shoulder straps from her underclothing and the buttons from her blouse. Resisting him, she tore buttons from his shirt and underclothing (R. 15). Accused finally threw her on the bed and then Mrs. Henderson screamed and called loudly to a neighbor, Mrs. Holcomb, for assistance (R. 16).

During the early part of that afternoon Mrs. Charlie B. Hart, who lived next door to Mrs. Henderson, heard the latter screaming, "Please don't hurt me again! Please let me alone!" Mrs. Hart left her house on an errand and returning about 4 p.m. heard the screaming still continuing (R. 24, 25). Mrs. Rachael Holcomb, also a neighbor, likewise heard the disturbance in Mrs. Henderson's house and heard her cry out at one time, "Don't kill me! You are choking me!" (R. 29). Seeing Mrs. Hart upon return from her errand, Mrs. Holcomb summoned her to the latter's house to discuss what they should do. They had about concluded to notify the police when they heard Mrs. Henderson scream, "Holcomb! Come quick" (R. 16, 25, 30). Mrs. Holcomb picked up a wooden board and the two of them rushed to Mrs. Henderson's house. There Mrs. Holcomb beat upon the side of the house with the board in an effort to scare the intruder away. The ruse did not have the desired effect so they both entered the house through the back door. As they did so, accused ran into the bathroom and locked the door (R. 16, 25, 30). They found Mrs. Henderson weeping and her appearance indicated she had been doing so for some time. She was clothed in little more than her skirt and was engaged in putting on a blouse. Her face, neck and arms were red, she had a bruise on one leg, and there were white

blotches on her skin where the flesh had been squeezed (R. 25-28). Mrs. Henderson picked up her baby and the three women proceeded to Mrs. Holcomb's house from whence they telephoned the police. Soon thereafter a taxicab drove to Mrs. Henderson's house, apparently called by accused, and he entered it after first taking some bottles from Mrs. Henderson's auto. Although the women told the taxi driver the police had been summoned, he refused to wait and drove off with accused (R. 16, 23, 25, 26, 30, 31).

About midnight that night, Mrs. Henderson was telephoned by her sister-in-law and informed that accused was at the Ace of Clubs. Mrs. Henderson thereupon telephoned the military police (R. 16). Shortly thereafter a cab deposited accused at Mrs. Henderson's house and she again phoned the military police. Mrs. Henderson's sister-in-law had followed accused to the house and entered through the front door while accused continued around to the rear door and threatened to break it down if denied admittance. He was told to go to the front door and as he arrived there the military police drove up and took him in custody (R. 17).

As a result of her encounter with accused, Mrs. Henderson was bruised about the legs, right thigh, across the abdomen and had both her eyes blackened (R. 17). Mrs. Hart observed that Mrs. Henderson had a black eye some several days after this episode (R. 27). Although accused had been drinking, Mrs. Henderson was certain accused was not drunk at any time during this extended fracas. She considered a man to be drunk when he "can't walk good" and talks "smart" (R. 22).

In support of the Specification of Additional Charge I and Specification 2 of Additional Charge II, the prosecution introduced evidence to show that on 8 April 1944 accused was restricted to the limits of his quarters except for mess and duty periods (R. 33; Pros. Ex. 3). About 1700 hours on 6 May his restriction was verbally modified at his request to extend to the limits of the post so that he might visit with his wife (R. 33-34). About 3:45 a.m. on 7 May, Sergeant Hugh E. McHugh, a member of the Midland Army Air Field Military Police Detachment, was seated in a city police car with police officer Dick Dillard at the corner of South Main and Wall Streets in the town of Midland, Texas. An Army "jeep" passed by and the sergeant noticed that the windshield was "mashed down on the steering wheel" and the canvas top torn (R. 43). They gave chase for about three and a half blocks, following the jeep as it was driven some 30 to 35 miles per hour on the right of the center lines of various streets and sharply about corners, before

they overtook it and forced it to the curb, discovering it was being driven by the accused (R. 47, 48). He jumped from the jeep and proceeded across the street until the sergeant overtook him (R. 44). The jeep bore the Army number 2042655 (R. 44, 45). This vehicle had been dispatched for on-post duty at Midland Army Air Field on 6 May and about 5:45 p.m. that day it had been parked in the ordnance area (R. 35, 37; Pros. Ex. 4). At the time accused was found driving it no person had authority to use it except the sergeant to whom it had been dispatched (R. 39, 40). On a periodic price list published by the Eighth Service Command on 8 December 1943, such a vehicle as this was listed as costing the Government between $1000 and $1100 (R. 36).

When accused was questioned by Sergeant McHugh he gave the name of Jeffery E. Townsend, his roommate (R. 41, 45). When asked to produce his AGO card he stated he had none (R. 44). Accused was intoxicated, his uniform was torn in numerous places and there was blood upon his hands. The windshield of the jeep had been forced back over the steering wheel, the glass was broken and the steering wheel protruded through the broken glass. The canvas top was torn and was hanging loosely to the rear of the jeep (R. 45, 47). Sergeant McHugh took accused to the Crawford Hotel across the street and stepped to a telephone to call Captain Taylor, the assistant provost marshal. When he did so accused entered an elevator and was carried to the upper reaches of the hotel (R. 45). The sergeant hastily mounted the steps to the fourth floor but was unable to locate accused. When he returned to the lobby of the hotel he informed Captain Taylor of the events that had transpired (R. 46).

4. On behalf of the accused it was stipulated by the prosecution, defense counsel and accused that on the following dates accused had made good the checks described in the following Specifications of Charge I (Def. Ex. A):

Dates	Amount of Check	Specification
1 May 1944	$45.76	Spec. 1
15 May 1944	$75	Spec. 4
18 April 1944	$10	Spec. 5
18 April 1944	$10	Spec. 6

The report of the Board of Officers appointed to examine the accused, introduced in evidence by the defense, stated that on 17 May 1944

accused was "normal mentally", was able to distinguish right from wrong and was not insane. It contained the further finding that "at the time of the alleged wrongful acts, 1st Lt. John S. Lucas was intoxicated to the extent that he could not distinguish between right and wrong and that in all probability such wrongful acts would not have been committed had he been sober" (Def. Ex. B). The Board further found that accused's overindulgence in liquor was caused by mild operational fatigue, tenseness, and lack of adjustment to Army life following return from combat area (Def. Ex. B).

Accused elected to make an unsworn statement through his counsel which contained the following information. Accused enlisted in the service as an aviation cadet in January 1942 and was commissioned a second lieutenant on 15 August 1942 (R. 48). From 15 January 1943 until September 1943 he served as bombardier aboard B-17 bombers in the European Theater. He participated in twenty-five bombing missions over Germany and France and was awarded the Distinguished Flying Cross and the Air Medal with three bronze clusters. During several of the missions he flew as lead bombardier and served as squadron bombardier for the last two months of his overseas duty. He was promoted to first lieutenant during his tour of duty overseas. Upon his return to this country in September 1943 he was sent directly to the 18th Replacement Wing, Salt Lake City, Utah, without passing through a redistribution center and from there he was assigned to an operational training unit at Dyersburg, Tennessee. A month later he was assigned to another such unit at Ardmore, Oklahoma, and from there he was sent to primary flying school at Decatur, Alabama, in response to his application for pilot training. However, he failed to complete the training course because of nervousness and tenseness apparently resulting from his overseas duty. While under the influence of liquor accused gave two checks dated 17 March 1944, one for $150 and the other for $90, in payment of gambling losses. At the time he wrote these checks and the other ones in question he was unaware that his bank balance would not cover them but thought he had sufficient funds on deposit to honor them and at no time intended to defraud anyone. He had commenced drinking heavily after failing in pilot training school and, on 7 April 1944, was so intoxicated that he remembered practically nothing that took place at the home of Faye Henderson. On the evening of 7 May 1944 he became drunk at the Officers' Club on post and was unable to recall anything that took place thereafter (R. 49).

5. When the check described in Specification 1 of Charge I in the amount of $45.76 was uttered on 15 March accused had a balance

of $53.50 in his account. A withdrawal of $40 on 17 March reduced the balance to $13.50 on that day causing dishonor of this check when it was presented for payment. Although accused had insufficient funds on deposit to pay this check when it was presented to the drawee bank, there is no evidence that accused's account was in such condition on the day the check was uttered. Indeed, the evidence is to the contrary. Further, there is nothing in the record to indicate whether the withdrawal of $40 on 17 March resulted from the presentation of a check issued prior to the one in question. Accordingly, it has not been proven that the accused made and uttered this check "then well knowing that he did not have" sufficient funds on deposit to pay it. The evidence is sufficient to support a conviction only of the lesser included offense of wrongfully issuing a check without having sufficient funds on deposit to pay it in violation of Article of War 96.

The evidence conclusively establishes that accused's bank account was woefully insufficient to pay the checks described in Specifications 2-6 inclusive, of Charge I when they were made and uttered and when presented to the bank for payment. These five checks totaled $335 and were uttered over the period from 17 March to 26 March 1944. During that time his balance fell from $13.50 to $6.90 and never rose above the higher figure except on 5 April when the balance was $36.90. There is no evidence that any person other than accused had authority to draw on this account. In such a case accused is charged with knowledge of the condition of his bank account (2 Bull. JAG 384-385). The court was eminently justified in concluding from these facts that at the time accused uttered these checks he did so with intent to defraud, not having and not intending to have sufficient funds on deposit to pay them. The fact that two of these checks were given in payment of gambling debts in nowise affects the criminal aspect of accused's act (Dig. Op. JAG, 1912-40, sec. 453 (24)). The evidence is sufficient to sustain the findings of guilty of Specifications 2-6 inclusive, of Charge I.

The evidence offered under Specification 7, Charge I, conclusively establishes that the accused committed a severe assault upon a married woman in her home, fighting and striking her at intervals over a period of time from the early morning until the late afternoon of 7 April 1944. The bruised condition of her person immediately after the intervention of neighbors and her pleas, screams and cries heard by these neighbors fully establish the vicious nature of the continuous assault. Although accused sought refuge behind the defense of drunkenness, there is conclusive evidence that although he had been drinking

he was not drunk, particularly on the afternoon of 7 April when his activities reached their climax. The evidence is sufficient to support the finding of guilty of Specification 7 of Charge I.

The evidence offered under the Specification of Additional Charge I and Specification 2 of Additional Charge II demonstrates that on 7 May accused broke restriction to the limits of Midland Army Air Field by going to the nearby town of Midland, Texas, where he was apprehended in an intoxicated condition by military police while driving a jeep owned by the United States which he had no authority to use. Accused claimed he was so drunk on this occasion he had no knowledge of what he was doing.

Drunkenness is no excuse for crime and may only be considered as affecting mental capacity to entertain a specific intent where such is an essential element of the offense (MCM, 1928, par. 126a). Willful or wrongful intent is not an essential element of the offense of breach of restriction (2 Bull. JAG 342). Accordingly, accused's intoxication is relevant only in a determination of whether he knowingly and willfully applied the jeep to his own use. Accused was intoxicated when apprehended by military police as he drove the jeep about the streets of Midland. Accused testified he had been drinking so heavily at the Officers' Club earlier in the evening that he was utterly unconscious of what he had done and had no knowledge of it. Although it is apparent accused was under the influence of liquor nevertheless he was able to walk, to talk and to drive a motor vehicle. Indeed, he was able to effect his escape from Sergeant McHugh, who had lately taken him into custody. There is insufficient evidence to sustain the defense that he was so drunk as not to know what he was doing and the court was warranted in so concluding. The Board of Officers appointed to examine into accused's mental condition pronounced him sane on 17 May 1944 and found he was then able to distinguish right from wrong. It further found that "at the time of the alleged wrongful acts, 1st Lt. John S. Lucas was intoxicated to the extent that he could not distinguish between right and wrong and that in all probability such wrongful acts would not have been committed had he been sober" (Def. Ex. B). The report contains none of the facts upon which the Board based its conclusions. It does not indicate whether it has reference to all of the offenses with which accused is charged or whether it pertains only to certain of them. The court was not bound to accept this conclusion without question. It was merely some evidence to be considered in conjunction with all other evidence presented at the trial in arriving at a determination of whether accused was so intoxicated as to be unable to entertain a specific intent where such intent may have been an

essential element of an offense charged (Dig. Op. JAG, 1912-40, sec. 395 (36)). There is ample evidence to support the court's findings to the contrary. The evidence is sufficient to support the findings of guilty of the Specification of Additional Charge I and Specification 2 of Additional Charge II.

6. Accused is 27 years of age. He enlisted in the service as an aviation cadet in January 1942 and was commissioned a second lieutenant, Air Corps, on 15 August 1942. On 10 April 1943 he was awarded the Air Medal for exceptionally meritorious service performed while participating in five separate bomber combat missions over enemy occupied continental Europe. He was also twice awarded the Oak Leaf Cluster for destroying two enemy airplanes while upon bombing missions. On 2 July 1943 he was promoted to first lieutenant.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Specifications 2-7 inclusive of Charge I and Charge I, of the Specification of Additional Charge I and Additional Charge I, of Specification 2 of Additional Charge II and Additional Charge II, legally sufficient to support only so much of the findings of guilty of Specification 1 of Charge I as involves the lesser included offense of wrongfully issuing a check without having sufficient funds on deposit to pay it; legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violations of Articles of War 94 and 96.

Thomas N. Tappy, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trueblood, Judge Advocate.

SPJGV
CM 258171

1st Ind.

War Department, J.A.G.O., 8 AUG 1944 - To the Secretary of War.

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of First Lieutenant John S. Lucas (0-728294), 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 Specifications 2-7 inclusive of Charge I and Charge I, of the Specification of Additional Charge I and Additional Charge I, of Specification 2 of Additional Charge II and Additional Charge II, legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge I as involves the lesser included offense of wrongfully issuing a check without having sufficient funds on deposit to pay it; legally sufficient to support the sentence and to warrant confirmation of the sentence. Accused has a fine war record, having participated in combat bombing missions over occupied continental Europe. He was awarded the Air Medal and two Oak Leaf Clusters in recognition of his valorous service. In view of this outstanding war record I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of pay of $100 per month for six months and that the sentence as thus commuted be carried into execution.

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

Myron C. Cramer

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

3 Incls.
Incl.1-Record of trial.
Incl.2-Dft 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 but commuted to reprimand and forfeiture of pay of $100 per month for six months. G.C.M.O. 448, 23 Aug 1944)

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

SPJGH
CM 258188

3 JUL 1944

UNITED STATES	)	84TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Claiborne, Louisiana, 7 June 1944. Dismissal, total forfeitures and confinement for eight (8) years. Disciplinary Barracks.
Second Lieutenant ALVIN C. BOLING (0-1323784), 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 61st Article of War.

Specification: In that Second Lieutenant Alvin C. Boling, Company K, 333d Infantry, did, without proper leave, absent himself from his organization at Camp Claiborne, Louisiana, from about 4 April 1944 to about 10 May 1944.

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

Specification: In that Second Lieutenant Alvin C. Boling, Company K, 333d Infantry, Camp Claiborne, Louisiana, did, at Bossier City, Louisiana, under the assumed name of Allen H. Bowlling, on or about 6 February 1944, wrongfully, unlawfully and bigamously marry Kathryn Davis, having at the time of said marriage to Kathryn Davis, a lawful wife then living, towit, Viola M. Boling.

He pleaded not guilty to the Specifications and the Charges. He was found guilty of the Specification, Charge I, of Charge I, of the Specification, Charge II, except the words "unlawfully and bigamously", and of Charge II. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for eight years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under the 48th Article of War.

3. a. The Specification, Charge II: The evidence for the prosecution shows by stipulation (Ex. C) that accused was married to Viola McKay at Olathe, Kansas, on 30 October 1941; that Viola M. Boling is alive, to the knowledge of accused, and resides at Route No. 6, Holden, Missouri; and that neither party to the marriage has ever obtained a divorce or annulment. Miss Kathryn Davis of Shreveport, Louisiana, testified that she had known accused about two weeks prior to 6 February 1944, had gone to the Club Coronado once and to a show another time with him, but could not remember the dates. Other persons were "in the group". At about 2:30 p.m. on Sunday, 6 February, she saw accused in the lobby of the Washington-Yuree Hotel. He was with another lieutenant. That afternoon accused and Miss Davis talked for the first time about getting married, and that evening they were married at Bossier City, Louisiana, by Justice of the Peace J. B. Lee. The marriage license (Ex. D) shows that "Allen H. Bowlling" and Miss Davis were married on 6 February 1944 at Bossier City by J. B. Lee. Miss Davis testified that accused signed the certificate of marriage in her presence. The names of Martha Jones, Mrs. O. S. Jones and another appear on the certificate as witnesses to the marriage. Miss Davis stated that the two persons named were not actually present. Miss Davis "assumed" that they were legally married. On 4 March she met accused and they "went out" to her home (R. 8-12).

b. The Specification, Charge I: An extract copy (Ex. A) of the morning report of Company K, 333rd Infantry, the organization of accused, submitted at Camp Claiborne, Louisiana, shows him from duty to absent without leave on 4 April 1944, and from absent without leave to absent in confinement on 10 May. An extract copy (Ex. B) of the morning report of Police and Prison Office, 3020th Army Air Forces Base Unit, La Junta, Colorado, shows accused from absent without leave to confinement on 10 May 1944. Captain George S. Gieszl, commanding Company K, checked the quarters of accused and searched the regimental area on 4 April, but accused could not be found. On 10 May Captain Gieszl received a post card from accused which had been mailed on 8 May (R. 6-8).

4. Captain Gieszl testified for the defense that he had known accused as a rifle platoon leader in Company K for about four months, that the service of accused as a platoon leader was excellent, and that accused had displayed a quality of leadership that is needed in the division. Captain Gieszl was with accused on Sunday, 6 February, from about noon to about 2:00 p.m. There was a "small amount" of drinking. The qualification card of accused (Def. Ex. 2) shows the manner of performance of duty as platoon leader, from 18 September 1943 to 31 December, as superior. The entry bears the initials of Lieutenant Colonel William T. Barrett, battalion commander, who gave accused the rating of superior. A letter (Def. Ex. 1) dated 28 March 1944 signed by Major General R. B. Woodruff, commanding the 84th Infantry Division, addressed to accused through the commanding officer of the 333rd Infantry, states:

"Your performance during the 6 day Platoon Leadership Exercises was superior.

Your orders were clear and complete. Your security measures, including the use of cover and concealment, were thorough and very

effective. You showed no hesitancy in making decisions and your planning was intelligently done. You retained full control over your platoon during action and showed yourself capable at all times of using your subordinates effectively. The high spirit of your men was particularly noticed.

I take pleasure in congratulating and commending you for the excellent qualities shown."

The first indorsement by Colonel T. A. Pedley, Jr., states:

"It is a matter of much gratification to me as Regimental Commander to receive and transmit a communication of this nature. You can rightfully feel the true satisfaction that accompanies a job well done.

The Division Commander's letter is concrete evidence that good work receives the credit it is due.

I am happy to add my own commendation for your achievement in this important training." (R. 14-17).

Accused testified that he went to Shreveport with other officers on Saturday, 5 February 1944, and that they indulged in some drinking, went to a night club, and spent the night at a hotel. At some time in the afternoon of Sunday, 6 February, he "met this woman, the first time I had ever seen her". They "continued the party, drinking with other people and later went off to ourselves". On the evening of 6 February "when this alleged marriage is to have taken place, I can only say I didn't know what I was doing". Accused testified that he "would say" he was drunk, and that he did not recall what happened. He did not realize that he was contracting a marriage. Of the four officers who went to Shreveport with accused on the occasion referred to, Captain Gieszl was with him only about two hours on Sunday afternoon as Captain Gieszl testified, and accused understood that the three lieutenants, whom he named, had "all received overseas orders" (R. 17-19).

Accused testified on cross-examination, redirect, and examination by the court that he met Miss Davis some time in the afternoon of 6 February, before dark, and "parted her company" the next morning. He could not say how many drinks he had. On 4 March accused went to Shreveport "with the intent to get this mess straightened out". He met Miss Davis in the lobby of the hotel and they went to her parents' home, where he was introduced to them as "Lt. Bowlling, my husband". He "couldn't see much sense to try to straighten out anything. There wasn't any use trying". When he went there he "had in mind" getting "this thing straightened out", but he "wasn't able to carry it out". On 6 March, Miss Davis came to Camp Claiborne and stayed about two days. Accused registered Miss Davis and himself at a hotel in Alexandria as Lieutenant and Mrs. Allen Bowlling. She came to Alexandria at his instance. His purpose was "to get her down here where I could talk to her away from her folks and see if we couldn't arrange to get it annulled or something done about it" (R. 19-23).

5. a. The Specification, Charge II: The evidence shows that on 30 October 1941 accused was married to Viola McKay in Kansas, that the marriage was not terminated by annulment or divorce, and that Mrs. Boling was living at the time of the trial.

On Saturday, 5 February 1944, accused, a rifle platoon leader of Company K, 333rd Infantry, stationed at Camp Claiborne, Louisiana, went to Shreveport with four other officers. They indulged in drinking, went to a night club, and spent the night at a hotel. The next day at about 2:30 p.m. accused met Miss Kathryn Davis of Shreveport in the lobby of the hotel. They "continued the party" and later accused and Miss Davis "went off to" themselves. They talked for the first time about getting married. At some later time on 6 February they were married at Bossier City, Louisiana, by a Justice of the Peace, and they "parted" the next morning. The marriage certificate showed the name of accused as "Allen H. Bowlling". Miss Davis testified that she had been with accused twice before 6 February, one time at a night club and the other at a show. She could not give the dates but both instances were within two weeks before 6 February. Accused testified that he had never seen her before 6 February. Accused also testified, without contradiction, that he was drunk at the time of the "alleged" marriage and that he did not remember what happened.

On 4 March accused returned to Shreveport with the intention of getting "this mess straightened out", met Miss Davis in the lobby of the hotel, and accompanied her to the home of her parents, where he was introduced as her husband. He "wasn't able" to carry out his intention at that time. On 6 March Miss Davis came to Camp Claiborne at the request of accused, as he wanted to talk to her "away from her folks" to see if they could arrange for an annulment of the marriage. They registered at a hotel in Alexandria, Louisiana, near Camp Claiborne, as Lieutenant and Mrs. Allen Bowlling. She remained there about two days.

The evidence sustains the finding by the court that accused wrongfully married Kathryn Davis on 6 February 1944, while he had a lawful wife living. Such conduct constitutes a violation of the 95th Article of War (CM 245278, Yagel; 3 Bull. JAG 150).

The accused testified that at the time of the marriage to Miss Davis he was drunk and did not know what he was doing. Although he had been drinking, the evidence indicates that he was not intoxicated to the extreme degree claimed. The handwriting in which he subscribed the assumed name "Allen H. Bowlling" on the marriage license (Ex. D) is firm, straight and legible. About a month after the bigamous marriage accused, under the same assumed name, and Miss Davis registered as man and wife at a hotel in Alexandria, where Miss Davis remained for about two days.

The defense contended that the marriage was invalid under Louisiana law because there were less than three witnesses. It is no defense that the

second marriage is void on other grounds than that of bigamy (CM 238173, Hutchins; 2 Bull. JAG 385).

b. The Specification, Charge I: Accused was absent without leave from his organization at Camp Claiborne from 4 April 1944 to 10 May, as alleged.

6. The accused is 25 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 28 October 1939; appointed second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 4 August 1943.

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

Samuel M. Driver, Judge Advocate.

(On Leave), Judge Advocate.

F J Lotthus, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 7 AUG 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 Alvin C. Boling (0-1323784), 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 married a second time on 6 February 1944 while his lawful wife was living (Spec., Chg. II) and was absent without leave from his organization from about 4 April to about 10 May 1944 (Spec., Chg. I). The record discloses that the manner of performance of duty by accused has been superior. In addition to the offense of wrongful marriage, which was charged under the 95th Article of War, the accused also was absent without leave for one month and six days and offered no explanation therefor although he testified as a witness at the trial. I recommend that the sentence to dismissal, total forfeitures, and confinement at hard labor for eight years be confirmed, but, in view of all of the circumstances, that the confinement be reduced to two years, the forfeitures remitted and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted and confinement reduced to two years. G.C.M.O. 455, 26 Aug 1944)

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

SPJGK
CM 258205

12 JUL 1944

UNITED STATES v. Second Lieutenant LEONARD C. GREEN (O-676473), Air Corps.	ARMY AIR FORCES EASTERN EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Lockbourne Army Air Base, Columbus, Ohio, 27 May 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, 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 Leonard C. Green, Air Corps, Section B-207, 2114th Army Air Forces Base Unit, Army Air Forces Pilot School (Specialized Four-Engine), Lockbourne Army Air Base, Columbus 17, Ohio, then a member of Headquarters and Headquarters Squadron, 44th Pilot Transition Training Group (Four-Engine), Army Air Forces Pilot School (Specialized Four-Engine), Lockbourne Army Air Base, Columbus 17, Ohio, did wrongfully fail to maintain a sufficient bank balance to pay a certain check, to wit: "Huntington National Bank of Columbus, Columbus, Ohio, April 25, 1944, No.____, Pay to the order of Officer's Mess, $10.00, Ten & no/100 Dollars," Signed "Leonard C. Green, O-676473, 2nd Lt, A.C.", made and uttered by said Second Lieutenant Leonard C. Green.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by general court-martial for absence without leave (10 days) in violation of Article of War 61, forgery of a check in the sum of $25 in violation of Article of War 93, fraudulently uttering the same check in violation of Article of War 96, and passing four worthless checks in the total amount

of $207.62, in violation of Article of War 96. For these offenses he was sentenced to be reprimanded, to be restricted to the limits of Lockbourne Army Air Base for three months and to forfeit $75 of his pay per month for 12 months. The sentence was adjudged 16 February 1944 and on 17 February the convening authority approved and ordered the execution of the sentence. In this case the accused 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, remitted the confinement imposed, and forwarded the record of trial for action under Article of War 48.

3. The evidence is as follows:

The accused, a second lieutenant, Air Corps, was a student at Army Air Forces Pilot School, Lockbourne Army Air Base, Columbus, Ohio. On 25 April 1944, in exchange for cash and merchandise accused gave to the officers' mess at the Lockbourne Army Air Base his personal check on the Huntington National Bank of Columbus, Ohio, in the amount of $10. The check was deposited by the officers' mess in the Ohio National Bank the 26th of April 1944 and was returned by that bank on 28 April 1944. Major Henry C. McCown, secretary and treasurer of the officers' club and mess, received notice of the return of the check and of its being charged against the club's account on 29 April 1944, which was a Saturday. On Monday, 1 May 1944, the accused, who had been informed by Major McCown's office of the return of the check, went to see Major McCown and expressed himself "as being most desirous to make the check good". Major McCown stated that the accused at this time had the cash for the payment of the check, and that he (Major McCown) suggested to accused that the check had been returned through an error on the part of the bank (R. 34). Nevertheless the accused was denied the privilege of making good the check (R. 30-35). The assistant cashier of the Huntington National Bank identified the original ledger sheet of the bank pertaining to the accused's account, photostatic copy of which was introduced in evidence and attached to the record as Exhibit A. The witness also identified the check (Ex. B) and stated that it was received by his bank for payment on 27 April 1944 and returned unpaid because on that date the credit balance of accused was only $7.93. In this connection witness stated that this was the only instance in which the accused's bank balance was inadequate to meet any and all checks drawn against the account.

First Lieutenant Prentiss G. Scudder, Air Corps, identified a signed statement which he had obtained from accused in the course of the official investigation (R. 39, Ex. C). In this statement accused admitted the negotiation of the check and asserted that he had tried to keep an accurate account of his bank balance. He also claimed that on the day the check was given his records indicated a credit balance of approximately $17, and contended that the entire transaction was the result of an honest

mistake.

Defense.

First Lieutenant Edward W. Olson testified that he was in charge of the flight in the trainer hangar, Lockbourne Army Air Base, Columbus, Ohio, and that as such the accused was under his supervision. Witness stated that on the afternoon of 29 April he observed the accused in conversation over the telephone and immediately upon the termination of the telephone conversation the accused approached him and stated that one of his checks had been returned. In the language of witness -

> "* * * he [accused] seemed very confused and amazed about it. He didn't see how in the world it came back. * * * and he couldn't understand it" (R. 41-42).

The accused after being fully advised of his rights, testified under oath. He confirmed his written statement introduced by the prosecution (Ex. C), and reaffirmed his care in the keeping of his bank account. He stated that he had maintained an account with the Huntington National Bank since 17 March 1944; that when the check was issued he honestly believed there were ample funds to his credit to cover the check, and, in effect, stated that he could only attribute the failure in this regard to an inadvertence in calculating his bank balance. Accused stated that he learned of the return of the check on Saturday afternoon, 29 April 1944, in a telephone conversation with Corporal Winifred I. Petro, bookkeeper in the officers' mess. He offered to pay the check that afternoon, but Corporal Petro suggested that he wait until the following Monday to make the check good (R. 43-46). Corporal Petro testified and corroborated the testimony of the accused with respect to her telephone conversation with him (R. 46-48).

4. The evidence in this case is undisputed. The accused is charged under the 96th Article of War with wrongfully failing to maintain a sufficient bank balance to make good his personal check for $10. The check was issued on 25 April 1944. It was presented to the drawee bank on 27 April, and because the accused's balance on that date was only $7.93 the check was returned. When the accused was notified of the return of the check on Saturday afternoon, 29 April, he expressed surprise and offered to make it good that day, but was requested by the bookkeeper of the officers' mess to wait until Monday. Accordingly, on Monday, accused reported to Major McCown, secretary and treasurer of the officers' mess, ready, able, and anxious to make good the check, but he was not allowed to do so. The evidence shows that the accused had maintained a comparatively substantial checking account with the drawee bank since 17 March 1944. A photostatic copy of the bank's ledger sheet pertaining to

accused's account shows that from 17 March 1944 to 23 May 1944 accused's average daily balance was $277.70. Although the records of the bank disclose that his credit balance on 27 April was $2.07 short of the amount necessary to meet the check, the accused testified and we think the evidence shows that accused endeavored to keep an accurate record of his bank account; that when he gave the check he honestly believed his credit balance was sufficient to meet it, and that when he was advised of the return of the check he diligently and in good faith offered to make good the check. There is no evidence in this case of any service-discrediting conduct on the part of the accused, nor of any wrongful failure on his part to maintain a sufficient bank balance to meet his check. The accused contended and the evidence shows that the incident was the result of an honest mistake not caused by carelessness or neglect on the part of the accused. The Board of Review is of the opinion that the contention of the accused is well founded, and that accordingly there is no evidence upon which to support the findings of guilty and the sentence (CM 249232, Norren). The Board of Review has noted the previous conviction of the accused by a general court-martial, but a finding of guilty of the Charge and Specification in this case cannot be supported by the previous misconduct of the accused for which he has already been tried.

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

Irving G. Zoll, Judge Advocate.

Hermann Mayer, Judge Advocate.

Samuel Gomperson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 18 JUL 1944 - To Commanding General, Army Air Forces Eastern Flying Training Command, Maxwell Field, Alabama.

1. In the case of Second Lieutenant Leonard C. Green (O-676473), Air Corps, I concur in the foregoing opinion of the Board of Review holding the record of trial legally insufficient to support the findings of guilty and the sentence, and for the reasons stated I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (M.C.M., 1928, p. 216), the record of trial is returned for your action upon the findings and sentence and for such further action as you may deem proper.

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

(CM 258205).

Myron C. Cramer

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

1 Incl.
Record of trial.

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

SPJGN
CM 258234

29 JUN 1944

UNITED STATES	)	92ND INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Huachuca, Arizona, 3 June 1944. Dismissal, total forfeitures and confinement for ten (10) years.
Second Lieutenant THOMAS A. BADGETT (0-1303287), Company F, 365th Infantry.	)	

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

---

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Second Lieutenant Thomas A. Badgett, Company "F", 365th Infantry, did, without proper leave, absent himself from his post and duties at Company "F", 365th Infantry, Louisiana Maneuver Area and Fort Huachuca, Arizona from about 2400 on or about 4 April 1944, to about 1300 on or about 21 April 1944.

Specification 2: In that Second Lieutenant Thomas

> A. Badgett, Company "F", 365th Infantry, did at Fort Huachuca, Arizona, without proper leave absent himself from his command from about 21 April 1944, to about 24 April 1944.

The accused pleaded guilty to the Charge and the Specifications thereunder. He was found guilty of the Charge and Specifications, as he had pleaded, and was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced no evidence. The court's findings were based on the accused's pleas of guilty (R. 6).

4. For the defense, the accused who had "been advised of his rights under the 24th Article of War" and understood "his right to speak or remain silent", was sworn and submitted an affidavit which reads in part as follows:

> "1. Prior to this statement I have requested that I stand trial by courts-martial rather than to accept punishment under the 104th A.W.
>
> "2. I further request that I be dismissed from the service for the following reasons: - (1) The desire to fulfill those obligations and responsibilities entrusted in me upon receipt of my commission (10 Dec. 1942), have long been a thing of the past; (2) I have lost all incentive and enthusiasm necessary to the molding of good soldier material and combat leadership.
>
> "3. The reasons as stated in par. 2 above, were the basis for my violation of A.W 61 and I believe that my retention in the service would be more a liability than an asset to the government of the United States."

The affidavit was made of his own free will and accord. When asked by the court what he meant in the affidavit by the words "those obligations

and responsibilities entrusted in [him] upon receipt of [his] commission have long been a thing of the past", the accused stated that the words were "just what" he meant and that "those obligations have failed * * * [and] no longer seem important to [him]" (R. 6-8; Def. Ex. 1).

5. The Specifications respectively allege absences without leave "from about 2400 on or about 4 April 1944, to about 1300 on or about 21 April 1944" and "from about 21 April 1944, to about 24 April 1944". The first unauthorized absence is alleged to have occurred at "Company 'F', 365th Infantry, Louisiana Maneuver Area and Fort Huachuca, Arizona", and the second unauthorized absence "at Fort Huachuca, Arizona". Due to the accused's pleas of guilty, the prosecution introduced no evidence. The sworn written statement and testimony of the accused were in no respect at variance with his pleas, which pleas are therefore deemed to have been providently entered (see Dig. Op. JAG, 1912-40, sec. 378 (2) and (3)). Under the circumstances, the court was justified in finding the accused guilty of the Charge and Specifications (CM 236359, Bulletin, JAG, Vol. II, No. 7, sec. 416 (3)).

6. The accused is 25 years of age. War Department records show that the accused was inducted on 10 March 1941 and served with Company K, 372nd Infantry, in the highest grade of sergeant; was commissioned on 10 December 1942 upon graduation from Officers' Candidate School, Fort Benning, Georgia.

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. Any sentence, except death, may be imposed upon conviction of absence without leave occurring after 2 December 1942, in violation of Article of War 61

Abner E. Lipscomb, Judge Advocate.

Walton Shuffield, Judge Advocate.

(On Leave), Judge Advocate.

SPJGN
CM 258234

1st Ind.

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

5 AUG 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 Thomas A. Badgett (0-1303287), Company F, 365th 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 be confirmed but that the confinement imposed be reduced to two years, that the sentence as thus modified be ordered executed and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

Myron C. Cramer

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

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

(Sentence confirmed but confinement reduced to two years. G.C.M.O. 510, 25 Sep 1944)

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

SPJGQ
CM 258235

5 JUL 1944

UNITED STATES	92ND INFANTRY DIVISION
v.	Trial by G.C.M., convened at Fort Huachuca, Arizona, 11 May 1944. Dismissal and fine of $500.
Second Lieutenant EDWARD J. ARMSTRONG (0-1301082), 371st Infantry.	

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL 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 85th Article of War.

Specification: In that Second Lieutenant EDWARD J. ARMSTRONG, 371st Infantry, was at the 92nd Infantry Division Military Police Orderly Room, Fort Huachuca, Arizona, on or about 0200 July 18, 1943, found drunk while on duty as 371st Infantry Officer of the Day.

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

Specification: (Finding of not guilty.)

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of the Specification of Charge II and of Charge II, but guilty of Charge I and its Specification. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service and to pay to the United States a fine of Five Hundred dollars ($500). The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

On the night of 17-18 July 1943, the accused was Regimental Officer of the Day of the 371st Infantry (Pros. Ex. A; R. 26). At about 2:00 a.m. on 18 July 1943, the accused, driving a jeep and accompanied by a sergeant, stopped in front of and across the street from the military police orderly room, Fort Huachuca, Arizona (R. 7-9). The accused got out of the jeep, "walked around in front of the jeep, up

to the radiator and he urinated right in front of the light" (R. 10-11). The headlights were burning (R. 9). There is an officer's latrine in the orderly room (R. 18). The accused then proceeded toward the orderly room and "as he came across the street, he staggered" (R. 11). After he entered the orderly room, and while he was talking to the enlisted man in charge, he "kept weaving back and forth, and he got hold of the railing" to brace himself (R. 11). There is a conflict of testimony among the prosecution's witnesses as to whether accused's speech was affected at this time. One witness (Major William M. Campbell, Provost Marshal of the 371st Infantry) testified that accused "was talking very indistinctly, as though his tongue was thick from something" (R. 17), while another witness (Private Robert L. Wilson), who was also present at the time, testified that accused's speech was not "blurry" (R. 11). In response to a direct question from Major Campbell as to whether he had been drinking, the accused at that time replied "Yes, sir, I drank a couple of beers over at the Officer's Club" (R. 17). The accused was armed with a .45 automatic pistol (R. 20). Major Campbell testified that the accused "wasn't drunk and he wasn't sober." The test for drunkenness, within the meaning of Article of War 85, was read to the witness (Major Campbell) and he thereupon testified as follows: "Well, sir, from that, he was drunk, sir" (R. 23). The accused had been summoned to the orderly room to obtain the release of a truck which belonged to his organization and which had been brought in by an MP who had arrested its drunken driver (R. 8). The enlisted man in charge of the orderly room refused to release the truck to the accused without the personal approval of the Provost Marshal. Hence the occasion of Major Campbell having been called to the orderly room at that hour of the night (R. 10). Major Campbell, after talking with the accused a few minutes and hearing that he had been drinking, said to him "You go back to your organization and report this, you are in no condition to be on guard duty here" (R. 17). As the accused left the orderly room, Major Campbell instructed him not to drive the jeep himself but to let the sergeant, who was with him, drive it (R. 17-18).

4. Evidence for the defense:

The accused, after having his rights as a witness explained to him, elected to be sworn as a witness and to testify in his own behalf. On the night of 17-18 July 1943, the accused was Regimental Officer of the Day of the 371st Infantry. During the evening he was carrying on his duties as Officer of the Day, and was at the guardhouse writing letters when a runner came from Regimental Headquarters and told the accused that the Duty Officer at Headquarters wished to see him (R. 26). Upon reporting to Regimental Headquarters the accused was advised by the Duty Officer that a telegram was held at the 370th Infantry for Lieutenant Rowe, the latter being a member of the 371st Infantry, and accused was asked to go and fetch the telegram (R. 26). When the accused returned with the telegram he was requested by the Duty Officer to deliver it to Lieutenant Rowe. A search of the barracks failed to locate Rowe, but one of the officers in the barracks said that Rowe was at the Mountain View Officers Club. Accused then repaired to the

Club, found Rowe, gave him the telegram and was asked by Rowe and his party to sit down and have a beer. Accused at first declined, and then did accept one glass of beer. He "stayed there three or four minutes and went and inspected the guard" (R. 27). Although the Officers Club was outside of the regimental area (something less than 100 yards), the accused went to the Club at another time during the night (R. 35). No one directed him to go to the Club the second time (R. 34). Accused testified that he had only one glass of beer and no other alcoholic beverage that night (R. 28-29, 32-33). He denied telling the Provost Marshal that he had had two glasses of beer, but testified that he told him that he had had one glass of beer (R. 32). He denied that he urinated in front of the jeep (R. 29).

The Sergeant of the Guard saw the accused at the guardhouse at 10:00 p.m. (R. 44), and again at 2:00 a.m. (R. 41, 44), when the accused stayed in the guardhouse about 30 minutes (R. 44). There was nothing about the accused to suggest to the sergeant that the accused had been drinking (R. 45). He acted normal (R. 47), and no odor of alcohol was detected on his breath (R. 42, 47).

5. The Specification of Charge I alleges that the accused "was at the 92nd Division Military Police Orderly Room, Fort Huachuca, Arizona, on or about 0200 July 18, 1943, found drunk while on duty as 371st Infantry Officer of the Day". The elements of the offense are being found drunk on duty (MCM, 1928, par. 145). It is not disputed that the accused was on duty, as alleged, during the night of 17-18 July 1943. On the question, however, as to whether he was drunk at or about the time alleged, the evidence is squarely contradictory. Two eye witnesses for the prosecution gave testimony which would support, if not compel, the inference that he was drunk at the time and place alleged. He staggered when he walked, he talked with a thick tongue, he held on to a rail to brace himself while standing, he smelled of alcohol and, without any apparent excuse (there being a latrine nearby), he urinated in the street in front of the orderly room and in the glare of the headlights of a jeep parked there. On the other hand, the accused, himself, testified in the most direct terms, that he had only one glass of beer and no other intoxicant during the night in question and the preceding day, that he did not commit the nuisance alleged and that he was not drunk; and the Sergeant of the Guard, testifying for the defense, stated that he saw the accused for about 30 minutes at or near 2 a.m., on the night in question, that there was nothing about the accused to suggest to the sergeant that the accused had been drinking, that he acted normal and that no odor of alcohol was detected on his breath.

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 finding of guilty of Charge I and its Specification, that the court accepted the testimony of the witnesses for the prosecution.

Drunkenness, within the meaning of the 85th Article of War, 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" (par. 145).

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

6. The records of the War Department show that this officer is 24 years of age. He was born and reared in Toledo, Ohio, and graduated from the Waite High School there in 1939. During the next year he was a laborer for a construction company. From 9 July 1939 until 10 March 1941 he was a member of the Ohio National Guard. He was inducted into the Army 10 March 1941, and has been on active duty since that date. He graduated from the Infantry School at Fort Benning, Georgia, on 26 November 1942, and was commissioned a second lieutenant on that date.

7. The court was legally constituted and had jurisdiction over the accused and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The sentence imposed by the court is authorized upon a conviction of a violation of Article of War 85, and dismissal is mandatory upon a conviction of a violation, in time of war, of that Article.

(on leave), Judge Advocate.

William H. Gaunbrell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 31 JUL 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Edward J. Armstrong (0-1301082), 371st Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Dismissal is justified but the fine appears to be unnecessary. I recommend that the sentence be confirmed but that the fine 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 of trial to the President for his action, and a form of Executive action designed to carry into effect the above recommendation, should such recommendation meet with approval.

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

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

(Sentence confirmed but fine remitted. G.C.M.O. 451, 26 Aug 1944)

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

SPJGV
CM 258265

1 JUL 1944

UNITED STATES	)	92D INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Huachuca, Arizona, 19 May 1944. Dismissal, total forfeitures and confinement for one (1) year.
Second Lieutenant ERNEST L. SHANE (0-1319448), Infantry.	)	

OPINION of the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, 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 61st Article of War.

Specification 1: In that Second Lieutenant Ernest L. Shane, 371st Infantry, did, without proper leave, absent himself from his organization at Louisiana Maneuver Area from about 1800, 19 February 1944 to about 0600, 21 February 1944.

Specification 2: In that Second Lieutenant Ernest L. Shane, 371st Infantry, did, without proper leave absent himself from his organization at Louisiana Maneuver Area from about 0600, 27 February 1944 to about 0630, 12 March 1944.

He pleaded not guilty to the Charge and both Specifications and was found guilty of the Charge and both Specifications. No evidence of prior convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

First Lieutenant Magellan C. Mars testified that he as commanding officer of accused's company gave accused permission to be absent on the night of 26 February 1944, having first informed all his commissioned and noncommissioned officers in a group, including accused, that they were to report back from the "break" given on the 26th, not later than 0600 on the morning of 27 February. The accused did not report back until 12 March 1944 (R. 7-9). The accused's unauthorized absence from 27 February to 12 March 1944 was further established by extract copy of morning report of accused's organization showing him absent without leave for this period (R. 8; Ex. A).

Lieutenant Mars also testified that accused was an excellent officer in performance of his work and he would like to have him in his company (R. 9, 12).

It was stipulated that if Captain Leonard N. James were present he would testify that on the afternoon of 19 February 1944 accused asked him for permission to have the afternoon off to go to town. He told accused he would give him permission to see the battalion executive officer or the battalion commander. Sometime later he checked for the accused. He then checked with the battalion commander and the battalion executive officer but the court stated that the replies received by witness to these inquiries would not be considered (R. 11). He then had the area checked and could not find accused, and thereupon instructed the first sergeant to carry accused as absent without leave. The next time accused was seen was on 21 February 1944. It was further stipulated that if First Sergeant James A. Poitier were present he would testify that he entered the accused on the company's morning report as AWOL as of 1800, 19 February 1944. The next time the sergeant saw the accused was on 21 February 1944. This period of accused's unauthorized absence was likewise established by introduction into evidence of extract copy of morning report of accused's organization showing his unauthorized absence for said period (R. 12; Ex. B).

During the time of accused's two unauthorized absences his organization was on maneuvers in the Louisiana Maneuver Area.

4. No evidence was presented by the defense, and accused after having his rights as a witness explained elected to remain silent.

5. The evidence is conclusive that accused absented himself without leave from his organization in the Louisiana Maneuver Area from

19 February to 21 February 1944, and a second time from 27 February to 12 March 1944.

6. War Department records show that accused is 30 years of age. He graduated from the Wathena High School, Wathena, Kansas. He entered the military service 25 July 1942, and after completing the Officers' Motor Maintenance Course, The Infantry School, Fort Benning, Georgia, was appointed second lieutenant, Army of the United States, 13 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 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 61.

Thomas N. Tapley, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert E. Trevethan, Judge Advocate.

SPJGV
CM 258265

1st Ind.

War Department, J.A.G.O. 4 AUG 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 Ernest L. Shane (0-1319448), 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, to support the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution. I further recommend that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 457, 26 Aug 1944)

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

28 Jul 1944

SPJGH
CM 258314

UNITED STATES	)	10TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Camp Hale, Colorado, 16-17
Second Lieutenant HAROLD	)	June 1944. Dismissal, total
B. REESER (0-1174116),	)	forfeitures and confinement
Field Artillery.	)	for ten (10) years.

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 58th Article of War.

Specification: In that Second Lieutenant Harold B. Reeser, 605th Field Artillery Battalion, did, at Camp Hale, Colorado, on or about 11 October 1943, desert the service of the United States, and did remain absent in desertion until he was apprehended at Los Angeles, California, on or about 4 December 1943.

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

Specification 1: In that Second Lieutenant Harold B. Reeser, 605th Field Artillery Battalion, did, at Camp Hale, Colorado, on or about 1 October 1943, feloniously embezzle by fraudulently converting to his own use a certain check in words and figures as follows, to wit:

Colorado Springs, Colo., Sept. 16 1943 No.____

THE FIRST NATIONAL BANK 82-2.10.
of Colorado Springs

Pay to the
order of 10th Division Artillery Officers Mess $32.20

Thirty-two & 20/100 ———————————— Dollars

James T Ross Jr.
1st Lieut., 605th F.A. Bn.

of the value of thirty-two dollars and twenty cents ($32.20), the property of the 10th Division Artillery Officers' Mess, entrusted to him by said 10th Division Artillery Officers' Mess.

Specification 2: Similar to Specification 1, but alleging embezzlement of a check dated 1 October 1943 in the amount of $23.

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

Specification 1: In that Second Lieutenant Harold B. Reeser, 605th Field Artillery Battalion, did, at Colorado Springs, Colorado, on or about 12 October 1943, with intent to defraud, wrongfully and unlawfully make and utter to Hibbard & Company, Colorado Springs, Colorado, a certain check in words and figures as follows, to wit:

Colorado Springs, Colo., 12 October 1943 No. 34

THE FIRST NATIONAL BANK 82-2.10.
of Colorado Springs

Pay to the order of Hibbard and Company $32.18

Thirty two and ----------18/100 Dollars

Harold B. Reeser
Harold B. Reeser
2nd Lt., 605th F.A. Bn.

and by means thereof did fraudulently obtain from said Hibbard & Company merchandise of the value of about thirty-two dollars and eighteen cents ($32.18), he, the said Second Lieutenant Harold B. Reeser, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank of Colorado Springs, Colorado, for the payment of said check.

Specification 2: Similar to Specification 1, but alleging check dated 21 October 1943 for $20, made at San Francisco, California, to the order of cash, uttered to H.A. Maynard and the fraudulent obtaining of $20.

Specification 3: Similar to Specification 1, but alleging check dated 22 October 1943 for $20 made at San Francisco, California, payable to and uttered to H.A. Maynard and the fraudulent obtaining of $20.

Specification 4: Similar to Specification 1, but alleging check dated 10 November 1943 for $20 made at Los Angeles, California, to the order of Cash, uttered to the Canadian Bank of Commerce and the fraudulent obtaining of $20.

Specification 5: Similar to Specification 1, but alleging check dated 12 November 1943 for $20, made at Los Angeles, California, to the order of cash, uttered to the Canadian Bank of Commerce and the fraudulent obtaining of $20.

Specification 6: Similar to Specification 1, but alleging check dated 18 November 1943 for $69.19, made at San Francisco, California, payable to Hastings, uttered to Hastings Clothing Company and the fraudulent obtaining of $69.19 in merchandise.

Specification 7: Similar to Specification 1, but alleging check dated 18 November 1943 for $30, made at San Francisco, California, payable to and uttered to the Palace Hotel Company and the fraudulent obtaining of $30.

Specification 8: Similar to Specification 1, but alleging check dated 20 November 1943 for $25, made at San Francisco, California, payable to and uttered to the Palace Hotel Company and the fraudulent obtaining of $10.50 cash and $14.50 credit.

Specification 9: Similar to Specification 1, but alleging check dated 20 November 1943 for $30, made at San Francisco, California, payable to and uttered to the Palace Hotel Company and the fraudulent obtaining of $30.

Specification 10: Similar to Specification 1, but alleging check dated 23 November 1943 for $20, made at San Francisco, California, payable to and uttered to H. Liebes & Company and the obtaining of $20.

Specification 11: Similar to Specification 1, but alleging check dated 25 November 1943 for $25, made at San Francisco, California, payable to and uttered to the Hotel Sir Francis Drake and the obtaining of $25.

Specification 12: Similar to Specification 1, but alleging check dated 28 November 1943 for $28.84, made at San Francisco, California, payable to and uttered to the Drake Wiltshire Hotel in payment of an account.

Specification 13: In that Second Lieutenant Harold B. Reeser, 605th Field Artillery Battalion, did, at Camp Hale, Colorado, on or about 30 September 1943, with intent to deceive Brigadier General David L. Ruffner, Headquarters 10th Infantry Division Artillery, Camp Hale, Colorado, officially state to said Brigadier General David L. Ruffner that his, Lieutenant Reeser's mother was dead, which statement was known by said Second Lieutenant Harold B. Reeser to be untrue in that his mother was then living.

He pleaded to all Charges and Specifications not guilty by reason of temporary insanity. The motion and plea of not guilty by reason of temporary insanity were not sustained and he was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for twenty (20) years. The reviewing authority approved only so much of the sentence as provides for dismissal, total forfeitures and confinement at hard labor for ten (10) years and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution:

a. Specification 13, Charge III: On 30 September 1943 the accused went to the office of Brigadier General David L. Ruffner, Commanding Officer of the 10th Infantry Division Artillery, Camp Hale, Colorado, and requested an emergency leave to fly to Florida, stating that his mother was "dead or dying". The request was of "such a serious nature" that General Ruffner granted the leave and notified the personnel section of the 605th Battalion, the organization to which accused belonged, of his approval. The written request (Ex. 15) for leave, dated 30 September 1943, and signed by accused shows that the purpose of requesting leave was because of the death of his mother. On or about 3 January 1944, the accused, after being advised of his rights, stated to Lieutenant Colonel James P. Pierson, his immediate commanding officer, that the statement he made in applying for leave, that his mother was dead, was "absolutely false", that he made the statement because he was not feeling well and wanted to get away, and that he "felt that was the way to do it". After accused had been granted leave and while he was still away from his organization Colonel Pierson received a letter from the mother of accused (R. 31-33).

b. Specifications 1 and 2, Charge II: During the month of September 1943 and at the time he went on leave the accused was the 10th Division Artillery mess officer. Captain (then Lieutenant) James T. Ross gave accused his check (Ex. 1a) dated 16 September 1943 payable to the 10th Division Artillery Officers' Mess in the sum of $32.20 for his August mess bill. Captain Ross delivered a similar check (Ex. 2) dated 1 October 1943, to accused in the sum of $23 for his September mess bill. He received a second bill for his September mess account as there was no record of it having been paid. An audit of the books of the 10th Division Artillery Officers' Mess showed that the two

checks given to accused by Captain Ross had not been deposited to the account of the mess fund although the payment of $32.20 had been credited on the ledger of the mess. When Captain Ross produced the cancelled check for $23 showing payment on his September mess bill he was given credit in that amount for the second payment he had made. The checks (Exs. 1a and 2) were paid by the drawee bank 21 October 1943. They bore the indorsement of the 10th Division Artillery Officers' Mess followed by the name of accused and the indorsement of Bank of America of California, Sacramento, California (R. 35-39; Ex. 19).

c. Charge I: An extract copy (Ex. 16) of the morning report of Headquarters and Service Battery, 605th Field Artillery Battalion shows the accused from leave to absent without leave 11 October 1943. An extract copy (Ex. 17) of the morning report of Ninth Service Command Military Police Station, Los Angeles, California, shows accused to confinement 4 December 1943 and from confinement to released with guard 21 December 1943. An extract (Ex. 18) of the morning report of Headquarters and Service Battery, 605th Field Artillery Battalion shows accused to confinement, Station Hospital, Camp Hale, Colorado, 24 December 1943. Accused had been granted an additional four days extension to his leave but had no authority to be absent from 11 October to 4 December 1943 (R. 32-34).

d. Specification 1, Charge III: Mr. Howard E. Smith, credit manager, Hibbard and Company, Colorado Springs, Colorado, testified by deposition that on 12 October 1943, accused presented his check (Ex. 3) to be cashed. Accused had a credit account with the company and did not have to furnish identification. He stated that the reason he was cashing the check was because the banks were closed. He asked for $20 in cash, remarked "I suppose I have that much in the bank", looked at his check book and said he had. The check dated 12 October 1943 drawn on the First National Bank of Colorado Springs, in the sum of $32.18, was cashed, $12.18 being applied in payment of his account and the balance of $20 being given him in cash. The check when presented for payment was returned unpaid and marked "closed". (R. 39)

e. Specifications 2 and 3, Charge III: Mr. Harold A. Maynard, San Francisco, California, testified by deposition that on 21 October 1943 he cashed a check (Ex. 4) for accused, which was dated the same date, payable to cash and in the sum of $20, and that he gave accused the amount of the check from the company funds of the Pan American Airway. On 22 October 1943 he indorsed another check (Ex. 5) for accused, which was dated the same date, payable to H. A. Maynard and in the same amount. This second check was cashed from the personal account of Mr. Maynard in the "Wells Fargo Bank and Union Trust Co.". Both checks were drawn on the First National Bank of Colorado Springs and when presented for payment were returned unpaid with the notation thereon, "short". Accused established his identity through his official identification card "WD AGO Form 65-1" (R. 39).

f. Specifications 4 and 5, Charge III: Mr. R. W. Fowler, Cashier, Canadian Bank of Commerce, Los Angeles, California, testified by deposition that on 10 November 1943 he cashed a check (Ex. 6) in the sum of $20 for accused and on 12 November 1943 cashed another check (Ex. 7) in the same amount. Both checks were dated as of date cashed, were payable to "cash" and drawn on the First National Bank of Colorado Springs. Accused identified himself and received the cash. He stated that he was on leave and needed the money to return to his organization stationed at Camp Hale, Colorado. The checks were presented for payment and returned unpaid, marked "account closed" (R. 40).

g. Specification 6, Charge III: Mrs. Glyde Ingham, employee of Hastings Clothing Store, San Francisco, California, testified by deposition that on or about 18 November 1943 she approved a check (Ex. 8) in the sum of $69.19 given by accused for the purchase of clothing. The check, dated 18 November 1943 was drawn on the First National Bank of Colorado Springs and made payable to the order of "Hastings". When presented for payment the check was returned unpaid with the notation "Protested For Non-Payment" and "acct. closed" (R. 40).

h. Specifications 7, 8 and 9, Charge III: The depositions of Miss Irene Lundberg and Mr. Lucius B. Stroupe, employees of the Palace Hotel, San Francisco, California, show that on 18 and 20 November 1943, accused cashed three checks at the hotel, drawn on the First National Bank of Colorado Springs and payable to Palace Hotel Company of San Francisco in amounts as follows: check (Ex. 9) dated 18 November 1943 for $30; check (Ex. 10) dated 20 November 1943 for $25; and check (Ex. 11) dated 20 November 1943 for $30. Accused identified himself by his "AGO" card and stated to Mr. Stroupe that his home was in Miami, Florida, that he was stationed at Camp Hale, Colorado and on leave. Accused received $10.50 cash and a credit of $14.50 on his hotel account for the $25 check and cash for the others. The checks were deposited in the Crocker First National Bank of San Francisco and were returned unpaid, each bearing the notation "acct. closed" (R. 41).

i. Specification 10, Charge III: Miss Anna W. Rose, credit manager of H. Liebes and Company, San Francisco, California, testified by deposition that on 23 November 1943 she approved a check for accused in the amount of $20. The check (Ex. 12) dated 23 November 1943, drawn on the First National Bank, Colorado Springs, Colorado, was made payable to "H. Liebes & Co". Accused identified himself by his officers' card and received $20 in currency. The check when presented for payment was returned unpaid, with the notation "acct closed" (R. 41).

j. Specification 11, Charge III: Miss Zenida London, employee of the Hotel Sir Francis Drake, San Francisco, California, testified by deposition that accused presented his check (Ex. 13) to be cashed. The check dated 25 November 1943, in the sum of $25, payable to Hotel Sir Francis Drake

was drawn on the First National Bank, Colorado Springs, Colorado. Accused identified himself with his "W.D. AGO" card and received $25 in currency. The check when presented for payment was returned unpaid, and was marked "acct closed" (R. 41).

k. Specification 12, Charge III: Mr. John B. Quigley, manager of the Drake-Wiltshire Hotel, San Francisco, California, testified by deposition that the hotel accepted a check (Ex. 14) from accused for $28.84. The check, given in payment of his hotel account was dated 28 November 1943, drawn on the First National Bank, Colorado Springs, Colorado, and made payable to Drake-Wiltshire Hotel. The check when presented for payment was returned unpaid with the notation "acct closed" (R. 42).

Mr. Henry J. Weberbauer, chief bookkeeper of the First National Bank of Colorado Springs, Colorado Springs, Colorado, testified by deposition that accused had a checking account in the bank from 6 March 1943 until 5 November 1943 when it was closed by a service charge of the bank for 23 cents. He stated that the twelve checks (Exs. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14; Specs. 1 to 12) were presented to the bank for payment and payment was refused. Three checks (Exs. 3-5) were not paid because of insufficient funds and payment on nine checks (Exs. 6-14) was refused because the account had been closed (R. 42).

4. For the defense: Lieutenant Colonel James P. Pierson, a member of the 10th Division Artillery mess council, testified that accused had made complete restitution on his indebtedness to the 10th Division Artillery Officers' Mess (R. 34).

The accused identified money order receipts (Exs. C, D and E received in evidence but not attached to record of trial) as representing payments to the Canadian National Bank for $40, to H. A. Maynard for $40, and to Hibbard Company for $32.18. On examination by the court accused stated that the check he issued to Hastings in San Francisco, California (Spec. 6, Chg. III) was for the purchase of military clothing (R. 42-43).

5. a. After the defense entered a plea of not guilty by reason of temporary insanity the court received evidence on that issue. The accused testified that when he was seventeen years of age he went on an errand for his mother and failed to return. He was gone about four days, had no recollection of being away from home, and subsequently "came to himself" in a drug store about twenty miles from home and fainted. In 1931 he had a similar attack and found himself in a strange place about six miles from a station where he had been waiting for a bus. This attack was also followed by a fainting spell and he was taken to the Boston General Hospital for observation. In 1938 there was a recurrence of the same condition accompanied by fainting and a severe headache. On this occasion he was taken to the Johns Hopkins Hospital in Baltimore. The accused stated that on 4 December 1941 he left his home in Miami, Florida to go to work, but for

"no apparent reason" went to Jacksonville, Florida, instead. He traveled up and down the coast, worked for a time in West Palm Beach, but for the most part the events "were hazy and some totally blank". He wired his father for money and returned home but "again had a lapse of memory" and left home. He learned later that during this attack he cashed a large number of checks. The accused stated that after receiving his draft notice he went to "Dr. Anderson", a psychiatrist in Miami, Florida, and asked if he should inform "the authorities what happened" to him. Dr. Anderson advised him that his condition was a "hysterical state" and the Army would probably be the best thing for him (R. 7-8).

The accused further testified that he had no additional attacks until the one in September 1943. His first symptoms were severe headaches, "periods of absent mindedness", a feeling of "claustrophobia", of "forgetting where you are", followed by a period of "extreme frustration and anxiety". Knowing of his previous spells the accused thought he would try to get home and "wipe out this feeling". He had been granted leave a few weeks before so used the first excuse that "popped" into his mind to get away. His mother had been ill so he used the excuse that his mother was dead. The general granted him the leave and told him he could have an extension if necessary. His wife was pregnant and he took her to his home in Miami, Florida. Accused stated that on the return trip from Miami he recalled being in Chicago but remembered nothing of the trip from Chicago to Colorado Springs. The next accused remembered was awakening in a strange place about 19 November 1943 and from the name on the telephone book realized he was in Los Angeles, California. He wired his father for funds but did not recall receiving the money. He remembered nothing further until 1 or 2 December 1943 when he found himself walking along an unfamiliar street. A receipt in his pocket gave the name of a hotel in Los Angeles and upon going there he was greeted by the clerk and given a key to his room. He realized his status and again wired his father for money as he wanted to go to Miami to see Dr. Anderson and "lay some sort of foundation to build on". When he was walking to the telegraph company to see if the money had arrived he was stopped by a man "who had cashed the check", taken to the police station and was later turned over to the military police. Accused did not remember arriving in Los Angeles nor did he have "any memory" between the time he sent the second wire to his father and the time he came to himself "here" (R. 8-9, 15).

On cross-examination and examination by the court accused testified that one period of lapse of memory "in December", had lasted for over a month and his condition had been diagnosed as "hysterical amnesia". When he left Camp Hale accused was "agitated" but still had his memory and thought he could "whip the thing" by traveling. He did not seek advice of medical officers as to his condition as he was afraid he would be retired from the service. He was granted a five day leave and left Camp Hale on 1 October 1943. When the leave was about to expire he wired for an extension and was granted an additional three days. He was in Miami less than twenty-four

hours and left on 7 October to return to Camp Hale. Accused stated that while in Los Angeles he used his own name and was always dressed in uniform. There was less than one day that he knew what he was doing and that was when he wired his father for money on 19 November. He realized he was "AWOL" and needed funds to return to Camp Hale. He did not remember receiving the money but later found a money order receipt in his pocket dated 19 November (R. 9-15).

It was stipulated that Mrs. Catherine Argo, Director of Home Service, American Red Cross, Miami, Florida, would testify as contained in a report (Ex. A) of an investigation she had made. The investigation consisted of interviews with the wife and mother of accused, who substantiated his testimony with reference to his past history of amnesia. His mother stated that the first two attacks lasting for three days each occurred in 1926 and 1932. On each occasion accused collapsed and did not remember where he had been or what had happened. The third attack occurred in 1938 after he was married and his wife placed him in the psychopathic ward in Johns Hopkins Hospital for observation. His condition was diagnosed as "hysterical amnesia" caused by pressure on the brain resulting from a fall as a child at the age of five. According to the wife of accused the doctor also stated that the vertebra of accused "was embedded six inches further than it should be through the base of his skull". The fourth attack occurred in 1941 when accused started to work and never reached his destination. The report further stated that each attack "seems to cover a longer period of time and the loss of memory in each case has followed a severe headache" (R. 15-16).

A copy of the medical records of Dr. James L. Anderson, Miami, Florida, dated 25 February 1942, pertaining to accused was received in evidence by stipulation. The history of accused as set forth in the record was substantially as testified to by accused. Dr. Anderson diagnosed the condition of accused as "hysterical amnesia" (R. 16).

Captain Manuel Sall, Station Hospital, Camp Hale, Colorado, specialist in neurology and psychiatry, testified that accused was a patient of his at the station hospital. After a study of the "personality makeup" and history of accused he diagnosed him as a "hysterical amnesiac". He stated that the usual attack of amnesia rarely lasts beyond ten to twelve days and the average attack is of four days duration except in rare instances. One attack may follow another with a period of lucidity intervening and a person might later recall all incidents that occurred during the lucid interval. During a period of hysterical amnesia a person does not retain command of his faculties. On cross-examination and examination by the court Captain Sall testified that accused came under his care on 24 December 1943 and he saw him "sometimes" twice a day. He defined amnesia as a complete or partial loss of memory which may be due to something organic, as a blow on the head, or due to shock. The latter type of amnesia results from some situation with

which the victim is unable to cope successfully and gives rise to hysteria. It is called hysterical amnesia. He did not consider it unusual in cases of hysterical amnesia for the individual to retain his own identity, but stated that this situation would vary in the individual case. He stated that hysterical amnesiacs in attempting to evade problems with which they are unable to cope do their best to forget the problem and in doing so they forget everything else. Captain Sall further stated that his examination of the history and behavior of accused made him believe that during one of the attacks accused did not know the difference between right and wrong. He thought it unlikely, however, that an hysterical attack would persist continuously from 3 October to 14 December. He was also of the opinion that if accused passed bad checks during a true attack of hysterical amnesia he would be doing so "more or less automatically" and though he would act "plausible" to others at the time, he would not know the difference between right and wrong. According to Captain Sall "normal restraint is lost" and "discipline is gone" during a hysterical episode. Rare cases of hysterical amnesia on record have extended over a period of months but are not usual. Captain Sall could not state definitely but could only assume that accused was in a state of hysterical amnesia during the period he was absent from Camp Hale (R. 17-23).

b. The prosecution introduced in evidence the Proceedings of a Disposition Board (Ex. 1) composed of three medical officers who examined accused on 27 March 1944 at Fitzsimons General Hospital, Denver, Colorado. The report briefly reviewed a portion of the past history of accused and stated that accused admitted worry over errors in his accounts as mess officer prior to his present episode. It described accused as "a very dramatic, glib and superficially pleasant person". The Board was of the opinion that the amnesia of accused was largely retrospective, that after he ran away from an unpleasant situation and committed various misdemeanors, he claimed no memory for that period. The Board further stated in its findings that the "retention of personal identity is certainly not characteristic of any type of amnesia". The Board found the diagnosis of accused to be "Constitutional Psychopathic State, Inadequate Personality", and concluded that he was sane, competent and mentally responsible (R. 24).

Lieutenant Colonel James L. Hamilton, Assistant Chief of Medical Service, Fitzsimons General Hospital, testified that he sat in on a conference as one of the three members of the disposition board when accused was interviewed and had talked over the case with the "staff" on several occasions. None of the members of the disposition board were psychiatrists but accused had been examined in the presence of Colonel Hamilton by Captain H. D. Lederer, the hospital psychiatrist, and the board considered his diagnosis along with the records from Johns Hopkins and Baltimore Hospitals, as well as the report of Doctor James Anderson, in making their findings. Colonel Hamilton further stated that it was "unusual" in hysterical amnesia to "lose personal identity".

On further examination, however, he testified that the period during which a person has amnesia "is lost", and that he would be unable to retain his identity or "to remember things at all". He would not recommend accused for any type of military duty and did not believe accused would have been inducted into the Army or that he would have been commissioned had he revealed his past personal history (R. 23-28).

Major Lewis Thorne, psychiatrist for the 10th Infantry Division, was of the opinion that accused "may possibly suffer from periodical recurrences of hysterical amnesia", but believed there was insufficient evidence to show "a true amnesiac episode" during the absence of accused from Camp Hale. He believed that the evidence showed periods of lucidity and periods of only partial confusion, leading to the conclusion that accused must be considered sane, as there was incomplete evidence to show him "completely irresponsible". He stated that his examination of accused was "cursory" however, and he could not say "for sure" that accused was not in a "true hysterical state" (R. 28-30).

c. The court after receiving all of the evidence on the question of insanity denied the plea of not guilty by reason of temporary insanity, and did in effect, by this ruling, find that accused was sane at all material times. Such finding, in the opinion of the Board of Review, is clearly supported by the evidence.

6. a. Specification 13, Charge III: It is shown by the evidence that on 30 September 1943 the accused asked Brigadier General David L. Ruffner for a leave of absence, stating to General Ruffner as the reason for his request that his mother was dead. The mother of accused was not dead and he later admitted to his commanding officer that the statement was "absolutely false". The accused testified that he wanted to get away and said his mother was dead because it was the first excuse to enter his mind. The proof shows that accused made the false official statement to General Ruffner as alleged.

b. Specifications 1 and 2, Charge II: On 16 September 1943, while accused was the 10th Division Artillery mess officer, he received a check in the sum of $32.20 from Captain James T. Ross in payment of his August mess account and on 1 October 1943 he received another check for $23 from Captain Ross in payment of his September account. Neither of the checks was ever deposited to the account of the 10th Division Artillery mess fund. The checks, whose perforations show they were paid by the drawee bank on 21 October 1943, bore the indorsement of the 10th Division Artillery officers' mess followed by the name of accused and the indorsement of the Bank of California, Sacramento, California. The evidence sustains the finding that accused embezzled the two checks entrusted to his care by fraudulently appropriating them to his own use.

c. Charge I: The evidence shows that accused without proper leave was absent from his post and duties at Camp Hale, Colorado, from about

11 October to 4 December 1943. He obtained leave on 30 September 1943 by making a false statement that his mother was dead. He was granted a few days extension to his original leave and failed to return at the expiration of the extended leave. After a period of nearly two months absence the accused, according to his own testimony, was apprehended by a civilian in Los Angeles, California, was held for a time by civil authorities on a check charge and later released to military control. The evidence further shows that prior to going on leave the accused had embezzled two checks from the 10th Division Artillery officers' mess. The court in its ruling on the insanity plea negatived any justifiable explanation by accused of his prolonged absence. The Board of Review is of the opinion that the circumstances are sufficient to establish that accused had the necessary intent to desert the military service.

d. Specifications 1 to 12, Charge III: The evidence shows that between 12 October and 28 November 1943 the accused made and uttered twelve checks in the aggregate amount of $340.21, receiving therefor a total of $215.50 in cash, $69.19 worth of merchandise and $55.52 credit on his accounts. All of the checks were drawn on the First National Bank of Colorado Springs, Colorado Springs, Colorado, and issued to the payees in amounts as follows: $32.18 on 12 October 1943 issued at Colorado Springs to Hibbard and Company (Spec. 1); $20 on 21 October issued in San Francisco payable to "cash" (Spec. 2); $20 on 22 October issued at San Francisco to H. A. Maynard (Spec. 3); $20 on 10 November 1943 issued at Los Angeles payable to "cash" (Spec. 4); $20 on 12 November 1943 issued at Los Angeles payable to "cash" (Spec. 5); $69.19 on 18 November 1943, issued at San Francisco to Hastings (Spec. 6); $30 on 18 November 1943, issued at San Francisco to Palace Hotel Company (Spec. 7); two checks on 20 November 1943, for $25 and $30, issued at San Francisco to Palace Hotel Company (Specs. 8 and 9); $20 on 23 November 1943 issued at San Francisco to H. Liebes & Co. (Spec. 10); $25 on 25 November 1943, issued at San Francisco to Hotel Sir Francis Drake (Spec. 11); and $28.84 on 28 November 1943 issued at San Francisco to Drake-Wiltshire Hotel (Spec. 12).

The drawee bank refused payment on the first three checks (Specs. 1-3) because of insufficient funds and did not pay the remaining checks (Specs. 4-12) for the reason that it had closed the account. The accused was absent without leave when he issued the checks and apparently did not receive official notice from the bank that his account had been closed. An accused, however, is properly chargeable with knowledge of the status of his bank account, where, as here, the status of the account results from the acts of accused, such as drawing checks (CM 236070, Wanner, 22 B.R. 279). The evidence sustains the findings of guilty of the fraudulent issuance of checks as alleged in Specifications 1-12, Charge III.

7. Upon arraignment accused pleaded "Not guilty by reason of temporary insanity". After hearing the evidence on this plea, the court denied it.

Thereupon, without requiring accused to plead further, the prosecution introduced its proof on the merits. Although accused should have been called on to plead to the general issue, it is obvious that all parties treated the original plea as one of not guilty. In the opinion of the Board there was no prejudice to accused.

8. The accused is 35 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 9 April 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 26 November 1942.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 58th or 93rd Articles of War and mandatory upon conviction of a violation of the 95th Article of War.

Samuel M. Drivers, Judge Advocate.

Robert Johnson, Judge Advocate.

F J Letterhos, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 12 AUG 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 B. Reeser (0-1174116), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused deserted the service of the United States on 11 October 1943 and remained absent in desertion until he was apprehended on 4 December 1943 (Spec., Chg. I), embezzled two checks of the total value of $55.20 (Specs. 1 and 2, Chg. II), with intent to defraud, made and uttered between 12 October 1943 and 28 November 1943, twelve checks in the total sum of $325.71 on which payment was refused by the drawee bank because of insufficient funds or because his account had been closed (Specs. 1-12, Chg. III) and with intent to deceive and to obtain a leave of absence made a false official statement to his superior officer to the effect that his mother was dead (Spec. 13, Chg. III). I recommend that the approved sentence to dismissal, total forfeitures and confinement at hard labor for ten years 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 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 as approved by reviewing authority confirmed but five years of confinement remitted. G.C.M.O. 529, 26 Sep 1944)

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

SPJGK
CM 258324

2 AUG 1944

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Will Rogers Field, Oklahoma, 3 June 1944. Dismissal and total forfeitures.
Second Lieutenant DONALD L. NINMAN (O-754540), Air Corps.	)	

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, Judge Advocates.

---

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

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

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

Specification 1: In that Second Lieutenant Donald L. Ninman, Section "S", 348th AAF Base Unit, Will Rogers Field, Oklahoma, was on or about 30 April 1944 drunk and disorderly in uniform in the Main Post Exchange, Will Rogers Field, Oklahoma.

Specification 2: In that Second Lieutenant Donald L. Ninman, Section "S", 348th AAF Base Unit, Will Rogers Field, Oklahoma, was on or about 30 April 1944 drunk and disorderly in uniform in Theatre Number 2, Will Rogers Field, Oklahoma.

Specification 3: In that Second Lieutenant Donald L. Ninman, Section "S", 348th AAF Base Unit, Will Rogers Field, Oklahoma, did, at the Main Post Exchange, Will Rogers Field, Oklahoma, on or about 30 April 1944, conduct himself in a manner unbecoming an officer and a gentleman by drinking intoxicating liquor with an enlisted member of the WAC, namely: Corporal Concha E. Aleman, Section "W", 348th AAF Base Unit, Will Rogers Field, Oklahoma, in the presence of civilians and other enlisted personnel who were then and there present.

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

Specification: In that Second Lieutenant Donald L. Ninman, Section "S", 348th AAF Base Unit, Will Rogers Field, Oklahoma, did, at

the Service Club, Will Rogers Field, Oklahoma, on or about 29 April 1944, wrongfully remove the insignia of rank and branch of service from his uniform with the intent of impersonating an enlisted man and thereby gain admittance to the Service Club.

The accused pleaded guilty to Specifications 1 and 2 of Charge I, except the words "drunk and", not guilty to Specification 3 of Charge I, not guilty to Charge I, but guilty of a violation of the 96th Article of War, and guilty to Charge II and its Specification. During the closing argument by defense counsel, accused was permitted by the court to withdraw his previous plea of guilty, with exceptions, to Specification 2 of Charge I, and to plead not guilty thereto. He was found guilty of all Charges and Specifications. Evidence was introduced of one previous conviction by general court-martial for being drunk and disorderly in uniform in a public place and for two acts of misconduct, all in violation of Article of War 96. Accused 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. Charge I and the three specifications thereunder.

The three offenses described in the specifications occurred on the night of 30 April 1944. Accused, a second lieutenant, stationed at Will Rogers Field, around 0930 accompanied Corporal Concha E. Aleman, Women's Army Corps, to the Main Post Exchange, where they occupied the "farthest table in the Northeast corner" (R. 17,34). They drank Coca-Colas from cups into which accused poured a liquid "stronger than coke" from a sack which he had under the table (R. 12,13,25,32,33). Accused did not conduct himself in a disorderly or boisterous manner, but was talking and laughing rather loudly at times; seemed to be "having a good time" and to be "happy"; was seen to hold Corporal Aleman's hands; and, according to one witness only, was seen to kiss the corporal. Accused gave indications of drinking but did not stagger (R. 9,10,13,14,18,22,24,25,34). He offered a "drink" to two other enlisted members of the Women's Army Corps (R. 18, 22,24). At about 2115 the civilian manager of the exchange, on the suggestion of "some of the soldier boys" that accused was violating a rule, advised accused in a friendly way to leave. Witness' attention had not been attracted by any disorderly conduct on the part of accused, who was neither bothering any one, misbehaving, nor making any unusual noise, but he considered accused to be "under the influence of something and I didn't know what it was" (R. 8-10).

Accused left the exchange before 2130 (R. 20) and proceeded with Corporal Aleman to Base Theatre No. 2, where they took the seats nearest the wall in the last row of the left section, with Corporal Aleman to the left of accused. Only one witness testified as to what occurred in

the theatre, Private Koditek, who was seated "about the center of the theater, or a little to the right" (R. 26). The theater was dark but "not too dark", light being furnished by the red "Exit" lights along the wall. Witness watched accused, who had his left arm around Corporal Aleman, and believed that accused kissed or tried to kiss her. He did not see their lips touch. He also saw accused "with his right arm playing around with her", a procedure which he had described to the investigating officer as a "good working over", but his final statement in answer to a question by the court was, "Well, his doings were nothing out of the ordinary only they were more so than what happened with anybody else that I noticed" (R. 25-30). In answer to other questions by the court witness testified that the light in the theater was not good enough to see "rather clearly what was going on" and that others noticed accused and the corporal (R. 28,29). However, no other witnesses were offered. Corporal Aleman did not recall what happened in the theatre (R. 33). At about 2200 accused telephoned Sergeant Trosper, Women's Army Corps, to ask her whether she would help him with Corporal Aleman. A little later he brought the Corporal to her barracks in a jeep and carried her into the barracks, staggering a little when he did so. Accused was characterized by Sergeant Trosper, based on her experience, not as being drunk but as having been drinking (R. 20-21). Accused stated to witness that he was only concerned about Corporal Aleman and asked witness "not to tell".

Defense offered no witnesses and accused, after an explanation of his rights, elected to remain silent.

b. Charge II and its Specification.

Not only did accused plead guilty to this Charge and its Specification but it was established that he had been wearing his insignia on the night of 29 April and removed them before entering the Service Club with Corporal Aleman (R. 16,31).

4. It is the opinion of the Board of Review that the testimony does not establish that accused was drunk or disorderly in either the Post Exchange or the Post Theatre. Unquestionably accused took some drinks of intoxicating liquor in the Post Exchange, but there is a dearth of testimony to establish drunkenness. His subsequent action in taking Corporal Aleman to her barracks and his conversations with Sergeant Trosper indicate clearly that he was in full possession of his faculties. While he may have been indiscreet in his conduct, the testimony shows that he did not misbehave or act in a boisterous manner in the Post Exchange, and there is only an insinuation of impropriety in his behavior in the theatre, attested to by one witness, who watched accused and his companion from a fairly distant seat, with the sole illumination afforded by the red "Exit" lights on the wall.

The court properly permitted accused to change his plea of guilty of disorderly conduct in the theatre to one of not guilty, and in the opinion of the Board the prosecution failed to establish accused's guilt of this offense. Accused did not make a similar request with regard to his plea of guilty of disorderly conduct in the Post Exchange. However, his plea of guilty was not based on his conduct being of the nature inhibited by Article of War 95 but by Article of War 96. Based on the record it is the conclusion of the board that the term "disorderly" was used by accused in the sense conveyed by the expression "disorders * * * to the prejudice of good order and military discipline" in Article of War 96. The mere fact of drinking intoxicating liquor in a Post Exchange with an enlisted member of the Women's Army Corps, in the presence of civilians and enlisted military personnel, constitutes a disorder under the latter Article, and it is the opinion of the Board that no other disorder has been established. In view of the finding of the Board in connection with the third specification, a finding of guilty of the first specification would be a prohibited duplication.

It is clear that accused did drink intoxicating liquor with an enlisted member of the Women's Army Corps in the Post Exchange in the presence of other enlisted personnel and some civilian employees of the exchange. He did this while seated at a table in a corner of the exchange, pouring the intoxicating liquor into cups of Coca-Cola from a bottle which he kept concealed in a sack under the table. He thereby unquestionably committed an offense under Article of War 96 (CM 229412, Munson, 16 B.R. 139). However, he was not drunk or disorderly nor does the proof establish that his action in this instance indicates the moral unfitness contemplated by Article of War 95. The Board consequently finds that accused's action constitutes a violation of Article of War 96 and not Article of War 95 (CM 234558, Field, 21 B.R. 41).

5. War Department records show that accused is 20-4/12 years of age. He enlisted on 11 April 1942 and was honorably discharged on 29 August 1943 in order to accept a commission as second lieutenant in the Air Corps, to which he was appointed on 30 August 1943. On 10 March 1944, accused was tried by a general court-martial at Will Rogers Field for being drunk and disorderly in a public place in uniform, in violation of Article of War 95, and for striking a woman and entering a ladies' rest room and fondling a woman, not his wife, in violation of Article of War 96. He was found guilty of all specifications, and of having violated Article of War 96. He was found not guilty of a violation of Article of War 95. He was sentenced to be restricted to the post for six months, to forfeit $100 per month for a like period, and to be reprimanded. The sentence was confirmed, although deemed inadequate by the reviewing authority, but the restriction was reduced to three months to conform with the limitation fixed by the Manual for Courts-Martial.

6. The court was legally constituted and had jurisdiction of the person and the offenses. Except as noted above, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications 1 and 2 of Charge I, legally sufficient to support only so much of the findings of guilty of Specification 3 of Charge I and Charge I as involves findings of guilty of this specification in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

Terry G. Zon, Judge Advocate.

Herman Moyse, Judge Advocate.

Samuel Gomperts, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 12 AUG 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. Ninman (0-754540), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specifications 1 and 2 of Charge I, legally sufficient to support only so much of the findings of guilty of Specification 3 of Charge I and Charge I as involves findings of guilty of this specification in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

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

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

3 Incls.
Incl.1-Record of trial.
Incl.2-Drft. 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 remitted. G.C.M.O. 500, 13 Sep 1944)

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

SPJGN
CM 258325

8 JUL 1944

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Morris Field, North Carolina, 16 June 1944. Dismissal.
First Lieutenant JOHN I. JACKSON (O-795752), Air Corps.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD 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 96th Article of War.

Specification: In that First Lieutenant John I. Jackson, Section P, 330th AAF Base Unit (RTU-MB), did, at Greenwood, South Carolina, on or about 6 June 1944, wrongfully and unlawfully violate Paragraph 16 a (1) (d), Section II Army Air Forces Regulations 60-16, dated 6 March 1944, by flying a Military aircraft at an altitude of less than 500 feet above the ground.

CHARGE II: Violation of the 83rd Article of War.

Specification: In that First Lieutenant John I.

> Jackson, Section P, 330th AAF Base Unit (RTU-MB), did, at Greenwood, South Carolina, on or about 6 June 1944, through neglect suffer a type B-25 C airplane, of the value of $114,495.00, military property of the United States, to be damaged by flying said airplane into Lake Greenwood.

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

3. The evidence for the prosecution shows that Operations Order number 159 issued by the Greenville Replacement Training Unit on 6 June 1944 directed a training flight that day in a B-25C by the accused as pilot, Second Lieutenants Daniel Rossman and Walter F. Wallace as co-pilots, and two enlisted men, Staff Sergeant Preston S. Alexander and Corporal John J. Benna. They took off at approximately 1:30 p.m. from Greenville, South Carolina, with the accused and Lieutenant Wallace in the pilot's and co-pilot's seats respectively. In about two hours they landed at Greenwood in the same State. After a short interval they took off again at about 4:20 p.m. on their return flight. The accused was still acting as pilot, but this time Lieutenant Rossman was the co-pilot and Lieutenant Wallace was in the navigator's compartment (R. 5-8, 10-12; Pros. Exs. 1, 2).

The accused directed the plane toward Lake Greenwood, which was located only a few miles away, and maintained an altitude in excess of 500 feet en route. As he approached the bridges at the northwest end of the lake, he descended to about 100 feet. Just beyond and over the water he continued to "let down" until he reached an altitude of only 10 to 20 feet. Suddenly both props struck the surface of the lake. The "left evidently dug in a little deeper than the right". The accused manipulated the controls in an attempt to rise, and the plane did attain a height of some 50 feet for a few seconds, but altitude could not be maintained. He "yelled for the 'hatch', and executed a 'water landing'". The prop tips on both engines had been "bent back" by the initial contact with the surface of the lake, and now the left engine was torn "loose from the mounts" and "dropped off". The plane floated for from seven to ten minutes and then sank. All five members of the crew reached the shore safely. Lieutenant Rossman suffered a "cut on the lip" and Lieutenant Wallace had one on his chin (R. 6-12; Pros. Ex. 2).

It was stipulated that the plane was military property of the

United States having a value of $114,495.00. The provisions of paragraph 16a (1) (a), Section II, Army Air Force Regulation 60-16, forbidding flights below 500 feet above the ground had been brought to the attention of flying personnel at the Greenville Army Air Base and were known to the accused (R. 11, 13).

4. The accused, after being fully apprised of his rights relative to testifying or remaining silent, took the stand on his own behalf. He had had ten months of service in North Africa and Italy and had performed strategic and tactical bombings. His work had been done at an altitude of from 8,000 to 12,000 feet. Most of the time he "was flying wing" (R. 15-18)

His version of the accident was in substance much the same as that given by him for his pre-trial statement. He testified that:

> "I was flying with two students and we flew about two hours with Lt. Wallace as co-pilot and at approximately 3:30 Lt. Rossman changed with Lt. Wallace. We took off from Greenville and flew to Greenwood. At Greenwood we took off again and circled from Greenwood back over Lake Greenwood, flew down over the lake I would estimate at around 20 or 25 feet and ran across the lake. I believe the reason for the accident was the fact that I hit a completely glassy place in the lake. I had lost altitude and started to pull out, the props touched water and we took to the air again; the left engine was running pretty badly and I feathered the props and the right prop did not seem to be pulling and I had noticed that it sounded like it was running away. I decided to set it down in the lake and I told the engineer to release the hatch, and just before we made contact with the water I cut the switches and made a water landing. The plane sank about ten minutes after we hit. The left engine was off the mounting, however, there was not too much damage to the rest of the aircraft in general."

He was familiar with Army Air Forces Regulation 60-16 (R. 16-17).

5. The Specification of Charge I alleges that the accused did "on or about 6 June 1944, wrongfully and unlawfully violate Paragraph 16a,

(1) (d), Section II Army Air Forces Regulations 60-16, dated 6 March 1944, by flying a Military aircraft at an altitude of less than 500 feet above the ground". This offense was laid under Article of War 96.

Paragraph 16a, Section II, of the Army Air Forces Regulations 60-16, reads as follows:

"16. Minimum Altitudes of Flights.

a. Except during take-off and landing, aircraft will not be operated:

(1) Below the following altitudes:

(a) 1,000 feet above any building, house, boat or other obstructions to flight.

(b) At an altitude above the congested sections of cities, towns, or settlements to permit an emergency landing outside of such sections in the event of complete power failure.

(c) 1,000 feet above any open air assembly of persons.

(d) 500 feet above the ground elsewhere than as specified above.

(2) Within 500 feet of any obstruction to flight."

While there is considerable doubt as to whether 16a (1) (d) is applicable to flights over water as distinguished from over the ground, the record establishes that the accused descended into the prohibited altitude as he reached the northwest end of the lake. Since he was then over two bridges, he was also violating paragraph 16a (1) (a) quoted above. His subsequent continued descent to the very surface of water, while perhaps not technically violative of paragraph 16a (1) (d), was at least an aggravation of the offense which he had clearly committed upon approaching the lake. His plea of guilty was perfectly consistent with the evidence presented.

6. The Specification of Charge II alleges that the accused did "on or about 6 June 1944, through neglect suffer a type B-25 C airplane, of the value of $114,495.00, military property of the United States, to be

damaged by flying said airplane into Lake Greenwood". This was set forth as a violation of Article of War 83.

The proof required by paragraph 143 of the Manual for Courts-Martial, 1928, for a conviction of the offense of suffering military property to be damaged through neglect is:

> "(a) That certain military property belonging to the United States was * * * damaged * * * in the manner alleged; (b) that such * * * [damage] was suffered by the accused through a certain omission of duty on his part; (c) that such omission was * * * negligent, as alleged; and (d) the value of the property, as alleged."

That the plane involved was military property of the United States of the value of $114,495.00 was stipulated to by the accused. His descent to an altitude of less than 500 feet was a violation of the Army Air Forces flying regulations and consequently a distinct "omission of duty on his part". That it was the product of negligence is self-evident. All of the elements of proof required by the Manual having been successfully adduced, and the accused having pleaded guilty, the evidence is legally sufficient beyond a reasonable doubt to sustain the findings.

7. The accused is about 24 years of age. The records of the War Department show that he had enlisted service from 28 March 1942 to 13 January 1943; that he was commissioned a second lieutenant on 14 January 1943 and promoted to first lieutenant on 28 January 1944; that he has been on active duty as an officer since 14 January 1943; and that he has been awarded the Air Medal and three Oak Leaf Clusters (Bronze).

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 and the sentence and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of Articles of War 83 and 96.

Abner E. Lipscomb, Judge Advocate.

Walton Shepherd, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 258325

1st Ind.

War Department, J.A.G.O., 11 OCT 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant John I. Jackson (0-795752), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but commuted to a forfeiture of pay of $100 per month for eight months, and that the sentence as thus modified be ordered executed.

3. Consideration has been given to a request for clemency submitted by the accused.

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

Myron C. Cramer

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

5 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Ltr. from Deputy Commander, Army Air Forces.
Incl 5 - Ltr. fr. accused.

(Sentence confirmed but commuted to forfeiture of pay of $100 per month for eight months. G.C.M.O. 573, 21 Oct 1944)

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

SPJGQ
CM 258326

- 2 AUG 1944

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Florence Army Air Field, Florence, South Carolina, 4, 5 and 6 May 1944. Dismissal, total forfeitures and confinement for five (5) years.
Captain JOHN A. DOUGHERTY (0-559746), Air Corps.	

OPINION of the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, Judge Advocates.

---

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

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

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

Specification: In that Captain John A. Dougherty, 649th Bombardment Squadron (L), 411th Bombardment Group (L), Florence Army Air Field, Florence, South Carolina, did, at Florence Army Air Field, South Carolina, on or about 1 January 1944 feloniously take, steal and carry away money of the value of about $1000.00, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Captain John A. Dougherty, 649th Bombardment Squadron (L) 411th Bombardment Group (L), having been duly placed in arrest to Bachelor Officers' Quarters area on or about 18 January 1944, did, at Florence Army Air Field, South Carolina, on or about 25 February 1944, break his said arrest before he was set at liberty by proper authority.

Specification 2: (Finding of not guilty.)

ADDITIONAL CHARGE II: Violation of the 94th Article of War.

Specification 1: In that Captain John A. Dougherty, 649th Bombardment Squadron (L), 411th Bombardment Group (L), Florence Army Air Field, Florence, South Carolina, being at the time Class A Finance Officer, did, at Florence Army Air Field, South Carolina, on or about 10 November 1943, feloniously embezzle by fraudulently converting to his own use money of the value of about $40.55, the property of the United States, furnished and intended for the military service thereof entrusted to him, the said Captain John A. Dougherty by the United States for use in payment to Corporal George N. Gale.

Specification 2: (Same as Specification 1, except that the amount alleged to have been embezzled is $43.75, and the name of the enlisted man for whose pay that sum was intended is Pfc. John J. Bent, Jr.).

Specification 3: (Same as Specification 1, except that the amount alleged to have been embezzled is $46.75, and the name of the enlisted man for whose pay that sum was intended is Pvt. John J. Loughlin).

Specification 4: In that Captain John A. Dougherty, 649th Bombardment Squadron (L), 411th Bombardment Group (L), Florence Army Air Field, Florence, South Carolina, being at the time Class A Finance Officer, did, at Florence Army Air Field, South Carolina, on or about 10 December 1943, feloniously embezzle by fraudulently converting to his own use money of the value of about $48.18, the property of the United States, furnished and intended for the military service thereof entrusted to him, the said Captain John A. Dougherty by the United States for use in payment to Sergeant Edward J. Dwyer.

Specification 5: (Same as Specification 4, except that the amount alleged to have been embezzled is $41.60, and the name of the enlisted man for whose pay that sum was intended is Sgt. Harley G. Eckelbarger.)

Specification 6: (Same as Specification 4, except that the amount alleged to have been embezzled is $63.60, and the name of the enlisted man for whose pay that sum was intended is Sgt. Francis G. Falk.)

Specification 7: (Same as Specification 4, except that the amount alleged to have been embezzled is $41.87, and the name of the enlisted man for whose pay that sum was intended is Sgt. Charles E. Hull).

Specification 8: (Same as Specification 4, except that the amount alleged to have been embezzled is $28.25, and the name of the enlisted man for whose pay that sum was intended is Pvt. James W. Bowe, Jr.).

Specification 9: (Same as Specification 4, except that the amount alleged to have been embezzled is $55.00, and the name of the enlisted man for whose pay that sum was intended is Pfc. Charles J. Jirinec.)

Specification 10: (Same as Specification 4, except that the amount alleged to have been embezzled is $53.75, and the name of the enlisted man for whose pay that sum was intended is Sgt. Carman R. Ryan.)

Specification 11: (Same as Specification 4, except that the amount alleged to have been embezzled is $16.40, and the name of the enlisted man for whose pay that sum was intended is Pvt. Harvey Des Soye.)

Specification 12: (Same as Specification 4, except that the amount alleged to have been embezzled is $40.23, and the name of the enlisted man for whose pay that sum was intended is Pfc. August J. Murcko.)

Specification 13: (Same as Specification 4, except that the amount alleged to have been embezzled is $42.70, and the name of the enlisted man for whose pay that sum was intended is Pvt. Paul C. Miller.)

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 2 of Additional Charge I, but guilty of all other Specifications and of all Charges. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for five (5) years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. From 17 October 1943 until the date of the trial, the accused was a member of the 649th Bombardment Squadron, 411th Bombardment Group, stationed at Florence Army Air Field, Florence, South Carolina. He was Executive Officer of his squadron, and was Class A Finance Agent for the purpose of paying the supplementary payroll for October 1943 and the supplementary payroll for November 1943. (R. 9, 43, 183; Pros. Exs. 11-14). The balance of the legal and competent evidence of record will be summarized under title references to the Charges and Specifications to which it relates. The offenses alleged will be considered in chronological order.

a. Specifications 1, 2 and 3 of Additional Charge II:

(1) For the Prosecution: These three Specifications allege that the accused embezzled approximately $131.05, the property of the United States, on or about 10 November 1943. The accused having, by proper orders, been appointed Class A Finance Agent for the supplemental payment of troops for the month of October 1943 (R. 16; Pros. Ex. 11), received from the Finance Office on 15 November 1943, the sum of $9,287.99, giving an official receipt therefor (Pros. Ex. 1). Following the payment of troops on the same day, the accused returned $540.96 to the Finance Office, representing that he had paid out to troops the balance of $8,747.03 (Pros. Ex. 2). Payment was made in the squadron Orderly Room, with the accused handing the money to the enlisted men and at the same time making a check beside their names on the triplicate or squadron copy of the payroll. The Witnessing Officer and the payroll clerk were present to identify the enlisted men and to verify the payments (R. 22). Eight men were red-lined on the payroll to indicate that they had not been paid, the amount of pay owed them being $540.96, which amount was the sum returned to the Finance Office by the accused (R. 23; Pros. Exs. 5, 6). The red-lining on the squadron copy was performed by the accused instead of by the Witnessing Officer, and his initials appeared beside the deleted names (R. 26-27). When the original was made to conform, however, the red-lining and initialling was done by the Witnessing Officer (R. 28). The names of three other enlisted men, Gale, Bent and Loughlin, were neither checked nor red-lined on the squadron copy, nor red-lined on the original copy, and hence they ostensibly had been paid the amount due them, which totaled $131.05 (R. 24; Pros. Exs. 5, 6). The original payroll thus indicated that these three men had been paid and this fact likewise would be assumed from the squadron copy even though there was no check next to the names, since the red-lining is the controlling factor in determining whether payment has been made, and their names were not red-lined (R. 30-31). Bent was away on furlough on 15 November and was not present to receive his supplemental payment (R. 38), and it was stipulated that if Gale and Loughlin were present they would testify that they were likewise absent on that date and were not in fact paid (R. 46).

Accused was aware that certain Class A Finance Agents had held out pay for enlisted men who were absent temporarily, so that they would not have to wait until the next pay day to receive their pay, and he had condemned this practice and told his commanding officer that he would never do it (R. 44-45). There was introduced in evidence an indorsement, dated 28 December 1943, signed by the accused, in response to an inquiry from Gale's new organization regarding the pay status of Gale, stating that Gale had been paid only through 30 September and that his service record should be amended to show that he had not been paid for October, as his service record theretofore indicated (R. 47, 48; Pros. Ex. 15). No copy of this correspondence was found in the squadron files (R. 49). The accused was an accomplished typist and at one time had been a sergeant

major, in which capacity he had learned how to prepare indorsements (R. 50; Pros. Ex. 16).

(2) For the Defense: The accused, having had his rights as a witness explained to him and having elected to testify under oath in his own behalf, testified that as Gale, Bent and Loughlin were not present to receive their pay on 15 November 1943, he held the money out for them. He returned the payroll to the Finance Office without red-lining the three names, and placed the money in the safe to give to the three men upon their return. Sometime in December, the three men not having asked for their money, he applied it to his own uses (R. 230). He admitted typing the indorsement regarding Gale's pay, but before the Investigating Board he had denied that he typed it (R. 231).

b. Specifications 4 through 13 of Additional Charge II:

(1) For the Prosecution: These ten Specifications allege that the accused embezzled approximately $431.63, the property of the United States, on or about 10 December 1943. The accused as Class A Finance Agent for the payment of the November 1943 supplemental payroll, received from the Finance Office on 11 December 1943 the sum of $3,567.48. On the same day he returned to the Finance Office the original payroll and no cash. As no names were red-lined on the payroll, it was represented to the Finance Office that the roll had been completely paid (R. 69; Pros. Exs. 3, 4). On the triplicate copy retained as the squadron copy, however, the names of ten enlisted men were red-lined, thus indicating that they had not been paid. The original and the squadron copy were, therefore, not in conformity, as they should have been (R. 71). The ten enlisted men referred to are the ones whose names appear in Specifications 4 through 13, respectively, and the respective amounts due them on said payroll correspond with the amounts set out in said Specifications (Pros. Exs. 8, 9). On the December payroll the remarks after the names of the ten men indicate that they were paid for November as well as December on that payroll, which indicates that they were not paid on the November supplemental payroll (R. 71-73). The reason for this was that the payroll clerk made up the December payroll in part from information obtained from the squadron copy of the November supplemental payroll (R. 75). The red-lining of the ten names on the squadron copy of the November supplemental payroll was done by the accused himself (R. 74). Five of the ten men testified that they had not been paid on the November supplemental payroll (R. 80, 82, 85). The other five had been transferred prior to the time of the trial (R. 89).

(2) For the Defense: The accused testified that "the men [I.e. the ten in question] * * * were on pass and furlough, so I did not send their money back to Finance. I kept that money in the squadron and returned the payrolls to Finance, stating that these men were paid. In other words, I kept their money in the squadron to be paid to them at a future date" (R. 225). This money, together with the money held out from the October supplemental payroll amounted to over $550, and none of it was ever paid to the enlisted men for whom it was intended (R. 226). The

accused lost about $250 gambling near the middle of December and used part of the payroll funds to cover that loss. Also, he paid from the same funds a personal debt of $112, and rent on a house in the amount of $50 (R. 227-228). On cross examination, the accused admitted that he knew he would be caught up with some time and would have to pay the money back (R. 238). He was then questioned as to where he expected to obtain the money to make reimbursement, to which he replied "It never entered my mind where I was going to get it or whether I could or could not" (R. 238). A little later, the following questions and answers appear on page 238 of the record:

"Q. Didn't you just testify you knew you were going to have to pay it back?
"A. But no one else knew it.
"Q. But you wouldn't have to pay it back so long as no one else knew about it?"
"A. That is exactly right."

The accused paid back to the Finance Office on 1 May 1944, $503.82 (Def. Ex. 1). His counsel contended that this was the full amount claimed by the Finance Office to be due (R. 224).

c. Specification of Charge I:

(1) For the Prosecution: This Specification charges the accused with stealing about $1,000, the property of the United States, on or about 1 January 1944. First Lieutenant Julius A. Stern, the Adjutant of the 649th Bombardment Squadron, was, by proper orders, appointed Class A Finance Agent for the payment of the troops for the month of December 1943 (Pros. Ex. 13). On the morning of 31 December 1943, he received from the Finance Office the sum of $24,479.70 for use in paying the troops that day (R. 97; Pros. Ex. 21). He placed the money in the squadron safe, which was located in the accused's office in the Orderly Room (R. 99). He had obtained the key to the safe from the accused earlier that day (R. 97,98). Most of the troops were paid during the afternoon of 31 December 1943, after which the balance of the payroll, amounting to approximately $6,700, was returned to the safe at the accused's suggestion (R. 100, 116, 201). The accused was in the Orderly Room when the remaining money was placed in the safe and he accompanied Lieutenant Stern to the Officers Club at about 5:30 p.m. Just before they left for the day, the accused said to Lieutenant Stern "Well I think I will stay and work on a Third Air Force report". Lieutenant Stern thereupon remarked "Well, if you are going to stay, I will stay and count the money". The accused then replied "Well, I will let the Third Air Force report go until tomorrow" (R. 100). The two of them then departed together (R. 100). Lieutenant Stern returned to the Orderly Room once during the evening, at 10:00 p.m. to obtain a bottle of whiskey which he had left in the accused's desk (R. 100). The Sergeant of the Guard was present and accompanied Lieutenant Stern during the entire time that he was there (R. 103, 139). The accused played blackjack at the Officers Club during the evening (R. 103).

At about 12:30 a.m. the accused had the Sergeant of the Guard call for him in a jeep and drive him to the squadron Orderly Room. The accused spoke of having to prepare court-martial papers and disappeared into the office of Major Kenneth H. Hohlaus, the Squadron Commander, which was next to his own office and connected with it by an inside door (R. 101, 139). He remained inside about 15 minutes, and neither the Sergeant of the Guard nor the Corporal of the Guard, both of whom were in the Orderly Room during the time that the accused was present in the office, saw him leave during that period (R. 140, 147). It would not have been possible for the accused to leave Major Hohlaus' office without coming into full view of the two noncommissioned officers (R. 148). The partitions in the Orderly Room prevented the two noncommissioned officers from looking into Major Hohlaus' office (R. 143). Aside from Lieutenant Stern's brief visit to the office earlier in the evening and the accused's visit between 12:30 a.m. and 1:00 a.m., no other officer entered the Orderly Room that night (R. 149, 150).

On the morning of 1 January 1944 Lieutenant Stern removed the money from the safe and, upon counting it, discovered that there was a shortage of $796.50. This amount was increased to $1,059.85 a few days later when he found that he had made an error in not paying four enlisted men (R. 109-110). Becoming suspicious of the accused, Lieutenant Stern telephoned him to wait in the Orderly Room about something important. Instead he went directly to accused's quarters to make a search and was very much surprised to find the accused there; he did not proceed with the search (R. 108-109). The accused had signed the Classified Material Security Form No. 1 on 31 December 1943, indicating that he had checked the safe that evening to verify that all classified documents were properly locked up for the night (R. 128; Pros. Ex. 27).

Two keys were originally issued with the squadron safe, but one of them was lost by the accused's predecessor, Lieutenant Gilkeson, sometime in November, and the remaining key was in the possession of the accused from the time Lieutenant Gilkeson was transferred out of the organization near the middle of November (R. 155; Pros. Ex. 24). Lieutenant Stern testified that he remembered having seen two apparently similar keys on the accused's dresser in his room in the Colonial Hotel prior to 31 December 1943 (R. 104). Lieutenant Stern retained the key, which he obtained from the accused on pay day, in his possession until after the shortage had been discovered on 1 January 1944 (R. 113).

On 4 January 1944 the accused purchased, a 1941 Plymouth convertible coupe for $1,425, paying $825 in cash, using 82 ten dollar bills and one five dollar bill. He agreed to pay the balance monthly (R. 131-133; Pros. Ex. 28). The basic bill used at the Florence Air Field for paying officers is the twenty dollar bill, while the basic bill used in paying enlisted men is the ten dollar bill (R. 135-136). There were no twenty dollar bills in the payroll money received by Lieutenant Stern

from the Finance Office on 31 December 1943. Practically all of that money was in ten dollar bills. (R. 98, 135-136). The testimony of the accused before three Investigating Boards on 10 January 1944, 17-18 January 1944 and 1 March 1944, was introduced in evidence over defense counsel's objections (R. 170-172; Pros. Exs. 30, 31). In that testimony the accused denies stealing the $1,059.85, but gives no satisfactory explanation of the source of the money with which he purchased the car and paid off numerous debts between 31 December 1943 and 8 January 1944. He claimed that all of the money came from his gambling winnings at the club, but his testimony included numerous contradictions and discrepancies regarding his winnings.

Major Hohlaus, the Squadron Commander, testified that it was unusual for the accused to return to the Orderly Room after he once leaves the office in the evening and that he knew of no circumstance warranting a return of the accused to the Orderly Room after midnight 31 December (R. 154-155).

(2) For the Defense: It was stipulated on the record that if Lieutenant Gilkeson were present he would testify that he was transferred from the Florence Army Air Field on 17 November 1943, to some field in Oklahoma, that about two weeks before he was transferred he lost one of the two keys to the squadron safe and that he reported such loss to Major Hohlaus, who had the other key (R. 173). The squadron Sergeant Major testified that on 31 December 1943, he prepared a set of court-martial papers concerning an enlisted man, that the accused was not present when they were completed late in the afternoon, that he placed them on Major Hohlaus' desk for the latter's signature and that it was customary for the accused, as Executive Officer, to check such papers for correctness and details before they were signed (R. 178-179).

The accused, testifying in his own behalf, denied that he stole the $1,059.85, and denied that he had ever had more than one key to the safe in his possession (R. 183). He did not have that key in his possession from the time he gave it to Lieutenant Stern on the morning of 31 December 1943, until the latter returned it to him on 2 January 1944 (R. 184). On the night of 31 December 1943 the accused played blackjack at the club until 12:30 a.m. He then telephoned the Sergeant of the Guard to call for him in a jeep and take him to the Orderly Room (R. 185). His primary purpose in going to the Orderly Room was to get something to eat (R. 186). Upon arriving there he went into Major Hohlaus' office to examine some court-martial papers, but was not able to find them, and so assumed that they had been signed and had gone forward (R. 185). He then crossed the road to the ness hall, but finding no food available there, returned to Major Hohlaus' office and cut out the light, closed the door and returned to the Club in the jeep (R. 186-187). He was in Major Hohlaus' office only about five minutes and did not go through the connecting door into his own office, where the squadron safe was located (R. 186). He returned to the Colonial Hotel by taxi at about 1:30 a.m. (R. 188).

With respect to his gambling activities, the accused testified that he played blackjack at the Club on the nights of 31 December 1943, and 2 and 3 January, 1944, winning approximately $900 in sum total (R. 189-190). On cross examination he admitted that he had only about $25 near the end of December (R. 196), and yet between 31 December and 8 January he spent $825 as a cash payment on an automobile, paid a debt of $112 to a person in Shreveport, Louisiana, paid $50 rent on a house, paid a gambling debt of $27 and spent approximately $40 on miscellaneous items (R. 197). In his testimony before the Investigating Boards he had told several different stories regarding his winnings, stating at one hearing that the total was $400, at another that it was $500 and at another that it was $750 (R. 198-199; Pros. Exs. 30, 31). When asked why he did not tell the Investigating Boards the truth with respect to his winning he replied "It wasn't any of their business" (R. 199). When pressed as to why he did not bring in witnesses to substantiate his claims as to his winnings, accused replied "I don't think that I have to, you have to prove that I didn't do it" (i.e. win the amount claimed) (R. 200).

Major Henry J. Rose, the investigating officer, testified that after he had warned the accused of his rights under Article of War 24, the accused declined to make a written statement but stated to him orally that he (the accused) "could win on the original charges" and that with respect to the Additional Charges "he would reimburse the Government and throw himself on the mercy of the court" (R. 62).

(d) Specification 1 of Additional Charge I:

(1) For the Prosecution: This Specification alleges that the accused broke his arrest on or about 25 February 1944. The accused was lawfully placed in arrest by order of the Commanding Officer of the 411th Bombardment Group on 18 January 1944 (R. 159; Pros. Ex. 29). Receipt by the accused of the order on 18 January 1944, is indorsed on the foot of the order (Pros. Ex. 29). By the order the accused was "restricted to the limits of your BOQ, the latrine adjacent thereto, and the Officers Mess (for eating purposes only)". The accused was seen by the Sergeant in charge of the main gate talking to two civilians outside of the limits of the field at about 2:40 p.m. on 25 February 1944 (R. 169).

(2) For the Defense: The accused admitted on the witness stand that he broke his arrest, stating that he merely went outside of the gate to sign some papers "on a lawsuit which he had pending in town" and that he was not out more than half an hour to three-quarters of an hour (R. 223).

4. With respect to the offenses alleged in Specifications 1 through 13 of Additional Charge II, no problems are presented. The evidence conclusively shows, and the accused admits, receipt by the accused of the monies in question, in a fiduciary capacity, and the conversion of those monies by the accused to his own purposes. All elements of the offenses

alleged are fully established, and the convictions are supported by the record.

5. With respect to the offense alleged in the Specification of Charge I, the evidence of the guilt of the accused, adduced by the prosecution, while circumstantial in nature, is such as to exclude any fair and rational hypothesis except that of guilt. Controlling authority provides that "what is required" in such cases is "not an absolute or mathematical but a moral certainty" (MCM, 1928, par. 78a). The following evidence forms a circumstantial web which is sharply inconsistent with the innocence of the accused and which compels, overwhelmingly, the conclusion that the accused is guilty of the offense alleged, beyond a reasonable doubt:

(1) The accused, having had little money during the month of December and having no outside income, made sudden and large expenditures in cash between 31 December 1943 and 8 January 1944, totaling over $1,000.

(2) The accused, in making the down payment of $825 on the automobile, used the same kind of bills, namely, ten dollar bills, that disappeared from the squadron safe on the night of 31 December 1944, and this, notwithstanding the fact that the accused's claimed winnings at blackjack came wholly from officers, for whom the basic pay unit is the twenty dollar bill. It was testified that an officer receiving pay of $278 would receive $260 of it in twenty dollar bills (R. 135).

(3) The squadron safe from which the money was stolen was located in the office of the accused.

(4) The accused had had possession of the key to the safe for a period of more than a month prior to the theft.

(5) The accused was in the Orderly Room in the late afternoon of 31 December 1943 and saw Lieutenant Stern put the unexpended portion of the payroll in the safe, in accordance with accused's suggestion.

(6) The accused returned to the Orderly Room after midnight 31 December and was alone in the office of Major Hohlaus for fifteen minutes, from where he had the opportunity to enter his own office unobserved and steal the money from the safe.

(7) At the time of the theft the accused owed numerous gambling and other debts.

(8) The Squadron Commander (Major Hohlaus) testified that it was unusual for the accused to return to the Orderly Room after once leaving the office in the evening, and that he knew of no circumstance warranting the return of the accused to the

Orderly Room after midnight on the night in question.

(9) The accused's testimony conflicts with that of the two disinterested noncommissioned officers (the Sergeant of the Guard and the Corporal of the Guard) respecting various details of the accused's visit to the Orderly Room on the night in question, including in particular, the question as to whether the accused came out of Major Hohlaus' office and walked across the road to the mess hall before finally leaving for the night.

(10) The accused made contradictary and unsatisfactory explanations as to the source of the money he used in making his large cash expenditures between 31 December and 8 January.

The test for the sufficiency of circumstantial evidence has been stated as follows:

"Where the only competent evidence is circumstantial, it must, in order to be sufficient to support a conviction, be of such nature as to exclude every reasonable hypothesis except that of accused's guilt" (Dig. Op. JAG 1912-1940, Sec. 395 (9)).

The Board of Review is of the opinion that the evidence in the instant case is clearly sufficient to meet that test. The web of circumstances pointing to the guilt of the accused is too strong to permit of any reasonable doubt that he feloniously stole the money from the squadron safe. The court disbelieved the accused's protestations of his innocence, and the soundness of its decision in this regard is fully supported by the record. The credibility of the accused was seriously impeached by the established fact that he told anumber of palpable falsehoods, relating to material issues of fact, during the hearings before the three Investigating Boards.

The Board of Review is of the opinion, therefore, that the evidence amply supports the findings of the court, and that beyond a reasonable doubt the accused is guilty of the Specification of Charge I and of Charge I.

6. No extended discussion of the proof of accused's guilt of the offense alleged in Specification 1 of Additional Charge I is required. The competent and legal evidence of record is amply sufficient to establish guilt. This is buttressed by the accused's own admission of guilt.

7. It may be noted that the accused was represented at the trial not only by the regularly defense counsel, but also by a civilian lawyer of his own choosing, W. S. Houck, Esquire, of Florence, South Carolina.

8. The records of the War Department show that this officer is 25 years and 8 months of age. He is a high school graduate, and attended New York University 1½ years. After quitting college, he engaged in

semi-professional baseball. He was inducted into the service in December, 1939, served 2½ years in an enlisted status, and was commissioned a second lieutenant upon graduating from the Air Forces Officer Candidate School in June 1942. He was promoted to first lieutenant 19 November 1942 and to captain 21 August 1943. He has had two efficiency ratings of "Excellent" since receiving his commission. He is married and has one child.

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

William H. Gambrell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 12 AUG 1944 - To the Secretary of War.

1. Herewith transmitted are the record of trial and the opinion of the Board of Review in the case of Captain John A. Dougherty (0-559746), Air Corps, 649th Bombardment Squadron, Florence Army Air Field, Florence, South Carolina.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence, and to warrant confirmation of the sentence. While the record of trial is legally sufficient to support all of the findings, it appears from the correspondence inclosed with 1st Indorsement, dated 4 July 1944, received by this office from Headquarters Third Air Force, subsequently to receipt of the record of trial, that a later audit of the pay accounts discloses that the soldier named in Specification 5, Additional Charge II (Sergeant Harley G. Eckelbarger), was in fact regularly paid the amount mentioned in said Specification and that the accused was, therefore, erroneously convicted of the offense alleged in that Specification. This correspondence is inclosed with the record of trial but, of course, does not form a part of the record. Disapproval of the finding of guilty of the Specification in question would in no way affect the validity of the sentence. I recommend, therefore, that the finding of guilty of Specification 5, Additional Charge II, be disapproved, 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 of trial to the President for his action, and a form of Executive action designed to carry into effect the above recommendation, should it meet with approval.

Myron C. Cramer

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

4 Incls.
1 - Record of trial.
2 - Dft. ltr. sig. of S/W.
3 - Form of action.
4 - Ltr. fr C.O., Florence Army Air Field, dated 26 June 1944.

(Finding of guilty of Specification 5, Additional Charge II, disapproved. Sentence confirmed. G.C.M.O. 507, 22 Sep 1944)

vol 37 Army JAG Bd Rev

vol 37 Army JAG Bd.Rev

TITLE

DATE	BORROWER'S NAME	EXT.