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Volume XLII

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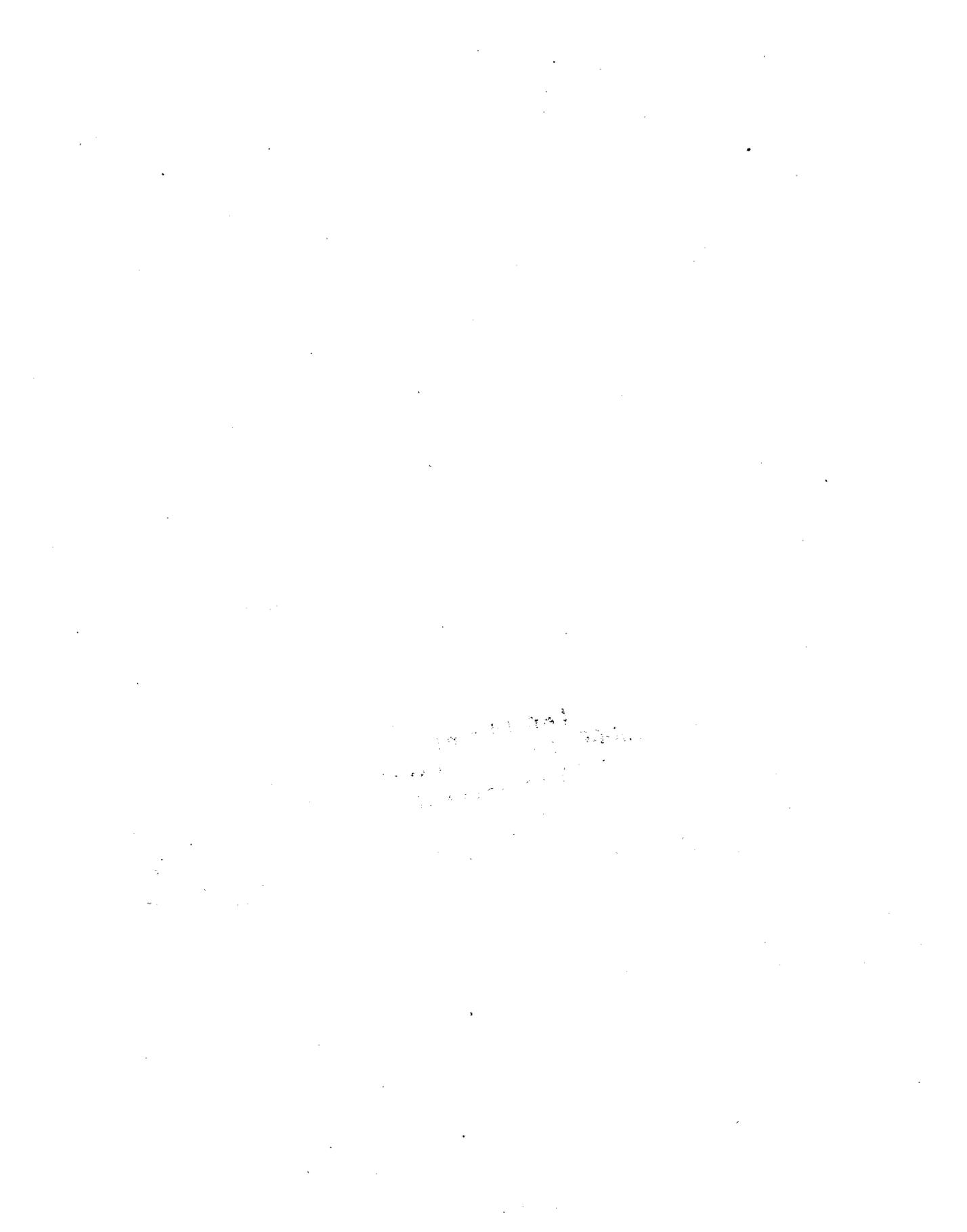
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WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington, D. C.

SPJGH  
CM 264093

13 OCT 1944

UNITED STATES )

SEVENTH AIR FORCE

v. )

Trial by G.C.M., convened at

Major STUART S. KNICKERBOCKER )  
(O-1699180), Air Corps. )

APO Number 953, 5-9 July 1944.  
Dismissal and total forfeitures.

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OPINION of the BOARD OF REVIEW  
TAPPY, MELNIKER and GAMBRELL, Judge Advocates

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

2. The accused was tried upon the following Charges and Specifications, a nolle prosequi having been entered to the Specification of Charge I prior to trial by direction of the appointing authority:

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

Specification 1: In that Major Stuart S. Knickerbocker, 1124th School Squadron (Special) AAF, did, at Honolulu, between the dates of March 1, 1943 and July 31, 1943, knowingly and wilfully associate with a prostitute, namely one Mary Del Basco, this to the scandal and disgrace of the military service.

Specification 2: In that Major Stuart S. Knickerbocker, \* \* \*, did, at APO #953, on or about June 19, 1943, knowingly and wilfully escort to a dance at the Officers' Club, APO #953, one Mary Del Basco, a prostitute, and then known by the said Major Stuart S. Knickerbocker to be a prostitute, this to the scandal and disgrace of the military service.

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Specification 3: In that Major Stuart S. Knickerbocker, \* \* \*, did, at APO #953, on or about November 19, 1943, with intent to deceive Major General Willis H. Hale, his superior officer, officially state in writing to the said Major General Willis H. Hale substantially as follows: "In reference to the fourth indorsement due to being sent to the mainland on duty it was impossible to make remittance, as I did not draw my pay during the period of this temporary duty." which statement was known by him, the said Major Stuart S. Knickerbocker, to be untrue, in that he did, in fact, while on the continental United States on said temporary duty, draw his pay for the month of August 1943, and Sixty dollars (\$60.00) in addition thereto, at McClellan Field, California.

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

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

Specification 2: In that Major Stuart S. Knickerbocker, \* \* \*, having been placed in charge of a mission from APO #953 to continental United States, and having been given an itinerary to follow in the performance thereof, did, on or about August 14, 1943, wrongfully and without authority deviate therefrom by authorizing Major James Kirkpatrick, 1124th School Squadron (Special) AAF, to operate an United States Army B-17F airplane from Hamilton Field, California to Gowen Field, Idaho, said airplane being the airplane which was assigned to Major Stuart S. Knickerbocker for use in the performance of said mission.

Specification 3: In that Major Stuart S. Knickerbocker, \* \* \*, did, at Hamilton Field, California, on or about August 14, 1943, wrongfully authorize Major James Kirkpatrick, 1124 School Squadron (Special) AAF, to operate a United States Army B-17 airplane from Hamilton Field, California, to Gowen Field, Idaho, without a qualified co-pilot, in violation of A.A.F. Regulation No. 55-5, Headquarters Army Air Forces, dated September 30, 1943.

Specifications 4-10 incl.: (Findings of not guilty).

Specification 11: In that Major Stuart S. Knickerbocker, \* \* \*, having been placed in charge of a mission from APO #953 to continental United States, and having been given an itinerary to follow in the performance thereof, did, on or about September 3, 1943, wrongfully and without authority deviate therefrom by going to Kansas City, Missouri.

Specifications 12, 13: (Findings of not guilty).

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

Specification: In that Major Stuart S. Knickerbocker, \* \* \*, did, at Honolulu, between the dates of August 1, 1943 and December 1, 1943, knowingly and wilfully associate with a prostitute, namely one Mary Del Basco, this to the scandal and disgrace of the military service.

The accused pleaded not guilty to all Specifications and Charges. He was found guilty of Charge II, guilty of Specification 1 thereof, except the word and figure "March 1", substituting therefor the word and figures "April 15", of the excepted word and figure not guilty, of the substituted word and figures guilty, guilty of Specification 2 thereof (as amended during the trial by substituting the date 17 May 1943 for the date 19 June 1943 (R. 62, 63)), and guilty of Specification 3 thereof; guilty of Charge III, guilty of Specifications 1, 2, 3 and 11 thereof and not guilty of all other Specifications thereof; guilty of the Additional Charge and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the finding of guilty of Specification 1 of Charge III, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. In support of Specifications 1 and 2 of Charge II, the prosecution introduced evidence to show that continuously from 15 August 1941 to at least May 1944, Opal Bruno, alias Mary Del Basco, alias Mary De Crasto, was a common prostitute in Honolulu, Territory of Hawaii, where she was employed from time to time in different houses of prostitution. For a portion of 1942 she was employed as a prostitute in a house of prostitution known as the New Bungalow and in 1943 she entered similar employment in another such establishment called the Service Hotel where she was so employed at the time of trial of this case (R. 37-40, 42-44, 46, 47, 56; Ex. 13). It was common knowledge among members of the vice squad of the Honolulu Police Department that she was a prostitute (R. 41). She was listed as an "entertainer" on the records of the Venereal Disease Control Office for the Board of Health, Territory of Hawaii, an "entertainer" being a person employed as a prostitute in a house of prostitution. She had been examined from time to time by that office for venereal disease over the period from 15 August 1941 to 22 May 1944 (R. 40, 42-44, 46).

Sometime prior to Easter 1943, accused told Captain William R. Coulson that he had sold his dog to a prostitute and that it was possible

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for him to arrange a party at her home (R. 75). Apparently this occurred sometime during January or February 1943, inasmuch as it was during that period that accused informed Colonel Arthur B. Custis, his superior officer, that he was going with a girl named Opal (Ex. 22). Captain Coulson and several lieutenants in accused's organization attended a gay Easter party at the home of Mary Del Basco and Captain Coulson then discovered her to be the prostitute about whom accused had earlier spoken (R. 75, 76). About a week after this party Captain Coulson asked accused "How's your whore" or "How's business downtown" and accused laughed in reply (R. 76). First Lieutenant Donald E. Cleveland was one of the junior officers at this party and some two or three weeks thereafter he heard a discussion as to the profession of Mary Del Basco (R. 79). Her home was located in Kalihi Valley and contained a kitchen, two bedrooms, living room, bar and maid's quarters for which she paid a monthly rental of \$125. She also employed a personal maid (R. 66, 67; Ex. 23). Sometime soon after accused became acquainted with Mary Del Basco he remarked to Colonel Custis that "I am all set now. I don't have to worry about getting this woman into trouble" (Ex. 22).

From February to July or August 1943, accused lived at Mary Del Basco's house at least half of every week (R. 56, 91; Ex. 24). During this time he had quarters with Colonel Custis but went there generally only to change his clothes or obtain his laundry. He informed the colonel that he was staying with Opal up in Kalihi Valley (Ex. 22). Colonel Custis met this woman about a month after accused had first commenced to associate with her when accused escorted her to a surprise birthday party given for the colonel on 27 February 1943. She was seen with accused in his living quarters at Hickam Field on several occasions and accused also escorted her to social functions at the Hickam Field Officers' Club where she was introduced to many officers and civilians connected with this field (R. 62, 65, 90; Exs. 22, 23). She was escorted by accused to one party at the Officers' Club around June 1943 where she was introduced to officers and civilians. She attended a dance at the club sometime in July or August 1943 and also the large Luau festival held there that year (R. 68, 69, 81; Exs. 22, 24). In May or June 1943, Colonel Custis and other officers attended a party given by accused at Mary Del Basco's home for the officers of his squadron (Exs. 22, 24). Accused invited Major James Kirkpatrick to dinner at her "large, beautiful home" in July 1943, and sometime later in 1943 Major Kirkpatrick, along with several other officers, was invited by accused to attend another party at the Del Basco home (Ex. 23). At various times over a period of two months commencing sometime in May 1943 accused was accustomed to have an enlisted man drive him to Kalihi Valley and then return for him the following morning around 7 a.m. This enlisted man also had transported two formally gowned women from the Kalihi Valley house to accused's quarters (R. 72-74). Captain Phillip Hawgood, who had been in the company of

accused and Mary Del Basco on some five or six occasions, slept at her home one night, occupying one of the two bedrooms. Accused did not occupy the room with him but departed with him the next morning (R. 83). Accused also escorted this woman to public eating establishments in downtown Honolulu on an average of about once a week (R. 62, 80).

On 6 July 1943, accused and Mary Del Basco acquired a Packard automobile, title to which was taken in their joint names (R. 52; Ex. 16). Mary Del Basco testified that she loaned accused \$500 to buy the car. The auto was for accused's use and her interest in it was solely a security interest to insure repayment of the loan. However, she admitted she filed the gas ration application for the automobile stating thereon that she used it for transportation to and from her work at the Service Hotel (R. 56, 57; Ex. 17).

During this period from February to July or August 1943, Mary Del Basco was about the only female companion with whom accused was seen. She was considered to be a respectable girl at least by Colonel Custis (Ex. 22). However, sometime between June and October 1943 it had become common gossip among the officers and men of accused's squadron that he was associating with a prostitute (Ex. 24). In July or August 1943 Colonel Custis learned of Mary Del Basco's profession, summoned accused to his office and informed him that she was a common prostitute. Accused denied that he had any knowledge that such was her occupation and stated that he would cease associating with her (Ex. 22). Mary Del Basco testified that when she first met accused she told him her family was wealthy and that she was employed at a local concern named C. B. Brewer's Company (R. 63). She stated that she never informed accused of her true occupation but that about two weeks before accused departed for a trip to the mainland on 14 August 1943, accused told her that Colonel Custis had informed him of her profession and that he would be unable to see her in the future (R. 58, 64).

A statement given by accused to a Colonel Benda of the Inspector General's Department on 28 October 1943 was read in evidence without objection (R. 54, 55). In it accused stated that he first began to associate with Mary Del Basco in February 1943, after having sold his dog to her. Although he spent several evenings at her house, he denied that he lived with her. Although he associated with her until three or four weeks prior to his trip to the mainland on 14 August 1944, visited at her home, escorted her to public dining establishments and to the Hickam Field Officers' Club, he denied he was aware of the fact that she was a prostitute. He stated he did not see Mary Del Basco and was not in her company after Colonel Custis had informed him of her occupation (R. 54).

In support of the Additional Charge and its Specification the prosecution introduced evidence to show that just before accused left on his trip to the mainland on 14 August 1943, Mary Del Basco gave Major Kirkpatrick her check for \$350, dated 12 August 1943, which she asked him to deliver to accused (R. 59). Mary Del Basco testified that this check represented part of her loan to accused to finance purchase of the Packard automobile (R. 59; Ex. 18), although the auto had been purchased 6 July 1943. She admitted that just three weeks before she gave accused this check he had told her he would no longer associate with her (R. 59).

On 22 August 1943, while accused was on his trip to the mainland, he cabled the following message to Mary Del Basco at Honolulu, viz: "Miss You Home Soon" (R. 161; Ex. 28). On 11 September 1943, accused telephoned from Sacramento, California, to Mary Del Basco at Honolulu. He opened the conversation with "Hello, darling. How are you", and then inquired as to her health. After discussing a woman known to both of them, the conversation continued as follows (R. 71; Ex. 19):

Accused: "Well, I just wanted to talk to you. I get awful lonesome."  
Mary: "Did you talk to mother?"  
Accused: "No, but I'll be going back that way and I'll call her when I get down there."  
Mary: "I see."  
Accused: "Take good care of yourself now, baby."  
Mary: "I will, honey."  
Accused: "Okay, darling. I hope to see you soon."  
Mary: "All right, dear. Bye."

Accused returned to Honolulu from his trip to the mainland on 10 October 1943 (Ex. 22). On 3 November 1943, accused and Mary Del Basco sold and transferred the Packard automobile to one John Messina for the sum of \$600. Mary Del Basco testified that she received \$200 of the purchase price to apply on her loan of \$500 to accused. Accused did not repay the balance due on this loan until March or April 1944 (R. 51, 57; Ex. 15).

On 17 November 1943, Mary Del Basco visited Wichman's Jewelry Store, Honolulu, and was shown several men's wrist watches. After tentatively selecting one she left the store. The following day she returned and looked at two more expensive models. She then called accused who was apparently outside the shop and he entered. Concealing the price tags from his view she asked him which watch he preferred and he indicated his choice. She then tore the price tag from the watch selected, handed it to the accused and told him to run along. Accused left the store while Mary Del Basco

turned to the saleslady and paid her the purchase price of the watch in cash, \$325, including tax (R. 85-87).

In support of Specification 3 of Charge II the prosecution introduced evidence to show that in October 1943 accused was delinquent in paying his account with the Hendricks Field Post Exchange, Sebring, Florida (R. 10). By 9th Indorsement dated 17 November 1943, accused was instructed by order of the Commanding General, Headquarters Seventh Air Force, to itemize all amounts he had paid on a balance of \$237.35 which had been due and owing on 22 December 1942, and to explain the contradiction between the 4th Indorsement dated 18 August 1943, in which accused stated that a check was being sent to pay the balance due, and the 7th Indorsement dated 7 October 1943, wherein accused stated that payment of the balance had not been made. Accused replied by 10th Indorsement stating that the account had been paid in full on 1 November 1943 and also that (Ex. 1):

"2. In reference to the fourth endorsement due to being sent to the mainland on duty it was impossible to make remittance, as I did not draw my pay during the period of this Temporary duty."

As a matter of fact while accused was at McClellan Field, California, during his trip to the mainland he had been paid base and longevity pay and rental and subsistence allowances to include 31 August 1943 and also a partial payment of \$60. All this appeared on accused's pay and allowance account for the month of September 1943 (Ex. 2). In an 11th Indorsement accused was confronted with these facts and requested to explain them. He replied by 12th Indorsement and offered the following explanation (Ex. 1):

"In compliance with your request of 11th Ind, the above voucher is correct, but due to circumstances of expense over a period of Eight weeks, as well as loaning finances to the enlisted personnel during this duty it was impossible to keep any obligations until such time as I had returned to this station."

In support of Specification 2 of Charge III the prosecution introduced evidence to show that on 14 August 1943 a B-17-F type Army aircraft left Hickam Field on a flight to the United States. The accused was the pilot in command of the flight, Major Kirkpatrick was co-pilot, Second Lieutenant F. M. Hemmings was navigator and Technical Sergeant R. M. Stanley was engineer. One other individual comprised the balance of the crew (R. 24; Exs. 5, 23, 28). This trip was strictly an emergency business trip to permit accused to secure critical supplies for the Seventh Air Force Gunnery School and spare parts for training equipment. The orders for this trip set forth an itinerary which included visits to the following cities in the order set forth, viz: San Francisco, California; Dallas, Texas; Dayton, Ohio;

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New York City; Dayton, Ohio; San Francisco, California; return to Honolulu, Territory of Hawaii. The trip was to consume not more than fourteen days, although accused did not in fact return to Hickam Field until 10 October 1943. No deviation from the planned itinerary was authorized. If for business reasons it became advisable to deviate from the itinerary, permission so to do was to be obtained beforehand from Colonel Custis. If any deviation occurred as a result of an emergency arising from weather conditions or unforeseen exigencies, the change in itinerary was to be promptly reported to Colonel Custis (R. 25; Exs. 5, 22).

The B-17 aircraft left Hickam Field at 0030 hours on Saturday, 14 August 1943 and arrived at Hamilton Field, California, at 1445 hours the same day. At 1930 hours that day this aircraft was flown from Hamilton Field to Gowen Field at Boise, Idaho, arriving there at 2400 hours (Ex. 7). Although the flight to Gowen Field was made with accused's permission, he did not go on it. He permitted Major Kirkpatrick to pilot the plane on that flight and War Department Air Corps - Form No. 1, upon which the pilot of the plane was required to make certain entries, lists Lieutenant Hemmings as co-pilot (R. 17, 19, 20; Exs. 7, 28). Lieutenant Hemmings was a rated navigator but was not a rated pilot or crew chief (R. 18; Ex. 23). According to Major Kirkpatrick certain of the radio equipment of the plane, including the command set receivers and radio compass, had not functioned properly on the trip across the Pacific. Inquiries at Hamilton Field and McClellan Field, California, revealed that the necessary repairs could not be made at either place until Monday, the repair shops apparently being closed over the week end. Major Kirkpatrick had previously been stationed at Gowen Field and his wife and children were living in the city of Boise. Believing that personnel at that field would make the necessary repairs on Sunday, it was decided that he should fly the plane there and then spend the week end visiting with his family. The return flight to Hamilton Field was made on the following Tuesday. According to Major Kirkpatrick accused in the meanwhile concerned himself at McClellan Field with matters pertaining to his mission (Ex. 28).

Form 41B is an official record which is carried aboard all planes and on which entries are made regularly after each flight relative to all inspections made of the plane and all repair work done thereon (R. 29-31). On the Form 41B of this B-17 aircraft there appears no entry of an inspection, work done or repairs made on Sunday, 15 August 1943. However, for 14 August 1943, the following entry appears, viz (R. 31; Ex. 9):

"#15 Check Radio compass OK Toggle Switch on Compass Rec  
was on - C - W - instead - of - voice (Sgt. Balunos)"

The expression "C-W" means "continuous wave" (R. 31). To change from continuous wave to voice merely requires a manual flip of the exposed toggle switch. The phrase "Radio compass OK" meant that the compass had been inspected and found to be operating properly (R. 95).

In support of Specification 3 of Charge III the prosecution introduced evidence to show that according to Army Air Forces Regulation No. 55-5, 30 September 1942

"multi-engined aircraft, the cockpits of which are arranged for side-by-side seating of pilot and co-pilot will be operated with a co-pilot except that commanding officers may authorize the operation of such aircraft with a minimum pilot crew of one pilot provided the pilot is accompanied by a crew chief or aerial engineer who is thoroughly familiar with the mechanical operation of the airplane and its equipment".

The regulation further provided that "Commanders may authorize deviation from the above requirements in case of military necessity" (Ex. 8). As has already been stated, Lieutenant Hemmings, who was a rated navigator but not a rated pilot or crew chief, was listed as co-pilot on the flight to Gowen Field, Idaho, on the plane's Air Corps Form No. 1. Technical Sergeant R. M. Stanley was engineer on this flight (R. 20; Ex. 7).

By agreement between the defense and the prosecution, Brigadier General William J. Flood, Chief of Staff, Seventh Air Force, was permitted to give his interpretation of Army Air Forces Regulation No. 55-5. He stated that when a plane was "out on its own" the pilot of the plane could authorize its operation by the co-pilot alone provided he was accompanied by a qualified crew chief or aerial engineer. He believed that if the accused were busy on matters connected with his mission that would constitute the "military necessity" requisite to permit deviation from the general rule promulgated by the regulations (R. 26).

In support of Specification 11 of Charge III the prosecution introduced evidence to show that, according to accused's official orders covering the trip to the mainland, a stop at Kansas City, Missouri, was not authorized (Exs. 5, 22). About the time the trip was made Colonel Custis was having some dental work done in Honolulu and some dental supplies which could be obtained from a dental house in Kansas City were needed to complete the work. According to Colonel Custis he gave accused a check for \$5 just before the latter departed on this trip and asked him if he would send it to the dental house in Kansas City when he arrived at

San Francisco, along with a letter requesting that the particular supplies desired be shipped to accused at San Francisco so he could pick them up there after completion of his trip about the United States and carry them to Honolulu. The supplies weighed less than a quarter of a pound. Colonel Custis stated that he did not ask accused to stop at Kansas City and obtain these supplies (Ex. 22). According to Major Kirkpatrick's version of this incident, just prior to leaving Honolulu Colonel Custis "wrote on a sheet of paper the name and address of a dental laboratory in Kansas City, from which I was to obtain a denture for him; and he gave me the money therefor" (Ex. 23). An overnight stop was in fact made at Kansas City and the dental supplies were obtained (R. 19; Exs. 7, 23). While at Kansas City, according to Major Kirkpatrick, they conferred with representatives of Twentieth Century Fox Motion Pictures relative to training films which might be available for use by the Seventh Air Force Gunnery School, having been advised so to do by Training Aids Division in New York (Ex. 23).

4. After accused had been informed of his rights as an accused on trial, he elected to take the stand and testify under oath. In addition the defense presented other evidence on certain of the offenses charged.

With respect to Specifications 1 and 2 of Charge II, accused testified that he met Mary Del Basco in February 1943 when she purchased his dog and soon thereafter he began to associate with her. He visited at her home and "many times spent the night there" (R. 118, 119). He escorted her to dinner at public places in Honolulu, to dances and parties at Hickam Field Officers' Club, to officers' homes and to his own quarters (R. 119, 120). She informed accused she was employed by C. Brewer Co. in Honolulu and accused asserted he did not discover her real occupation until sometime in late July or the early part of August when Colonel Custis informed him and Major Kirkpatrick of it (R. 120, 121). At first accused did not recall having any conversation with Captain Coulson sometime prior to Easter 1943 during which accused referred to Mary Del Basco as a prostitute (R. 119). Later he denied that he ever so referred to her in any conversation with Captain Coulson (R. 138, 139). Accused denied that he told Colonel Custis, shortly after his association with Mary Del Basco began, that now he would not have to worry about getting a woman pregnant (R. 141). The statement of Commander John B. Cooke, U. S. Navy, retired, was admitted in evidence with the consent of the prosecution. In it the commander stated he had seen Mary Del Basco in accused's company on some eight or ten occasions, one of which was a birthday party given for him at Hickam Field on 17 May 1943 (Ex. E).

On cross-examination accused admitted he had been married three times, having married his third and present wife, a Catholic, before his

second marriage had been terminated. Although his third wife had stated she would not divorce him, apparently accused had busied himself about maintaining divorce proceedings and had gone so far as to become engaged to a nurse connected with the 147th General Hospital (R. 126, 128, 137).

With respect to the Additional Charge and its Specification, the accused testified that he did not associate with Mary Del Basco after he learned her real occupation except to close up business matters connected with the sale of the Packard automobile. He stated that although Mary had agreed to loan him all of the money to buy the auto, he actually paid the balance of \$350 due on it and that the check he received from her on 12 August 1943 was given to him in fulfillment of her promise to loan him the money to buy the auto (R. 121, 122). Major Kirkpatrick gave him the check stating "Mary wanted you to have it" (R. 139). When he returned from his trip to the mainland he sold the auto for \$600, paid Mary \$200 of it in reduction of her loan and repaid the balance of the loan around Easter 1944 (R. 122, 142). He explained his trans-oceanic phone conversation with her by stating that he wished to pacify her because he was fearful she might cause him trouble (R. 128). He stated, "In my own opinion, knowing I had been deceived by this lady, I didn't know what she might do, and I didn't care to become involved any more, so I called her up and inquired if anything could be done. I didn't mention when I would be back" (R. 123). He conceded he might have sent her a card and a cablegram from the mainland during his trip (R. 128). He explained this conduct by saying, "Just because you don't associate with a person is no reason for not calling or writing. A telephone call or a card is not an association" (R. 128). Major Kirkpatrick had given accused the address of Mary's mother and accused planned to call her while on the mainland to tell her of Mary's well being (R. 144).

Accused further testified that late in November, after he and Major Kirkpatrick had been suspended from duty, they were walking in downtown Honolulu and quite by accident met Mary Del Basco who handed Major Kirkpatrick a Christmas present. She told accused to accompany her down the street and she would give him a present. Therefore, they entered a jewelry store and Mary told accused to take his choice of one of two watches which were shown to them. He indicated his choice, took the watch he chose and then left the store after thanking her (R. 123).

With respect to Specification 3 of Charge II, accused stated that when he wrote the 10th Indorsement he had not received flight pay due him, although he had received all other pay and allowances plus a partial payment of \$60, and that he had intended to say in the indorsement that he had not drawn all of his pay and for that reason the account with the Exchange at Sebring Field had not been settled earlier. He had little experience with

military correspondence and had not intended to deceive by his misstatement (R. 101, 102, 143).

In defending against Specification 2 of Charge III the accused testified that on the trip to the mainland the radio equipment of the B-17 plane including the radio compass failed to function properly. He sought to have the equipment serviced at Hamilton Field upon arrival there on 14 August 1943 but was advised that there were no spare parts at the field. Accused flew to San Francisco that same afternoon but the repairs could not be made there. It was decided that either Tucson, Arizona, or Gowen Field, Idaho, was the nearest place where the work could be performed. Because of Major Kirkpatrick's acquaintance with personnel at the latter field it was decided that he should fly the plane there and have the necessary repairs made while accused remained in California to carry on with the business of the mission (R. 107, 108).

Second Lieutenant Frederick M. Hemmings, the navigator on the flight from Honolulu, testified that the radio compass did not function properly during the trip to the mainland (R. 149). When the plane landed at Hamilton Field at the end of its trans-oceanic flight, it was met by accused's wife (R. 154). Major Kirkpatrick's wife met the plane when it landed at Gowen Field (R. 155). During the flight to Gowen Field the radio ceased to function and they were forced to land at Pocatello, Idaho, to obtain their bearings. On the return trip to Hamilton Field the radio functioned properly (R. 151).

With respect to Specification 3 of Charge III, the accused testified that the requirements of Army Air Forces Regulation No. 55-5 were complied with on the flight to Gowen Field because Technical Sergeant Stanley was a qualified flight engineer on B-17 type of aircraft and "one of the finest crew chiefs \* \* \* in this area" (R. 109). Accused believed the trip to Gowen Field was dictated by "military necessity" in order to afford rest for his crew and to obtain the necessary repairs to the radio equipment (R. 110). Lieutenant Hemmings testified that both he and the flight engineer, Technical Sergeant Stanley, acted as co-pilot on the flight to Gowen Field. For the first 30 or 45 minutes of the flight Sergeant Stanley was in the co-pilot's seat and then as night fell the lieutenant relieved him. Sergeant Stanley returned to the co-pilot's seat before the plane was landed at Pocatello, Idaho. He assisted in the take-off from there and remained in the co-pilot's seat for the balance of the flight to Gowen Field where he "also landed the ship" (R. 150, 151).

With respect to Specification 11 of Charge III, accused testified that he was told by Major Kirkpatrick that they were to stop at Kansas City,

Missouri, to pick up some items for Colonel Custis. They also used this overnight stop to contact representatives of Twentieth Century Fox films in an attempt to locate training films (R. 115). Lieutenant Hemmings testified that the afternoon of the day the flight to the mainland was made Colonel Custis entered the hangar at Hickam Field and handed Major Kirkpatrick some papers. He did not recall if accused was present on that occasion (R. 153).

5. The evidence introduced by the prosecution in support of Specification 1 of Charge II conclusively shows that at least from 15 April 1943 until 31 July 1943 (as found by the court) the accused publicly associated with a common prostitute. He not only lived with her at her home about half that period of time but also escorted her to public eating establishments in Honolulu, to his quarters, to social events at the Hickam Field Officers' Club and to parties given by other officers. He invited other officers to the home of the prostitute to attend parties held there. During this association he introduced her freely to officers and civilians connected with Hickam Field. Accused's only defense was that he did not know she was a prostitute. However, competent evidence introduced by the prosecution shows that he learned of her profession shortly after he met her in February 1943. He told Captain Coulson she was a prostitute sometime prior to Easter 1943, and also told Colonel Custis, in a conversation concerning her, that "I am all set now. I don't have to worry about getting this woman into trouble". All during this time rumors as to the profession of accused's lady friend were rampant in accused's organization. At least one officer chided accused about her unsavory occupation and received only a laugh in reply. The evidence conclusively establishes that accused knew the occupation of this woman from the inception of his association with her and that despite it he associated intimately with her and brazenly escorted her in public and to social functions attended by military personnel. He also arranged parties at her not too modest home to which he invited other officers. Such conduct was reprehensible and disgraceful and leaves no doubt of accused's unfitness to remain an officer. The court found accused guilty of associating with this prostitute from 15 April 1943 rather than from 1 March 1943 as alleged and the evidence fully sustains the finding.

After all evidence had been presented, the prosecution requested, and was granted, permission by the court to amend Specification 2 of Charge II by changing the date on which accused was charged with escorting this prostitute to a dance at the Officers' Club APO #953 from 19 June 1943 to 17 May 1943. Although witnesses for the prosecution testified that accused escorted her to a party at the Officers' Club around June 1943 and to a dance around July or August 1943, a witness for the defense definitely fixed 17 May 1943 as a date on which she and accused attended a social

function at the club. Apparently because of that definite testimony, the prosecution sought and received permission from the court to amend the Specification.

A court may permit a specification to be amended if, though defective, it is nevertheless sufficient fairly to apprise the accused of the offense alleged (MCM, 1928, par. 73). In view of the fact that the evidence shows accused escorted this woman to the Officers' Club on several occasions, one of which occurred around June 1943, it might well be doubted that the original Specification (fixing 19 June 1943 as the date of the offense) fairly apprised accused that he was being tried only for the particular visit made to the club on 17 May 1943. If there had been but one visit made to the Officers' Club the amendment might well have been allowed. The evidence indicates that such was not the fact. However, even more substantial objection exists to this Specification. Under Specification 1 of Charge II the court found the accused guilty of associating with her from 15 April to 31 July 1943. The association is not limited to any particular places or times during this period. The language of the Specification is sufficiently broad to include his association with her wherever and whenever it occurred from 15 April until 31 July 1943. Escorting her to the Officers' Club on 17 May 1943 was but one incident of the entire association of which he had already been found guilty. Thus, when accused was found guilty of Specification 2, he was in fact being twice found guilty of the same offense. It is elementary that an accused may not properly be found guilty twice for the same offense. Accordingly, the finding of guilty of Specification 2 of Charge II cannot be sustained.

Under the Specification of the Additional Charge competent evidence shows that after 1 August 1943 and after Colonel Custis told accused he knew of Mary Del Basco's profession and advised him to cease his association with her, he still continued to do so at least to the extent of (a) speaking to her in endearing and affectionate tones over trans-oceanic telephone from California to Honolulu, (b) sending her a cable indicating that he missed her while on his trip to the mainland, (c) accepting a check for \$350 from her, his attempted explanation of which is offensive to ordinary common sense, and (d) accepting from her as a present a wrist watch valued at \$825. There is no evidence that this later association was of the flagrant and open nature that characterized accused's relations with this prostitute over the period covered by Specification 1 of Charge II. Nevertheless it is clear that accused continued a social relationship with a common prostitute after her character and profession had become known to him and his superiors and he had been warned against continuance of the relationship. For an officer to continue such an association under these circumstances, albeit

concealed to a substantial degree from the public gaze, constitutes conduct unbecoming an officer and a gentleman in violation of Article of War 95. Although this conduct is alleged in the Specification to be "to the scandal and disgrace of the military service" such words are descriptive only and may be treated as surplusage. Conduct condemned by Article of War 95 is not necessarily conduct that scandalizes the military service or the community (Winthrop's Military Law and Precedents, 2d Ed., p. 711). It is conduct "morally unbecoming and unworthy" of an officer and a gentleman (Winthrop, supra, p. 711). If the net effect of an officer's behavior in an unofficial or private capacity is such as to exhibit him "as morally unworthy to remain a member of the honorable profession of arms", his conduct is violative of Article of War 95 (Winthrop, supra, p. 713). Such was the conduct of the accused in associating with this woman after 1 August 1943. The evidence sustains the findings of guilty of the Additional Charge and its Specification.

We are not unmindful that Specification 1 of Charge II and the Specification of the Additional Charge cover a continuous association with this prostitute from 1 March 1943 to 1 December 1943. Objection might be raised that inasmuch as a continuous course of conduct is the gravamen of the offense, arbitrarily to separate the conduct under two specifications, one covering the period from 1 March 1943 to 31 July 1943 and the other from 1 August 1943 to 1 December 1943, constitutes an unreasonable multiplication of charges frowned upon by military law (MCM, 1928, par. 27). Certainly it would have been improper to have arbitrarily divided the entire period from 1 March to 1 December into two or more periods unless the character of the association warranted such a division. However, the temporal division here made was not arbitrary. Accused's conduct during the first period was open and notorious. Around July or August came the denouement so far as accused's superior officer was concerned. Colonel Custis learned of the girl's character and profession, conveyed his knowledge to accused and was informed by accused that he would terminate the relationship. This accused failed to do, but, on the contrary, he continued to associate with his paramour although he did so in a secretive, unobtrusive way to avoid detection. It thus becomes clear that accused's conduct was not continuously of the same nature over the entire period but rather falls into two distinct categories. Under such circumstances it was not improper to set forth each course of conduct in a separate specification.

The evidence offered under Specification 3 of Charge II conclusively establishes that accused knowingly and intentionally made a false official statement in writing to a superior officer, stating that he had received no pay while on his trip to the mainland when in fact he had received base and longevity pay, rental and subsistence allowances and a partial payment of \$60. He had not, however, received his flight pay. Grasping that fact, he sought

to convince the court that when he wrote that he had not received "my pay" while on his trip to the mainland, he meant to write "all my pay". This explanation fails to command credence when it is remembered that he was using the alleged failure to receive pay as an excuse for failing to make remittance on an obligation long overdue. The evidence sustains the finding of guilty of Specification 3 of Charge II.

The evidence offered under Specification 2 of Charge III demonstrates that accused violated orders which expressly programmed the itinerary of the flight to the mainland when he permitted Major Kirkpatrick to fly the plane to Gowen Field, Idaho. Accused sought to explain it on the grounds that the trip was necessary to obtain needed repairs to the plane's radio equipment over the week end to prevent any loss of time from the business of the mission. This excuse was demolished by documentary proof that no repairs were made at Gowen Field inasmuch as the radio equipment was found to be functioning properly. Further, we are unable to see how any time was conserved since Major Kirkpatrick did not return to Hamilton Field, California, until the Tuesday following the week end. More time would have been saved if the plane had remained at Hamilton Field and the alleged repairs had been made on Monday. It is inescapable that the real purpose of the trip was to permit Major Kirkpatrick to visit his wife and children in Boise, Idaho. The evidence sustains the finding of guilty of Specification 2 of Charge III.

The evidence offered under Specification 3 of Charge III shows that on the flight to Gowen Field the plane was piloted by Major Kirkpatrick with Lieutenant Hemmings listed as co-pilot although he was only a rated navigator. Technical Sergeant Stanley served as engineer on this flight. Under Army Air Forces Regulation No. 55-5, 30 September 1943, operation of this plane with a minimum pilot crew of one pilot accompanied by an aerial engineer thoroughly familiar with the mechanical operations of the plane and its equipment was authorized. The prosecution presented no evidence to show that Sergeant Stanley did not fulfill the requirements of that regulation. Proof of that fact was an essential element of the offense alleged. Failure to offer any proof on that essential point was fatal to the prosecution's case. In addition, the defense presented evidence to show that Sergeant Stanley occupied the co-pilot's seat for a portion of the trip and actually assisted in landing and taking off the plane during this flight. Such evidence brings the defect in the prosecution's case into bold relief. The evidence does not sustain the finding of guilty of Specification 3 of Charge III.

The evidence offered under Specification 11 of Charge III establishes that accused made an overnight stop at Kansas City, Missouri, while

on his trip to the mainland. This stop was not authorized by accused's official orders. Although the defense introduced evidence to show that the stop was made at the request of Colonel Custis, accused's superior officer, to permit performance of a personal errand for him, Colonel Custis denied that he had requested accused so to do. The court believed the testimony of Colonel Custis. There is nothing in the record to indicate it was unwarranted in so doing. The evidence sustains the finding of guilty of Specification 11 of Charge III.

6. The accused is 32 years of age. In civilian life he was employed in promotion and public relations work successively by two of the smaller western airlines in this country. He served as flight lieutenant in the Royal Canadian Air Force from June 1940. He was commissioned a captain, Army of the United States, 16 May 1942 by Special Order of the Canadian-American Military Board, Belkville, Ontario. He was promoted to major on 1 January 1943.

7. 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. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Charge II and Specifications 1 and 3 thereof, Charge III and Specifications 2 and 11 thereof, and the Additional Charge and its Specification, legally insufficient to support the findings of guilty of Specification 2 of Charge II and Specification 3 of Charge III, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 96.

Thomas M. Jappe, Judge Advocate.

Arnold, Judge Advocate.

William H. Lambrell Judge Advocate.

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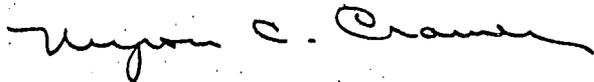
War Department, J.A.G.O., 23 OCT 1944 - To the Secretary of War.

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 Major Stuart S. Knickerbocker (O-1699180), 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 Charge II and Specifications 1 and 3 thereof, Charge III and Specifications 2 and 11 thereof, and the Additional Charge and its Specification, legally insufficient to support the findings of guilty of Specification 2 of Charge II and Specification 3 of Charge III, legally sufficient to support the sentence and to warrant confirmation of the sentence. The accused was found guilty of knowingly and willfully associating with a common prostitute from 15 April 1943 until 1 December 1943, while married to his third wife, by escorting her in public and to social functions attended by military personnel and by living with her in her home for a portion of that time; of making a false official statement to a superior officer; of deviating without permission from the authorized itinerary of an official business mission by flying an Army plane to a city not within the itinerary; and of permitting an officer under his command similarly to deviate. Accused's conduct has clearly demonstrated his moral unfitness to remain an officer. Further, in July 1944, he received a reprimand under the 104th Article of War for improper use of a Government vehicle. I recommend that the sentence be confirmed but that the forfeitures adjudged be remitted, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to the attached letter from Senator C. Wayland Brooks dated 18 October 1944.

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



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

- 4 Incls  
Incl 1 - Record of trial.  
Incl 2 - Ltr fr Senator  
C Wayland Brooks.  
Incl 3 - Dft ltr for sig S/W.  
Incl 4 - Form of action.

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(Findings of guilty of Specification 2, Charge II and Specification 3, Charge III, disapproved. Sentence confirmed but forfeitures remitted. G.C.M.O. 677, 29 Dec 1944)

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

(19)

SPJGN  
CM 264138

15 NOV 1944

UNITED STATES )

XXIII CORPS

v. )

Trial by G.C.M., convened  
at Camp Swift, Texas, 28  
August 1944. Dishonorable  
discharge and confinement  
for ten (10) years. Dis-  
ciplinary Barracks.

Private ANDREW LEWIS )  
(18105456), Company C, )  
816th Tank Destroyer )  
Battalion, Camp Swift, )  
Texas. )

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HOLDING by the BOARD OF REVIEW  
LIPSCOMB, O'CONNOR and GOLDEN, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Andrew Lewis, Company C, 816th Tank Destroyer Battalion, did, at Camp Swift, Texas, on or about 5 July 1944 desert the service of the United States by absenting himself without proper leave from his organization with intent to shirk important service, to wit: transfer to a personnel replacement depot for shipment to duty overseas, and did, remain absent in desertion until he was apprehended at Alice, Texas, on or about 25 July 1944.

He pleaded not guilty to and was found guilty of the Specification and the Charge. Evidence was introduced of previous convictions by summary court-martial of absence without leave for two days and by special court-martial of absence without leave for one month and eight days. 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 ten years at such place as the reviewing authority might direct. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. The evidence for the prosecution shows that Company C, 816th Tank Destroyer Battalion, stationed at Camp Swift, Texas, was called upon to furnish personnel to be sent to a personnel replacement depot for shipment overseas. Thirty-eight men of the company, including accused, were selected for the transfer and each of the men was then given a ten-day furlough (R. 6-8). Prior to their departure on furlough the company commander, "Captain Guinn", read the 28th Article of War to the men and they were given the opportunity to ask questions (R. 10-11). Accused left camp on furlough about 24 June 1944 and failed to return at its expiration on 5 July 1944 (Ex. A; R. 7, 12). He remained absent without leave until 25 July 1944, when he was apprehended at Alice, Texas (R. 9, 10). In a conversation with the investigating officer he admitted knowing that he was scheduled to be sent to a replacement depot for shipment overseas on the expiration of his furlough (R. 11). At the time of trial, 28 August 1944, only a few of the men selected for shipment had left Camp Swift (R. 8).

4. Evidence for the defense: Accused testified that he was not present at any meeting in which Captain Guinn read Articles of War 28 or 58. The only meeting accused attended was when Captain Guinn spoke about furloughs. Captain Guinn told them they were getting furloughs so as to be qualified for overseas replacement and that they might leave "any day" when they returned. Accused did not return because he was drinking (R. 17-19).

Private James V. D'Andrea testified that two meetings were had of the men selected for shipment; at one meeting Captain Guinn discussed furloughs, and at the other he read some Articles of War. Private D'Andrea did not see accused at the latter meeting (R. 13-15, 19-20). Sergeant Arthur I. Lemon had heard accused say he would like to go overseas. Accused was a good soldier (R. 12).

5. Accused is charged under Article of War 58 with desertion by absenting himself without leave with intent to shirk important service, to wit, transfer to a personnel replacement depot for shipment to duty overseas. It is an essential element of this offense that the service specified, transfer to a personnel replacement depot for shipment to duty overseas, be important service within the meaning of Article of War 28.

The question of "important service" as related to a transfer to a replacement depot has been recently considered by the Board of Review in CM 264237 Pattillo, CM 265447, Hodge and CM 266441, Mugan. In the Pattillo case the Board said:

"\* \* \* 'Important service' includes all actual service designed to protect or promote national or public interest or welfare 'in a manner direct and immediate', such as embarkation for foreign duty in time of war, but does not include what may be termed 'preparatory service' (1 Bull. JAG 271, 272).

"There is no evidence in this record that accused's transfer to the Replacement Depot was directly related to embarkation for foreign duty. He might well have remained at Fort George G. Meade for an indefinite length of time before he, or a unit of which he was a member, or to which he was eventually assigned, was selected for transfer to a port of embarkation and alerted for prompt overseas shipment. Without proof that embarkation for foreign service was to result directly and immediately from the transfer to a Replacement Depot, that transfer can be classified only as a preparatory step to such embarkation and, consequently, does not constitute important service within the intendment of Article of War 28. \* \* \*".

The same conclusion was reached in the cases of Hodge and Mugan. As in the Pattillo case there is no evidence here that accused's transfer to a replacement depot was directly related to embarkation for foreign duty. There is nothing to show that accused was under orders for immediate embarkation or that his transfer was anything other than merely a preparatory move. The evidence is sufficient, therefore, only to sustain the lesser included offense of absence without leave for the period alleged in the Specification, in violation of Article of War 61.

6. The accused is 22 years of age. He enlisted in the Army at San Antonio, Texas, 22 May 1942 and has no prior service.

7. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings that the accused did, at the time and place alleged, absent himself without leave from his organization and did remain absent until he was apprehended at the time and place alleged, in violation of Article of War 61, and legally sufficient to support the sentence.

Abner E. Lipscomb Judge Advocate.  
Robert G. Clannon Judge Advocate.  
Daniel H. Golden Judge Advocate.

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SPJGN  
CM 264138

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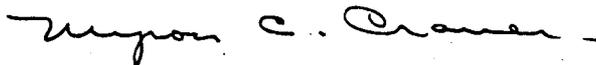
War Department, J.A.G.O., - To the Commanding General,  
XXIII Corps, Fort McPherson, Georgia.

1. In the case of Private Andrew Lewis (18105456), Company C, 816th Tank Destroyer Battalion, Camp Swift, Texas, I concur in the foregoing holding by the Board of Review and for the reasons stated therein recommend that only so much of the findings of guilty of the Specification and the Charge be approved as involves a finding of guilty of absence without leave, in violation of Article of War 61. Upon compliance with the foregoing recommendation, and under the provisions of Article of War 50 $\frac{1}{2}$ , you will have authority to order the execution of the sentence.

2. It is recommended that the confinement be reduced to a period not in excess of five years in accordance with the policy announced in War Department letter AG 250.4 (2-12-43), dated 5 March 1943, Subject: "Uniformity of Sentences adjudged by general court-martial".

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 264138).



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.

(23)

SPJGN  
CM 264149

5 OCT 1944

UNITED STATES )

v. )

Second Lieutenant ROBERT )  
L. ENGELHARDT (O-676766), )  
Air Corps. )

ARMY AIR FORCES  
CENTRAL FLYING TRAINING COMMAND

Trial by G.C.M., convened  
at Liberal, Kansas, 24  
August 1944. Dismissal,  
total forfeitures and  
confinement for one (1)  
year.

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OPINION of the BOARD OF REVIEW  
LIPSCOMB, O'CONNOR and GOLDEN, Judge Advocates

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Second Lieutenant Robert L. Engelhardt, Air Corps, did, at Liberal Army Air Field, Liberal, Kansas, on or about 4 July 1944, feloniously take, steal, and carry away, one Pioneer Type Sextant, having Stock Number 6200-327975, value about \$445.00, the property of the United States, furnished and intended for the military service thereof.

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

3. The evidence for the prosecution shows that a Bendix Pioneer Navigation Sextant, having a reasonable market value of \$445.00, was issued on 13 April 1944 to Captain Burdette J. McKinnis at San Marcos Air Field, San Marcos, Texas. The Instrument was "Government property, furnished and intended for the military service thereof at all times"

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(R. 7, 9-10; Pros. Exs. 2, 3, 4, 5). It could be identified not only by its manufacturer's serial number but by a peculiar flaw in its winding mechanism (R. 8-9).

Captain McKinnis was transferred to Liberal Army Air Field, Liberal, Kansas, shortly after 13 April 1944. He arrived at his new station on 27 April 1944 bringing the sextant with him (R. 7). During the evening of 4 July 1944, one day before he was due to leave for another post, the instrument was underneath the table in room 10 of Barracks 800 which had been assigned to him as his living quarters (R. 8).

During Captain McKinnis' absence the accused entered the building for the purpose of visiting a Second Lieutenant William R. Fay (R. 16; Pros. Ex. 9). In passing room 10 the accused "noticed" the sextant lying on the floor. He forthwith picked it up and "carried it back to his own room" (Pros. Ex. 9). The next day he placed the instrument in an "Aviator's Kit Bag", wrapped a blanket around the bag, and sent the package by express to his home at 4627 Sepulveda Boulevard, Van Nuys, California (R. 11; Pros. Exs. 6, 9).

When Captain McKinnis returned to his quarters, he immediately discovered his loss (R. 8). Upon his reporting the theft to the Provost Marshal of the Liberal Army Air Field, a telegram was sent to the Provost Marshal of Van Nuys, California, directing that the package sent by the accused be searched (R. 11; Pros. Ex. 6). An examination of the shipment made in pursuance to this instruction at the Railway Express Office of Van Nuys resulted in the finding of the sextant (R. 12; Pros. Ex. 7). It was promptly returned to Liberal Field (R. 12-13; Pros. Ex. 8).

The accused, upon being interrogated, signed a full confession on 11 July 1944 (R. 15; Pros. Ex. 9). Subsequently on 16 August 1944 he executed an additional statement in which he identified and described the sextant which he had stolen (R. 17-18; Pros. Ex. 10). Both documents were freely and voluntarily given (R. 15-18).

4. The accused, after being apprised of his rights relative to testifying or remaining silent, took the stand on his own behalf. He had been in the Army since 3 April 1942. After more than a year of service as an enlisted man he had been honorably discharged on 21 April 1943 for the purpose of accepting a commission as a second lieutenant on 22 April 1943 (R. 19-20; Def. Ex. A). His ground school grades had been high (R. 21). He had been stationed at various posts as a pilot and had accumulated between 1000 to 1100 hours of flying time (R. 20). During pilot transition training at Liberal Army Air Field his record had been good (R. 21-22; Def. Ex. B).

5. The Specification of the Charge alleges that the accused did, "on or about 4 July 1944, feloniously take, steal, and carry away, one Pioneer Type Sextant, having Stock Number 6200-327975, value about \$445.00, the property of the United States, furnished and intended for the military service thereof." This was set forth as a violation of Article of War 94.

The accused entered Captain McKinnis' quarters, picked up a sextant which was Government property, carried it to his own room, and mailed it the following day to his home in Van Nuys, California. The trespass, the asportation, and the intent to deprive the rightful owner of possession permanently are all established by the testimony adduced, by the accused's free and voluntary confession, and by his plea of guilty.

Although not raised by him or by defense counsel, a question of constitutional law is presented by the record, for apparently the Provost Marshal of Van Nuys, California, made his examination at the Railway Express Office without first obtaining a search warrant. It is of course axiomatic that searches and seizures affecting military personnel outside of the limits of a military reservation are subject to the requirements and restrictions imposed by the Fourth and Fifth Amendments to the Federal Constitution. The general rule is that a search and seizure made without a search warrant will be sustained only when (1) it is incident to a lawful arrest or (2) when the property itself by reason of its physical characteristics furnishes credible evidence of the commission of a crime, or (3) when reliable information of a violation of the law is received and immediate action is imperative because of the exigencies of the situation.

Husty v. United States, 282 U.S. 694, 75 L. Ed. 629 (1930) and Carroll v. United States, 267 U.S. 132, 69 L. Ed. 543, are authority for this third proposition.

From all indications the Provost Marshals of both Liberal Field and Van Nuys were acting upon "reliable information". Immediate action was unquestionably essential in this case, for the delivery of the sextant might have enabled the accused to conceal it or to dispose of it and thus to frustrate the processes of justice. In the light of these circumstances the search must be deemed reasonable and lawful.

6. The accused is married and about 27 years old. The records of the War Department show that he attended the Massachusetts Institute of Technology for three years, but was not graduated; that from 1939 to April 1942 he was employed successively by Glenn L. Martin Aircraft Corp., Middle-River, Maryland, Douglas Aircraft Corp., Santa Monica,

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California, Lockheed Aircraft Corp., Burbank, California, and Aircraft Components, Inc., Van Nuys, California; that his position with the last named company was that of precision inspector; that he had enlisted service from 3 April 1942 to 21 April 1943; that he was commissioned a second lieutenant on 22 April 1943; and 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 authorized upon conviction of a violation of Article of War 94.

On leave, Judge Advocate.

Robert J. Connor, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

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CM 264149

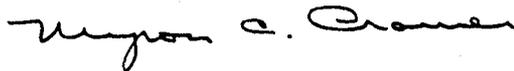
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War Department, J.A.G.O., **24 OCT 1944** To the Secretary of War.

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 Second Lieutenant Robert L. Engelhardt (O-676766), 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 legally sufficient to support 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 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,  
Major General,  
The Judge Advocate General.

3 Incls.

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

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(Sentence as approved by reviewing authority confirmed.  
G.C.M.O. 655, 16 Dec 1944)



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

(29)

SPJGN  
CM 264167

13 OCT 1944

UNITED STATES )

v. )

Second Lieutenant NORTON D.  
LUBENOW (O-1280904), Air  
Corps. )

ARMY AIR FORCES EASTERN  
FLYING TRAINING COMMAND

) Trial by G.C.M., convened at  
) Turner Field, Albany, Georgia,  
) 1 August and 7 September 1944.  
) Dismissal, total forfeitures and  
) confinement for three (3) years.

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OPINION of the BOARD OF REVIEW  
LIPSCOMB, O'CONNOR and GOLDEN, Judge Advocates  
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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that Second Lieutenant Norton D. Lubenow, Finance Department, 2147th Army Air Forces Base Unit, Souther Field, Americus, Georgia, did, without proper leave, absent himself from his station and organization at Souther Field, Americus, Georgia, from about 9 May 1944 to about 21 May 1944.

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

Specification 1: In that Second Lieutenant Norton D. Lubenow, Finance Department, 2147th Army Air Forces Base Unit, Souther Field, Americus, Georgia, did, at Montgomery, Alabama, on or about 14 April 1944, with intent to defraud wrongfully and unlawfully make and utter to First Lieutenant Tom J. E. Hunt a certain check in words and

figures as follows, to-wit: "Madison, Wis., 14 April 1944, Bank of Madison, Pay to the Order of Cash \$100.00 One Hundred and No/100 Dollars, Norton D. Lubenow - 2nd Lt. F. D. 01280904", and by means thereof did obtain from the said Lieutenant Tom J. E. Hunt the sum of \$100.00, he, the said Lieutenant Norton D. Lubenow, then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of Madison, Madison, Wisconsin, for the payment of said check.

Specification 2: Same form as Specification 1 but alleging check drawn on same bank, dated 17 April 1944, payable to the order of Cash, made and uttered to Second Lieutenant Thomas L. Moss, at Montgomery, Alabama, and thereby fraudulently obtaining \$71.50.

Specification 3: Same form as Specification 1 but alleging check drawn on same bank, dated 21 April 1944, payable to the order of Cash, made and uttered to Second Lieutenant Thomas W. Fauntleroy, at Montgomery, Alabama, and thereby fraudulently obtaining \$145.00.

Specification 4: In that Second Lieutenant Norton D. Lubenow, Finance Department, 2147th Army Air Forces Base Unit, Souther Field, Americus, Georgia, did at Montgomery, Alabama, on or about 21 April 1944, with intent to defraud wrongfully and unlawfully make and utter to Second Lieutenant Max Weis, Jr., a certain check in words and figures as follows, to-wit: "Madison, Wis. 21 April 1944, Bank of Madison, 79-1050, Pay to the Order of Cash \$41.00 Forty One and No/100 Dollars, Norton D. Lubenow-2nd Lt. F.D. 01280904", and by means thereof did obtain from the said Lieutenant Max Weis, Jr., satisfaction of a debt, he, the said Lieutenant Norton D. Lubenow, then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of Madison, Madison, Wisconsin, for the payment of said check.

Specification 5: Same form as Specification 1 but alleging check drawn on same bank, dated 21 April 1944, payable to the order of Cash, made and uttered to Second Lieutenant William H. Manby, at Montgomery, Alabama, and thereby fraudulently obtaining \$25.00.

Specification 6: Same form as Specification 1 but alleging check drawn on same bank, dated 21 April 1944, payable to the order of Cash, made and uttered to Second Lieutenant James J. Dougherty, at Montgomery, Alabama, and thereby fraudulently obtaining \$78.25.

Specification 7: Same form as Specification 1 but alleging check drawn on same bank, dated 22 April 1944, payable to the order of Cash, made and uttered to Second Lieutenant James J. Dougherty, at Montgomery, Alabama, and thereby fraudulently obtaining \$124.00.

Specification 8: Same form as Specification 1 but alleging check drawn on same bank, dated 22 April 1944, payable to the order of Cash, made and uttered to Warrant Officer (JG) Thomas M. Young, at Montgomery, Alabama, and thereby fraudulently obtaining \$181.50.

Specification 9: In that Second Lieutenant Norton D. Lubenow, Finance Department, 2147th Army Air Forces Base Unit, Souther Field, Americus, Georgia, did at Americus, Georgia, on or about 6 May 1944, with intent to defraud wrongfully and unlawfully make and utter to E. A. Drew, doing business as Windsor Pharmacy, Americus, Georgia, a certain check in words and figures as follows, to-wit: "Madison, Wis. 6 May 1944, Bank of Madison, 79-1050, Pay to the Order of Windsor Pharmacy \$50.00 Fifty and No/100 Dollars, Norton D. Lubenow-2nd Lt. F.D. 01280904", and by means thereof did obtain from E. A. Drew, doing business as Windsor Pharmacy, Americus, Georgia, merchandise and services at a value of approximately \$9.00 and cash at a value of approximately \$41.00, he, the said Lieutenant Norton D. Lubenow, then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of Madison, Madison, Wisconsin, for the payment of said check.

Specification 10: Same form as Specification 9 but alleging check drawn on same bank, dated 8 May 1944, payable to the order of Cash, made and uttered to E. A. Drew, doing business as Windsor Pharmacy, at Americus, Georgia, and thereby fraudulently obtaining merchandise and services at a value of about \$15.00 and cash at a value of about \$25.00.

Specification 11: Same form as Specification 9 but alleging

check drawn on same bank, dated 9 May 1944, payable to the order of Cash, made and uttered to E. A. Drew, doing business as Windsor Pharmacy, at Americus, Georgia, and thereby fraudulently obtaining merchandise and services at a value of about \$22.50 and cash at a value of about \$5.00.

Specification 12: Same form as Specification 9 but alleging check drawn on same bank, dated 9 May 1944, payable to the order of Windsor Pharmacy, made and uttered to E. A. Drew, doing business as Windsor Pharmacy, at Americus, Georgia, and thereby fraudulently obtaining merchandise and services at a value of about \$12.00 and cash at a value of about \$3.00.

Specification 13: (Finding of guilty disapproved by reviewing authority).

Specification 14: In that Second Lieutenant Norton D. Lubenow, Finance Department, 2147th Army Air Forces Base Unit, Souther Field, Americus, Georgia, did at Albany, Georgia, on or about 11 May 1944, with intent to defraud wrongfully and unlawfully make and utter to T. M. Tarpley, Albany, Georgia, a certain draft in words and figures as follows, to-wit: "Bank of Madison, Madison, Wisconsin, May 11, 1944, \$200.00 Two Hundred and No/100 Dollars, Norton D. Lubenow, 2nd Lt. F.D. O-1280904", and by means thereof did obtain from T. M. Tarpley the sum of \$200.00, he, the said Lieutenant Norton D. Lubenow, then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of Madison, Madison, Wisconsin, for the payment of said draft.

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

Specification 1: In that Second Lieutenant Norton D. Lubenow, Finance Department, 2147th Army Air Forces Base Unit, Souther Field, Americus, Georgia, did, at Souther Field, Americus, Georgia, on or about 23 April 1944, present for approval and payment a pay and allowance account against the United States by presenting to D. S. Cushman, Lt. Colonel, Finance Department, finance officer at 2109 Army Air Forces Base Unit, Turner Field, Albany, Georgia, an officer of the United States duly authorized to approve and pay such accounts, in the amount of \$960.90 for subsistence and rental

allowance from 31 March 1943 to 31 March 1944, for an unmarried child under the age of 21 years by the name of Gerald Lubenow, who was represented in said account to be his legitimate son, which claim was false and fraudulent, and which was then known by said Lieutenant Norton D. Lubenow to be false and fraudulent, in that Gerald Lubenow, named in the pay and allowances account as his dependent child is in fact not a dependent child of said Lieutenant Norton D. Lubenow but is a legitimate dependent child of Vincent F. Lubenow of Sheboygan, Wisconsin.

Specification 2: In that Second Lieutenant Norton D. Lubenow, Finance Department, 2147th Army Air Forces Base Unit, Souther Field, Americus, Georgia, did, at Souther Field, Americus, Georgia, on or about 23 April 1944 present for approval and payment a pay and allowance account against the United States by presenting to D. S. Cushman, Lt. Colonel, Finance Department, finance officer at 2109 Army Air Forces Base Unit, Turner Field, Albany, Georgia, an Officer of the United States, duly authorized to approve and pay such accounts in the amount of \$167.98, \$36.00 for subsistence and rental allowance from 1 April 1944 to 30 April 1944 for an unmarried child under 21 years of age, named Gerald Lubenow, who was represented in said account to be his legitimate son, which claim for the additional \$36.00 was false and fraudulent and which was then known by the said Lt. Lubenow to be false and fraudulent, in that Gerald Lubenow, named in the pay and allowance account as a dependent child is in fact not the dependent child of said Lt. Lubenow but is a legitimate dependent child of Vincent F. Lubenow of Sheboygan, Wisconsin.

He pleaded not guilty to Specifications 1-8 and 12-13, Charge II but guilty to all Charges and the remaining Specifications and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for ten years. The reviewing authority disapproved so much of the findings of guilty of Specifications 1, 2, 3, 5, 6, 7 and 8, Charge II, as involves a finding of guilty of obtaining the sums of money as alleged from the officers named therein, so much of the finding of guilty of Specification 4, Charge II, as involves a finding of guilty of obtaining the satisfaction of a debt from the officer named therein and the findings of guilty of Specification 13, Charge II. He approved the sentence but remitted seven (7) years of the confinement

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imposed and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused, according to his organization's morning report and the testimony of his organization's personnel officer, absented himself from his station and organization at Souther Field, Americus, Georgia, from about 9 May 1944 until 21 May 1944 when, according to the stipulated testimony of the Sergeant of the Guard on duty with the Military Police, Maxwell Field, Alabama, he, properly uniformed as an officer, voluntarily "turned himself in" at the Exchange Hotel in nearby Montgomery, Alabama (R. 9-11; Ex. "A").

Between 14 April 1944 and 16 May 1944 the accused drew the checks and draft described in the Specifications, Charge II, upon his checking account at the Bank of Madison, Madison, Wisconsin. During this period he also drew other checks against his account and they were paid but the aforementioned checks and draft were all dishonored by the bank because his account was insufficient to pay them when presented (R. 43-47; Exs. "P"- "R"). Mr. E. A. Drew, owner of the Windsor Pharmacy, testified concerning the checks described in Specifications 9-12, Charge II, and Mr. T. M. Tarpley testified concerning the draft described in Specification 14, Charge II. The testimony of the payees of the other checks was by agreed stipulation. Photostatic copies of the checks and of the draft were substituted for the original instruments and were admitted into evidence without objection. The pertinent information concerning the checks and the draft is disclosed by the following summary:

Payee	Date	Amount	Presented for Payment	Bank Balance on date Presented	Exhibit Numbers	Record References
1st Lt. Tom J.R. Hunt	14 Apr 44	\$100.00	22 Apr 44	\$23.81	B	R 12-14 R 43
2d Lt. Thomas L. Moss, CWS	17 Apr 44	71.50	22 Apr 44	23.81	C	R. 14-15 R 43
2d Lt. Thomas W.Fauntleroy	21 Apr 44	145.00	12 May 44	61.04	D	R 16-17 R 44
2d Lt. Max W. Weis, Jr.	21 Apr 44	41.00	2 May 44	22.06	E	R 18-19 R 44
2d Lt. Wm. H. Manby	21 Apr 44	25.00	2 May 44	22.06	F	R 20-21 R 44

Payee	Date	Amount	Presented for Payment	Bank Balance on date Presented	Exhibit Numbers	Record References
2d Lt. James J. Dougherty	22 Apr 44	78.25	27 Apr 44	22.81	G	R 21-23 R 45
2d Lt. James J. Dougherty	22 Apr 44	124.00	29 Apr 44	22.41	H	R 21-23 R 45
WO (j.g.) Thomas M. Young	22 Apr 44	181.50	2 May 44	22.06	I	R 23-25 R 45
Windsor Pharmacy	6 May 44	50.00	15 May 44	30.74	J	R 25-28 R 46
Windsor Pharmacy	8 May 44	40.00	16 May 44	15.44	K	R 26-29 R 46
Windsor Pharmacy	9 May 44	27.50	16 May 44	15.44	L	R 26-30 R 46
Windsor Pharmacy	9 May 44	15.00	16 May 44	15.44	M	R 30-32 R 46
Draft on Bk of Madison	11 May 44	200.00	16 May 44	15.44	O	R 39-42 R 47

The checks described in Specifications 1-8, Charge II, (Exs. "B" to "I") were given to the payees thereof for the accused's gambling debts to them (R. 12-25). For the checks described in Specifications 9-12, Charge II, (Exs. "J"- "M") the accused received value substantially as alleged (R. 25-33). The accommodation endorsement of Mr. Tarpley was secured and used by the accused to cash the draft described in Specification 14, Charge II, (Ex. "O") and the endorser was required to comply therewith when the draft was dishonored (R. 39-42). None of the checks or the draft had been redeemed by the accused.

On or about 30 April 1944 the accused signed and presented a pay and allowance account form for subsistence and rental allowances from 1 April 1943 to 31 March 1944 in the sum of \$960.90 and a similar form for the month of April 1944, in which was included an additional sum of \$36 which, as did the sum of \$960.90, represented additional subsistence and rental allowances claimed by the accused as the father of a minor child named Gerald Lubenow (Exs. "S", "T"). According to the testimony

of the noncommissioned officer who assisted the accused in preparing the vouchers, the accused stated that his wife had died and left him with the 4 year old child. (R. 51-54). The vouchers were presented to the finance officer at Turner Field, Albany, Georgia, and were duly paid by government checks which were endorsed by the accused and deposited to his account in the Madison bank (R. 54-56, 57-59; Exs. "U", "Y"). According to the stipulated testimony of the accused's brother, Vincent E. Lubenow, and his sister-in-law, Cecilia Lubenow who is the wife of Vincent E. Lubenow, and certain appropriate documentary evidence the accused was not the father of Gerald Lubenow who is his brother's and sister-in-law's child and had never been dependent upon the accused (R. 60-67; Exs. "W"- "Z").

4. The defense offered no evidence except the unsworn statement of the accused who, after explanation of his rights as a witness, elected to make the following statement:

"Gentlemen of the court: I have served in the United States Army for nearly three years, prior to my being commissioned in the service. During this term of enlisted service I served one and one-half (1 1/2) years over seas. During all this time I was neither suspicioned nor accused of any breach of any Article of War. During the time I was AWOL without proper authority, I wore the uniform as prescribed at all times. I turned myself over to the proper authorities with the attitude in mind of clearing myself and confessing of my mistake, and in order that I could bring this trial to a close in the least possible time and delay, and with the least injury to persons involved. During my time of confinement I gave my fullest cooperation to the prosecution in pleading guilty and in joining with the prosecution to stipulations, in order that time and expense might be conserved in this courts-martial. I do realize I have a financial debt to absorb, and I will absorb that debt to the best of my ability. I also realize that I have a physical debt to pay and that debt I will pay. All that I can ask is that you show leniency in this General Courts-Martial."

5. The Specification, Charge I, alleges that the accused absented himself without proper leave from his station and organization at Souther Field, Americus, Georgia, from about 9 May 1944 to about 21 May 1944. The elements of the offense of absence without leave, which is violative of Article of War 61, 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 competent documentary evidence and testimony adduced by the prosecution conclusively establish the accused's unauthorized absence as alleged and abundantly supplement his plea of guilty to this offense. His unsworn statement also implicitly admits his guilt. All of the evidence and the accused's plea of guilty, therefore, beyond a reasonable doubt support the court's findings of guilty of Charge I and its Specification.

6. Specifications 1-12 and 14, Charge II, allege that the accused at designated times and places with intent to defraud, wrongfully and unlawfully made and uttered to certain named payees 12 checks and 1 draft upon his bank account which he knew was insufficient to pay them and in which he did not intend that he should have sufficient funds to pay them whereby he secured from such named payees the aggregate sum of \$1,098.75 in cash or other value. The issuance of checks and drafts by an officer against a known inadequate bank account without intending that there should be ample funds upon deposit to pay them and securing cash or other value therefor reflects discredit upon the service and is clearly violative of Article of War 96. Similarly violative of the same Article is the issuance of checks against such a bank account for gambling or other pre-existing debts (CM 202601 [1935] Dig. Ops. JAG, 1912-40, Sec. 453 [24]).

The prosecution's evidence shows that the accused issued all of the checks and the draft as alleged upon a hoplessly inadequate bank account in which he did not intend to have sufficient funds for their payment. The checks described in Specifications 1-8, Charge II, were given for pre-existing gambling or other debts and consequently he received neither cash nor satisfaction of the debts therefor. The gravamen of the offenses alleged nevertheless remained and the reviewing authority appropriately disapproved so much of the findings of guilty of such Specifications as were unsupported by the evidence. For the checks described in Specifications 9-12 and 14, Charge II, the accused received cash or value therefor as alleged and pleaded guilty thereto. The evidence, therefore, beyond a reasonable doubt supports the findings of guilty of Charge II and Specifications 1-12 and 14 thereunder as approved by the reviewing authority.

7. Specifications 1 and 2, Charge III, allege that the accused on or about 23 April 1944 presented for approval and payment two pay and allowance accounts wherein he fraudulently represented himself as the father of a minor

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son and entitled to subsistence and rental allowances, therefor, in the aggregate amount of \$996.90 for the months of April, 1943 through April, 1944 when he knew that such claims were false and fraudulent in that the named minor child was neither his nor dependent upon him but was the dependent child of his brother. The presentation of a false and fraudulent claim against the United States for approval or payment is condemned by Article of War 94 (MCM, 1928, par. 150b).

The prosecution's evidence abundantly supplements the accused's plea of guilty to this Charge and its two Specifications and beyond a reasonable doubt shows that the accused perpetrated a deliberate fraud upon the government by presenting a fraudulent claim based upon the false claim that his brother's child was his own and dependent upon him, whereby he fraudulently secured payment to himself of the sum of \$996.90 to which he was not entitled. The evidence and his plea of guilty conclusively support the court's findings of guilty of Charge III and its two Specifications.

8. The accused is about 27 years old. The War Department records show that he graduated from high school, attended North Dakota State College for one year and Dakota Business College for two years graduating in 1939. He is unmarried and without dependents. He was a member of the North Dakota National Guard from 8 May 1934 to 14 January 1936 when he was honorably discharged therefrom. He has had enlisted service from 4 November 1940 until 31 March 1943 when he was commissioned a second lieutenant upon completion of Officers' Candidate School and has had active duty as an officer since the latter date. From August 1940 until October 1940 he was employed by the American Tobacco Company in sales promotion work and from the latter date until November 1940 by his father as a salesman and bookkeeper.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications, as approved by the reviewing authority, and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of either Article of War 61, Article of War 94 or Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Robert J. Connor, Judge Advocate.

Samuel H. Golden, Judge Advocate.

SPJGN  
CM 264167

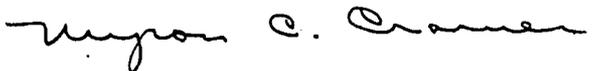
1st Ind.

War Department, J.A.G.O., ~~19 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 Second Lieutenant Norton D. Lubanow (O-128094), Air Corps.

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



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

3 Incls.

- 1 - Record of trial
- 2 - Op. Bd. of Rev. w/JAG Ind.
- 3 - Form of action

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(Sentence as approved by reviewing authority confirmed.  
G.C.M.O. 660, 16 Dec 1944)



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

(41)

SPJGH  
CM 264237

UNITED STATES )  
 )  
 v. )  
 )  
 Private HIRAM L. PATILLO )  
 (34768717), Company D, )  
 144th Infantry. )

23 Oct 1944  
XXI CORPS

Trial by G.C.M., convened at  
Camp Van Dorn, Mississippi,  
31 August 1944. Dishonorable  
discharge (suspended), and con-  
finement for ten (10) years.  
Rehabilitation Center

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OPINION of the BOARD OF REVIEW  
TAPPY, MELNIKER and GAMBRELL, Judge Advocates  
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1. The record of trial in the case of the above-named soldier, having been examined in the Office of The Judge Advocate General and there found legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves the lesser included offense of absence without leave, 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, viz

CHARGE Violation of the 58th Article of War.

Specification In that Private Hiram L. Pattillo, Company D, 144th Infantry, did, at Camp Van Dorn, Mississippi, on or about 25 July 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to shirk important service, to wit Transfer to Army Ground Force Replacement Depot #1, Ft. George G. Meade, Md., and did remain absent in desertion until his return to military control at Stockbridge, Ga., on or about 11 August 1944.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of three previous convictions for absence without leave was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The reviewing authority approved the sentence, suspended the dishonorable discharge, designated the Fourth Service Command Rehabilitation Center, Fort Jackson, South Carolina, as the place of confinement, and ordered the sentence executed. The proceedings were published in General Court-Martial Orders No. 63, Headquarters XXI Corps, 16 September 1944.

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3. The prosecution introduced competent evidence to show that pursuant to Special Orders No. 152, Headquarters 144th Infantry, Camp Van Dorn, Mississippi, 22 July 1944, accused and some 250 other enlisted men were to be transferred from Camp Van Dorn to Army Ground Forces Replacement Depot #1, Fort George G. Meade, Maryland. The effective date of the transfer was 25 July 1944 (Pros. Ex. B).

On or about 20 July 1944, a Lieutenant McCorcklin read Article of War 28 to accused and apparently to the other enlisted men. Immediately thereafter Technician Fifth Grade Vinous W. Cantrell checked accused's equipment and informed him and the others that they were being processed for shipment to a Replacement Depot. Corporal Cantrell told the man he did not know the exact date the transfer would occur but that it would be very soon (R. 7, 8).

On 25 July 1944, accused absented himself without leave from his station, Camp Van Dorn, Mississippi, and on 11 August 1944, he was delivered to Fort McPherson, Georgia, by military police and was confined to the post stockade (R. 6 Pros. Exs. A, C).

4. The accused elected to make an unsworn statement. He informed the court that relations between his wife and her mother were strained. The latter had unsuccessfully attempted to scald accused's wife with hot grease and had thereafter written accused that he would have to remove his wife from her home. Accused presented this domestic picture as his excuse for going home at the time of his unauthorized absence (R. 9).

5. Specifically, accused was charged with desertion by absenting himself from his organization with "intent to shirk important service, to wit Transfer to Army Ground Force Replacement Depot #1, Ft. George G. Meade, Md.\*\*\*". His conviction of this offense can be sustained only if a transfer of an enlisted man to a Replacement Depot constitutes "important service" within Article of War 28. "Important service" includes all actual service designed to protect or promote national or public interest or welfare "in a manner direct and immediate", such as embarkation for foreign duty in time of war, but does not include what may be termed "preparatory service" (1 Bull. JAG 271, 272).

There is no evidence in this record that accused's transfer to the Replacement Depot was directly related to embarkation for foreign duty. He might well have remained at Fort George G. Meade for an indefinite length of time before he, or a unit of which he was a member, or to which he was eventually assigned, was selected for transfer to a port of embarkation and alerted for prompt overseas shipment. Without proof that

embarkation for foreign service was to result directly and immediately from the transfer to a Replacement Depot, that transfer can be classified only as a preparatory step to such embarkation and, consequently, does not constitute important service within the intendment of Article of War 28. The evidence is not sufficient to sustain a conviction of the offense of desertion but only of the lesser included offense of absence without leave for the period alleged in the Specification, in violation of Article of War 61.

6. The accused is 19 years of age. He was inducted into the military service at Fort McPherson, Georgia, on 21 April 1943.

7. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involves an absence without leave by accused from his organization at Camp Van Dorn, Mississippi, from 25 July 1944 to 11 August 1944, in violation of Article of War 61, and legally sufficient to support the sentence.

THOMAS N. TAPPY, Judge Advocate.

A. A. MELNIKER, Judge Advocate.

WILLIAM H. GAMBRELL, Judge Advocate.

(44)

SPJGH  
CM 264237

1st Ind

War Department, J.A.G.O., 25 Oct 1944 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50<sup>1</sup>/<sub>2</sub>, as amended by the act of 20 August 1937 (50 Stat. 724 10 U.S.C. 1522), is the record of trial in the case of Private Hiram L. Pattillo (34768717), Company D, 144th Infantry, together with the foregoing opinion of the Board of Review.

2. I concur in said opinion of the Board of Review and for the reasons stated therein recommend that so much of the findings of guilty of the Charge and its Specification be vacated as involves findings of guilty of an offense by accused other than absence without leave from his organization, at the place alleged, from about 25 July 1944 to about 11 August 1944, in violation of Article of War 61, and that all rights, privileges and property of which accused has been deprived by virtue of the findings so vacated be restored.

3. In accordance with War Department policy relative to uniformity of sentences, I also recommend that the period of confinement be reduced to five years.

4. Inclosed is a form of action designed to carry into effect the recommendations hereinabove made, should such action meet with your approval.

(Signed) Myron C. Cramer

2 Incls

Incl 1 - Record of trial  
Incl 2 - Form of action

(Typed) MYRON C. CRAMER,  
Major General,  
The Judge Advocate General.

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(Findings vacated in part in accordance with recommendation of The Judge Advocate General and confinement reduced to five years, by order of the Under Secretary of War. G.C.M.O. 609, 8 Nov 1944)

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

SPJGH  
CM 264264

18 OCT 1944

UNITED STATES	)	INFANTRY REPLACEMENT TRAINING CENTER
	)	CAMP BLANDING, FLORIDA
v.	)	
First Lieutenant DENNIS E.	)	Trial by G.C.M., convened at
CANON (O-1314441), Infantry.	)	Camp Blanding, Florida, 7
	)	September 1944. Dismissal,
	)	total forfeitures and confinement
	)	for five (5) years. Disciplinary
	)	Barracks.

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OPINION of the BOARD OF REVIEW  
TAPPY, MELNIKER and GAMBRELL, Judge Advocates

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following Charges and Specifications:

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

Specification: In that First Lieutenant Dennis E. Canon, Company "C", 195th Infantry Training Battalion, Camp Blanding, Florida, did, without proper leave, absent himself from his organization at Camp Blanding, Florida from about 11 July 1944 to about 4 August 1944.

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

Specification: In that First Lieutenant Dennis E. Canon, \* \* \*, did, at Camp Blanding, Florida, on or about 24 June 1944, feloniously embezzle by fraudulently appropriating to his own use, \$24.00, lawful money of the



States, he the said First Lieutenant Dennis E. Canon then well knowing that he did not have and not intending that he should have any account with the Camp Blanding Facility Office, Camp Blanding, Florida, for the payment of said check.

Specification 3: Same allegations as Specification 2 except check dated 19 July 1944 and made and uttered to Hotel John Marshall, Richmond, Virginia.

Specification 4: Same allegations as Specification 2 except check in the amount of \$20, dated 19 July 1944, and made and uttered to Hotel Murphy, Richmond, Virginia.

Specification 5: Same allegations as Specification 2 except check in the amount of \$50, dated 3 August 1944, and made and uttered to Rice Hotel, Houston, Texas.

Specification 6: Same allegations as Specification 2 except check in the amount of \$50, dated 4 August 1944, and made and uttered to Rice Hotel, Houston, Texas.

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

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

Specification 2: In that First Lieutenant Dennis E. Canon, \* \* \*, did, at Jacksonville, Florida on or about 11 July 1944, with intent to defraud the Hotel Seminole, Jacksonville, Florida, wrongfully obtain lodging at said hotel.

Specification 3: (Finding of guilty disapproved by the reviewing authority).

ADDITIONAL CHARGE: (Molle prosequi entered by direction of appointing authority after prosecution rested (R. 68)).

He pleaded guilty to Charge I and its Specification; not guilty to Charge II and its Specification; guilty to Specification 1, Charge III as a violation of the 96th Article of War; guilty to Specifications 2, 3, 4, 5 and 6 of Charge III as violations of the 96th Article of War except the words "with intent to defraud, wrongfully and unlawfully" and the words "he the said First Lieutenant Dennis E. Canon then well knowing that he did not have and not intending that he should have any account with the Camp Blanding Facility Office, Camp Blanding, Florida for the payment of said check", of the excepted words not guilty; not guilty to Charge III;

not guilty to Charge IV and its Specifications and not guilty to the Additional Charge and its Specification. He was found guilty of Charge I and its Specification; guilty of Charge II and its Specification except the words "a total of \$343.75", substituting therefor the words " a total of \$258.75", of the excepted words not guilty, of the substituted words guilty; guilty of Charge III and all of its Specifications and guilty of Charge IV and all of its 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 five years. The reviewing authority approved only so much of the finding of guilty of the Specification of Charge II as involves embezzlement of \$24, lawful money of the United States, the property of Private Thomas C. Agatone; \$31, lawful money of the United States, the property of Private William F. Laufer; \$42.25, lawful money of the United States, the property of Private Juvinal Salas; \$40, lawful money of the United States, the property of Private John R. Christian, \$26.50, lawful money of the United States, the property of Private Henry Blam; \$28, lawful money of the United States, the property of Private Wayne E. L. Lucas; \$27, lawful money of the United States, the property of Private William Coveney, a total of \$218.75, disapproved the findings of guilty of Specifications 1 and 3 of Charge IV, approved the sentence, designated the United States Disciplinary Barracks as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence pertaining to Specifications 1 and 3 of Charge IV (findings of guilty disapproved by the reviewing authority), will not be discussed except as it may pertain to the Specifications under which there were approved findings of guilty.

4. The evidence for the prosecution in support of those Specifications under which there were approved findings of guilty is substantially as follows:

a. Specification, Charge I.

On 27 June 1944 accused was relieved from further assignment and duty at the Infantry Replacement Training Center, Camp Blanding, Florida, and ordered to report to Fort George G. Meade on 14 July 1944 (Pros. Ex. 1). He was granted a ten day leave of absence effective 2 July 1944 and signed out in pursuance thereof (R. 12). On 7 July 1944 accused was informed by telegram at Houston, Texas, that his orders had been revoked and he was directed to return to Camp Blanding at once (R. 13; Pros. Ex. 3). Accused replied by telegram dated 8 July 1944, advising that he had received the telegraphic orders and was leaving immediately (R. 14; Pros. Ex. 4). The accused had three days travel time which allowed him until 11 July to report.

He failed to report on this date and was absent without authority until 4 August 1944, on which date he was apprehended in Galveston, Texas (R. 15; Proq. Ex. 6).

b. Specification, Charge II.

In June 1944 accused, who was then Executive Officer of Company C, 195th Battalion, undertook to collect monies from the trainees attached to his company. These funds were to be held until the men completed training and then were to be returned to them for the purchase of furlough transportation or used to purchase such transportation (R. 47, 48). Certain trainees delivered money in sealed envelopes to the accused personally while others delivered such funds to third persons who turned the money over to accused. In certain instances, where money had been delivered to accused, it was not returned to the trainees nor was transportation furnished (R. 19, 25, 31, 32, 34, 36, 38, 39, 41). Men who failed to receive their money back or to get transportation, and the respective amounts lost, were Private Thomas C. Agatone, \$24; Private Juvinal Salas, \$42.25; Private William F. Lauffer, \$31; Private Henry Blam, \$26.50; Private Wayne E. L. Lucas, \$28; Private William Coveney, \$27; and Private John R. Christian, \$40. No receipts were given by the accused in most cases, although he had been instructed by his company commander to give receipts in all cases (R. 47, 80). Money collected from the trainees was kept in the company safe. One set of keys was held by the accused and one by the company commander (R. 47, 48). On 30 June 1944, prior to his departure from Camp Blanding, accused delivered the safe keys to Lieutenant Doherty and informed him that the furlough monies were in the safe. The safe was opened on 1 July 1944 and the monies therein were checked against a list found in the safe (R. 52; Pros. Exs. A, 7, 8). The total found in the safe was \$1799.06, which was a sum slightly in excess of the total called for by the list. Certain names on the list had been lined out. Payments to trainees were commenced on 3 July 1944 and it was observed that certain names had been lined out in cases of men who claimed to have money due to them and that other men, whose names did not appear on the list, claimed to have turned in checks and money orders (Pros. Ex. 7). The names of Agatone, Lauffer, Salas, Christian, Menarde, Blam, Lucas and Coveney did not appear on the list (Pros. Ex. 8). When payments were completed, in accordance with the list, \$34.04 remained and eleven men were unpaid (R. 55).

c. Specification 1, Charge III.

It was stipulated that the accused wrongfully wore captains' insignia in a public place (Pros. Ex. 18). He cashed two checks representing himself to be a captain (Pros. Exs. 14, 15). He pleaded guilty to the offense as a violation of the 96th Article of War.

## d. Specifications 2-6, Charge III.

The accused entered a plea of guilty to each of these Specifications as a violation of Article of War 96, but not guilty of the allegations of intent to defraud and of knowledge that he did not have and did not intend to have an account for the payment of said checks. The proof establishes that the accused had maintained an account with the bank on which the checks were drawn until 21 June 1944 at which time he had no balance on deposit in the account. The checks were issued about a month later. Two of the issued checks listed accused's rank as captain (Pros. Exs. 14, 15). It was stipulated that the accused made and uttered the checks described in Specifications 3, 4, 5 and 6 and obtained cash on each of them (Pros. Ex. 18). The check described in Specification 2 was cashed by the cashier of the Seminole Hotel (R. 63).

## e. Specification 2, Charge IV.

The accused registered at Hotel Seminole in Jacksonville, Florida, on 11 July 1944 and remained until 20 July 1944. During this time he incurred a hotel bill of \$63. The accused left the hotel without paying the bill, leaving his baggage behind (R. 64).

## 5. For the defense.

From time to time, after 1 June 1944, sealed envelopes were seen on the desk of accused, in his absence from the orderly room (R. 69). On one occasion a key borrowed from another company and filed down was used to open the padlock on the safe (R. 70). On this occasion, the company commander opened the safe, removed one envelope from it, and relocked the safe (R. 71, 75, 76, 77). A lieutenant other than the accused (R. 77) and a sergeant (R. 72) as well as the company commander (R. 71) all had opportunity to enter the safe where the funds were kept.

The accused elected to testify under oath after his rights as a witness had been explained to him. He related that when collections were first begun, the men delivered cash to him, were issued a receipt, and their names and amounts were listed. Later the method was changed. The men placed their funds in an envelope, signed and sealed the latter and inscribed a mark over the flap. The men were instructed to give him the money but at times it would be left on his desk. The envelopes were placed in the company safe to which others had access, namely the company commander, who had his own set of keys, and a lieutenant and sergeant to whom on occasions accused delivered his keys. On 19 June accused compiled a complete list of funds, opening all the envelopes. The amounts inscribed on the envelopes were in agreement with the contents. On 20 June a typewritten list was compiled (Pros. Ex. 8).

Accused denied taking any of the funds and insisted that missing envelopes never reached the safe or were removed from the safe in the period between receipt and 19 June.

Accused stated that he had wished to deposit these funds in a special bank account but the company commander had told him not to do so (R. 78-100). On cross-examination the accused admitted that on the 1st or 2nd of June he discontinued making any record of envelopes received by him from trainees, with the result that he had no way of knowing whether or not he received an envelope from any given trainee. His explanation of his failure to make any further records was that "I got too many envelopes" (R. 89). He further admitted that on 3 June 1944 he deposited in his personal bank account, in addition to his Government pay check for \$246.50, the sum of \$198 in currency, a \$30 Western Union money order and a check for \$3 (R. 93). His explanation of the source of the \$198 was that it was given to him by his wife who, he said, had just closed out her bank account in Gainesville, Florida (R. 93-94). He further admitted that he did not attempt to check the furlough fund with his successor before departing the station on 1 July 1944 (R. 92) and that, although he knew that no accurate account of the monies entrusted to him existed, he did not at any time attempt to rectify the situation by calling the company out and having the men report the amounts claimed to have been deposited by them (R. 98).

6. Supporting the accused's pleas of guilty to Charge I and its Specification, the evidence introduced by the prosecution conclusively establishes his guilt of the absence without leave as alleged.

With reference to the offense alleged in the Specification of Charge II, the evidence discloses that the accused received various monies, from time to time, to safeguard for certain of the trainees. Although the names of some of the trainees were entered on a list by the accused, others, who deposited money with the accused, were not listed. When time for payment came there was no money to pay these men who had not been listed. A person who receives various sums of money from others, for which he is accountable and responsible, and 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 (Dig. Op. JAG, 1912-40, sec. 451 (17)). The rule applies here, where the accused, according to his own testimony, was so derelict in his stewardship that he did not even attempt to keep or make an accurate record of the monies entrusted to him.

The accused was found guilty of a violation of Article of War 95 in that he wore a captain's insignia in public (Spec. 1, Ch. III). The accused pleaded guilty to the act as an offense under Article of War 96. The evidence discloses that two worthless checks were signed by the accused as a captain. It is a violation of the 95th Article of War for an officer to wear unauthorized insignia with intent to deceive, for personal gain or advantage, not necessarily pecuniary, or for personal aggrandizement, social or otherwise (3 Bull. JAG 100).

Specifications 2 to 6 inclusive, of Charge III, involved five worthless checks allegedly made and uttered with intent to defraud. The proof establishes that the accused had maintained an account with the bank on which the checks were drawn until the account was closed on 21 June 1944. The checks were issued about a month later. The giving of a series of worthless checks, amounting in the aggregate to \$170, drawn on a bank where no account was maintained clearly establishes the intent to defraud and constitutes conduct unbecoming an officer and a gentleman in violation of Article of War 95.

Specification 2 of Charge IV alleged that accused, with intent to defraud, wrongfully obtained lodging at the Hotel Seminole, Jacksonville, Florida. The offense is a misdemeanor under Florida law (Florida Statutes 511.38), and proof that lodging was obtained by absconding without paying or offering to pay, is prima facie evidence of fraudulent intent (Florida Statutes 511.39). The evidence discloses that accused left the hotel without his baggage and without paying his bill of \$63, which establishes commission of the offense, in violation of the Florida statute. This violation of local law constitutes conduct of a nature to bring discredit upon the military service in violation of Article of War 96.

The court sentenced the accused "to be dishonorably discharged the service". Such a sentence was inappropriate but not illegal or prejudicial to the accused and is the legal equivalent of a sentence to dismissal (3 Bull. JAG 281; CM 249921).

7. War Department records show that the accused is 30 years of age and married. He is a graduate of the Austin (Texas) High School and attended the University of Texas two and one half years. In civil life he was employed by the W.P.A. for one and one half years as a statistician and, previous to that, was a partner in a liquor business for two years. He was inducted into the Army in September 1942, was commissioned a second lieutenant, Infantry, Army of the United States, upon graduation from The Infantry School, in March 1943, and was promoted to first lieutenant, 15 May 1944.

8. 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 mandatory upon conviction of a violation of Article of War 95, and is authorized upon conviction of a violation of Article of War 61, 93 or 96.

Thomas W. Jaffy, Judge Advocate.

Admiral, Judge Advocate.

William H. Hamrell, Judge Advocate.

SPJGH  
CM 264264

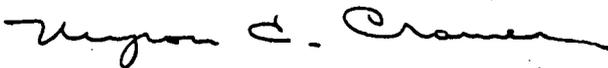
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War Department, J.A.G.O., 24 OCT 1944 - To the Secretary of War.

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 Dennis E. Canon (O-1314441), Infantry.

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

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



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

3 Incls.

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

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(Sentence confirmed. G.C.M.O. 650, 16 Dec 1944)



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

SPJGH  
 CM 264276

31 OCT 1944

UNITED STATES )

SECOND AIR FORCE )

v. )

Trial by G.C.M., convened at  
 Colorado Springs, Colorado,  
 29 August 1944. Dismissal  
 and total forfeitures.

Second Lieutenant ARTHUR A.  
 HILLGROVE (O-774155), Air  
 Corps. )

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 OPINION of the BOARD OF REVIEW  
 LIPSCOMB, O'CONNOR and GOLLEN, Judge Advocates  
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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Arthur A. Hillgrove, Air Corps, attached unassigned, 262nd Army Air Forces Base Unit, did, on or about 19 June 1944, near Norfolk, Nebraska, wrongfully violate paragraph 16a (1) (d), Army Air Forces Regulations 60-16, by flying the military airplane of which he was pilot at an altitude of approximately thirty (30) feet above the ground while not in take-off or landing.

The accused pleaded not guilty to, and was found guilty of, the Charge and the 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 Article of War 48.

3. The evidence for the prosecution shows that five P-47 airplanes took off at approximately 9:00 a.m. on 19 June 1944 from Bruning Army Air Field, Bruning, Nebraska, on what was announced as a low level navigation and ground gunnery mission (R. 12, 21-22, 40, 42, 58). The pilots were First Lieutenant Clyde J. Whaley, Second Lieutenant Howard F. Holmes, Second Lieutenant Charles H. Hughes, Flight Officer Charles Cram, and the accused (R. 8, 21, 42, 58). Lieutenant Whaley was the flight commander; the others were trainees in his charge (R. 8, 21-22, 43, 55-56, 58). His ship had a red cowling and a silver body. The remaining four planes also had red noses but their bodies were camouflaged in an olive drab (R. 14-16, 20, 32-33, 35, 40-41, 45, 62, 65).

Before the take-off Lieutenant Whaley "briefed" his men on the nature of the mission, and the altitude to be maintained (R. 22, 28). He told them that they were to fly on a low level navigation mission during which they would be "on their own", that they were "to spread out [approximately a half mile apart], \* \* \* to keep [his] ship in sight, [to] stay above at all times, and never to go below three hundred feet" (R. 8, 22, 28-35, 38). In his opinion it "was definitely not a formation flight" (R. 34, 39). Lieutenant Holmes, however, gained the impression that what was wanted was a "loose formation" (R. 47).

Once in the air Lieutenant Whaley both by radio and by the visual signal of "fishtailing" repeated his direction to "spread out" (R. 22-23, 45, 62). The other four men responded by drawing away from one another into a "loose" "V" formation. Although they frequently varied the distances between themselves, they maintained their relative positions all the way to the gunnery range (R. 44-45, 48, 62). They had all been taught that when in formation they were "to fly the flight leaders' wing, and do whatever he did" (R. 56.) When he went up, they were to go up, and when he went down, they were to go down also (R. 56-57, 62-63).

For the first ten miles the prescribed altitude of 300 feet was carefully maintained by all five pilots (R. 50). As to what happened thereafter the testimony adduced by the prosecution is somewhat in conflict. Lieutenant Whaley testified on direct examination that to the best of his knowledge, he did not go below 300 feet although he admitted that he "could have varied slightly below" (R. 23). On examination by the court, in answer to the question, "Were you as low as 150 feet?" he replied, "Sir, not that I know of". He also stated he was positive he was "at least more than one hundred feet above the ground" (R. 37). Lieutenant Holmes testified that Whaley went down as low as thirty feet above the ground, that he ranged between that precarious level and 100 feet above the ground for some seventy miles, and that

the trainees all followed his example remaining, however, at all times slightly above him (R. 42-43, 49-51, 54-55). Lieutenant Hughes testified on direct examination in part as follows:

"Q. Are you able to give this court a fairly reasonable estimate as to the altitude of Lt. Whaley's plane above the ground during the course of that trip?

A. Well, sir, I'm not a very good judge of altitude, but I would say roughly that it was three hundred feet. It could have been above, or could have been below. I can't judge altitude very well.

Q. Your best judgment is that Whaley's plane flew at an altitude of about three hundred feet above the ground?

A. That's what I would estimate.

Q. And about how high did you fly?

A. I was level or a little bit above him, sir.

Q. Well, approximately how high were you?

A. Well sir, I don't wish to answer that; it might incriminate myself; if you don't mind." (R. 59).

Upon cross-examination and upon interrogation by the court he waived his right against self-incrimination to the following extent:

"Q. Did your altitude vary considerably?

A. Sir, its hard for me to tell the difference between one hundred feet and three hundred feet.

Q. It is quite possible you could have gone down to one hundred feet?

A. Yes sir.

\* \* \*

Q. Now, I am going to ask you one question, and I want you to carefully consider the answer. Did you or did you not fly appreciably below three hundred feet on that flight on the 19th of June?

A. Sir, I might have been a little below it, checking the altitude by myself, because I myself can't estimate whether I was one hundred feet or three hundred feet.

Q. Then you might have been one hundred feet, and never knew it?

A. That's right, sir.

Q. You might have just barely skimmed this cable by a half an inch?

A. No sir, I don't think I could have been that low.

Q. Are you willing to state under oath that you never got below fifty feet?

A. I don't think I did, sir," (R. 62, 65).

Unquestionably the accused and Lieutenant Holmes descended to about thirty to thirty-five feet above the ground, for their respective planes struck a power line and were slightly damaged (Pros. Ex. 5-A). The accused's P-47 was the first to collide with the wire, and Lieutenant Holmes' ship following immediately behind was caught in its predecessor's "prop wash" and was also briefly entangled (R. 24-25, 50-54; Pros. Ex. 5-B). Both planes were able, however, to complete their mission.

Two power lines, roughly one mile apart, were severed by planes that morning (Pros. Ex. 5-A). Charles A. Eggen, a farmer, witnessed one of the collisions. He saw two red-nosed ships barely clear the wire and a third go through it. He believed that one of them "had a silver chest" but he was not certain (Pros. Ex. 1). Mr. Frank H. Finkral, whose land was in the immediate vicinity of the second power line, observed a flight of five or six red-nosed planes that morning. The one nearest him passed under the wire but all came "very close" and were only "from twenty to thirty feet off the ground" (Pros. Exs. 3, 4).

The planes observed by witnesses Eggen and Finkral were not identified as being those in which Lieutenant Whaley and his four trainee pilots flew. The flight in which the accused participated was one of three similar flights scheduled on the morning of 19 June 1944. The accused's flight was the second or third in order of take-off.

4. The accused, after being apprised of his rights relative to testifying or remaining silent, took the stand in his own behalf. He had enlisted at the age of eighteen. At the time of the trial he had flown 361 hours and 15 minutes. On the morning of the accident he and the four other pilots took off in tactical formation but, upon clearing the field, changed to a V formation. Lieutenant Whaley gradually dropped to an altitude of between thirty to fifty feet and continued at that level for about sixty-five to seventy miles until the wire was hit (R. 76, 80). Since it was the custom to follow the leader, the accused and the other trainees descended to the same altitude (R. 77, 87, 89).

At the commencement of the hearing the Trial Judge Advocate and the Defense Counsel stipulated that:

"\* \* \* Flight Officer Charles Cram, if present, would testify substantially as follows: That he was one of five pilots who flew from Bruning Army Air Field the morning of 19 June 1944 to the ground gunnery range, some 125 miles to the north, and return, being a member of the flight of which 1st Lt. Clyde J. Whaley acted as flight commander. That the flight was a low level navigation and gunnery mission, the trainee pilots having been instructed to fly at an altitude of from three hundred to five hundred feet above the ground, and to fly behind and above the flight leader, and to keep his plane in sight. That during the flight, the flight leader flew at an altitude of substantially less than three hundred feet for a considerable portion of the distance between Bruning Army Air Field and the ground gunnery range, and that the witness based his altitude at which he operated his plane on that of the flight leader."

Captain Archie V. Swanson, called as a witness for the defense, stated that on 19 June 1944 he had been the Operations Officer of Squadron One and that on the date of the trial he was the Squadron Commander (R.68). As one who had had 135 missions in combat, he was satisfied that the accused was "tops as a pilot, among trainee pilots". Prior to 19 June 1944 trainee pilots were definitely instructed that in formations "they were to stick with their flight leader" (R. 70-71). Both the accused and Holmes were outstanding students and would have been retained as instructors upon the completion of their course (R. 71-73).

5. The Specification alleges that the accused did "on or about 19 June 1944, wrongfully violate paragraph 16a (1) (d), Army Air Forces Regulation 60-16, by flying the military aircraft of which he was pilot at an altitude of approximately 30 feet above the ground while not in take-off or landing".

A fair evaluation of the evidence shows that on 19 June 1944, the accused, as the trainee pilot of a "P-47" aircraft, followed his flight leader on a low level navigation and gunnery mission from Bruning Army Air Field to a gunnery field some distance away. In addition to the aircraft flown by the accused there were three other aircraft similarly operated by trainee pilots. Prior to the take-off the flight leader instructed the four trainee pilots on the nature of the mission and the altitude to be maintained. They were instructed that the flight was a low level navigation mission which would be flown at an altitude of 300 feet and that each trainee pilot would keep an elevation above that of the flight leader. The trainee pilots were told that they would "spread out" at approximately one-half mile apart but that they would keep the flight leader's ship in sight. Both the accused and Lieutenant Holmes gained the impression that the flight would be conducted in a "loose formation". For the first ten miles the prescribed altitude of 300 feet was carefully maintained by all pilots. Although there is some conflict in the testimony as to the elevation which was thereafter maintained by the flight leader and the entire group, the evidence considered in its entirety establishes to a high degree of certainty that Lieutenant Whaley and the other members of the group all flew at an altitude considerably below 300 feet and at times below 100 feet. The accused and Lieutenant Holmes testified specifically that the flight leader flew at an altitude of from thirty to fifty feet. They also testified that they endeavored at all times to fly at an altitude above that of their leader although once or twice they may have dropped below the altitude which he was maintaining. Concerning this controverted part of the testimony the Trial Judge Advocate has stated in a letter attached to the record, the following:

"After a thorough investigation prior to trial, after trial of both cases, and after confidential talks with the witnesses after both trials had been concluded, it is definitely my opinion that the version of the affair as given by Lieutenant Hillgrove and Lieutenant Holmes is true and accurate, and that in fact their flight leader did lead the flight at an altitude of approximately 25 to 50 feet above the ground for a considerable distance. It was during this low flying that each accused struck a power line."

Such a statement might normally be expected from a defense counsel but when it is presented in a clemency letter by the Trial Judge Advocate who prosecuted the accused it is unusually persuasive.

The record shows that there is a custom and practice among trainee pilots to follow the example of their instructor, while under-

going training, and to perform whatever maneuvers or tactics he performs. Both the accused and Lieutenant Holmes testified that in view of this custom they thought that they were expected to operate their aircraft after the example set by their leader. The evidence is quite clear that neither the accused nor any of the other trainee pilots engaged in any independent buzzing. Both the accused and Lieutenant Holmes sought to follow their leader, elevating their planes when he elevated his and lowering their planes when the flight leader lowered his. While flying in the manner described, their planes came in contact with a high power wire with the result that each was slightly damaged.

In the light of the above evidence showing that the accused operated his aircraft after the example of his leader and that his conduct was motivated by no malicious or willful intent, the worst view which could possibly be taken of his conduct would lead to the conclusion that only a technical offense had been committed. This fact, combined with the accused's previous good record, and the evidence showing his superior ability as a pilot, suggests the conclusion that an unpardonable vice "fatally infected the trial" and corrupted the court's sentence.

In its deliberations the court was charged with judicial knowledge of two regulations. The first regulation involves a restriction against low flying which the Specification alleges was violated by the accused. The second regulation which was promulgated by Headquarters Second Air Force as Regulation 60-2 on 21 August 1944, provides in part, as follows:

"1. In all cases of wilful or negligent violation of flying regulations the offending person will be immediately grounded and full report of the offense made to this Headquarters with the least practicable delay.

"2. All such offenders will be tried by General Court-Martial, convened by this Headquarters, and the following sentences will be deemed appropriate, regardless of the capabilities of the offender, his excellent combat record, or other extenuating circumstances:

- a. Dismissal from the service, in the case of an officer.
- b. Dishonorable discharge, in the case of a Flight Officer or enlisted man" (Underscoring supplied).

The plain effect of the above regulation was to instruct the members of the court that the only sentence in the present case which would be "deemed appropriate" by the Commanding General, Second Air Force, was "Dismissal from the service" regardless of "extenuating circumstances". Necessarily the members of the court were placed in a dilemma. On the one hand, they were required by a regulation to impose a sentence of dismissal in every case involving low flying regardless of "extenuating circumstances". On the other hand, they were obligated to abide by their oath, to observe the criterion for imposing just punishments set forth in the Manual for Courts-Martial, to exercise in an independent manner their obligation under the Articles of War to impose a just sentence, and to comply with the constitutional concept of fairness and due process as required by our organic law.

At the beginning of the trial each member of the court took the oath prescribed by Article of War 19 obligating himself to,

"\* \* \* duly administer justice without partiality, favor or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to his conscience, the best of his understanding, and the custom of war in like cases; \* \* \*".

This oath placed each member of the court under the sworn duty to administer justice in accordance with law by determining the guilt or innocence of the accused and by imposing a just sentence consistent with his conscience and the best of his understanding. The duty and responsibility of each member was an individual and personal one and for him to surrender his independent judgment for the expressed opinion or wish of his commanding officer would be a shameful abdication of his duty to the prejudice of the fundamental rights of the accused.

Although the reviewing authority had the privilege and duty of reducing sentences which he regards as excessive, the primary responsibility for the imposition of a just sentence rests with the court. The proper performance of this duty is as vital to the rights of the accused as is the duty of rendering a just verdict. Courts should, therefore, always avoid giving an excessive sentence in the expectation that their undue severity will be ameliorated by the action of the reviewing authority. In the performance of this vital duty they are not without guidance. The Manual for Courts-Martial presents the following formula for determining the appropriate punishment to be imposed:

"Basis for determining.— To the extent that punishment is discretionary, the sentence should provide for a legal, appropriate, and adequate punishment. See 102-104 (Punishments). In the exercise of any discretion the court may have in fixing the punishment, it should consider, among other factors, the character of the accused as given on former discharges, the number and character of the previous convictions, the circumstances extenuating or aggravating the offense itself, or any collateral feature thereof made material by the limitations on punishment. The members should bear in mind that the punishment imposed must be justified by the necessities of justice and discipline" (MCM, 1928, par. 80a).

It is important to observe that the court in order to impose a just sentence should consider among other things "the character of the accused", and "the circumstances extenuating or aggravating the offense itself, or any collateral features thereof". The regulation previously quoted is in direct contradiction to the basic provisions of the Manual set forth above.

The accused was tried for an offense alleged to be a violation of Article of War 96 for which no minimum punishment has been prescribed by law. The court had, therefore, under the wording of that Article a wide discretionary power to impose upon the accused any punishment, except death (A.W. 43). The regulation which sought to establish a sentence of arbitrary dismissal in every case involving a breach of a flying regulation was an unlawful effort to establish a minimum sentence for a particular type of offense in contravention of both the spirit and the language of the Articles of War. Congress alone has the power to prescribe minimum penalties. Whatever may have been the practice prior to 1920 when the present Articles of War were enacted, it is now clearly contemplated that our courts-martial should freely exercise certain distinctively judicial functions in a manner which will guarantee independence of judgment in determining the guilt or innocence of an accused and in the imposition of his sentence. That Congress intended to endow our courts-martial with this essential judicial attribute is clearly shown by the Articles themselves. Article of War 40 states that, "No authority shall return a record of trial to any courts-martial for reconsideration of \* \* \* (d). The sentence originally imposed, with a view to increasing its severity, \* \* \*". Article of War 45 provides that the President may prescribe maximum punishments, but significantly fails to authorize the President to establish any minimum punishment whatsoever. Finally, in Article of War 50 $\frac{1}{2}$ , Congress sought to insure that the administration

of justice in our Army would be in accordance with law by providing for a system of automatic appellate review.

In compliance with its statutory duty the Board of Review has repeatedly condemned any interference with or undue influence upon the court's freedom of deliberation.

In CM 156620, German, the court was closed during the trial of the case and before final argument. Upon reopening without having made any findings, it adjourned for the stated purpose of consulting higher authority on certain questions. The record fails to disclose the nature of these questions. Upon reconvening, the court, without disclosing what advice it had received, immediately proceeded to find the accused guilty. It was held that the procedure was unauthorized. A court-martial is not permitted in closed session to consult any outside authority. Under such circumstances the error was fatal to the conviction.

In CM 216707, Hester, during the trial, a circular letter announcing a mandatory policy of dishonorably discharging enlisted men in cases referred to general courts-martial was distributed to the members of the court after they had deliberated without result one hour and twenty minutes. Although the cited case involved an officer and not an enlisted man, it was held that the presentation of the letter to the court constituted an error injuriously affecting the substantial rights of the accused and vitiated both the findings and the sentence.

In condemning the regulation in question the Board of Review does not intend to criticize the practice of military commanders in disseminating among courts-martial information revealing the need for the imposition of stern punishment for certain offenses. Such action may at times be essential to the proper performance by courts-martial of their functions. The process should, however, always be a process of education and never of coercion. The Trial Judge Advocate who tried the present case states in a letter to The Judge Advocate General that "the court which tried the accused was forcefully indoctrinated by the appointing authority". Such a statement by the officer who prosecuted the accused cannot be lightly disregarded.

The existence of the regulation in question deprived the accused of the fair trial contemplated in the due process clause of the Fifth Amendment to the United States Constitution. In the case of United States ex rel, Innis v. Hiatt (141 F, 2d 664), the court stated:

"We think that this basic guarantee of fairness afforded by the due process clause of the fifth amendment

applies to a defendant in criminal proceedings in a federal military court as well as in a federal civil court. An individual does not cease to be a person within the protection of the fifth amendment of the Constitution because he has joined the nation's armed forces and has taken the oath to support that Constitution with his life, if need be. The guarantee of the fifth amendment that 'no person shall \* \* \* be deprived of life, liberty or property, without due process of law,' makes no exception in the case of persons who are in the armed forces. The fact that the framers of the amendment did specifically except such persons from the guarantee of the right to a presentment or indictment by a grand jury which is contained in the earlier part of the amendment makes it even clearer that persons in the armed forces were intended to have the benefit of the due process clause. This is not to say that members of the military forces are entitled to the procedure guaranteed by the Constitution to defendants in the civil courts. As to them due process of law means the application of the procedure of the military law. Many of the procedural safeguards which have always been observed for the benefit of defendants in the civil courts are not granted by the military law. In this respect the military law provides its own distinctive procedure to which the members of the armed forces must submit. But the due process clause guarantees to them that this military procedure will be applied to them in a fundamentally fair way."

The trial of the accused by a court which, to repeat the statement of the Trial Judge Advocate, had been "forcefully indoctrinated" or which had been subjected to the overzealous influence of the appointing authority could not have been conducted in "a fundamentally fair way". Obviously this is true because justice cannot survive in an atmosphere of coercion. "No man can serve two masters". A trial in which the members of the court are put to the election of either stultifying their conscience and disregarding their oath or abiding thereby at the peril of violating a regulation promulgated by their appointing and reviewing authority is fatally infected by extraneous influence and runs "afoul of the basic standard of fairness which is involved in the constitutional concept of due process of law".

Since the record is fatally defective, the injury to the accused's rights cannot be cured by Presidential clemency regardless of how generous that clemency might be. The accused is entitled to legal

justice and not merely to mercy. Only by a recognition of this basic truth can his legal rights and the legal rights of many like him be maintained. The Board of Review is of the opinion that the record of trial is legally insufficient to sustain the findings and the sentence.

6. The records of the War Department show that the accused is approximately 20 years of age. He completed the twelfth grade in high school and attended Fresno State College for two months. From December 1942 to February 1943 he was employed in an aircraft factory. On 28 February 1943 he enlisted in the service and thereafter on 15 April 1944 he was commissioned a second lieutenant in the Air Corps.

7. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of the Charge and the Specification thereunder and the sentence.

Abner E. Lipscomb, Judge Advocate.

Robert J. Munner, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

1st Ind.

War Department, J.A.G.O.,

- To the Secretary of War.

NOV 24 1944

1. Herewith transmitted are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Arthur A. Hillgrove (O-774155), Air Corps.

2. I do not concur in the opinion of the Board of Review and, for the reasons hereinafter set forth, am 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.

3. This is a low-flying case, wherein sentence of dismissal and total forfeitures was imposed and approved. A detailed summary of the evidence appears in the opinion of the Board of Review. Briefly, the accused officer, as a member of a training flight following its leader in what may be regarded as loose and extended formation, so operated the military airplane of which he was pilot as to strike an electric power line about thirty feet above the ground, slightly damaging the plane but not interrupting the flight. Under orders to fly above and behind the leader, the accused must, by his own testimony (R. 83), have failed to stay above the leader at the point in question, since the leader's plane did not collide with the wires or the ground. The case does not turn upon the sufficiency of the evidence, but upon other considerations hereinafter mentioned.

4. The important issue here involved is whether or not the court was so influenced by the policy of the command with regard to the suppression of low-flying offenses as to impair its judicial integrity and render it incapable of holding a fair trial and reaching proper findings and a just sentence. Nowhere in the record of trial does it appear that the court or its members were subjected to any extraneous influence or received any directions or suggestions as to their disposition of the case. However, the Trial Judge Advocate, in a recommendation for clemency, attached to the record, suggests that the sentence reflects an increased severity of attitude toward offenses of this character following an Army Air Forces directive as a result of which the members of the court "were forcefully indoctrinated by the Appointing Authority with the Air Force policy". The Defense Counsel, in a separate letter recommending clemency, has made a like suggestion and attached a copy of Second Air Force Regulations 60-2, dated 21 August 1944. Paragraphs 1 and 2 of these Regulations are quoted in the opinion of the Board of Review as matter of which the court was "charged with judicial knowledge". They require reports of violations of flying regulations and state that offenders will be tried by general court-martial and that sentence to dismissal will be "deemed appropriate", regardless of the capabilities or record of the

offender or other extenuating circumstances. Based upon this extraneous matter accompanying the record, the Board of Review is of the opinion that the court's free volition was thereby destroyed and the accused deprived of a fair trial. I dissent.

The record in this case is legally sufficient under the principle laid down in my dissenting opinion in the recent Davis case (CM 253209) which you concurred in and which the President confirmed on 20 October 1944. In that case involving an offense of similar nature, all of the members of the court, in a recommendation for clemency, stated that the sentence was imposed in accordance with Air Forces policy establishing dismissal as an appropriate sentence in such cases, but recommended commutation to forfeitures. It was contended in the Davis case that by such a statement the court disclosed that it had acted under such compulsion as to invalidate its sentence. However, this contention was rejected and the sentence was confirmed, upon your concurrence in my recommendation, although clemency was exercised in accordance with all recommendations. If the sentence to dismissal was held to be free from compulsion in the Davis case, wherein the record of trial discloses that the court had actual knowledge of the existing Air Corps policy as to the appropriateness of dismissal as a penalty in low flying cases, it logically follows that there is no reason whatever to vacate the sentence in this case on the ground of undue influence where the only suggestion of compulsion is derived, not from the record of trial, or as in the Davis case, the affirmative statement of all members of the court who voted on the sentence, but rests merely upon the informal statements set forth in letters attached to the record of trial by the trial judge advocate and defense counsel, neither one of whom may be present or participate in the secret deliberations of the court when it arrives at its sentence.

It is a matter of settled law and long-established military practice that courts-martial may with propriety consider general policies of the command relative to the uniform and rigid enforcement of discipline in cases of a particular character, where deterrent effect is an important element in arriving at proper sentences (CM 250472, Hoffman).

5. In a memorandum to me dated 16 October 1944, Lieutenant General Barney M. Giles, Deputy Commander, Army Air Forces, states that:

"1. I have considered the evidence in the case of this officer who has been convicted of unauthorized low flying which resulted in his striking electric power wires while he was en route with a group of four other planes to a gunnery range.

"2. In my opinion, the admitted distance of one-quarter to one-half mile between the planes, the extreme low level at which

the collision occurred and the fact that this officer was instructed to fly above as well as behind his leader place this case in the class of serious and wilful violations, regardless of the apparent bad example set by the instructor who was leading the flight. It is not, however, to my mind, an aggravated case in which under all the circumstances the best interests of the service require dismissal of the offender or other heavy penalty.

"3. I, therefore, recommend that the sentence be commuted to forfeiture of pay in the amount of \$60 per month for four months."

I concur in that recommendation, and also recommend that the sentence be confirmed but commuted to a forfeiture of pay of \$60 per month for four months, and that the sentence as thus modified be carried into execution.

6. Attention is invited to the recommendation of clemency by the Trial Judge Advocate, attached to the record of trial. Consideration has also been given to the letter by Defense Counsel requesting clemency.

7. 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,  
Major General,  
The Judge Advocate General.

5 Incls.

- Incl. 1-Record of trial.
- Incl. 2-Dft. ltr. for sig. S/W.
- Incl. 3-Form of Action.
- Incl. 4-Ltr. from Def. Counsel.
- Incl. 5-Memo from Lt. Gen. Giles.

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(Sentence confirmed but commuted to forfeiture of \$60 per month for four months. G.C.M.O. 679, 29 Dec 1944)



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

SPJGN  
 CM 264277

31 OCT 1944

U N I T E D S T A T E S	)	SECOND AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	Colorado Springs, Colorado,
Second Lieutenant HOWARD F.	)	28 August 1944. Dismissal
HOLMES (O-774158), Air Corps.	)	and total forfeitures.

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 OPINION of the BOARD OF REVIEW  
 LIPSCOMB, O'CONNOR and GOLLEN, Judge Advocates  
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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Howard F. Holmes, Air Corps, attached unassigned, 262nd Army Air Forces Base Unit, did, on or about 19 June 1944, near Norfolk, Nebraska, wrongfully violate paragraph 16a (1) (d), Army Air Forces Regulations 60-16, by flying the military airplane of which he was pilot at an altitude of approximately thirty (30) feet above the ground while not in take-off or landing.

The accused pleaded not guilty to, and was found guilty of, the Charge and the 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 Article of War 48.

3. The facts in the present case are substantially the same as the facts in the companion case of Second Lieutenant Arthur A. Hillgrove, CM 264276, and the same legal principles apply. For the reasons therein stated, the Board of Review is of the opinion that the record of trial in the present case is legally insufficient to support the findings of guilty and the sentence.

4. The records of the War Department show that the accused is approximately 20 years of age having been born on 21 October 1924. He completed the twelfth grade in high school and attended the University of California for one-half year. For brief periods he was employed in the lumber logging business and by a ship building company. On 30 July 1943 he entered the service and was thereafter commissioned a second lieutenant in the Air Corps on 15 April 1944.

5. For the reasons stated in CM 264277, Hillgrove, referred to above, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of the Charge and the Specification thereunder and the sentence.

Abner E. Lipscomb, Judge Advocate.

Robert Planno, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

1st Ind.

War Department, J.A.G.O.,

NOV 24 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 Second Lieutenant Howard F. Holmes (O-774158), Air Corps.

2. I do not concur in the opinion of the Board of Review and, for the reasons hereinafter set forth, I am 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.

3. This is a low-flying case, wherein sentence of dismissal and total forfeitures was imposed and approved upon conviction for violation of Army Air Forces Flying Regulations. Briefly, the facts in evidence are that the accused officer, as a member of a training flight following its leader in loose and extended order, so operated the military airplane of which he was pilot as to strike an electric power line about thirty feet above the ground, slightly damaging the plane, but not interrupting the flight. The accused, flying immediately behind another officer who was in turn following the flight leader, became entangled in the propeller wash of the plane ahead, which was also flying too low. The accused, admittedly under orders to fly above and behind the flight leader, failed to do so at the point in question, since the fact is that he struck the wires while the flight leader did not collide with either the wires or the ground. The evidence is ample to establish the offense charged.

4. The important issue here involved is whether the court was so influenced by the policy of the command with regard to the suppression of low-flying offenses as to impair its judicial integrity and render it incapable of holding a fair trial and reaching proper findings and a just sentence. Nowhere in the record of trial does it appear that the court or its members were subjected to any extraneous influence or made the recipients of any directions or suggestions as to their disposition of the case. However, the Trial Judge Advocate, in a recommendation for clemency, attached to the record, suggests that the sentence reflects an increased severity of attitude toward offenses of this character following an Army Air Forces directive as a result of which the members of the court "were forcefully indoctrinated by the Appointing Authority with the Air Force policy". The Defense Counsel, in a separate letter recommending clemency, has made a like suggestion and attached a copy of Second Air Force Regulations 60-2, dated 21 August 1944. Paragraphs 1 and 2 of these Regulations are quoted in the opinion of the Board of Review as matter of which the court was "charged with judicial knowledge". These regulations require reports of violations of flying regulations and state that offenders will be tried by general court-martial and that sentence to dismissal will be "deemed appropriate", regardless

of the capabilities or record of the offender or other extenuating circumstances. Based upon this extraneous matter accompanying the record, the Board of Review is of the opinion that the court's free volition was thereby destroyed and the accused deprived of a fair trial. I dissent.

The record in this case is legally sufficient under the principle laid down in my dissenting opinion in the recent Davis case (CM 253209) which you concurred in and which the President confirmed on 20 October 1944. In that case, involving an offense of similar nature, all of the members of the court, in a recommendation for clemency, stated that the sentence was imposed in accordance with Air Forces policy establishing dismissal as an appropriate sentence in such cases, but recommended commutation to forfeitures. It was contended in the Davis case that by such a statement the court disclosed that it had acted under such compulsion as to invalidate its sentence. However, this contention was rejected and the sentence was confirmed, upon your concurrence in my recommendation, although clemency was exercised in accordance with all recommendations. If the sentence to dismissal was held to be free from compulsion in the Davis case, wherein the record of trial discloses that the court had actual knowledge of the existing Air Corps policy as to the appropriateness of dismissal as a penalty in low flying cases, it logically follows that there is no reason whatever to vacate the sentence in this case on the ground of undue influence where the only suggestion of compulsion is derived, not from the record of trial, or, as in the Davis case the affirmative statement of all members of the court who voted on the sentence, but merely rests upon the informal statements set forth in letters attached to the record of trial by the trial judge advocate and defense counsel, neither one of whom was or could be present or participate in the secret deliberations of the court when it arrived at its sentence.

It is a matter of settled law and long-established military practice that courts-martial may with propriety consider general policies of the command relative to the uniform and rigid enforcement of discipline in cases of a particular character, where deterrent effect is an important element in arriving at proper sentences (CM 250472, Hoffman).

5. In a memorandum to me relative to the instant case, dated 16 October 1944, Lieutenant General Barney M. Giles, Deputy Commander, Army Air Forces, states that:

"1. I have considered the evidence in the case of this officer who has been convicted of unauthorized low flying which resulted in his striking electric power wires while he was en route with a group of four other planes to a gunnery range.

"2. In my opinion, the admitted distance of one-quarter to one-half mile between the planes, the extreme low level at which

the collision occurred and the fact that this officer was instructed to fly above as well as behind his leader place this case in the class of serious and wilful violations, regardless of the apparent bad example set by the instructor who was leading the flight. It is not, however, to my mind, an aggravated case in which under all the circumstances the best interests of the service require dismissal of the offender or other heavy penalty.

"3. I, therefore, recommend that the sentence be commuted to forfeiture of pay in the amount of \$60 per month for four months."

I concur in that recommendation, and also recommend that the sentence be confirmed but commuted to a forfeiture of pay of \$60 per month for four months, and that the sentence as thus modified be carried into execution.

6. Attention is invited to the recommendation of clemency by the Trial Judge Advocate, attached to the record of trial. Consideration has also been given to the following letters requesting clemency: From Major Martin Menter, J.A.G.D., Defense Counsel, dated 23 September 1944, and his letter therewith enclosed, dated 9 September 1944, directed to the Commanding General, Second Air Force; letters dated 7 August 1944, 5 September 1944, and 4 October 1944, and telegram dated 6 October 1944, all directed to the President, from Mrs. Minnie A. Holmes, mother of the accused; letter dated 3 October 1944, directed to the President, from Dorothy and Bob Holmes, sister and brother of the accused.

7. 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*

10 Incls.

Incl.1-Rec. of trial.

Incl.2-Dft.Ltr. sig. S/W.

Incl.3-Form of Action.

Incl.4-Ltr. fr. Def. Counsel,  
23 Sept. 44, w/incl.

Incl.5-Memo fr. Lt. Gen. Giles.

Incl.6-Ltr. fr. Mrs. Minnie A. Holmes,  
7 Aug. 1944.

Incl.7-Ltr. fr. Mrs. Minnie A. Holmes,  
5 Sept. 1944.

Myron C. Cramer,

Major General,

The Judge Advocate General.

Incl.8-Ltr. fr. Mrs. Minnie A. Holmes,  
4 Oct. 1944.

Incl.9-Telegram fr. Mrs. Minnie A.  
Holmes, 6 Oct. 1944.

Incl.10-Ltr. fr. Dorothy and Bob  
Holmes, 3 Oct. 1944.

(Sentence confirmed but commuted to forfeiture of \$60 per month for four months. G.C.M.O. 675, 29 Dec 1944)



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

(77) 1

SPJCK  
CM 264288

10 OCT 1944

UNITED STATES )

v. )

Second Lieutenant DONALD  
A. TOLL (O-690277), Air  
Corps. )

ARMY AIR FORCES  
CENTRAL FLYING TRAINING COMMAND

Trial by G.C.M., convened at  
Blackland Army Air Field, Waco,  
Texas, 9 September 1944. Dis-  
missal and total forfeitures.

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OPINION of the BOARD OF REVIEW  
LYON, HEPBURN and MOYSE, Judge Advocates.  
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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Donald A. Toll, Air Corps, did, without proper leave, absent himself from his station while enroute from San Antonio Aviation Cadet Center, San Antonio, Texas, to Blackland Army Air Field, Waco, Texas, from about 11 August 1944 to about 19 August 1944.

He pleaded guilty to and was found guilty of the Charge and the Specification. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under the provisions of Article of War 48.

3. Notwithstanding the plea of guilty the prosecution showed by competent evidence that the accused at the time of the alleged offense was in the military service in the grade of a second lieutenant, Air Corps, stationed, on 3 August 1944, at the San Antonio Aviation Cadet Center. On that date he was assigned to Blackland Army Air Field, Waco, Texas, by paragraph 9 of Special Orders 184, Headquarters Army Air Forces Central Flying Training Command, effective 10 August 1944. The accused departed from the San Antonio Aviation Cadet Center for Blackland Army Air Field at 1630 8 August 1944 (Pros. Ex. D). The accused signed in at the latter field at 2000 19 August 1944 (R. 7, Pros. Ex.A). No authority was given to him to delay en route and

he was therefore carried on the morning report of his new organization as absent without leave from 11 August to 19 August 1944 (R. 7-8, Pros. Exs. B and C).

4. Having been advised regarding his rights the accused elected to testify under oath. He enlisted in the service on 19 June 1942 to gratify a desire to fly. In order to get into the Air Corps he submitted to an operation for the removal of two deformed toes (R. 9-11). While on guard duty at "Preflight" he accidentally ran a bayonet into his foot which kept him in a hospital for ten days. He recovered from this injury and was eventually commissioned as a pilot and second lieutenant, Air Corps, 30 August 1943. He went to B-26 transition training at Del Rio, Texas, as a student officer, but was not able to graduate from that school. He was then sent to the Combat Classification Center at Brooks Field in October 1943. There he flew the training fighter planes for a while but was hospitalized for arthritis. He remained in a hospital at Brooks Field from November 1943 until February 1944 and was then sent to a hospital in Denver, Colorado. There he was treated for about three months. Then he was declared fit for duty and ordered to San Antonio Combat Classification Center. Accused did not think that he had been completely cured of his ailment (R. 12-15). While at the Combat Classification Center he received his orders to report to Blackland Army Air Field on 9 August 1944 and left that day to spend the night in San Antonio so that he could catch the 7 o'clock train the next morning for Waco (R. 16). He stated that he was feeling "pretty low and discouraged" and that after getting his room he purchased a bottle of whiskey and took two or three drinks. The night clerk failed to call him the next morning and he did not awaken until 10:30 (R. 17). He thereupon proceeded to get drunk. He sobered up in a few days and while trying to decide what to do he again drank to the extent of losing his "power of reasoning". On 18 August 1944, he stated that he realized that the longer he remained absent "the worse it was going to be" and he determined to proceed to Blackland Army Air Field and face the consequences (R. 19-20). Accused stated that he is a light drinker and that he had not had anything to drink for many months because he had been advised that "drinking would make his condition worse" (R. 18).

5. The evidence introduced by the prosecution and the testimony of the accused in conjunction with his plea of guilty clearly established that accused did absent himself from his station without proper leave from 11 August to 19 August 1944, as averred in the specification of the Charge in violation of the 61st Article of War.

6. War Department records show the accused to be 22 years of age and unmarried. He graduated from high school and for two years attended Menlo Junior College and Denver University. He left college to enter the service as an air cadet 19 June 1942. Upon completion of his training as a pilot he was commissioned a second lieutenant, 30 August 1943.

7. The court was legally constituted and had jurisdiction of the accused 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 and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of a violation of Article of War 61.

Wm. C. Fox, Judge Advocate.  
Charles Stebbins, Judge Advocate.  
(On Leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O.,

18 OCT 1944 To the Secretary of War.

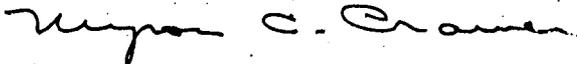
1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Donald A. Toll (O-690277), Air Corps.

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 Staff Judge Advocate states with reference to the accused:

"On 30 May 1944 he was classified for limited service and on 26 June 1944 was removed from flying status and disqualified for overseas duty due to physical disability. He is suffering from synovitis, a form of arthritis, and states that he presently feels the effect of this ailment."

The Staff Judge Advocate also states in his review of the record of trial for the reviewing authority that the immediate commander of accused recommended that the accused be eliminated from the service, and that the investigating officer likewise recommended his elimination because of his unstable and irresponsible character as evidenced by his absence without leave in the instant case. Despite these recommendations, in view of the youth of accused, his evident physical disability prior to and at the time of his misconduct, and of his two years of military service without any previous conviction, I recommend that the sentence be confirmed but commuted to a reprimand and a forfeiture of \$50.00 per month of his pay for a period of three months, and that the sentence as thus modified be carried into execution.

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



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

3 Incls.

Incl.1-Record of trial.

Incl.2-Draft of ltr. for  
sig. Sec. of War.

Incl.3-Form of Ex. action.

(Sentence confirmed but commuted to reprimand and forfeiture of \$50 per month for three months. G.C.M.O. 627, 17 Nov 1944)

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

SPJGH  
CM 264296

29 NOV 1944

UNITED STATES

MIDDLETOWN AIR SERVICE COMMAND

v.

Second Lieutenant GORDON  
SIMMS (O-579242), Air Corps.

Trial by G.C.M., convened at  
AAF Overseas Replacement Depot,  
Greensboro, North Carolina,  
15-16 August 1944. Dismissal.

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OPINION of the BOARD OF REVIEW  
TAPPY, MELNIKER and GAMBRELL, Judge Advocates

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

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

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

Specification 1: In that Second Lieutenant Gordon Simms, Air Corps, Section W, 1060th AAF Base Unit (ORD), then 3503rd AAF Base Unit (ORD), did, without proper leave, absent himself from his command at Greensboro, North Carolina, from about 0630, 22 June 1944, to about 1230, 22 June 1944.

Specification 2: In that Second Lieutenant Gordon Simms, Air Corps, Section W, 1060th AAF Base Unit (ORD), did, without proper leave, absent himself from his command at Greensboro, North Carolina, from about 6 July 1944 to about 14 July 1944.

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

Specification 1: In that Second Lieutenant Gordon Simms, \* \* \*, then 3503rd AAF Base Unit (ORD), did, at Greensboro, North Carolina, on or about 22 June 1944, with intent to deceive,

falsely sign the Post Officers' In Register at about 1900, 22 June 1944, to the effect that he had returned to AAF ORD, Greensboro, North Carolina, at 0630, 22 June 1944, whereas he did not return to said station until about 1230, 22 June 1944.

Specification 2: In that Second Lieutenant Gordon Simms, \* \* \*, did, at Greensboro, North Carolina, from on or about 5 June 1944 to 5 July 1944, wrongfully make sign and utter the following checks without maintaining sufficient funds to cover the same when presented within a reasonable time for payment, to wit:

Check dated 5 June 1944, drawn on the City Bank, 8th and G Streets, S.E., Washington, D.C. and payable to the order of Cash, in the amount of \$5.00.

Check dated 8 June 1944, drawn on The City Bank, 8th and G Streets, S.E., Washington, D.C. and payable to the order of Cash, in the amount of \$40.00.

Check dated 12 June 1944, drawn on The City Bank, 8th and G Streets, S.E., Washington, D.C. and payable to the order of Cash, in the amount of \$25.00.

Check dated 29 June 1944, drawn on The City Bank, 8th and G Streets, S.E., Washington, D.C. and payable to the order of Andrews Service Station, in the amount of \$45.00.

Check dated 27 June 1944, drawn on The City Bank, 8th and G Streets, S.E., Washington, D.C. and payable to the order of Hotel O. Henry, in the amount of \$10.00.

Check dated 28 June 1944, drawn on The City Bank, 8th & G Streets, S.E., Washington, D.C. and payable to the order of Hotel O. Henry, in the amount of \$15.00.

Check dated 4 July 1944, drawn on The City Bank, 8th and G Streets, S.E., Washington, D.C., and payable to the order of Hotel O. Henry, in the amount of \$15.00.

Check dated 5 July 1944, drawn on The City Bank, 8th and G Streets, S.E., Washington, D.C. and payable to the order of Hotel O. Henry in the amount of \$25.00.

The accused pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence was introduced at the trial of a previous conviction on 8 February 1944 of two violations of Article of War 95 (obtaining money under false pretenses and making and uttering an insufficient funds check) and of two violations of Article of War 96 (gambling with enlisted men and borrowing from an enlisted man). He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years. The reviewing authority approved only so much of the sentence as provides for dismissal, and forwarded the record of trial for action under Article of War 48.

3. For the prosecution evidence was presented that on 20 June 1944 accused requested and was given permission to be absent from his post, AAF Overseas Replacement Depot, Greensboro, North Carolina, for not more than 24 hours, commencing at the time of departure (R. 50). He signed out at 0630, 21 June 1944. His commanding officer did not see him again until 1015 on the 23rd although he claimed to have returned around noon of the 22nd. He actually signed in about 7 o'clock in the evening of the 22nd. When he signed the "In Register" (Pros. Ex. 16) at 1900 he noted on the register that he had returned at 0630 on 22 June and placed his name and and return data at the top of the page over the names of other officers who had registered "in" before he did (R. 50, 51). He claimed to have signed a "slip" or "in ticket" when he returned at 1230 on the 21st and to have left it on the adjutant's desk. The adjutant did not see it on the 22nd although he did not leave his office until after 5 o'clock that day and did not see it until the next day (the 23rd) when the accused showed it to him lying on his desk. The adjutant was not sure whether the accused picked it off his desk or from the "clip board" which hangs on the wall behind his desk, but he did not see it the day before, either on his desk or on the clip board. The accused told his commanding officer the next day after his return that he realized he had made a mistake in signing the register incorrectly (R. 50). The unauthorized absence of the accused on 22 June 1944 was also established by an extract copy of the morning report of his organization (Pros. Ex. 17).

The prosecution further showed by extract copies of the morning report of accused's organization (Pros. Exs. 19, 20) that accused was absent from his post without authority from 6 July 1944 to 14 July 1944. When he returned to the post on 14 July he told the military police officer who accompanied him from his quarters to the camp that he had just come back from Washington (R. 57).

The prosecution further established that on 23 May 1944, Lillian E. Simms, mother of the accused, had opened a checking account in The City

Bank, of Washington, D. C. with an initial deposit of \$26 (Pros. Ex. 10); that on 29 May 1944 this account was converted into a joint account with the accused (Pros. Ex. 11). Thereafter between 5 June 1944 and 5 July 1944 the accused made and uttered in Greensboro, North Carolina, the checks described in Specification 2, Charge II either for cash, merchandise or services (R. 23, 26, 29, 45). A representative of the bank testified that each of these checks was returned unpaid because accused's balance was insufficient when the check was presented for payment (R. 32-37). A transcript of the account from 31 May 1944 to 11 July 1944 was introduced without objection (Pros. Ex. 7). It shows that between 5 June and 21 June the balance in the account never exceeded \$9 and that from 12 June to 21 June the account was in fact overdrawn. It also shows that deposits made after 21 June were quickly withdrawn and that on 5 July the balance stood at \$7.65.

4. Following a full explanation of his rights accused testified under oath that he is 23 years of age, is married and has three children; that he enlisted on 10 September 1942, was promoted to corporal; went to OCS, was commissioned a second lieutenant, Air Corps and was assigned to Sedgefield, 1st District, at Greensboro, North Carolina, where he has been ever since (R. 58-59). He obtained a VOCO for 24 hours and left the post at 0630 on 21 June and returned on the 22nd between 12 and 12:30, six hours overdue (R. 63). He went right to his section headquarters and signed in on the register around 12 or 12:30, had his lunch and did nothing else the rest of the afternoon as he had no assignment at that time. Later about 1900 he signed the Post Register (Pros. Ex. 16) noting thereon that he returned at 0630 although he had not in fact returned at that time. The next morning he informed Captain William C. Sowers (the adjutant) that he had signed the register "in case anything came up about it" (R. 64). He also told Captain Sowers he was six hours late getting back and showed him the register he had signed and which was on the captain's desk and further told him he had signed it incorrectly so that they could see it. He told Lieutenant Colonel Morris H. Merritt, his commanding officer, the same thing. He further testified that the "in ticket" he had signed at 12:30 on 22 June was right on the adjutant's desk; that Captain Sowers had it on the 22nd; and that there was no intention on his part to falsify the register (R. 65). The accused further testified that his wife lived with her parents in Washington, D. C.; that on 17 June 1944 she gave birth to twins in a hospital in Washington; that he had tried to get leave first on 15 June before they were born and again on 1 July but his application was disapproved; that about 2 or 3 July his wife came down to visit him at Greensboro and left on 7 July; that he was unable to get rail transportation back for her so he took her home by bus (R. 65-67). He remained in Washington until the following Thursday when he returned to camp. During his stay in Washington he tried to straighten up his bills and see that his wife was in fair condition; that he went because of his wife's condition and the crowded bus and to make sure she got a seat (R. 68).

On cross-examination he said that he left camp on Friday, 7 July and returned Friday, 14 July; that when he started back to camp his wife and mother accompanied him in a car. His wife was physically well enough to make the trip in order to ascertain what was going to be done to him for being AWOL. While in Washington, although he lived only a half block from the bank, he did not go there to find out the status of his account; his wife went, but he did not recollect what information she brought back (R. 75, 77-78). He signed the "In Register" at 1900 (on 22 July); he signed it at the top "erroneously" so that anybody could see he signed it wrong (R. 80). He was coming from Reidsville, North Carolina, when his car broke down about 14 miles from Greensboro; it was after 6:30 he got a lift into camp; the car broke down twice, he had a flat tire in Reidsville at midnight; later he had another "flat" and mechanical trouble; it was early in the morning; it took him about an hour to get into Greensboro; he got in about noon; it was not full daylight when he broke down; if he had not broken down it would have taken less than 30 minutes to get into Greensboro and he would have arrived at the post about daylight; "they" left Reidsville between 5 and 6 o'clock in the morning and drove five or six miles before the car broke down the second time; he left the car about 11 o'clock and caught a ride back to camp arriving there about 12 o'clock (R. 82-86).

With reference to his bank account the accused testified that he had no way of knowing what checks his mother drew unless she told him; he never received any statements or communications from the bank (R. 59); at the time he issued checks (Pros. Exs. 5, 6) he was sure he had money in the bank to take care of them; he never received any notice of dishonor; he made a deposit of \$225 before the checks to the O. Henry Hotel (Pros. Exs. 1-4) were drawn (R. 60); he did not know there were no funds to meet them when he issued these checks; did not learn of it until he was confined and then sent money down to pay them off (R. 61); with reference to the check for \$45 to the Andrews Service Station (Pros. Ex. 9) dated 29 June, he did not know it had been dishonored till Major Herbolzheimer brought it to him; he did not know he did not have sufficient funds in the bank to meet it as he had wired money to the bank the day after issuing the check; he sent the \$45 down immediately to Mr. Roy G. Andrews to pay him off; nobody has lost a single penny; he had called the bank three times during the month (R. 61). He asked for a statement but never received any; at no time during the period covered by the seven checks did he know the exact status of his account (R. 62); does not know how many checks "bounced"; was not very well informed about his account; did not know whether he had ten cents in the account (R. 72); did not know how many checks his mother drew; did not know how many times he was short; did not keep a record of his balance (R. 69). All the dishonored checks have been paid.

Mrs. Marjorie Simms, wife of accused, testified that she and accused left Greensboro, North Carolina, by bus about 3:30 on Friday afternoon (7 July 1944) and arrived in Washington, D. C. at 3 or 3:30 the next morning; the accused stood up in the bus all the way home (R. 90-91). She went to the bank while accused was in Washington, made a deposit, asked about the account and brought back several figures; the bookkeeper at the bank told her she had mailed the statement to accused's mother who lived two blocks away (R. 92-93).

#### 5. Specification 1, Charge I.

By his own admission the accused was about six hours late in returning from leave given him to be absent for 24 hours from 0630, 21 July 1944. His excuse that his car broke down about 14 miles from Greensboro between 5 and 6 o'clock on the morning of the 22nd and that if it had not broken down it would have taken him not over 30 minutes to get to Greensboro and he would have arrived at the post about or shortly after full daylight was properly rejected by the court, in view of its inherent incredibility, his many lapses of memory, his evasiveness and his failure to offer the slightest corroborative evidence which if his story were true, should have been readily available. He failed entirely to explain why if he broke down 14 miles from camp at the hour claimed it took him until noon to get to camp and why during that period he failed to communicate by telephone with the headquarters of his organization. The burden was on him to make a plausible explanation of his absence so as to show that it was due to circumstances beyond his control. He utterly failed to sustain that burden. In the opinion of the Board of Review the evidence amply sustains the finding of guilty of this Specification.

#### Specification 2, Charge I.

The accused admitted his unauthorized absence from 7 July to 14 July; No defense is interposed to this charge. His attempted explanation of his flagrant violation of duty was that he could not get rail transportation for his wife to go back to Washington after visiting him at Greensboro, North Carolina, so he boarded a bus with her to make sure that she got a seat. Even if his explanation be taken at face value, it obviously supplies no legal defense to a charge of absence without leave. He and his wife left Greensboro at about 3:30 on Friday afternoon, 7 July. They arrived in Washington the following morning at about 3 o'clock according to her story, the next afternoon according to his. The accused did not return to his post until 14 July. The finding of guilty of this Specification is amply sustained by the evidence.

## Specification 1, Charge II.

By the Specification the accused is charged with having falsely signed the register at his headquarters to make it appear that he had returned at 0630 on 22 June 1944 at the termination of his 24 hours leave, when in fact he did not return till about 1230 and that this was done with intent to deceive. The Specification is laid under the 96th Article of War. Not only did the accused make the admittedly false entry in the register, but he placed the entry at the top of the page ahead of an entry properly made by an officer who registered in first that day at 0700 and ahead of all the other officers who had registered in during the course of the day. He admitted all this and sought refuge behind the transparently implausible contention that he had no intent to deceive and that he made the entry as he did in order to call attention to it. It would be a work of supererogation to call attention to his equally unconvincing statement that he had made out a "sign in" slip at 1230 at the time he returned and left it on the adjutant's desk. Suffice it to say that the adjutant who was in his office and at his desk all afternoon until after 1700 did not see it until the accused "discovered" it on his desk the next morning. The making of such a false entry with intent to deceive was clearly prejudicial to good order and military discipline, in violation of Article of War 96. The finding of guilty of the offense charged is fully sustained by the evidence.

## Specification 2, Charge II.

The accused is charged with having wrongfully made, signed and uttered eight checks between 5 June 1944 and 5 July 1944 without maintaining sufficient funds to cover the same when presented within a reasonable time for payment.

The making, signing and uttering of the checks was proved and admitted. Some were given for cash, some for merchandise and some for services. All were drawn and uttered in Greensboro, North Carolina, on a bank in Washington, D. C. They were all dishonored upon presentation to the bank on which they were drawn because of insufficiency of funds.

It is to be noted that the accused here is not charged with intent to defraud, in violation of Article of War 95. He is charged merely with wrongfully making and uttering certain checks without maintaining sufficient funds to cover them when presented within a reasonable time, in violation of Article of War 96. It has been held that

"The negotiation by an officer of worthless checks without intent to defraud is conduct of a nature to bring discredit upon the military service in violation of A.W. 96 (CM 224286 (1942), 14 B.R. 97)" (3 Bull. JAG 290).

In a recent case the Board of Review held that a member of the military establishment is under a particular duty not to issue a check without maintaining a bank balance or credit sufficient to meet it and that such conduct is not only a reflection on the individual but is service-discrediting as well (CM 249232, Norren, 3 Bull. JAG 290, 32 B.R. 95). In that case the Board said:

"A member of the military establishment is under a particular duty not to issue a check without maintaining a bank balance or credit sufficient to meet it. Such conduct is not only a reflection on the individual and a violation of civil law if committed with wrongful intent, but is service-discrediting as well. Frequently checks are cashed not because of the assurance derived from the implied representation attached to the check so much as the faith created by the uniform. The individual may be satisfied by the exculpation which flows from an explanation rooted in carelessness or neglect. The hurt to the credit and reputation of the Army is not so easily removed.

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

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

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

The rule announced in the Norren case applies here. The evidence is clear that the accused issued checks indiscriminately and without making any pretense of keeping tract of the amount of his balance. He admits as much

himself. He never knew whether "there was ten cents in the account" (R. 72). It is true that the account was a joint account and that his mother had authority to draw on it. But, as pointed out in the Norren case, the fact that another person has the right to draw on the account only serves to require "extra caution". In the instant case the evidence clearly shows, and the accused admits, that he exercised no caution whatever.

Similarly, in CM 202027, McElroy, 5 B.R. 347, where the accused was charged with "dishonorably and wrongfully" failing to maintain a sufficient bank balance to meet a check issued by him, in violation of Article of War 95, and was convicted, by amendment of the Specification, of "wrongfully" failing to maintain such balance, in violation of Article of War 96, it was held by the Board of Review that the amended Specification stated an offense in violation of Article of War 96 and that the conviction was proper.

Only one further question requires consideration. Upon arraignment, the defense counsel made a motion to strike Specification 2 of Charge II on the ground that "it embraces eight different check charges", whereas the Manual for Courts-Martial, 1928, provides that "One specification should not allege more than one offense either conjunctively or in the alternative" (par. 29). The motion was denied and, the Board believes, correctly so. The Specification alleges a course of conduct from 5 June 1944 to 5 July 1944 in violation of Article of War 96.

"A specification alleging, as a violation of A.W. 95, a series of acts constituting a course of dishonorable conduct amounting to a fraud, is not objectionable on the ground of duplicity. G.M. 153268 (1922); 192530 (1930)" (Dig. Op. JAG, 1912-40, sec. 428 (13)).

Similarly, a specification alleging, as a violation of Article of War 96, a series of acts constituting a course of action of a nature to bring discredit upon the military service, is not objectionable on the ground of duplicity. The test is whether the specification is so framed as to advise the accused of the particular act or offense intended to be alleged, and to enable him to plead a former conviction or acquittal if subsequently brought to trial on account of the same act (Winthrop's Military Law and Precedents, 2d Ed., p. 138). No basis exists in the instant case for a contention by the accused that he was in any way misled by the form of the specification, nor was any such contention made. Each of the eight checks alleged in the specification to have been wrongfully made and uttered was specifically described and was readily identifiable. Moreover, the Manual specifically provides (par. 87):

"No finding or sentence need be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect, or that his substantial rights were otherwise injuriously affected thereby."

See, also, CM 247496, Egalnick, 30 B.R. 361; and CM 202601, Sperti, 6 B.R. 171. The Board of Review is of the opinion, therefore, that the motion to strike Specification 2 of Charge II on the ground of duplicity was properly denied.

6. The accused is a native American citizen, 23 years of age, married and the father of three children. He did not finish high school but left to find employment as an entertainer and musician. He worked as an inspector of building materials for one year prior to his enlistment on 10 September 1942. He entered Army Air Forces Officer Candidate School on 13 December 1942 at Miami Beach, Florida, was commissioned a second lieutenant, Army of the United States, on 16 April 1943 and was assigned to Headquarters, 1st District AAF Technical Training Command, Greensboro, North Carolina.

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 and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of a violation of either the 61st or the 96th Article of War.

Thomas N. Tappin, Judge Advocate.

Arnold, Judge Advocate.

William H. Gambrell, Judge Advocate.

War Department, J.A.G.O.,

DEC 6 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 Gordon Simms (O-579242), 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 as approved by the reviewing authority and to warrant confirmation of the sentence. On 2 February 1944 accused was tried and convicted by general court-martial for obtaining money under false pretenses, for gambling with enlisted man and for borrowing \$100 from an enlisted man and received a sentence of forfeiture of \$50 per month for three months, restriction to the limits of his post for three months and a reprimand. The first of the present offenses was committed about a month after accused served his sentence of three months' restriction. By 2nd Indorsement from the Commanding General, Army Air Forces, there was received on 17 November 1944 a letter from accused's commanding officer setting forth in detail further incidents of accused's misconduct occurring subsequent to the present trial. The general nature of these offenses are that on 8 October 1944 accused was apprehended at Union Station, Washington, D. C. in improper uniform; that he was absent without leave from his command from 10 October 1944 to 12 October 1944; that he made and uttered four worthless checks aggregating \$240 drawn on two banks in which he had no account; that he breached arrest and stole two fifths of whiskey from the quarters of a fellow officer. I recommend that the sentence as approved by the reviewing authority, although inadequate, be confirmed and carried into execution.

3. Consideration has been given to letters requesting clemency from Mrs. Lillian Simms, mother of accused, dated 24 and 25 August 1944; to a letter from Senator Albert B. Chandler, dated 15 November 1944 and to a memorandum from the Legislative and Liaison Division, Office of the Chief of Staff, War Department, dated 6 September 1944.

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

*Myron C. Cramer*

6 Incls.

- Incl 1 - Record of trial.
- Incl 2 - Ltr fr Mrs Lillian Simms.
- Incl 3 - Ltr fr Sen A B Chandler.
- Incl 4 - Memo to TJAG fr I&LD, OCS.
- Incl 5 - Dft ltr for sig S/W.
- Incl 6 - Form of action.

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

(Sentence as approved by reviewing authority confirmed.  
G.C.M.O. 59, 27 Jan 1945)



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

SPJGH  
 CM 264342

14 OCT 1944  
 THIRD AIR FORCE

UNITED STATES

v.

Second Lieutenant JOHN A.  
 REIS (O-699961), Air Corps

Trial by G.C.M., convened at  
 Avon Park Army Air Field, Avon  
 Park, Florida, 4 September 1944.  
 Dismissal, total forfeitures and  
 confinement for three (3) years,  
 Disciplinary Barracks.

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OPINION of the BOARD OF REVIEW  
 TAPPY, MELNIKER and GAMBRELL, Judge Advocates

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

2. Lieutenant Reis was tried jointly with Corporal John M. Signorelli (12149518) and Private First Class Maurice P. Levy (12159876) upon the Charge and Specifications set out below. Since only the legal sufficiency of the record to support the findings and the sentence as to Lieutenant Reis requires consideration by the Board of Review, the legal sufficiency of the record to support the findings and the sentences as to the two named enlisted men is not considered in this opinion. References in this opinion to the "accused" refer to Lieutenant Reis only. The Charge and Specifications upon which the accused and Signorelli and Levy were tried jointly, as aforesaid, are the following:

CHARGE: Violation of the 93rd Article of War.

Specification 1: (Applies only to Signorelli).

Specification 2: In that Second Lieutenant John A. Reis, Corporal John M. Signorelli, and Private First Class Maurice P. Levy, all of Squadron U, 325th AAF Base

Unit RTU (HB) Avon Park Army Air Field, Avon Park, Florida, did jointly and in pursuance of a common intent on or about 6 August 1944 at St. Petersburg, Florida, in the night-time feloniously and burglariously break and enter the Army and Navy Club with intent to commit a felony, viz larceny.

Specification 3: In that Second Lieutenant John A. Reis, Corporal John M. Signorelli, and Private First Class Maurice P. Levy, all of Squadron U, 325th AAF Base Unit, RTU (HB), Avon Park Army Air Field, Avon Park, Florida, did, acting jointly and in pursuance of a common intent, on or about 6 August 1944, at St. Petersburg, Florida, feloniously take, steal and carry away seven (7) bottles of whiskey and one (1) bottle of sloe gin, value of approximately \$32.00, property of the Army and Navy Club, St. Petersburg, Florida.

The accused pleaded not guilty to and was found guilty of the Charge and both Specification 2 and Specification 3 thereof. No evidence of any previous conviction was introduced at the trial. 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, at such place as the reviewing authority may direct, for three (3) years. The reviewing authority approved the findings, except the words "and burglariously" contained in Specification 2, approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

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

The accused and Signorelli and Levy were present together at the Post Exchange at the Avon Park Army Air Field, Avon Park, Florida, on the 4th or 5th of August 1944. Sergeant Burt Gordon there discussed with the three of them plans for a trip which they were contemplating taking together over the approaching week-end, and they suggested that he go with them "purely for purposes of pleasure". The City of Tampa, Florida, was mentioned as a possible place to go (R. 8). On or about 4 August 1944, Levy spoke to Private First Class Charles C. Eckert and Private First Class Henry V. Gaidis, each of whom owns a one-half interest in a 1936 Cadillac black sedan, about borrowing the car for the week-end. Both of them agreed to lend the car to him (R. 9-10). At the time the car was lent, two Army blankets and two small gasoline cans were in it and its gasoline tank was approximately one-eighth full. The car averages about eleven

miles per gallon of gasoline. Levy promised to return the car on Sunday, 6 August (R. 9).

Anderson Albritton is a porter at the Army and Navy Club in St. Petersburg, Florida. Arriving at the Club at 5 a.m. Sunday morning, 6 August 1944, in the regular course of his duties, he discovered that the music box and the cigarette machine had been torn open and that the liquor cabinet behind the bar had been broken open. He promptly telephoned the police. Upon further search he discovered that an outside window and screen had been broken open, the liquor cabinet in the office had been broken open, the combination on the safe "was all torn open and a hammer was on the floor" and "the lock was broken off the back door" (R. 11-13). Henry L. Wallace is the bartender at the Club. He stopped selling drinks at midnight Saturday, 5 August 1944, in accordance with the rules of the Club, and proceeded to close the bar, leaving the Club at 12:25 a.m. Everything was in good order when he left. Sunday morning at 7 o'clock he received a telephone call to come to the Club. Upon arriving at the Club he observed the same breakage which had been seen by the porter, as above enumerated. The bartender also noticed that the "losses" from the liquor cabinet behind the bar were "2 Schenley's, 2 I.W. Harper's and 1 Gilbey's Sloe Gin". These were the losses from that particular cabinet only (R. 13-14). The bartender receives liquor at the bar from the liquor cabinet in the Club office, twelve bottles at a time. There is affixed to each bottle before it is delivered to him a price sticker, approximately two inches square, showing, in large figures, which the customer may readily read, the price per drink. He identified samples of the stickers used (R. 15; Pros. Ex. A). He also identified a particular torn red sticker as being one of the kind used at the Club (R. 15; Pros. Ex. F). He also identified five bottles of Schenley's, two bottles of I. W. Harper's and one bottle of DuBouchett Sloe Gin (Pros. Ex. B) as conforming in make and brand with items that were missing from the Club on the night in question, and he testified to observing on each of these bottles evidence of "something torn off on the left side of the label" (R.15). Likewise he identified a carton bearing the label "Army & Navy Club, St. Pete" as being one that he personally had opened (R. 15-16; Pros. Ex. C).

At 5:30 a.m. Sunday, 6 August 1944, M. C. Cooksey, who operates a gasoline filling station at 1505 Main Street, Bartow, Florida, arrived at his place of business to prepare to open for the day. Just as he entered his station he saw a black sedan pull up and stop. A man in a soldier's uniform got out of the car, took a can and siphon hose from the car and proceeded to siphon gasoline from a truck parked near Cooksey's station. Cooksey called to the man and the latter offered to pay for the gasoline which he had taken. Cooksey refused to accept payment but called the police instead (R. 17-18). Two patrolmen, responding to the call, chased the sedan and overtook it on U. S. Highway 17 approximately two and one-half miles northeast of Bartow. Signorelli was driving the sedan and the accused and Levy were riding with him. Signorelli readily admitted stealing

the gasoline. The patrolmen arrested the three occupants of the sedan and promptly delivered them into the custody of the Provost Marshal at Bartow Army Air Field. The patrolmen did not search the sedan, but one of them upon flashing a light in the sedan "saw something covered in the back of the car" (R. 19-21)

At about noon on Sunday, 6 August 1944, Captain Clinton S. Ezell arrived at Bartow Army Air Field to return the accused and Signorelli and Levy to Avon Park Army Air Field. At that time the two enlisted men were in the stockade at Bartow and the accused was in the custody of the Officer of the Day at Bartow. The Cadillac sedan was parked beside the stockade. Captain Ezell caused the sedan to be brought to the office of the Provost Marshal at Bartow, and there, in the presence of the accused and the two enlisted men, he searched the sedan, finding, in a carton under a blanket, five Schenley's, two I. W. Harper's and one bottle of DuBouchett Sloe Gin. He identified the bottles and carton introduced as Prosecution's Exhibits B and C as the same items he found in the sedan. He also identified Prosecution's Exhibit F as a torn red sticker which he found in the carton "sticking at the side of one of the pieces of cardboard which separates the bottles". The cap seals were not broken on any of the Schenley's or Harper's. In addition, Captain Ezell found in the sedan a gasoline can and a black rubber hose (Prosecution's Exhibit G). The can and hose smelled of gasoline (R. 22-24). Corporal Walter Hansberry testified that he is chauffeur for Captain Ezell and that he was present when Captain Ezell made the search of the Cadillac sedan above related. He corroborated Captain Ezell's testimony and identified Prosecution's Exhibits B, C and F as the bottles, carton and torn sticker found in the sedan (R. 25-26).

#### 4. Evidence for the defense:

The rights of the accused as a witness having been explained to him, he elected to remain silent (R. 28). No witness were called for the defense.

5. The accused has been convicted of the offense of the larceny of eight bottles of liquor and the offense of housebreaking, both in violation of Article of War 93. Specification 2 alleges burglary, but under the findings, as modified by the reviewing authority, the accused stands convicted of housebreaking, which is a lesser included offense within the offense of burglary (Dig. Op. JAG, 1912-40, sec. 451 (15), CM 149111).

The evidence upon which the accused has been convicted in the case of each of the two offenses is identical, and all of it is circumstantial. It is believed, however, that the evidence, taken altogether, is such as to exclude any fair and rational hypothesis except that of guilt (Dig. Op. JAG, 1912-40, sec. 395 (9), CM 153330). The Manual for

Courts-Martial, 1928, provides that "what is required" in such cases is "not an absolute or mathematical but a moral certainty" (par. 78a). The following uncontradicted evidence forms a circumstantial web which is sharply inconsistent with the innocence of the accused and which, in the opinion of the Board, compels, overwhelmingly, the conclusion that the accused is guilty of the two offenses of which he stands convicted.

(1) The accused and Signorelli and Levy were seen together at the Post Exchange on Friday, 4 August 1944, and were heard to be discussing the taking of a week-end trip together.

(2) The Army & Navy Club, in St. Petersburg, Florida, was broken into between 12:25 a.m. and 5 a.m. Sunday, 6 August 1944, and, among other things, certain bottles of liquor of known brands and bearing distinctive club stickers were known to have been stolen from the club.

(3) The accused and the two named enlisted men were apprehended at six o'clock on the morning of the theft riding on the highway leading from St. Petersburg to Avon Park (where accused's station is located) in an automobile lent to Levy by two soldiers of his squadron.

(4) There were found in the automobile eight bottles of liquor, a carton bearing the label "Army & Navy Club, St. Pete", and a torn price sticker. Each of the bottles bore evidence of having been stripped of the price sticker customarily placed by the Club on its bottles of liquor, each bottles was of a make or brand conforming to items in common use at the Club, and four of the bottles (2 Schenley's and 2 I.W. Harper's) were identified as being similar in all respects to four bottles known to have been stolen from one particular liquor cabinet in the bar of the Club on the night in question. Further, the torn price sticker (Pros. Ex. F) was positively identified as one used by the club.

All of the circumstances point to concerted action on the part of the accused and the two enlisted men. They were known to have planned to take a week-end trip together and they were found riding in an automobile together at six o'clock Sunday morning, in the possession of very recently stolen goods. The unexplained possession of recently stolen goods has repeatedly been held to be sufficient to support a finding of guilty of larceny (Dig. Op. JAG, 1912-40, sec. 451 (37)). In a recent decision of the Board of Review it was stated:

"The probative value of such evidence depends upon the character of the possession, the time that has elapsed between the theft and the discovery of the stolen goods in the possession of the accused and other attendant circumstances (Wharton's Criminal Evidence (11th Ed.) 198-200; Boykin v. The State, 34 Ark. 443; Ingals v. State, (Wis.) 4 N.W. 785; Bellamy v. State (Fla.) 17 So. 560; State v. Williams (Ore.) 202 P. 428)" (CM 230928, Lanyon; 18 BR 115, 123).

It is to be noted that in the instant case the accused and his two companions were apprehended in possession of the stolen goods within six hours of the time of the theft.

With reference to joint possession of recently stolen property, the Board of Review, in a recent case, said:

"Possession has been held to be joint, and as such sufficient to support the inference of guilt of a defendant, who, in company with one or two other persons, was found riding in a recently stolen automobile and, although defendant was not shown to have been driving the car, the attendant circumstances were such as reasonably to indicate that he was acting in concert with the other occupants with reference to its possession (State v. Kehoe (Mo.) 220 S.W. 961, Cheatham v. State (Ga.) 197 S.E. 70)" (CM 234964 Furtado; 21 BR 217, 221).

As indicated, there appears to be no reason to doubt that, in the instant case, the action of the accused and his two companions was concerted and that they did, in fact, have joint possession of the stolen goods at the time they were apprehended.

It is well settled that, in order that a presumption of guilt of larceny may arise, the unexplained possession of recently stolen articles by the accused must be personal, conscious and exclusive (CM 202720, Clem, 6 BR 251; CM 202966 Baker and Krueger, 6 BR 389). In the opinion of the Board of Review the evidence in the instant case is such as fully to warrant the conclusion that the possession of the eight stolen bottles of liquor by the accused and his two companions was, at the time of accused's apprehension, personal, conscious and exclusive.

The same unexplained possession of recently stolen goods may support both a finding of guilty of larceny and a finding of guilty of house-breaking (Dig. Op. JAG, 1912-40, sec. 451 (32)). In the instant case, the conclusion that the accused is guilty of the larceny alleged, requires the conclusion that he is also guilty of the offense of housebreaking, because the evidence is uncontroverted and conclusive that the Club was broken into between the hours of 12:30 a.m. and 5 a.m. on 6 August 1944 and that during that interval of time the eight bottles of liquor found in the possession of the accused were stolen from the Club. Entrance therein was necessary to gain possession of the stolen articles.

6. The records of the War Department show that the accused is 23 years and 7 months of age, he having been born in Romania, on 1 February 1921. He is a high school graduate, and in civilian life was employed by International Business Machines Corporation as a customers' service man, repairing machines in the possession of customers. He was inducted into the Army in October 1942, and, upon graduation from the Army Air Forces Navigation School in December 1943, was commissioned a second lieutenant, Air Corps, Army of the United States.

He was reprimanded and fined \$75 on 1 July 1944 by the Commanding General of the III Bomber Command (his commanding officer) for (a) being absent without leave from three ground school classes on 29 May 1944, one on 31 May 1944 and one on 12 June 1944; (b) willfully failing to salute a superior officer and (c) failing to obey an order to sign in every hour during a specified period.

7. The court was legally constituted and had jurisdiction of 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 is authorized upon a conviction of a violation of Article of War 93.

Thomas N. Jaffey, Judge Advocate

Adelstein, Judge Advocate

William H. Dambrell, Judge Advocate

(100)

SPJGH  
CM 264342

1st Ind.

War Department, J.A.G.O., 28 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 Second Lieutenant John A. Reis (O-699961), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority, and the sentence and to warrant confirmation of the sentence. There appear to be no extenuating or mitigating circumstances. 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 Federal Reformatory, Chillicothe, Ohio, 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 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.

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(Sentence confirmed but forfeitures remitted. G.C.M.O. 635, 24 Nov 1944)

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NAVY DEPARTMENT  
WAR DEPARTMENT

Army Service Forces

In the Office of The Judge Advocate General  
Washington, D.C.

(101)

SPJGN  
CM 264353

29 SEP 1944

UNITED STATES

) ARMY AIR FORCES WESTERN  
) FLYING TRAINING COMMAND

v.

) Trial by G.C.M., convened at  
) Mather Field, Sacramento,  
) California, 8 September 1944.  
) Dismissal and total forfeitures.

Second Lieutenant ROBERT W.  
HAWKE (O-771019), Air Corps.

OPINION of the BOARD OF REVIEW  
LIPSCOMB, O'CONNOR 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 61st Article of War.

Specification 1: In that 2nd Lt. Robert W. Hawke, Section "H", 3031st AAF Base Unit, Mather Field, California, did, without proper leave, absent himself from his organization at Mather Field, California, from about 3 July 1944 to about 4 July 1944.

Specification 2: In that 2nd Lt. Robert W. Hawke, Section "H", 3031st AAF Base Unit, Mather Field, California, did, without proper leave, absent himself from his organization at Mather Field, California, from about 5 July 1944 to about 8 July 1944.

He pleaded guilty to and was found guilty of the Charge and the 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 two years. The reviewing authority approved the sentence but remitted the confinement and forwarded the record of trial for action under Article of War 48.

3. The accused, after having the effect and meaning of his plea of guilty explained to him, stated that he wished his plea to stand and the prosecution, relying thereon, introduced no evidence (R. 7).

4. The evidence for the defense shows that according to the "War

02461

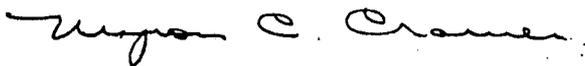


SPJGN  
 OM 264353

1st Ind.

War Department, J.A.G.O., 4 - 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 Second Lieutenant Robert W. Hawke (O-771019), Air Corps.
2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed but commuted to a reprimand and a forfeiture of \$50 of his pay per month for three 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 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.

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(Sentence as approved by reviewing authority confirmed but commuted to reprimand and forfeiture of \$50 per month for three months. G.C.M.O. 581, 25 Oct 1944)



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

(105)

SPJGH  
CM 264354

7 FEB 1945

UNITED STATES

v.

Second Lieutenants BOBBY  
B. LEONARD (O-778188),  
ROBERT W. JENKINS (O-778168),  
FREDERICK R. LaTURNER  
(O-778186) and Flight Officer  
WILLIAM D. KRAUSS (T-4054),  
Air Corps.

ARMY AIR FORCES  
WESTERN FLYING TRAINING COMMAND

Trial by G.C.M., convened at  
Mather Field, Sacramento,  
California, 1 and 2 September  
1944. Leonard, Jenkins and  
LaTurner: Dismissal. Krauss:  
Dishonorable discharge (suspended).

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2d Lt. Bobby B. Leonard, Air Corps, scheduled to fly solo instrument in a TB-25 type aircraft, did, at Mather Field, California on or about 24 July 1944, wrongfully agree with 2d Lt. Frederick R. LaTurner, Air Corps, 2d Lt. Robert W. Jenkins, Air Corps, and Flight Officer William D. Krauss, to engage in an unauthorized formation flight with another TB-25 type aircraft in the vicinity of Marysville, California.

Specification 2: In that 2d Lt. Bobby B. Leonard, Air Corps, did, on or about 24 July 1944, near Marysville, California,

wrongfully fail to prevent 2d Lt. Robert W. Jenkins, Air Corps, who was then under the said 2d Lt. Bobby B. Leonard's command, from piloting a TB-25 type aircraft closer than 500 feet to another aircraft in flight in violation of paragraph 5 h AAF Regulation 60-16.

Specification 3: In that 2d Lt. Bobby B. Leonard, Air Corps, did, on or about 24 July 1944, near Marysville, California, wrongfully fail to prevent 2d Lt. Robert W. Jenkins, who was then under said 2d Lt. Bobby B. Leonard's command, from piloting a TB-25 type aircraft in such a manner as to endanger friendly aircraft in the air in violation of paragraph 1, AAF Regulation 60-16.

The accused, Jenkins, was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2d Lt. Robert W. Jenkins, Air Corps, scheduled to fly solo instrument in a TB-25 type aircraft, did, at Mather Field, California on or about 24 July 1944, wrongfully agree with 2d Lt Bobby B. Leonard, Air Corps, 2d Lt. Frederick R. LaTurner, Air Corps, and Flight Officer William D. Krauss, to engage in an unauthorized formation flight with another TB-25 type aircraft in the vicinity of Marysville, California.

Specification 2: In that 2d Lt. Robert W. Jenkins, Air Corps, did, on or about 24 July 1944, near Marysville, California, wrongfully pilot a TB-25 type aircraft closer than 500 feet to another aircraft in flight in violation of paragraph 5 h AAF Regulation 60-16.

Specification 3: In that 2d Lt. Robert W. Jenkins, Air Corps, did, on or about 24 July 1944, near Marysville, California wrongfully pilot a TB-25 type aircraft in such a manner as to endanger friendly aircraft in the air in violation of paragraph 1, AAF Regulation 60-16.

The accused, LaTurner, was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2d Lt. Frederick R. LaTurner, Air Corps, scheduled to fly solo instrument in a TB-25 type aircraft,

did, at Mather Field, California on or about 24 July 1944, wrongfully agree with 2d Lt. Robert W. Jenkins, Air Corps, 2d Lt. Bobby B. Leonard, Air Corps, and Flight Officer William D. Krauss, to engage in an unauthorized formation flight with another TB-25 type aircraft in the vicinity of Marysville, California.

Specification 2: In that 2d Lt. Frederick R. LaTurner, Air Corps, did, on or about 24 July 1944, near Marysville, California, wrongfully fail to prevent Flight Officer William D. Krauss, who was then under the said 2d Lt. Frederick R. LaTurner's command, from piloting a TB-25 type aircraft closer than 500 feet to another aircraft in flight in violation of paragraph 5 h AAF Regulation 60-16.

Specification 3: In that 2d Lt. Frederick R. LaTurner, Air Corps, did, on or about 24 July 1944, near Marysville, California, wrongfully fail to prevent Flight Officer William D. Krauss, who was then under said 2d Lt. Frederick R. LaTurner's command, from piloting a TB-25 type aircraft in such a manner as to endanger friendly aircraft in the air in violation of paragraph 1, AAF Regulation 60-16.

The accused, Krauss, was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Flight Officer William D. Krauss, scheduled to fly solo instrument in a TB-25 type aircraft, did, at Mather Field, California, on or about 24 July 1944, wrongfully agree with 2d Lt. Robert W. Jenkins, Air Corps, 2d Lt. Bobby B. Leonard, Air Corps, and 2d Lt. Frederick R. LaTurner, Air Corps, to engage in an unauthorized formation flight with another TB-25 type aircraft in the vicinity of Marysville, California.

Specification 2: In that Flight Officer William D. Krauss, did, on or about 24 July 1944, near Marysville, California, wrongfully pilot a TB-25 type aircraft closer than 500 feet to another aircraft in flight in violation of paragraph 5 h AAF Regulation 60-16.

Specification 3: In that Flight Officer William D. Krauss, did, on or about 24 July 1944, near Marysville, California, wrongfully pilot a TB-25 type aircraft in such a manner as to endanger friendly aircraft in the air in violation of paragraph 1, AAF Regulation 60-16.

The accused were tried together in a common trial as directed by the convening authority and consented to by the accused (R. 8, 10, 13, 15). Each of the accused pleaded not guilty to the respective Charge and Specifications pertaining to him and each was found guilty of the Charge and of Specifications 1 and 3 and of Specification 2, except the words "in violation of Par. 5 h, AAF Regulation 60-16," substituting therefor, the words, "In violation of Par. 1 b, AAF Regulation 60-16A," dated 15 April 1944; of the excepted words, not guilty, and of the substituted words, guilty. No evidence of previous convictions was introduced as to any of the accused. The three officers, Leonard, Jenkins and LaTurner were each sentenced to dismissal. Flight Officer Krauss was sentenced to dishonorable discharge. The reviewing authority approved the sentences and forwarded the record of trial under Article of War 48 as to the commissioned officers and under Article of War 50½ as to the flight officer, Krauss. Subsequently on to wit: 17 January 1945 the reviewing authority withdrew his original action in the case of Flight Officer William D. Krauss and substituted a new action in which he approved the sentence, but suspended the execution thereof, and promulgated his new action in General Court-Martial Orders No. 19, Headquarters Army Air Forces Western Flying Training Command, dated 17 January 1945.

3. The evidence for the prosecution shows that on 24 July 1944, at about 0645, the accused, all students assigned to the 3031st Army Air Forces Base Unit, Mather Field, California, set out from Mather Field on a "solo" instrument training mission. Lieutenant LaTurner and Flight Officer Krauss were assigned to a TB-25 type of Army aircraft designated T-635 and Lieutenants Leonard and Jenkins were assigned to another TB-25 aircraft designated T-636 (R. 26).

When students fly "solo" they work on various phases of instrument training. "Formation" flying is not included in this instrument training. "Solo" flying is done "under the hood" with individual aircraft and without visual contact with the horizon or the ground. "Formation" flying is done in groups of two or more planes and the pilots are in visual contact with each other's planes (R. 26, 27). The instructor of the group, First Lieutenant Milton A. Johnson, briefed the flyers, using Mather Field Circular No. 50-2-9A, 12 July 1944, and the check list attached thereto (Def. Ex. 2) for that purpose (R. 29, 30). The students were briefed on the specific subject of the training and also on "General" subjects. They were not specifically told not to fly in "formation" (R. 30) nor who was to pilot the planes. They were briefed on instrument flying and not on formation flying (R. 30). They were scheduled to fly "solo instrument".

It is customary and approved practice to have proper signals arranged before student officers engage in formation flying (R. 51). The regulations require that an instructor be present in each formation (R. 53) for safety as well as for other reasons. There are approved signals for "breaking" a formation and it is not approved practice for a formation to break without giving a visual signal or a radio signal (R. 53). It is customary to brief students on "formation" flight if they are going out for "formation" flying and it was customary at Mather Field to brief student officers in accordance with paragraph 4 of Circular 50-2-9A before they

engaged in a "formation" flight (R. 54). A following plane dipping under a lead ship in order to attain the lead would not be accepted by experienced pilots as common practice (R. 55).

Army Air Forces Regulations No. 60-16, dated 6 March 1944, as amended by Army Air Forces Regulations No. 60-16A, 15 April 1944, provides in part 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.
- b. Proximity to Other Aircraft. No aircraft will be flown closer than 500 feet to any other aircraft in flight, except when two or more aircraft are flown in duly authorized formation. On authorized formation flights, aircraft will not be flown closer to each other than the distance of one-half the wingspan of the largest aircraft concerned."

Army Regulations No. 95-15, 3 May 1944, paragraph 3, provides that:

"3. Command of aircraft.--The senior member of the operating crew of an aircraft who holds an appropriate military pilot rating will command the aircraft, except when the organization commander responsible for the aircraft specifically designates who shall command."

Accused, LaTurner, stated to the investigating officer (Pros. Ex. F) after having been advised of his rights and privileges that at about 0645 on 24 July 1944 he took off in plane No. 635 with Flight Officer Krauss at the controls; that:

"\* \* \* Shortly before the take off and in the ready room Krauss and Lieutenants Jenkins and Leonard and myself had agreed to meet at Marysville to do some formation flying. I do not recall whether Lieutenant Johnson told us that we were to fly solo instrument but I was fully aware that we were to fly solo instrument, since I knew there was a shortage of gas. We went directly to the vicinity of Marysville and when we got there observed the other ship in which Lieutenants Leonard and Jenkins were riding. Our ship then pulled up into formation flight with the other ship riding off of its right wing, with proper clearance for formation flight of about one wing's length apart and our ship was behind the other ship at

an angle of about 45°. We flew with the other ship in the lead for approximately ten minutes. I do not recall whether our ship then took the lead. I do recall however that before the accident the formation was broken, although this is merely from my own knowledge. I did not tell any one to break up the formation nor did any one tell me that the formation had broken up. Our ship then made a wide turn to the left heading back to Sacramento flying south, and while we were in this turn I did not personally see the other plane. Between five and ten minutes after we broke up the formation, I felt an impact off the right engine and then saw the other ship go into a spin. I do not know whether the other ship was coming to take the lead from us. We had had no arrangements or signals with respect to taking the lead.

\* \* \*

"I was not at the controls at any time that day but I did not at any time take any steps to break up the formation flying."

Accused, Jenkins, stated to the investigating officer (Pros. Ex. G) after having been advised of his rights and privileges that at about 0638 on 24 July 1944 he took off in plane No. 636 with Lieutenant Leonard; that:

"\* \* \* Just before take off Lts. Leonard, and LaTurner, Flight Officer Krauss, and myself had arranged to do some formation flying and to meet at Marysville. We did not receive any definite instruction that we were to fly instrument according to the best of my memory, but we all assumed that we were to fly solo instruments and in fact we had been flying solo instrument for a week before; and also it was an instrument instructor who assigned the ships to us.

"I was at the controls and took the ship directly to the vicinity of Marysville. The other ship containing Lt. LaTurner and Lt. Krauss arrived there shortly afterwards. We then took up formation flying with our ship in the lead and the other ship about a wing's length to our right and at a 45° angle to our ship. We flew this formation for about 5 or 10 minutes and then the other ship went ahead and took the lead but I do not recall for how long. I do remember that the other ship then took off and made a wide turn to the left. I followed the other ship, also making a left turn. At the time my ship was a little lower than the other ship and it was my intent to move into the lead slightly below and to the right of the other ship without my ship actually passing under the belly of the other ship. However, my ship ran into a little turbulence and was thrown slightly under the other ship. I attempted to pull out to the right but the rudder of my ship struck the right propeller of the other ship, throwing my ship into a spin. Lt. Leonard and myself both bailed out. I would estimate that the

contact between the two ships occurred approximately 5 or 10 minutes after our ships started the turn as above related. We had no prearranged signals with respect to the changing of the lead.

"As far as I know all this flying took place within the local flying area. I was at the controls at all times but Lt. Leonard made no objection to the method of flying."

Accused, Leonard, stated to the investigating officer (Pros. Ex. H) after having been advised of his rights and privileges that at about 0638 on 24 July 1944 he took off in plane No. 636 with Lieutenant Jenkins at the controls; that:

"\* \* \* Shortly before the take off and in the waiting room Lt. Jenkins, Lt. LaTurner, F/O Krauss, and myself had agreed to meet at Marysville and do some formation flying. No one gave us a specific order that this was to be an instrument solo flight; but it was understood by us that we were to fly solo instruments. Earlier that morning Lt. Johnson 'pooped' us and in effect said these will be the solo ships for today; and he, then, read off a list of ships which included 636 and 635. We understood that we were to fly solo instrument because that is all we had been flying that entire week.

"Lt. Jenkins flew the ship to the vicinity of Marysville, reaching there at about 0700. The other ship came there a few minutes later and our ship took lead and flew formation with the other ship for about 10 minutes. During that time the other ship was to our right about a wing's length from our right wing and was at about a 45° angle from our ship. After about 10 minutes we changed lead and the other ship took the lead still flying to the right of ours. The other ship just moved up into the lead and we flew about a 45° angle behind the other ship and about a wing's length from the other ship's left wing. After flying about the same length of time the other ship broke the formation. As the other ship broke the formation it made a wide sweeping turn to the left. Our ship, then moved in underneath the other ship to take up the lead position. As we moved in the tail of our ship caught the right propeller on the other ship causing our ship to go into a violent spin. We succeeded in getting the ship out of this first spin momentarily; but had no control and the ship went into another spin at which time we both bailed out.

"At no time did we have any prearranged signals in respect to changing the leads in the formation flying. The collision took place at about 7000 feet."

Accused, Krauss, stated to the investigating officer (Pros. Ex. I) after having been advised of his rights and privileges that at about 0645 on 24 July 1944 he took off in plane No. 635 with Lieutenant LaTurner; that:

"\* \* \* 2nd Lt. F. R. LaTurner was in the co-pilot's seat and I was in the pilot's seat operating the ship. I do not recall that a Lieutenant Johnson, instrument squadron commander, told us whether this flight was to be solo instrument. However, I did know before the take off that the flight was to be solo instrument. Shortly before the take off, Lt. F. R. LaTurner and 2nd Lts. B. B. Leonard and R. W. Jenkins and myself had met on the flight line and decided that we would meet at Marysville and fly formation flight. I flew the ship directly to Marysville and while flying north near Marysville observed the other ship, #636, in which Lieutenants Leonard and Jenkins were flying. We then took up formation flight with the other ship flying the lead for about five minutes. During that time I operated my ship about 15 to 20 feet to the right of the right wing of the other ship with the nose of my ship approximately abreast to the tail of the other ship. After about five minutes, without any prearranged signal, I pulled ahead of the other ship and I took the lead with the other ship flying about 20 feet to the left of my left wing and with the nose of the other ship about abreast of the tail of my ship. We flew in this formation for about five minutes more until I observed the other ship to pull away. I assumed that the other ship was not going to fly any more formation and I then started to fly south to Sacramento. About five to seven minutes later I felt a bump in the vicinity of the right engine and I then saw the other plane pull up and go into a spin. I did not observe any chutes but did see the ship burning on the ground. I then returned the ship to Mather Field and landed at about 0745.

"Lieutenant LaTurner was at no time at the controls. At no time did he take any action to discontinue the formation flying.

"I did not see this other ship after we broke up formation flight until after the contact between our ships. The other ship was apparently flying to our right and below us.

"To the best of my knowledge, our ships did not leave the local flying area that morning".

The T-636 flown by Leonard and Jenkins crashed and was totally destroyed. The T-635 flown by LaTurner and Krauss had its right propeller damaged beyond repair, the right motor had to be replaced and there were holes and dents in the fuselage (R. 19, 20).

4. For the defense, Second Lieutenant Rollie Jones, Air Corps, testified that he was in the squadron room on 24 July; he was in the same group with accused officers; there was never any question that they

were to engage in a "solo instrument" mission (R. 60); it is not general practice to engage in "formation" flight when the assignment is "solo instrument" (R. 62). He did not recall that the squadron commander briefed them as to anything except weather conditions (R. 57); he did not believe he covered the items on the check list relating to instrument training flights (R. 58); he did not say that there should be no formation flying.

After being advised as to his rights accused Leonard testified that he was 21 years of age and had completed two years of college before entering the Army as a private on 2 May 1943. After completing the cadet course he was commissioned a second lieutenant and sent to Mather Field for training in night flying. He had had only two hours of formation flying (R. 69, 72). Accused Jenkins operated the plane. Leonard did not know who was the senior but, even if he had known he had authority over Jenkins, he did not know whether he would have exercised it as he considered Jenkins as capable as himself. He had never been told that formation flying was objectionable or that there were rules against it. Before taking off on the 24th of July, they all agreed to meet at Marysville to engage in formation flying, and they carried out this agreement (R. 71-72). They did not discuss any signals, he had never been taught that prearranged signals must be used (R. 72); signals were just "taken for granted"; the collision was "just an accident" and "couldn't be helped". They were not secretive about it as he did not think they were doing anything wrong. He was not familiar with Army Air Forces Regulations No. 60-16 which covers usual signals for formation flying. He had never been reprimanded while a cadet or officer for misconduct (R. 73). He had never seen the check list (Def. Exs. 1, 2) before the day of trial (R. 75). Neither he nor Jenkins gave any signal when they came up from behind and under the other plane (R. 77). He did not know an operation order was necessary before a formation flight was made, that an instructor had to be present and that a senior instructor had to brief the flight (R. 79).

Accused LaTurner also took the stand after being advised as to his rights and testified that he entered cadet training in August 1943 and after being commissioned was ordered to Mather Field for night fighter training. He had never seen an instrument check list till the day of trial (R. 83, 85) and was never told it was improper not to fly "formation" when flying "instrument". He stated that four or five hours of instrument flying is monotonous so a certain amount of leeway is allowed to relieve the monotony (R. 86). The four of them before starting agreed to meet at Marysville to engage in formation flying, and they carried out this agreement. He thought it was proper to engage in formation flying. The formation had been broken for five or ten minutes before the accident happened (R. 89-91). They had no authority to do formation flying (R. 92). He assumed that it was supposed to be an instrument flight (R. 93).

Accused Jenkins and Krauss having been advised as to their rights to testify in their own behalf elected to remain silent (R. 93).

5. Accused Leonard is charged with (a) wrongfully agreeing to engage in an unauthorized flight (Spec. 1), (b) being in command of the plane and failing to prevent accused Jenkins from violating regulations not to approach closer than 500 feet to another plane (Spec. 2), and (c) failing to prevent Jenkins from piloting the plane in such a manner as to endanger friendly aircraft (Spec. 3).

Accused Jenkins is charged with (a) wrongfully agreeing to engage in an unauthorized flight (Spec. 1), (b) wrongfully piloting a plane closer than 500 feet to another plane in violation of regulations (Spec. 2) and (c) piloting a plane in such a manner as to endanger friendly aircraft (Spec. 3).

The Specifications against accused LaTurner are similar to those against Leonard and the Specifications against Krauss are similar to those against Jenkins.

The guilt of each accused is established by his voluntary statement given prior to trial to military authorities. Each statement contains a confession of accused's guilt of the offenses charged. The law member properly ruled, on admitting these confessions, that each one constituted evidence only against the maker thereof and could not be considered as evidence against the other accused (MCM, 1928, par. 114c). Inasmuch as an accused cannot be legally convicted upon his unsupported confession, these confessions could not receive the consideration of the court unless there was other evidence in the record, direct or circumstantial, indicating that the offenses charged had probably been committed. Such other evidence, however, need not be sufficient of itself to convince beyond a reasonable doubt that the offenses charged have been committed, or to cover every element of the charges or to connect the accused with the offenses (MCM, 1928, par. 114a).

Other evidence present in this record establishes that the four accused paired off and were ordered to fly two Army planes on an instrument training mission. During this flight one of the planes crashed to the ground and burned, while the other returned to its base substantially damaged. The uncontradicted testimony of accused Leonard and LaTurner shows that all of the accused agreed before taking off to engage in formation flying during this instrument training mission and that pursuant to this agreement they met in the vicinity of Marysville, California, where both planes were flown in formation flight. During the formation flight the two planes collided at an altitude of about 7000 feet. This evidence amply establishes the corpus delicti and, accordingly, the voluntary confession of each accused was properly admitted in evidence as to him.

Leonard and LaTurner are charged in Specifications 2 and 3 of the respective Charges against them with failure to prevent the pilots of their respective planes from violating paragraphs 1 and 5 of Army Air Forces Regulations No. 60-16. Such failure is properly chargeable under Article of War 96 (Winthrop's Military Law and Precedents, 2d ed., p. 726).

Lieutenant Leonard being senior to Lieutenant Jenkins was in command of the plane operated by Jenkins (par. 4d, AR 600-15, 10 Dec. 1941; par. 16, AR 605-10, 26 May 1944), and Lieutenant LaTurner was in command of the other plane operated by Flight Officer Krauss by virtue of his rank. It was their duty to prevent or make reasonable effort to prevent any violation of flying regulations. This by their own admissions they failed to do and made no attempt to do. By their own admissions they agreed before taking off to meet near Marysville to engage in "formation" flying in direct and flagrant violation of the regulations. Their defense that they did not know it was wrong is unworthy of credence and was properly rejected by the court because they knew they were to fly an instrument training mission, not a formation flight mission. The finding of guilty of Specification 1 of the Charge against each of them is amply supported by the evidence.

Leonard being senior to Jenkins was responsible for the operation of the ship and clearly was guilty of failing to prevent Jenkins from flying within 500 feet of the other plane. He also failed to prevent Jenkins from piloting his plane in unauthorized formation but, on the contrary, permitted him to do so without having any prearranged signals to communicate intended courses of flight. Such manner of flight was as dangerous for each plane as the results demonstrated. The findings of guilty of the offenses charged in Specifications 2 and 3 of the Charge against accused Leonard are amply supported by the evidence.

LaTurner, being the senior and in command was responsible for the plane operated by Flight Officer Krauss and clearly was guilty of failing to prevent the latter from flying the plane within 500 feet of the other plane. He also failed to prevent Krauss from piloting the plane in unauthorized formation but, on the contrary, permitted him to do so without having any prearranged signals to communicate intended courses of flight. Such manner of flight was as dangerous as the consequences demonstrate. The evidence amply sustains the findings of guilty of Specifications 2 and 3 of the Charge against accused LaTurner.

Jenkins, the pilot of plane T-636, wrongfully agreed with the other accused to engage in unauthorized flight formation and also violated the regulations by flying within 500 feet of the other plane, and by piloting his plane so as to endanger other friendly aircraft in the air when he

flew in formation flight with the other plane without having any pre-arranged signals to communicate intended courses of flight. The evidence amply sustains the findings of guilty of Specifications 1, 2 and 3 of the Charge against accused Jenkins.

The reason for the findings of guilty of Specification 2 as to each accused by exceptions and substitutions is that Army Air Forces Regulation No. 60-16, dated 6 March 1944 (Pros. Ex. A, p. 1) which accused were charged with violating, was superseded by Army Air Forces Regulation No. 60-16A, dated 15 April 1944 (Pros. Ex. A, p. 2) which was in full force and effect at the time of the commission of the offense. The language of the two regulations is practically identical and therefore the exceptions and substitutions caused no substantial injury to the rights of any of the accused.

6. Accused Leonard was born at Duncan, Arizona, on 30 January 1923, and is single. He graduated from high school in 1940 and for two years attended Arizona State College at Flagstaff, Arizona, where he majored in languages, English, French and Spanish. He was employed with the Phelps-Dodge Corporation at Marenci, Arizona, as a member of a civil engineering crew from July 1942 to January 1943, at a monthly salary of \$300. He enlisted in the Air Corps as a private on 2 March 1943 and was sent to Lincoln, Nebraska, for basic training. After completion of his flying training, he was commissioned a second lieutenant at Luke Field, Arizona, on 23 May 1944, and thereafter transferred to Mather Field as a student officer. The character of his service is "Excellent".

Accused Jenkins was born at Heaton, Oklahoma, on 19 February 1924, and is married. He attended a number of schools, graduating from high school in January 1942. In school he specialized in business and ship studies. During the last two years of his high school career he had a part time job as a clerical worker in a grocery store. Later he was employed by different oil companies as a rigger, and as a pumper's helper and gauger. On 28 February 1943 accused was inducted into the Army at Fresno, California. After one month of basic training he was transferred to the College Training Detachment at La Grande, Oregon, where he remained for five months. After completion of his flying training he was commissioned a second lieutenant

at Luke Field, Arizona, on 23 May 1944. Thereafter he was transferred to Mather Field as an officer student. The character of his service is "Satisfactory".

Accused LaTurner was born at Spokane, Washington, on 31 December 1924, and is single. He attended three years of high school, quitting before he received his diploma. He was employed from August to November 1942 at the Government docks at San Francisco, where he worked as a freight handler. He was inducted into the Army on 28 February 1943 at Monterey, California, and received his basic training there. Thereafter he was transferred to Sheppard Field, Texas, where he received further basic training, and then sent to a College Training Detachment at Arizona State Teachers College. After his primary, basic and advanced training, he was commissioned a second lieutenant at Luke Field, Arizona, on 23 May 1944, and sent to Mather Field for training as an officer student.

7. The court was legally constituted and had jurisdiction of the persons 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 each sentence and to warrant confirmation of each sentence as to the three commissioned officers. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Thomas N. Tappin, Judge Advocate.

William H. Bairdell, Judge Advocate.

Robert C. Crutcher, Judge Advocate.

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SPJGH-CM 264354

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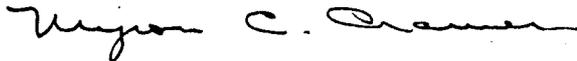
Hq ASF, JAGO, Washington 25, D. C. FEB 13 1945

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 Bobby B. Leonard (O-778188), Air Corps, Second Lieutenant Robert W. Jenkins (O-778168), Air Corps, Second Lieutenant Frederick R. LaTurner (O-778186), Air Corps, and Flight Officer William D. Krauss (T-4054).

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 each sentence and to warrant confirmation of each sentence as to the three commissioned officers, Leonard, Jenkins and LaTurner. There is attached to the record a Memorandum for The Judge Advocate General, dated 21 November 1944, from General H. H. Arnold, Commanding General, Army Air Forces, in which General Arnold recommends that the sentence as to each of the three commissioned officers be commuted to a forfeiture of pay in the amount of \$75 per month for six months. I concur in the recommendation of General Arnold and recommend that the sentence as to each of the three commissioned officers Leonard, Jenkins and LaTurner be confirmed but commuted to a forfeiture of pay of each accused in the amount of \$75 per month for six months.

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.



4 Incls

1. Record of trial
2. Memo fr Gen Arnold,  
21 Nov 44
3. Dft ltr for sig S/W
4. Form of action

MYRON C. CRAMER  
Major General  
The Judge Advocate General

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(In the cases of Second Lieutenants Leonard, Jenkins, and LaTurner, each sentence confirmed but commuted to forfeiture of \$75 per month for six months. G.C.M.O. 150, 16 Apr 1945)

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

(119)

SPJGN  
CM 264374

19 OCT 1944

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened
	)	at MacDill Field, Tampa,
Second Lieutenant LEO K.	)	Florida, 29 August 1944.
ROONEY (O-540137), Air	)	Dismissal and confinement
Corps.	)	for one (1) year. Discip-
	)	linary Barracks.

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OPINION of the BOARD OF REVIEW  
LIPSCOMB, O'CONNOR and GOLDEN, Judge Advocates

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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits, this its opinion, to The Judge Advocate General.
2. The accused was tried upon the following Charges and Specifications:

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

Specification 1: In that 2d Lieutenant Leo K. Rooney, Squadron S, MacDill Field RTU (HB), MacDill Field, Tampa 8, Florida did, at MacDill Field, Tampa 8, Florida on or about 19 May 1944, with intent to deceive, wrongfully and unlawfully make and utter to the MacDill Field Officers' Mess for cash, a certain check, in words and figures as follows to wit:

\$35.00 Tampa, Fla., May 19, 1944

Pay to the Order of MACDILL FIELD OFFICERS' MESS

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

TO 1st National Bank  
Name of Bank

St. Paul, Minnesota  
Location of Bank

s/ Leo K. Rooney,  
488th BCD, Crew #286  
2nd Lt., AC, O-540137

and by means thereof did fraudulently obtain from the MacDill Field Officers Mess Thirty-Five dollars in cash, he the said 2d Lieutenant Leo K. Rooney then well knowing that he did not have and not intending that he should have any account with the First National Bank of St. Paul, Minnesota for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check drawn on same bank, dated 27 May 1944, payable to the order of Officers Mess, made and uttered to the MacDill Field Officers' Mess, and fraudulently obtaining thereby \$25.

Specification 3: Same form as Specification 1, but alleging check drawn on same bank, dated 29 May 1944, payable to order of MacDill Field Officers' Mess, made and uttered to the MacDill Field Officers' Mess, and fraudulently obtaining thereby \$15.

Specification 4: Same form as Specification 1, but alleging check drawn on same bank, dated 29 May 1944, payable to order of MacDill Field Officers' Mess, made and uttered to the MacDill Field Officers' Mess, and fraudulently obtaining thereby \$15.

Specification 5: Same form as Specification 1, but alleging check drawn on the American National Bank, St. Paul, Minnesota, dated 31 May 1944, payable to order of MacDill Field Officers' Mess, made and uttered to the MacDill Field Officers' Mess, and fraudulently obtaining thereby \$50.

Specification 6: Same form as Specification 1, but alleging check drawn on same bank, dated 31 May 1944, payable to order of MacDill Field Officers' Mess, made and uttered to the MacDill Field Officers' Mess, and fraudulently obtaining thereby \$15.

Specification 7: Same form as Specification 1, but alleging check drawn on same bank, dated 3 June 1944, payable to order of MacDill Field Officers Mess, made and uttered to the MacDill Field Officers' Mess, and fraudulently obtaining thereby \$15.

Specification 8: Same form as Specification 1, but alleging check drawn on same bank, dated 3 June 1944, payable to order of MacDill Field Officers' Mess, made and uttered to the MacDill Field Officers' Mess, and fraudulently obtaining thereby \$15.

Specification 9: In that 2d Lieutenant Leo K. Rooney, Squadron S, MacDill Field RTU (HB), MacDill Field, Tampa 8, Florida, was, at Tampa Florida, on or about 25 June 1944, drunk and disorderly in uniform in a public place to wit, Manhattan Cafe, Tampa, Florida.

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

Specification: In that 2d Lieutenant Leo K. Rooney, Squadron S, MacDill Field RTU (HB), MacDill Field, Tampa 8, Florida, having been duly placed in arrest in quarters at MacDill Field, Tampa 8, Florida on or about 25 June 1944, did at MacDill Field, Tampa 8, Florida, on or about 4 July 1944 break his said arrest before he was set at liberty by proper authority.

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

Specification: In that 2d Lieutenant Leo K. Rooney, Squadron S, MacDill Field RTU (HB), MacDill Field, Tampa 8, Florida, did without proper leave absent himself from his station at MacDill Field, Tampa 8, Florida from about 1200 4 July 1944 to about 1200 7 July 1944.

He pleaded not guilty to all Charges and Specifications. The court, upon motion of defense counsel and without objection by the prosecution, amended Specification 9 of Charge I by deleting the words "and disorderly" (R. 24). The accused was found guilty of all Charges and Specifications including Specification 9, Charge I, as amended. He was sentenced to be dismissed the service and to be confined at hard labor for one year. The reviewing authority approved the finding of guilty of Specification 5 of Charge I except the words "and by means thereof did fraudulently obtain from the MacDill Field Officers' Mess Fifty Dollars in cash", approved the finding of guilty of Specification 8 of Charge I except the words "and by means thereof did fraudulently obtain from the MacDill Officers' Club Fifteen Dollars in cash", approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that from 13 May 1944 to and including 3 June 1944, the accused wrote a series of 8 checks for sums of from \$15 to \$50 in the aggregate amount of \$185. Seven checks were drawn on The First National Bank of St. Paul, Minnesota, and the other on the American National Bank of the same city. The accused personally cashed six of the checks at the MacDill Field Officers' Club, to which all the checks were made payable, and the other two were

cashed at the Club by a Major Fisk and a Lieutenant Garrett (R. 7-8). After two or three of the checks were returned unpaid, Major Joseph C. Lauro, the local Club Officer, called the accused to the office on about 20 June 1944, and told him that they would have to be made good. The accused stated that he was having trouble with his wife, who was withdrawing money faster than he could bank it, and promised to make the checks good. Major Lauro engaged in a subsequent similar conversation with the accused after several other checks were returned unpaid. On the 7th or 8th of July 1944, after an investigation had been commenced, the accused redeemed all the checks, which were then returned to him (R. 9). The cashier of the American National Bank testified by deposition that accused had no account in that bank during May and June of 1944 (Ex. "C"). Photostatic copies of the face of each of the eight checks were introduced as a single exhibit (Ex. "A").

At about 0045 o'clock on 25 June 1944, two military policemen on duty in Tampa, Florida, saw the accused slumped over a counter at the Manhattan Cafe in that city. There were other people in the cafe. Upon being asked to go outside, the accused, whose breath smelled of alcohol, attempted to rise but was unable to get to the door unaided. He was helped outside by the military policemen and was taken to their headquarters. When in the cafe, the accused was in proper uniform and neither resisted nor caused any commotion (R. 12). Witnesses who observed accused upon his arrival at "MP Headquarters", testified that he was intoxicated, that he staggered, his speech was thick and his manner was belligerent (R. 14). Lieutenant Colonel William L. Koob, Commanding Officer of Squadron S, thereafter and on about 25 June 1944, placed the accused in arrest under the terms of which the accused was directed to stay in his quarters except when going to meals, participating in flights or attending classes on the Base. The colonel testified that on his order a search was made for the accused in and about his quarters on 4 July 1944 and that accused was not there. In response to questions about whether the accused broke his arrest before he was set at liberty, the colonel replied that he did (R. 15-16). An extract copy of the Morning Report showing accused "AWOL" from 4 July 1944 to 7 July 1944 was admitted in evidence (Ex. C).

4. The accused, having been apprised of his rights as a witness, elected to make a sworn statement. He testified that he was now a bombardier on a combat crew and that he had been in military service for five years and seven months. He was appointed a Flight Officer on 28 April 1943 and commissioned a second lieutenant on 12 November 1943. He had a wife and son in St. Paul, Minnesota (R. 25-26). Domestic difficulties had arisen within the preceding six months, during which time his wife refused to come to MacDill Field, and wrote him several disturbing letters. Because of his troubles, he began to drink and gamble, and lost money to several people. On such occasions he was not entirely sober, but had reached a point where he did not care, and did not know whether he

was doing right or wrong (R. 29). For the period during which he was charged with being "AWOL" he had no flying or other duties to perform, since his pilot was temporarily absent from the Base, and he had finished ground school. When a member of a combat crew was neither flying nor attending classes, it was understood that he was "off." As for breaking arrest, the accused testified that he had almost the same freedom of the Base that he had enjoyed before, and did not even consider that he was under arrest in quarters (R. 29-30). He admitted writing the two checks that were cashed by Major Fish and Lieutenant Garrett and stated that he never had an account in the American National Bank, but that he had had one in The First National Bank of St. Paul from July, 1943 to January, 1944. He admitted knowing that the latter account was closed at the time he "introduced" the check dated June 3, 1944, bearing the indorsement of Lieutenant Garrett. (R. 30-32). On 25 June 1944, at the Manhattan Cafe, he was able to walk, but that the military policemen had nevertheless taken hold of his arms (R. 31).

According to stipulated testimony the accused while undergoing training for a commission was a diligent student and since being commissioned he has performed his military duties in an excellent manner (R. 33).

6. Specifications 1 through 8, Charge I, allege that the accused with intent to defraud made and uttered to the MacDill Field Officers' Club between 19 May 1944 and 3 June 1944 eight separate checks in the amounts of \$35, \$25, \$15, \$15, \$50, \$15, \$15, and \$15, respectively, involving a total sum of \$185, knowing that he did not have and not intending to have sufficient funds for the payment thereof, and that by means thereof he fraudulently obtained in cash the face value thereof. "Giving a check on a bank where he knows or reasonably should know there are no funds to meet it, and without intending that there should be" is definitive of an offense that is violative of Article of War 95 (M.C.M., 1928, par. 151).

The evidence clearly established that the accused wrote all the checks in the amounts and on the dates alleged. All of them were payable to and cashed by the Officers' Club, six of them being presented by the accused personally and two by his brother officers. The prosecution presented no competent evidence that there were no funds in the First National Bank with which to pay the checks drawn against it, but such evidence was supplied by testimony of the accused himself that his account with such bank existed from July, 1943 to January, 1944 and that he knew when he drew one of the checks dated 3 June 1944, that the account had been closed. The reviewing authority properly excepted from the findings of guilty of Specifications 5 and 8, Charge I, the allegations that the accused fraudulently received cash on the two checks set forth therein since the evidence showed that those checks were in fact cashed by other officers. Such evidence, however, was not a fatal variance from the allegations that the two checks were made and uttered to

(124).

the MacDill Field Officers' Club, for they were both made payable to the club and it therefore must have been contemplated that they were to be presented to the club. They were in fact presented to and cashed by the club. Under such circumstances it was not material that the accused did not personally cash them there. Approximately one month after the last check was issued, the accused paid all checks in full. Restitution, however, does not constitute a defense, although it may be considered in extenuation or mitigation. The evidence shows that the accused had no account in either of the two banks upon which he drew the checks, that he issued them at a time when "he did not care", and that repayment was not made until after an investigation had been started and after payment had been twice demanded. The evidence therefore beyond a reasonable doubt supports the findings of guilty of Charge I and Specifications 1-8, inclusive, thereunder.

7. Specification 9, Charge I, as amended alleges that the accused at a designated time was drunk in uniform in a named public place. Gross drunkenness in a public place while in uniform is clearly violative of Article of War 95 (M.C.M., 1928, par. 151). (CM 114900, 121290 [1918] Dig. Ops. JAG, 1912-40, 453 [12]).

From the evidence it is obvious that the accused was conspicuously drunk in uniform in a public place where other persons were assembled. He was slumped over a counter of a cafe and his faculties were so impaired that he was unable to walk without assistance. To publicly exhibit himself in such condition was clearly reprehensible conduct on the part of accused and his drunkenness was so gross as to constitute that type of conduct denounced by the 95th Article of War. The evidence, therefore, beyond a reasonable doubt supports the findings of guilty of Charge I and Specification 9 thereunder.

8. The Specifications, Charges II and III, respectively, allege that on or about 4 July 1944 the accused broke arrest after having been duly placed therein before he was set at liberty by proper authority and that he absented himself from his named station from about 1200 o'clock on 4 July 1944 until about 1200 o'clock on 7 July 1944. "The offense of breach of arrest is committed when the person in arrest infringes the limits set by orders" and the offense is violative of Article of War 69 (M.C.M., 1928, par. 139a). The elements of the offense of absence without leave, which is violative of Article of War 61, and the proof required for conviction thereof, according to applicable authority, are as follows:

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

The testimony of Lieutenant Colonel Koob clearly shows that the accused had been placed in arrest which had not been terminated on 4 July 1944 when he broke his arrest before being released by proper authority. The morning report of his organization showing his absence without leave as alleged not only establishes such offense but is also probative of the alleged breach of arrest. The explanations given by the accused that he had almost the same freedom after his arrest as he had before, that he "didn't even consider it under arrest in quarters" and that he was "off" duty implicitly admit the two offenses alleged and in no way state any defense thereto. The evidence, therefore, beyond a reasonable doubt supports the findings of guilty of Charges II and III and the Specifications thereunder.

9. The record discloses that on the evening of 29 August 1944, the court recessed until the following morning. This was properly an adjournment and should have been so designated. It was the duty of the Trial Judge Advocate to sign the record of that day's proceedings in compliance with the provisions of paragraph 41d, Manual for Courts-Martial, but his failure to do so was harmless inasmuch as the entire record was properly authenticated.

10. The accused is 24 years old. War Department records show that he has had prior enlisted service from 28 November 1938 to 10 November 1943 when he was appointed a second lieutenant after his honorable discharge in the grade of Flight Officer to which he had been appointed on 29 April 1943. On 9 June 1944 he accepted punishment under Article of War 104 for absence from scheduled flying classes. He graduated from high school and from three Army training schools in aerial gunnery, bombing and parachute rigging. He is married and in 1937-1938 was employed as a milk route driver and in "boning hams for canning" by a large packing house.

11. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications as approved by the reviewing authority and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61 or 69 and is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb Judge Advocate.

Richard L. Simon Judge Advocate.

David H. Golden Judge Advocate.

(126)

SPJGN  
CM 264374

1st Ind.

28 OCT 1944

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Leo K. Rooney (O-540137), Air Corps.
2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and ordered executed.
3. Consideration has been given to the communication of the Commanding General, Third Air Force, in which this office was advised of the accused's escape from confinement on 28 September 1944 while his case was undergoing review.
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,  
Major General,  
The Judge Advocate General.

- 4 Incls.
- Incl 1 - Record of trial.
  - Incl 2 - Dft. ltr. for  
sig. S/W.
  - Incl 3 - Form of action.
  - Incl 4 - Commun. fr. Com.  
Gen., 3rd Air Force.

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(Sentence approved. G.C.M.O. 636, 24 Nov 1944)

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

(127)

SPJGK  
CM 264387

10 OCT 1944

UNITED STATES )

v. )

Second Lieutenant EDWIN E.  
DOUGHERTY (O-1308490),  
Infantry. )

FIELD ARTILLERY REPLACEMENT TRAINING CENTER  
Camp Roberts, California.

Trial by G.C.M., convened at Camp  
Roberts, California, 8 September  
1944. Dismissal, total forfeitures,  
and confinement for fifteen (15)  
years. Disciplinary Barracks.

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OPINION of the BOARD OF REVIEW  
LYON, HEPBURN and MOYSE, Judge Advocates.  
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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Edwin E. Dougherty, Second Lieutenant, Infantry, Headquarters, Infantry Training Replacement Center, Camp Roberts, California, did, at Camp Adair, Oregon, on or about 31 July 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at North Hollywood, California, on or about 17 August 1944.

He pleaded guilty to the specification except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave"; of the excepted words, not guilty, of the substituted words, guilty. He also pleaded not guilty to the Charge but guilty of a violation of the 61st Article of War. He was found guilty of the Charge and the specification. Evidence was introduced of a previous conviction by general court-martial on 31 March 1943 of a violation of the 61st Article of War, for which he was sentenced to be reprimanded and to forfeit \$75.00 per month for 12 months. In the instant case he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 15 years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The competent evidence for the prosecution shows that on 22 July 1943 by paragraph 19 of Special Orders 173, Headquarters Infantry Replacement Training Center, Camp Roberts, California, the accused was relieved from assignment and duty from that station and assigned to the 70th Infantry Division, Camp Adair, Oregon (Pros. Ex. 3). By paragraph 8, Special Orders 29, Headquarters 70th Infantry Division, Camp Adair, Oregon, 26 July 1944, the accused was granted 5 days leave of absence en route to join that organization (Pros. Ex. 4). The morning report of Headquarters, 70th Infantry Division, admitted in evidence without objection, showed the accused "from leave en route to join to AWOL as of 31 July 1944" (Pros. Ex., 5). It was stipulated that if Staff Sergeant Gallagher of the Military Police Detachment, Los Angeles, California, were called and sworn as a witness he would testify that on 17 August 1944 he apprehended the accused in North Hollywood, California, and that the accused was returned to Camp Roberts, California, on 24 August 1944 (R. 13).

4. The accused having been advised of his rights elected to testify under oath. He stated that he was in the military service of the United States and that on 22 July 1943 he was assigned from Camp Roberts to the 70th Infantry Division, Camp Adair, Oregon (R. 15). After he received the order of assignment he shipped all of his uniforms and equipment to Camp Adair, but reserved and took along with him sufficient clothing to last him two weeks because of the delays in shipment (R. 16,19). On the 24th of July he left Camp Roberts and went to Los Angeles to see his fiancée. At eight o'clock the following night he went to an appointed place to meet a soldier who was to drive him to Camp Adair, but the soldier did not appear, although he waited for him until 10 o'clock. He did not know that he had been granted 5 days' leave. He tried to get to Paso Robles to meet another lieutenant and go with him to Camp Adair, but was unable to get transportation due to the congestion of the transportation facilities. He therefore remained in Los Angeles until the following day, and knowing that he would not be able to reach the camp in the time required of him he thought that he undoubtedly would be court-martialed so he "just delayed starting back again from day to day". Six or eight times he purchased transportation and started to go but decided that "one more day would not make any difference because I would probably be sentenced very heavily anyhow". He never intended to desert the service. During his absence he always wore his uniform, was never employed, and lived on some money that he had with him when he started and money that he received from his home in Tannersville, New York (R. 16-18). He could give no other reason or excuse for remaining away (R. 17).

5. The evidence introduced by the prosecution and the plea of guilty of the accused clearly established that the accused did absent himself without proper leave from his station on or about the 31st of July 1943 and remained absent until he was apprehended on or about 17 August 1944. The only evidence of intent to desert was the length of time during which he was absent, terminated by apprehension. The court was fully justified in finding



1st Ind.

War Department, J.A.G.O., 28 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 Second Lieutenant Edwin E. Dougherty (O-1308490), 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. I recommend that the sentence be confirmed but that the confinement thereof 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.3-Drft. of ltr. for  
sig. Sec. of War.  
Incl.4-Form of Ex. action.

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(Sentence confirmed but confinement reduced to five years.  
G.C.M.O. 641, 4 Dec 1944)

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

SPJGQ  
CM 264509

10 NOV 1944

UNITED STATES )

FIRST AIR FORCE

v. )

Second Lieutenant KENNETH  
W. WASSING (O-766803),  
Air Corps. )

Trial by G.C.M., convened at  
Selfridge Field, Michigan, 31  
August, 1 and 2 September 1944.  
Dismissal, total forfeitures,  
and confinement for 18 months.

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OPINION of the BOARD OF REVIEW  
ANDREWS, FREDERICK and BIERER, Judge Advocates

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

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

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

Specification: In that Second Lieutenant Kenneth W. Wassing, Air Corps, Section G (Administrative), 134th Army Air Forces Base Unit (Fighter), Army Air Base, Oscoda Army Air Field, Oscoda, Michigan, while operating a type P-47 government owned airplane and while leading a flight of three type P-47 government owned airplanes, did, at Lake Margrethe, Michigan, on or about 2 August 1944, by his culpable negligence in leading said flight in a reckless and unauthorized manner, unlawfully and feloniously kill Mary Meyer, by running into and striking her with an airplane of his flight.

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

Specification: In that Second Lieutenant Kenneth W. Wassing, Air Corps, Section G (Administrative), 134th Army Air Forces Base Unit (Fighter), Army Air Base, Oscoda Army Air Field, Oscoda, Michigan, did, at or near Lake Margrethe, Michigan, on or about 2 August 1944, wrongfully and unlawfully fly a P-47 type airplane over a boat at an altitude of less than 1000 feet in violation of paragraph 16a (1) (a), Army Air Forces Regulation Number 60-16, dated 6 March 1944.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 18 months. 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 2 August 1944, accused as the leader of a flight of three P-47 United States Army airplanes took off at about 10:15 a.m. from Oscoda Army Air Field. The weather was clear except for a slight haze noticeable at high altitude (R. 38, 77, 89). Sergeants Antoine P. Fabby and Andre C. Erard, both members of the French Army, were flying the other two planes. The mission was a high altitude formation flight, to be flown between 20,000 and 30,000 feet, with a minimum authorized altitude of 1000 feet except for take-off and landing (R. 8-13, 20). Between the hours of 10 a.m. and 12 noon on that day there were only thirteen aircraft in the air from Oscoda Field. In addition to accused, there were four flights, one led by Second Lieutenant Nelson consisting of three planes, one by Second Lieutenant Willard consisting of three planes, one by Aspirant Saint-Jean consisting of two planes, and one by First Lieutenant Decker consisting of two planes (R. 7-8). All planes were type P-47 (R. 14).

The flight led by accused climbed north then west to a point near the shore of Lake Michigan, and southeast of South Fox Island (R. 33-34; Ex. 4). While in that vicinity the flight executed a few level barrel rolls at an altitude of about 28,000 feet. At this time the flight was still near the shore of Lake Michigan and approximately thirty-five miles northwest of Lake Margrethe (Ex. 4). This lake, irregular in shape and approximately three miles long and one to two miles wide, is located close to Grayling, Michigan (Exs. 4, 13). Oscoda Army Air Field, on the western shore of Lake Huron, is approximately sixty-five miles east and slightly south of Lake Margrethe (Ex. 4). Testimony of the pilots flying the other two planes in accused's flight indicates the following: Accused next led the flight in a southeasterly direction, diving to an altitude of 30 to 100 feet, and engaging in "hedge-hopping" (R. 45). Flying in a tight "V".

formation, the three planes flew over two lakes, on the second of which two or three boats were observed, with people in them. As the flight went over this lake, the planes were alternately diving and climbing slightly, never flying level. They passed over the boats at a speed of about 200 miles per hour and at an altitude of 20 or 30 feet, climbing slightly just before passing over the first boat (R. 35, 36, 37, 40, 46, 47, 48, 55). Each pilot noticed an occupant of the boat waving a hat (R. 35, 49). Sergeant Erard noticed that the other occupant stooped or leaned over (R. 35). It was shown that when a P-47 is in level flight, the propeller blades extend 28 inches below the fuselage (R. 20).

Sergeant Fabby's position during the flight was to the left and rear of the leader and the right wing man (R. 52). Sergeant Erard's position was to the right and rear of the leader (R. 22). It is standard procedure in the Army Air Forces for wing men to follow their leader always, and that is the policy at Oscoda Army Air Field (R. 11, 21). The wing men flying with the accused had been so instructed and were so acting on this occasion (R. 39, 50).

At least three small boats were on Lake Margrethe on the morning of 2 August 1944. All were anchored and the occupants were fishing. Walter G. Meyer was in one boat with his mother, Mary Meyer, the deceased. She was seated on one of the cross seats (R. 62-65). This was a rowboat, which sits out of the water 10 to 12 inches (R. 63; Ex. 12). Approximately 300 yards due east from the Meyer boat was a larger boat with an outboard motor, occupied by Mr. and Mrs. Clough and son. The third boat was some distance east of the Meyer boat, but not in line with it and the Clough boat (R. 40, 91).

Between 11 and 11:30 a.m. (R. 66, 100, 108), a flight of three airplanes, flying close together, approached at high speed and low altitude from the west (R. 64, 74, 85, 91). The planes were identified as P-47's (R. 109). They were in a "V" formation (R. 108) and flying at an estimated speed of 200 miles per hour (R. 110). As the planes approached, the center plane, which appeared to Meyer to be flying a little lower than the other two, darted down toward the Meyer boat and "continued to come." When the witness Meyer last saw the center plane it was headed toward his boat (R. 72). The center plane appeared to Mrs. Clough to be the lowest as the flight approached (R. 84). But from the view of the witness Kubitz, an occupant of the boat one-half to three quarters of a mile from the Meyer boat, the left plane appeared to be lower than the other two - "not over two or three feet, between the bottom of his plane and the boat" (R. 77, 79, 81). The planes came directly toward the boats occupied by Meyer and his mother and by the Cloughs, and "nosed down" toward them. Meyer waved his hat and dropped to the bottom of the boat; his mother, who was seated, stooped forward (R. 85). As the flight passed the Meyer boat there was a "swish" of noise, a pressure of air, and a very loud report similar to the backfire of an engine or a shotgun exploding.

The flight continued over the Clough boat with somewhat similar disturbances. The Cloughs sought protection on the bottom of their boat as the flight passed (R. 64, 65, 86).

Immediately after the planes had passed his boat, Meyer noticed his mother lying in the bottom of the boat, and, going to her, he discovered blood and saw that she was badly injured (R. 70). The Clough boat towed Meyer to shore, after he had called for help (R. 66). A post mortem examination revealed a sharp cut across Mrs. Meyer's back, perforating the right pleural cavity, puncturing the right lung, and completely severing the spinal cord at the level of the eighth thoracic vertebra. In addition, several ribs were fractured, the left kidney was lacerated, and there was a perforation of the peritoneal cavity. The injuries, with resulting hemorrhage, caused death (Exs. 14, 15). Although the time of death is not shown, it probably occurred shortly after the accident.

The flight of planes led by accused, continuing in a southeasterly direction, returned to the field around 11:45 and landed (R. 8, 32, 50). All planes of this flight were examined that afternoon. The only damage noted consisted of a few small scratches on the propeller tip of plane J-99, flown by Sergeant Fabby (R. 14, 15, 59; Ex. 2). These scratches had not been observed on the inspection made the day before (R. 59). All flight leaders except the accused testified regarding their flights on this particular morning. Lieutenants Willard, Nelson, Decker, and Aspirant Saint-Jean testified that their flights were not in the vicinity of Lake Margrethe and that none of them except Saint-Jean, who did not indicate his altitude, flew under an altitude of 2000 feet (R. 25-31).

Other than Oscoda, the nearest Army Air Bases using P-47's for training were Wright Field, Dayton, Ohio, and Mitchel Field and Westover Field, the two latter on the East Coast (R. 11, 21). By stipulation it was shown that no Navy planes from Traverse City, Michigan, were near the lake on this occasion (Ex. 9). No other flight of three planes was observed by the witnesses who were on the lake at the time (R. 77, 78, 79, 84).

Colonel John C. Crosthwaite, Air Corps, commanding officer of Oscoda Army Air Base and a qualified pilot since 1917, testified as follows:

A pilot, in flying over a still body of water, has no depth perception, and cannot accurately estimate his height above the water. A fighter plane is relatively heavy and has a tendency to "squash"; that is a tendency of the plane, on a change of flight path, such as a pull-out after a dive, to continue on its original flight path. In flying close to the ground, "squashing" must be watched carefully in order to avoid coming into contact with the ground or objects on the ground (R. 117-118).

On being questioned after the flight, accused stated that he had passed over a lake at an altitude of 30 to 40 feet (R. 16). Later, before an investigating board, and after being advised of his rights, he stated that on this flight he had passed over a lake at a low altitude, not lower than 30 to 40 feet; that he saw three boats on the lake; that he observed two people in one of the boats; and that one of the persons appeared to be waving a hat (R. 112-114).

Paragraph 16a (1) (a), Army Air Forces Regulations 60-16, dated 6 March 1944, was read to the court, and the court indicated that it would take judicial notice thereof (R. 5, 10). The paragraph prohibits the operation of aircraft below 1000 feet above any boat except during take-off and landing. The provisions of these regulations had been brought to the attention of the accused (R. 9).

4. The evidence for the defense is as follows:

On 3 August 1944 the three airplanes piloted by the accused and his wing men were examined for the presence of human blood. The planes piloted by Sergeant Erard and the accused disclosed no suspicious stains on either the propeller blades or the cowling. Swabbed samples were taken from the propeller blades of accused's plane, but due to the presence of oil, recently applied, no samples were taken from Erard's plane. A reddish brown stain and similar splashes were observed on the propeller and cowling of the plane piloted by Sergeant Fabby. Specimens and swabbed samples were obtained from these areas. Laboratory examination of all specimens revealed no evidence of the presence of human blood (Exs. A, B).

A copy of accused's Form 66-2 shows that accused is rated "excellent" as a pilot (Exs. D, C).

Major Carl W. Payne, Air Corps, director of Operations and Training at Oscoda Army Air Field, testified that he considered accused an able and qualified pilot; that he had been credited with commendable flying in assisting trainees in returning to their base during severe and inclement weather; and that accused's supervision and instruction of less experienced pilots had been very creditable (R. 122). Accused's immediate commanding officer, Captain Edmund D. Griffin, Jr., Air Corps, testified that he had known accused for five or six months and that he had selected accused as a supervisor of trainees out of a group of sixty; that accused was an experienced pilot with around 500 hours flying time, and the best gunnery pilot in the squadron; that accused was generally known as a conservative pilot in the squadron; and that he had a consuming desire to go overseas into combat. The witness stated that he (witness) had been in aerial combat overseas and would be glad to have accused as a wing man in combat (R. 123-124).

Mr. Arnold Wassing, accused's brother, testified that accused was well liked in his home community and proficient in high school athletics, and that he volunteered for the Air Corps, although not subject to the draft, because of a consuming and ardent desire to be in combat overseas (R. 125-126).

The accused, after having his rights as a witness explained to him, elected to remain silent.

5. Under the Specification of Charge I, accused was convicted of involuntary manslaughter by culpable negligence in leading his flight in a reckless and unauthorized manner, resulting in the death of Mary Meyer "by running into and striking her with an airplane of his flight." The evidence clearly shows that at some time between 11 and 11:30 a.m. on the day in question, a flight of three P-47 airplanes approached Lake Margrethe from a westerly direction, flying at high speed and very low altitude. There were three or more small boats on the lake at the time, occupied by persons engaged in fishing. In one of them, a rowboat, were Mrs. Meyer (the deceased) and her son. Mrs. Meyer was seated on one of the cross seats. The planes "darted down" toward the boat. Meyer dropped to the bottom of the boat and his mother stooped forward. Immediately after the planes had passed, it was discovered that Mrs. Meyer had been struck (probably by a propeller), and had suffered grievous wounds from which she died shortly thereafter.

Naturally, in the rush and excitement, the witnesses did not notice the numbers or other designations on the planes, but in our opinion the evidence proves beyond a reasonable doubt that they were the three planes in the flight led by the accused. No other flight from Oscoda Army Air Field was in the vicinity of Lake Margrethe at the time, and the same is true of planes stationed at the Traverse City Navy base. Other fields using this type of airplane are so far away as to render the presence of their aircraft at this time and place highly improbable, and the presence of other aircraft is not suggested in this case.

The witnesses on Lake Margrethe and the shores thereof observed only one flight of three P-47 planes during the morning. It is undisputed that accused's flight consisted of three P-47 planes and that on the return trip they flew from a point somewhat northwest of Lake Margrethe to Oscoda Army Air Field, which was slightly southeast of the lake and approximately 65 miles distant therefrom. The flight landed at the field at approximately 11:45 a.m.

Accused's wing men admitted that the three planes dived down to an altitude of 30 to 100 feet and engaged in "hedgehopping," and that they flew over a lake in formation at a very low altitude. They saw three boats on the lake, and admitted flying as low as 20 or 30 feet and at a speed of 200 miles an hour as they passed over the boats. They saw people in the boats. The planes were not flying "level" over the lake, and climbed slightly just before passing over the first boat. The accused himself admitted flying over a lake at an altitude of 30 or 40 feet. He saw three boats, in one of which he observed two people. He said that one of the two people appeared to be waving a hat. This statement coincides with Meyer's assertion that he waved his hat at the approaching planes. The other pilots also saw the waving of a hat, and one of them saw the other occupant of the boat stoop or lean forward. There was expert evidence that in flying over a body of water, a pilot has no depth perception and cannot accurately estimate his height above the water. Considering all the evidence, the identity of the flight which caused the death of Mrs. Meyer was clearly established as the flight led by accused.

That the conduct of accused in leading his flight in such patently dangerous maneuvers amounted to culpable negligence is so clear as to brook no argument. His conduct was as culpable, if not more so, than that of the accused in the Bell case, in which a conviction of involuntary manslaughter was affirmed (CM 233196, Bell, 19 BR 365). It will be recalled that the witness Kubitz estimated the altitude of one of the planes as only two or three feet above the Meyer boat and that the expert testimony referred to the danger of "squashing" when flying at low altitude. But even if the planes were a few feet higher than Kubitz believed, it is obvious that they were close enough to endanger the lives of persons in the boats and to stamp the accused's conduct as negligence of a most flagrant character.

As already noted, the Specification charges that accused killed Mrs. Meyer "by running into and striking her with an airplane of his flight." The evidence does not disclose which plane struck Mrs. Meyer. It is fundamental that in order to warrant a conviction for involuntary manslaughter, the accused's act must be the proximate cause of the death. It is equally fundamental that if an independent intervening cause was responsible for the death, the chain of causation leading from the accused's acts to the fatal accident is broken, and the accused escapes liability for the very good reason that his act did not cause the death. But not all intervening acts amount to "independent intervening" causes. The test is a simple one. If the intervening act was one reasonably likely to result from the accused's act, and did so result, the intervening cause is not "independent," and the accused's act is the proximate cause (See 26 AM. Jur., Homicide, sec. 50). There is no difficulty in applying the rule to the facts of the present case. It was standard procedure for the two

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wing men to follow their flight leader and it was reasonably to be expected that they would do so. When the accused piloted his plane in the culpably negligent manner disclosed by the evidence, he knew or should have known that his wing men would follow him. Since their actions were a result of the actions of the accused, readily foreseeable and reasonably likely to occur, his acts proximately caused Mrs. Meyer's death, regardless of which plane struck her.

No discussion is necessary to support the finding that, as alleged in the Specification of Charge II, accused violated the regulation referred to, by flying over a boat at an altitude of less than 1000 feet.

Although the two Specifications stemmed from the same transaction, no prejudice to the accused resulted from the inclusion of both of them.

6. War Department records show that accused is 24 years old and single. He graduated from high school and worked approximately one year and eight months as an airplane mechanic and flight chief before entering military service. He enlisted as an aviation cadet on 17 April 1943 and was commissioned a second lieutenant, Air Corps, on 8 February 1944.

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

Fletcher R. Andrews, Judge Advocate

Herbert B. Budenich, Judge Advocate

A. S. Sieren, Judge Advocate

1st Ind.

War Department, J.A.G.O.,

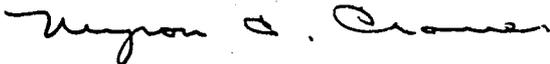
NOV 16 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Kenneth W. Wassing (O-766803), 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 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. Consideration has been given to the attached memorandum from General H. H. Arnold, Commanding General of the United States Army Air Forces, dated 7 November 1944. He recommends that the sentence of dismissal, total forfeitures and confinement at hard labor for 18 months be confirmed and ordered executed.

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 my recommendation into effect, should such action meet with approval.



Myron C. Cramer,  
Major General,

The Judge Advocate General.

4 Incls.

- 1 - Record of trial
- 2 - Dft ltr for sig. S/W
- 3 - Memo. fr Gen. H. H. Arnold  
dated 7 November 1944
- 4 - Form of Executive action

(Sentence confirmed but forfeitures remitted. G.C.M.O. 12, 5 Jan 1945)



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

(141)

SPJGH  
CM 264534

3 NOV 1944

UNITED STATES )

THIRD AIR FORCE

v. )

Trial by G.C.M., convened at  
Greenville Army Air Base, Green-  
ville, South Carolina, 11 Sept-  
ember 1944. Dismissal.

Second Lieutenant DANIEL R.  
LEIGHTON (O-765508), Air Corps.)

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OPINION of the BOARD OF REVIEW  
TAPPY, MELNIKER and GAMBRELL, Judge Advocates  
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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant Daniel R. Leighton, Squadron N, 330th AAF Base Unit (RTU-MB), then of Squadron S, 330th AAF Base Unit (RTU-MB), did, without proper leave absent himself from his organization at Greenville Army Air Base, Greenville, South Carolina, from about 8 June 1944 until apprehended by military authorities at Stockton, California, on or about 28 July 1944.

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

Specification 1: In that Second Lieutenant Daniel R. Leighton, Squadron N, 330th AAF Base Unit (RTU-MB), then of Squadron S, 330th AAF Base Unit (RTU-MB), did, at Greenville, South Carolina on or about 6 May 1944 with intent to defraud wrongfully and unlawfully make and utter to Second Army Air Forces Service Group Officers Club, Municipal Airport, Greenville, South Carolina, a certain check in words and figures as follows:

Grass Valley, California May 6-44 No. \_\_\_\_\_

BANK OF AMERICA

Pay to the Order of \_\_\_\_\_ Cash \_\_\_\_\_ \$10.00

Ten and no/100 \_\_\_\_\_ Dollars

/s/ Dan R. Leighton, 2nd Lt. AC  
O-765508

334 B. C. S. Greenville, S. C.

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and by means thereof, did fraudulently obtain from Second Army Air Forces Service Group Officers Club, Municipal Airport, Greenville, South Carolina, the sum of ten dollars (\$10.00), in payment thereof, he, the said Second Lieutenant Daniel R. Leighton, then well knowing that he did not have and did not intend that he should have any account with the Bank of America, Grass Valley, California, for the payment of said check.

Specification 2: (In substantially same form as Specification 1, except that check drawn on the same bank was dated 7 May 1944, was payable to cash in the amount of \$10 and was negotiated to Central Exchange Second Army Air Forces Service Group.)

Specification 3: (In substantially same form as Specification 1, except that check drawn on the same bank was dated 18 May 1944, was payable to Belk-Simpson Company in the amount of \$10.95 and was negotiated to Belk-Simpson Company.)

Specification 4: In that Second Lieutenant Daniel R. Leighton, Squadron N, 330th AAF Base Unit (RTU-MB), then of Squadron S, 330th AAF Base Unit (RTU-MB), did, at Greenville, South Carolina on or about 8 June 1944 with intent to defraud, wrongfully and unlawfully make and utter to Greenville Army Air Base Exchange, Greenville, South Carolina, a certain check in words and figures as follows:

Greenville, S. C. June 8 1944 No. \_\_\_\_\_

THE FIRST NATIONAL BANK  
of Greenville, S. C.

Pay to the order of \_\_\_\_\_ Cash \_\_\_\_\_ \$25.00

Twenty Five and no/100 \_\_\_\_\_ Dollars

/s/ D. R. Leighton 2nd Lt.  
0-765508

473 B. C. S.

and by means thereof, did fraudulently obtain from the Greenville Army Air Base Exchange, Greenville, South Carolina, the sum of twenty five dollars (\$25.00), in payment thereof, he, the said Second Lieutenant Daniel R. Leighton, then well knowing that he did not have and did not intend that he should have sufficient funds in the First National Bank of Greenville, South Carolina, for the payment of said check.

Specification 5: (In substantially same form as Specification 4, except that check drawn on the same bank was dated 8 June 1944, was payable to cash in the amount of \$20 and was negotiated to Greenville Army Air Base Officers Club.)

Specification 6: (In substantially same form as Specification 4, except that check drawn on the same bank was dated 9 June 1944, was payable to cash in the amount of \$25 and was negotiated to The Peoples National Bank of Greenville, South Carolina.)

Specification 7: (In substantially same form as Specification 1, except that check drawn on the same bank was dated June 1944, was payable to cash in the amount of \$5 and was negotiated to The Milk Bar, Greenville, South Carolina.)

Specification 8: (In substantially same form as Specification 1, except that check was drawn on the same bank and was undated, was payable to cash in the amount of \$5 and was negotiated to The Milk Bar "during the month of June 1944".)

Specification 9: (In substantially same form as Specification 1, except that check drawn on the same bank was dated 4 March 1944, was payable to Stone Brothers, of Greenville, South Carolina, in the amount of \$12 and was negotiated to Stone Brothers.)

Specification 10: (In substantially same form as Specification 1, except that check drawn on the same bank was dated 14 April 1944, was payable to Stone Brothers in the amount of \$25 and was negotiated to Stone Brothers.)

He pleaded guilty to and was found guilty of all Charges and Specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority characterized the sentence as "inadequate" but nevertheless approved it and forwarded the record of trial for action under Article of War 48.

### 3. Evidence for the prosecution:

#### Specification of Charge I

The commencement of the accused's absence without leave on 8 June 1944, was established by the introduction into evidence of a certified extract copy of his organization's morning report (R. 10; Pros. Ex. 1). It was stipulated that the accused was apprehended by military authorities on 18 July 1944, in Stockton, California, and that he was at that time "dressed in military clothing" (R. 10).

#### Specifications 1, 2, 3, 7, 8, 9 and 10, Charge II

The accused opened a checking account in the Grass Valley Branch of Bank of America, National Trust & Savings Association, Grass Valley, California, on 23 February 1944, with a deposit of \$15. His total deposits in this account thereafter made amounted to \$417.50. The account was closed out on 5 May 1944 "by a written request" of the accused (Pros. Ex. 2). After the last mentioned date, the accused issued against said bank and

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negotiated for value the following checks: check dated 6 May 1944, payable to cash in the amount of \$10, negotiated to Second Army Air Forces Service Group Officers Club (Spec. 1); check dated 7 May 1944, payable to cash in the amount of \$10, negotiated to Central Exchange Second Army Air Forces Service Group (Spec. 2); check dated 18 May 1944, payable to Belk-Simpson Company in the amount of \$10.95, negotiated to Belk-Simpson Company (Spec. 3); check dated June 1944 (day of month not specified), payable to cash in the amount of \$5, negotiated to The Milk Bar, Greenville, South Carolina (Spec. 7); and an undated check payable to cash in the amount of \$5, negotiated to The Milk Bar on or about 5 June 1944 (Spec. 8). Each of said checks was, in the regular course of business, deposited for collection and each was returned unpaid. None of them has yet been paid (R. 11, 13, 14; Pros. Exs. 4, 5, 6, 11, 12). The accused also issued against said bank and negotiated to Stone Brothers, of Greenville, South Carolina, for value, a check dated 4 March 1944, in the amount of \$12 (Spec. 9) and a check dated 14 April 1944, in the amount of \$25 (Spec. 10), each of which was duly presented for collection, was returned unpaid and still remains unpaid (R. 14; Pros. Exs. 13, 14).

#### Specifications 4, 5 and 6, Charge II

On 8 June 1944 the balance in the accused's checking account in The First National Bank, Greenville, South Carolina, amounted to \$15. No further deposits were made in that account during June 1944 (R. 13; Pros. Ex. 8). The accused issued against said The First National Bank and negotiated for value the following checks: check dated 8 June 1944, payable to cash in the amount of \$25, negotiated to Greenville Army Base Exchange (Spec. 4); check dated 8 June 1944, payable to cash in the amount of \$20, negotiated to Greenville Army Air Base Officers Club (Spec. 5); and check dated 9 June 1944, payable to cash in the amount of \$25, negotiated to The Peoples National Bank, of Greenville, South Carolina (Spec. 6). Each of said checks was duly presented for collection, was returned unpaid and still remains unpaid (R. 12, 13; Pros. Exs. 7, 9, 10).

Lieutenant Colonel Robert G. Emmens, a witness for the prosecution, testified that the accused was called to his office on 8 June 1944 and questioned regarding complaints which had been received from persons off the base claiming to hold worthless checks issued by the accused. The witness demanded to know of the accused the total amount of such checks and was told by the accused that they amounted to \$25. The witness thereupon made certain suggestions to the accused with respect to providing for the payment of such checks and requested the accused to report back to him. The accused never reported back and the witness never saw the accused again (R. 12).

#### 4. Evidence for the defense.

The accused, after being advised as to his rights as a witness, elected to make an unsworn statement, the material portions of which are as follows:

"I never had any trouble until I arrived at Columbia, South Carolina, January 15, which is the day I received my commission. I immediately opened a bank account with the Grass Valley Bank and deposited \$100.00 per month in my name and my mother's name. My mother had cashed \$70.00 worth of checks, which I did not know about. I cashed some myself not knowing that the money had been drawn out. My checks were returned. I had lost my wallet, my W.D.A.G.O. Pass and lost my pay as well. I did not have the money to pick up these checks. So I asked them if they would grant me until pay day, they were going to, but apparently they did not. I had been at this field about two months and all of my buddies had shipped out going overseas. There was nothing showing that I had any processing. I did not like that but I did not express my opinion to anybody. I was down town the night before the real thing happened. Two people were talking to me (I believe this is on the military police record in Columbia). I had a few drinks in me and some people were inquiring too deeply into what I knew about B-25s, which I thought was none of their business. I reported this to the civil authorities and I told them to notify the military police, but instead of them working with me I was more or less stepped on and kicked down for my attitude. I was called in the next day by a Lieutenant Colonel, I do not wish to mention his name, he is at Columbia, and he said that I had missed a class. I had missed a class, but not to my knowledge."

\* \* \* \*

"I was called before this Lieutenant Colonel and he reprimanded me for missing this class. I told him I was not aware that I was put in Class 27. He asked me for my A.G.O. Pass. I had lost my pass and he reprimanded me and said he didn't know whether I was a lieutenant or a spy, and I was put to the task of proving who I was. I was sent to S-2 and they investigated my case and character. I went back to the Lieutenant Colonel's Office and he told me to my face that I was a liar, that I had never been to St. Petersburg and taken basic training. He checked my signature and told me my signature was not the same. I left the office then and I was restricted. That was something I could not help. When I left his office I was so stunned I could not have quoted my name. I started drinking quite heavily. I was prepared to pay the checks. I wrote a letter from Greenville. They did not reply to me. They replied to some Lieutenant Colonel and he reprimanded me. I told him I had the money and was intending to pay the checks. I sent the money and in turn received the checks. Things kept going like that for three or four weeks. Later I was called by someone on the base about a check and he told me he would give me so much time to pick the check up and report back to him. I had to go to class and could not go in town unless excused by the Provisional Group Commander. He would not excuse me, so the only thing to do was to go to town anyway,

so I went to town and in turn was restricted by the Provisional Group Commander. I believe it was for two weeks. There was too much coming to me at once. I started to drinking. I lost my wallet again at this base, me and two other lieutenants out of barracks 1080. I had lost almost \$200.00 in money, which I had intended to deposit into the bank to make the checks good. I had no means of getting money and any effort to recover my wallet was not taken and I was left in that condition. When I left this base I can say with a clear conscience I did not know whether I left in May or whether I didn't. I don't know. I was satisfied because I figured maybe I did leave in May. My wallet was sent to me and other papers stating that I left in June. I contacted Captain Bick and told him that I did not leave in May. I was not aware when I left this base. I know I went to Richmond, from there on I do not know. I believe that is all I have to say."

No witnesses were called for the defense.

5. The Specification of Charge I alleges that the accused did, without proper leave, absent himself from his organization "from about 8 June 1944 until apprehended \* \* \* on or about 28 July 1944". The proof shows commencement of the absence without leave on the date alleged in the Specification, but there is a variance between the proof and the Specification as to the date of accused's apprehension by the military authorities in Stockton, California. The date alleged in the Specification is "28 July 1944", whereas the date stipulated in the proof is "18 July 1944". It seems probable that the inclusion in the stipulation of "18 July" rather than "28 July" was due to inadvertance. In any case, the accused having pleaded guilty to the offense of AWOL as charged, the variance is immaterial.

6. Supporting the accused's plea of guilty to all of the offenses alleged in Specifications 1 to 8, inclusive, of Charge II, the competent evidence introduced by the prosecution conclusively establishes the accused's guilt of each of such offenses. In the cases of Specifications 1, 2, 3, 7 and 8, respectively, the accused had no account in the bank against which the checks were drawn at the time the checks were issued. In the cases of Specifications 4, 5 and 6, respectively, each of the checks was well known by the accused to be larger than the amount of his balance in the bank against which the checks were drawn.

The status of the accused's account in Bank of America, National Trust & Savings Association on the dates of the checks mentioned in Specifications 9 and 10 of Charge II (4 March 1944 and 14 April 1944, respectively) is not shown by the record of trial. The record does show, however, that both of these checks were returned unpaid and, at the date of the trial, still remained unpaid. These facts, coupled with the accused's plea of guilty to both Specifications, make it necessary to sustain the findings of guilty made by the court.

The accused's flagrant disregard of his duties as an officer in the matter of issuing worthless checks is emphasized by the fact that he continued his reckless course even after being called to the office of Colonel Emmens to explain his conduct in this regard.

The record of trial leaves no room for doubt that the accused issued the checks described in the ten Specifications of Charge II well knowing that he did not have, and not intending that he should have, sufficient funds in the banks on which they were drawn to cover them. Such conduct has uniformly been held to be violative of the 95th Article of War (Dig. Op. JAG 1912-40, sec. 453 (24) (25); 3 Bull. JAG 14).

7. The records of the War Department show that the accused is 23 years and 11 months of age and single. He was born and reared in Long Beach, California, and attended high school, but did not graduate. In civilian life he worked for mining and construction companies from 1938 until 1942. He was inducted into the Army on 16 November 1942, completed basic and preflight training and, upon graduation from the Army Air Forces Bombardier School, at Carlsbad, New Mexico, in January 1944, was commissioned a second lieutenant, Air Corps, Army of the United States.

8. The court was legally constituted and had jurisdiction of 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 and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of a violation of Article of War 61 and is mandatory upon a conviction of a violation of Article of War 95.

Thomas N. Lofky, Judge Advocate.

Admiral, Judge Advocate.

William H. Dambrell, Judge Advocate.

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1st Ind.

NOV 7 1944

War Department, J.A.G.O.,

- To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Daniel R. Leighton (O-765508), 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. There appear to be no mitigating or extenuating circumstances. I recommend that the sentence be confirmed and carried into execution.

3. Subsequent to receiving the record of trial in this case, I have received from Headquarters, Third Air Force, a letter dated 29 September 1944, inclosing correspondence and other papers from which it appears, among other things, (a) that during the months of May, June and July 1944 the accused issued at least 38 worthless checks to 21 different individuals and organizations; and (b) that in October 1939, he was convicted of two robberies in Nevada County, California, for which he was confined in the Nevada County Jail six months and thereafter placed on probation for five years. Only ten of the above-mentioned worthless checks are involved in the present case. Action on the others is being delayed pending final disposition of the present case. The above-mentioned letter, dated 29 September 1944, and its inclosures are attached to, but do not form a part of, the record of trial.

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

*Myron C. Cramer*

4 Incls.

Incl. 1- Rec. of trial.

Incl. 2- Ltr fr Hq Third AF,  
29 Sep 44 w/incls.

Incl. 3- Dft ltr for sig S/W.

Incl. 4- Form of Action.

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

(Sentence confirmed. G.C.M.O. 35, 19 Jan 1945)

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

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SPJGK  
CM 264535

17 OCT 1944

UNITED STATES )

FOURTH AIR FORCE

v. )

Trial by G.C.M., convened  
at McChord Field, Washington,  
30 August 1944. Dismissal.

Second Lieutenant LLOYD C.  
BOWMAN, JR. (O-815703), Air  
Corps. )

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OPINION of the BOARD OF REVIEW  
LYON, HEPBURN and MOYSE, Judge Advocates.  
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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Lloyd C. Bowman, Jr., Squadron "A", 464th Army Air Forces Base Unit, did, at or near Five Mile Lake, Washington, on or about 28 July 1944, wrongfully pilot a P-39 type Army airplane at an altitude of less than five hundred (500) feet above the ground, in violation of paragraph 16 a(1)(d), Army Air Force Regulation No. 60-16, dated 6 March 1944.

Specification 2: In that Second Lieutenant Lloyd C. Bowman, Jr., Squadron "A", 464th Army Air Forces Base Unit, did, at or near Auburn Academy, near Auburn, Washington, on or about 28 July 1944, wrongfully pilot a P-39 type Army airplane at an altitude of less than one thousand (1,000) feet above a building and other obstructions to flight, in violation of paragraph 16 a(1)(a), Army Air Force Regulation No. 60-16, dated 6 March 1944.

Specification 3: In that Second Lieutenant Lloyd C. Bowman, Jr., Squadron "A", 464th Army Air Forces Base Unit, did, at or near Five Mile Lake, Washington, on or about 28 July 1944, wrongfully violate paragraph 1 a, Army Air Force Regulations No. 60-16A, dated 15 April 1944, by operating a P-39 type Army airplane in a reckless manner.

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Specification 4: In that Second Lieutenant Lloyd C. Bowman, Jr., Squadron "A", 464th Army Air Forces Base Unit, did, at or near Auburn Academy, near Auburn, Washington, on or about 28 July 1944, wrongfully violate paragraph 1 a, Army Air Force Regulations No. 60-16A, dated 15 April 1944, by operating a P-39 type airplane in a reckless manner.

He pleaded not guilty to and was found guilty of the Charge and all of its Specifications. No evidence was introduced of any previous conviction. 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. By stipulation entered into between the prosecution and the defense it was shown that the accused on 28 July 1944 and on the date of the trial was a member of Squadron "A", 464th Army Air Forces Base Unit, McChord Field, Washington, in the military service of the United States; that on 28 July 1944 he was assigned to the duty of flying "slow time" a P-39 type of aircraft; and that between 0954 and 1101 of that day he flew a P-39 plane having on the sides of its nose "S-30" and on its left side to the rear, including the rudder, "220479" (R. 7). Photographs of the plane were admitted in evidence (R. 8; Pros. Exs. 1 and 2).

There was also admitted in evidence by stipulation a copy of the weather report for 28 July 1944 which showed that the weather was clear, ceiling unlimited and visibility 10 miles within a radius of 50 miles of the field (R. 8; Pros. Ex. 3).

Seventeen photographs showing scenes of Five Mile Lake and of Auburn Academy and their surroundings including buildings, tents, docks, poles, trees, and overhead wires were admitted in evidence over the objection of the defense counsel. They were all identified by the person who took the photographs (R. 8-13) and numerous witnesses testified that they correctly and truly portrayed photographically the scenes they purported to show at the two places named on 28 July 1944 (R. 25, 41, 50, 73-74; Pros. Exs. 4 to 29 incl.). Counsel's objection was based upon the admitted fact that the photographs were taken on 4 and 12 August 1944 and not on 28 July 1944 (R. 13). It was stipulated that the photographs correctly portrayed photographically the areas they purport to show (R. 14).

On the morning of 28 July 1944 Captain H. O. N. Mendenhall assigned the accused the mission of "slow timing" one of the P-39's. The term "slow time" has a well defined and generally understood meaning among pilots of planes and means to "break in" a new engine in a plane by flying it about four hours at reduced manifold pressure and prop setting. It would not require high speed flying, nor simulated strafing, nor buzzing.

He told the accused that the flight would be a "slow time mission" (R. 15-16). The P-39 is a low altitude craft but the military organization of which the accused was a member was formed for the sole purpose of ferrying aircraft to and from bases in the Fourth Air Force and it has no flying training program other than to maintain proficiency in the handling of aircraft on normal straight level flying (R. 17). In the opinion of Captain Mendenhall the accused has been a very good pilot and his efficiency was excellent (R. 17-18).

Mrs. Ruth Miller, Mrs. Ruth Henderson, and Mr. Donald Reilly were at Five Mile Lake, Washington, on the morning of 28 July 1944 and observed a P-39 plane flying at a low altitude over the tops of the trees and buildings on the north edge of Five Mile Lake and across the lake three times. Mrs. Miller was unable to say definitely at what altitude the plane was flown but on one of its flights it passed over her dance hall located on the slope of the hill adjoining the lake at a height no greater than the height of the ceiling of the courtroom to the floor (R. 40). At another time it flew below the top of a tree estimated to be 125 feet in height (R. 46). In a statement which she had signed previous to the trial she estimated the altitude of the plane to be 200 feet above the ground (R. 52). "It was marvelous flying" (R. 45).

Mrs. Ruth Henderson was unable to estimate the altitude of the plane but fixed its altitude as "below the tops of the trees" (R. 23) on its first pass over the lake. On its second pass, it flew over Miller's dance hall at an altitude of less than 10 feet above the dance hall (R. 24, 29, 36). She judged the flying to be "good except for being low" (R. 31).

Donald Reilly, the 17 year old son of Mrs. Miller, heard and saw the plane when it passed over the lake the first time and ran down to the lake and stood on a dock extending out over the water (R. 55). The plane came down again and it looked to him as "if it was going to land" but flew across the lake 4 or 5 feet above its surface (R. 56). In his opinion it was "excellent flying". The plane on its third pass flew over the dance hall at an altitude of 4 or 5 feet above it (R. 61).

Two of the above witnesses identified the plane by "S-30" on its nose (R. 26, 43).

Mr. Jacob Mehling, treasurer of the Auburn Academy, located at Auburn, Washington, testified that the academy is a high school operated by the Seventh Day Adventist Denomination. On 28 July 1944 there was a camp meeting in session on the grounds of the academy. A large tent had been erected in the center of the grounds sufficient in size to seat 2,500 to 3,000 people. Surrounding the large tent were about 125 to 150 smaller tents used for dormitory purposes (R. 67-68). In addition to the tents the academy

had a main administration building, barracks for the students, a gymnasium and a girl's dormitory. About 10:30 on the morning of 28 July 1944 the witness was attracted by the noise of an airplane overhead. The plane passed over the top of the large tent and within 20 to 25 feet above it six or seven times (R. 70). The tent poles supporting the tent were 42 feet in length (R. 79). There were about 500 people in and about the tent at the time (R. 80). He observed on the nose of the plane "S-30" and the numerals on the tail section 220476 (R. 72-73). In his opinion the pilot was a skillful flyer (R. 78).

Mr. Wallace W. Dickjose and Mr. Vernon Jewett were also present at the academy that morning and saw the plane with "S-30" on its nose flying over the top of the big tent 3 or 4 times (R. 82, 90). In the opinion of Mr. Dickjose the plane flew 30 to 40 feet above the tent (R. 81). In his opinion its pilot was a "good" flyer (R. 87). Mr. Jewett estimated the height of the plane as it flew over the tent to be 10 to 20 feet above the poles of the tent (R. 90) and estimated the number of people present as being approximately 1,000 (R. 91).

4. The accused having been advised of his right to remain silent, make an unsworn statement, or to testify under oath, elected to testify (R. 93). He related that on the morning of 28 July 1944, while waiting for an assignment to fly he volunteered to fly a P-39 on what he was told to be a slow time mission. He had never performed a slow time mission before but understood it to mean the breaking in of a new engine on a plane. He took off from the field about 10:30 and flew around the area for 15 or 20 minutes. He then flew toward Mt. Rainier and when he reached the location of the Auburn Academy on an impulse "did a little low flying" (R. 94-95). He conceded that this was no part of the mission but as the engineer had instructed him on his take off to try out and test the plane, he proceeded to put it through its paces (R. 95). He did his low flying over the Auburn Academy and Five Mile Lake (R. 95). He had no particular reason for selecting these two areas. His past training in P-39s was in low altitude flying, strafing, dive bombing, skip bombing and aerial gunnery. Very rarely were these planes flown at high altitude (R. 97). He admitted that his present assignment consisted of ferrying planes but felt that he should engage in low altitude flying in order to keep himself fit for that type of flying. He knew of the Army Air Force Regulations relative to low flying (R. 98). Since early youth he had a great desire to be a flyer and as soon as he was 18 years of age he enlisted in the air force. He had never experienced any difficulty in flying planes and has been rated a pilot since 5 December 1943. He is married and has no children (R. 99).

On cross-examination he admitted that he flew over Five Mile Lake three or four times but could not state exactly at what altitude because of "the excitement of it" (R. 100-101). He flew at a speed between 270 and

290 miles an hour and was aware of the fact that he was flying at less than 500 feet above the ground (R. 102). He also admitted that he flew over the tops of the tent poles and the buildings of the Auburn Academy but could not estimate his altitude. He admitted that he was less than 500 feet above the ground (R. 103). He made about four passes over these obstructions and on each of the four passes he was below 500 feet above the ground (R. 104).

5. The prosecution read aloud to the court definitions of the word "reckless" as contained in Black's Law Dictionary and Webster's New International Dictionary. The definition in the former read as follows:

"Reckless—not recking; careless; heedless, inattentive; indifferent to consequences according to circumstances; 'reckless' may mean desperately heedless, wanton or willful, or it may mean only careless, inattentive, or negligent". (R. 105)

6. Specifications 1 and 2 of the Charge aver that the accused flew a P-39 Army airplane at an altitude of less than 500 feet above the ground at or near Five Mile Lake and at an altitude of less than 1,000 feet at or near Auburn Academy in violation of paragraph 16a (1)(d) and 16a (1)(a) of Army Air Force Regulation 60-16.

The paragraph referred to reads 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.

\* \* \* \*

(d) 500 feet above the ground elsewhere than as specified above."

Specifications 3 and 4 charge the accused with violating paragraph 1a of Army Air Force Regulation 60-16A by operating a P-39 Army airplane in a reckless manner at or near the two places specified. The pertinent paragraph of that Regulation reads as follows:

"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."

It has been consistently held that any Army pilot who flies a plane in violation of either of the above regulations may properly be found guilty of thereby violating Article of War 96, such conduct being prejudicial to good order and military discipline (CM 261063; CM 262800).

The questions presented in the instant case are (1) did the accused at the time alleged fly an Army airplane at an altitude less than 500 feet at Five Mile Lake and less than 1,000 feet at Auburn Academy, and (2) was the operation of the plane on those two occasions "reckless", within the meaning of paragraph 1a, Army Air Force Regulations No. 60-16A, dated 15 April 1944?

With reference to (1) above it was definitely proved by six witnesses on the ground and admitted by the accused in his testimony under oath that he flew the P-39 Army plane over Five Mile Lake at an altitude less than 500 feet and that he flew that same plane over the buildings and other obstructions of the Auburn Academy at less than 1,000 feet. The evidence was therefore ample to support the findings of guilty of Specifications 1 and 2.

With reference to (2) above - reckless flying - all of the witnesses who expressed an opinion on the subject stated that the accused was a skillful pilot and that he showed his ability as a flyer by the manner in which he handled and maneuvered his plane as he skimmed over the lake, the trees, the tents and the buildings at the places mentioned. Being a skillful flyer, however, is no defense to the charge if, in fact, the accused did operate the plane in a "reckless and careless manner", within the meaning of paragraph 1a, of Army Air Force Regulation 60-16A. To fly a plane, at the speed admitted, at an altitude of 10 or 20 feet over the top of a tent within or about which were assembled over 500 people is undoubtedly a reckless act. So too is the act of flying a plane over a dance hall and a lake at an altitude of 4 or 5 feet as was done by the accused in this case. Obviously both of these acts endangered the people and property on the ground and constituted a clear violation of paragraph 1a, Army Air Force Regulation 60-16A. The findings of guilty of Specifications 3 and 4 are therefore sustained (CM 241729, Weld; CM 254055, Madden; CM 249703, Tillman).

There is no merit in the contention of the defense that the photographs of the terrain where the low flying of the accused is alleged to have occurred were inadmissible in evidence. The photographs were identified by an experienced photographer who took them. It was stipulated that they correctly portrayed photographically the areas "they purport to portray" as of the time they were taken (R.11-14). Some of the pictures were taken 4 August 1944 - six days after the date of the alleged offense and others 12 August 1944 - fourteen days thereafter. Numerous witnesses examined the pictures and testified that those taken on 4 August 1944 correctly represented the terrain as of the date of the offenses. The

photographs taken on 12 August 1944 of the Auburn Academy were made after the tents had been removed but the witness testified that with this exception these photographs correctly represented the locus in quo as of 28 July 1944 (R. 68, 69).

\*\*\* photographs, etc., as to localities \*\*\* are admissible in evidence when properly verified by the party who made them, or by anyone personally acquainted with the locality \*\*\* thereby pictured, and able to state their correctness, from his own personal knowledge or observation \*\*\*. (MCM 1928, par. 118, page 122).

7. The defense raised no objection to the generality of Specifications 3 and 4, which charged reckless operation of a P-39 type airplane on the same date and at the same places described in Specifications 1 and 2, respectively. From the testimony adduced it is apparent that the offenses described in Specifications 1 and 2 are included in and, at least to a great extent, are the basis for the offenses described in Specifications 3 and 4, respectively. The latter Specifications, however, are far broader in their scope than the first two and permit the consideration of acts of recklessness in addition to those set forth in Specifications 1 and 2. The Specifications, therefore, do not fall within the rules forbidding duplicitous charges and specifications, and inasmuch as the sentence, as approved by the reviewing authority, is authorized upon conviction of any of them, no prejudice to any substantial rights of accused is found in the number of them.

8. Attached to the record is a letter written by Lieutenant Colonel Frank A. Flynn, who acted as defense counsel for the accused, urgently requesting that the sentence be suspended because of the accused's previous excellent rating as a flyer and his value to the service in that capacity.

9. War Department records show accused to be 20 years of age and single. It will be noted that in his testimony accused states that he is now married. He completed his 11th grade of schooling. During March 1943 he enlisted as an Air Cadet and upon completion of his training as a pilot was commissioned a second lieutenant, Air Corps, 5 December 1943.

10. The court was legally constituted and had jurisdiction over the accused and of 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 of the sentence. Dismissal is authorized upon a conviction of a violation of Article of War 96.

Wm. G. Jones, Judge Advocate.

Earle Johnson, Judge Advocate.

Wm. M. Mayo, Judge Advocate.

1st Ind.

War Department, J.A.G.O.,

28 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 Second Lieutenant Lloyd C. Bowman, Jr. (O-815703), 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.

3. Consideration has been given to a letter attached to the record of trial from Lieutenant Colonel Frank A. Flynn, Air Corps, defense counsel, addressed to the Commanding General, Fourth Air Force, urgently requesting and recommending that the sentence to dismissal be suspended because of accused's excellent character and experience as a skillful pilot. Consideration has also been given to the attached letter from General H. H. Arnold, Commanding General, Army Air Forces, dated 23 October 1944, stating that he has considered the evidence in the case and that in his opinion there are no extenuating circumstances which call for clemency, and recommending that the sentence be confirmed and ordered executed, in which recommendation I concur.

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



Myron C. Cramer,  
Major General,

The Judge Advocate General.

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. Gen. H.H.  
Arnold, CG, AAF.

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(Sentence confirmed. G.C.M.O. 648, 16 Dec 1944)

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

(157)

SPJGN  
CM 264556

20 OCT 1944

UNITED STATES )  
                  ) )  
                  v. )  
                  ) )  
Second Lieutenant CHARLES )  
D. GAMBS (01321765), In- )  
fantry. ) )

42D INFANTRY DIVISION

Trial by G.C.M., convened  
at Camp Gruber, Oklahoma,  
4 September 1944. Dis-  
missal, total forfeitures,  
and confinement at hard  
labor for ten (10) years.

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OPINION of the BOARD OF REVIEW  
LIPSCOMB, O'CONNOR and GOLDEN, Judge Advocates

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

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

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

Specification: In that Second Lieutenant Charles D. Gambs, Company M, 242d Infantry, did, without proper leave, absent himself from his organization at Camp Gruber, Oklahoma, from about 14 February 1944 to about 26 April 1944.

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

Specification: In that Second Lieutenant Charles D. Gambs, Company M, 242d Infantry, did, at Camp Gruber, Oklahoma, on or about 12 February 1944, feloniously embezzle, by fraudulently converting to his own use, one 1940 Ford Convertible Coupe automobile, motor number 18-5770517, 1944 Georgia license number C-28389, of the value of about \$650.00, the property of Second Lieutenant Thomas J. Gwin, 242d Infantry, entrusted to him, the said Second Lieutenant Charles D. Gambs, by the said Second Lieutenant Thomas J. Gwin.



- Specification 4: Same form as Specification 2, but alleging check drawn on same bank, dated 14 February 1944, payable to order of Adams Hotel, made and uttered to the Adams Hotel, Tulsa, Oklahoma, and fraudulently obtaining thereby \$15.
- Specification 5: Same form as Specification 2, but alleging check drawn on same bank, dated 15 February 1944, payable to order of Clarke's, made and uttered to Clarke Bros., Tulsa, Oklahoma, and fraudulently obtaining thereby merchandise of the value of \$15, or the sum of \$15 in U.S. currency, or cash and merchandise aggregating \$15.
- Specification 6: Same form as Specification 2, but alleging check drawn on same bank, dated 15 February 1944, payable to order of Cash, made and uttered to National Bank of Tulsa, Tulsa, Oklahoma, and fraudulently obtaining thereby \$20.
- Specification 7: Same form as Specification 2, but alleging check drawn on same bank, dated 17 February 1944, payable to order of Cash, made and uttered to Republic National Bank, Dallas, Texas, and fraudulently obtaining thereby \$20.
- Specification 8: Same form as Specification 2, but alleging check drawn on same bank, dated 18 February 1944, payable to order of Cash, made and uttered to Republic National Bank, Dallas, Texas, and fraudulently obtaining thereby \$25.
- Specification 9: Same form as Specification 2, but alleging check drawn on same bank, dated 19 February 1944, payable to order of Mrs. Alfred Andersen, made and uttered to Mrs. Alfred Andersen, 2016 S. Beckley Ave., Dallas, Texas, and fraudulently obtaining thereby \$10.
- Specification 10: Same form as Specification 2, but alleging check drawn on same bank, dated 19 February 1944, payable to order of Ring and Brewer, made and uttered to Ring & Brewer, Dallas, Texas, and fraudulently obtaining thereby merchandise of the value of \$20.70.
- Specification 11: Same form as Specification 2, but alleging check drawn on same bank, dated 21 February 1944, payable to order of H. E. Collins, made and uttered to H. E. Collins, Dallas, Texas, and fraudulently obtaining thereby \$10.

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- Specification 12: Same form as Specification 2, but alleging check drawn on same bank, dated 21 February 1944, payable to order of Miss Ruth McClintock, made and uttered to Miss Ruth McClintock, Dallas, Texas, and fraudulently obtaining thereby \$10.
- Specification 13: Same form as Specification 2, but alleging check drawn on same bank, dated 22 February 1944, payable to order of Glenn Bartoo, made and uttered to Glenn Bartoo, Anthony, New Mexico, and fraudulently obtaining thereby \$2.75 in cash and \$2.25 in merchandise.
- Specification 14: Same form as Specification 2, but alleging check drawn on same bank, dated 23 February 1944, payable to order of Dana Bros., made and uttered to Dana Bros., Tempe, Arizona, and fraudulently obtaining thereby \$8.77 in cash and \$1.23 in merchandise.
- Specification 15: Same form as Specification 2, but alleging check drawn on same bank, dated 23 February 1944, payable to order of B. P. Hale, made and uttered to B. P. Hale, Los Angeles, California, and fraudulently obtaining thereby \$20.
- Specification 16: Same form as Specification 2, but alleging check drawn on same bank, dated 23 February 1944, payable to order of Cash, made and uttered to Bank of America, Monterey Park Branch #944, Monterey Park, California, and fraudulently obtaining thereby \$20.
- Specification 17: Same form as Specification 2, but alleging check drawn on same bank, dated 23 February 1944, payable to order of Cash, made and uttered to Burnrose Enterprises, Inc., Hollywood, California, and fraudulently obtaining thereby \$20.
- Specification 18: Same form as Specification 2, but alleging check drawn on same bank, dated 29 February 1944, payable to order of Cash, made and uttered to Burnrose Enterprises, Inc., Hollywood, California, and fraudulently obtaining thereby \$40.
- Specification 19: Same form as Specification 2, but alleging check drawn on same bank, dated 29 February 1944, payable to order of Cash, made and uttered to Burnrose Enterprises, Inc., Hollywood, California, and fraudulently obtaining thereby \$40.

- Specification 20: Same form as Specification 2, but alleging check drawn on same bank, dated 2 March 1944, payable to order of Cash, made and uttered to Burnrose Enterprises, Inc., Hollywood, California, and fraudulently obtaining thereby \$25.
- Specification 21: Same form as Specification 2, but alleging check drawn on same bank, dated 25 February 1944, payable to order of Cash, made and uttered to The Hollywood State Bank, and fraudulently obtaining thereby \$20.
- Specification 22: Same form as Specification 2, but alleging check drawn on same bank, dated 25 February 1944, payable to order of Cash, made and uttered to Southern California Enterprises, Inc., Hollywood, California, and fraudulently obtaining thereby \$10.
- Specification 23: Same form as Specification 2, but alleging check drawn on same bank, dated 28 February 1944, payable to order of Cash, made and uttered to the Bank of America, Hollywood-Highland Branch, Hollywood, California, and fraudulently obtaining thereby \$20.
- Specification 24: Same form as Specification 2, but alleging check drawn on same bank, dated 29 February 1944, payable to order of Cash, made and uttered to the Bank of America, Gower Sunset Branch, Hollywood, California, and fraudulently obtaining thereby \$25.
- Specification 25: Same form as Specification 2, but alleging check drawn on same bank, dated 1 March 1944, payable to order of Cash, made and uttered to Security-First National Bank of Los Angeles, Western & Beverly Branch, Los Angeles, California, and fraudulently obtaining thereby \$25.
- Specification 26: Same form as Specification 2, but alleging check drawn on same bank, dated 1 March 1944, payable to order of Cash, made and uttered to Security-First National Bank of Los Angeles, Melrose & Fairfax Branch, Los Angeles, California, and fraudulently obtaining thereby \$25.
- Specification 27: Same form as Specification 2, but alleging check drawn on same bank, dated 2 March 1944, payable to order of \_\_\_\_\_, made and uttered to Security-First National Bank of Los Angeles, Melrose & Fairfax Branch, Los Angeles, California, and fraudulently obtaining thereby \$25.

- Specification 28: Same form as Specification 2, but alleging check drawn on same bank, dated 8 March 1944, payable to order of Cash, made and uttered to Bank of America, Camp Roberts Branch, Camp Roberts, California, and fraudulently obtaining thereby \$40.
- Specification 29: Same form as Specification 2, but alleging check drawn on same bank, dated 9 March 1944, payable to order of Cash, made and uttered to Bank of America, Camp Roberts Branch, Camp Roberts, California, and fraudulently obtaining thereby \$50.
- Specification 30: Same form as Specification 2, but alleging check drawn on same bank, dated 3 February 1944, payable to order of Cash, made and uttered to Joseph A. Lowy, Los Angeles, California, and fraudulently obtaining thereby \$5.
- Specification 31: Same form as Specification 2, but alleging check drawn on Bank of America, National Trust and Savings Association, dated 11 March 1944, payable to order of Cash, made and uttered to Bank of America, Monterey Branch, and fraudulently obtaining thereby \$40.
- Specification 32: Same form as Specification 2, but alleging check drawn on same bank, dated 13 March 1944, payable to order of Cash, made and uttered to First National Bank, Reno, Nevada, and fraudulently obtaining thereby \$25.
- Specification 33: Same form as Specification 2, but alleging check drawn on the First National Bank of Columbus, Georgia, dated 15 March 1944, payable to order of Cash, made and uttered to the First Security Bank of Utah, Ogden, Utah, and fraudulently obtaining thereby \$20.
- Specification 34: Same form as Specification 2, but alleging check drawn on the First National Bank of Columbus, Georgia, dated 15 March 1944, payable to order of Cash, made and uttered to Bill Nelson, Idaho Falls, and fraudulently obtaining thereby \$20 in merchandise.
- Specification 35: Same form as Specification 2, but alleging check drawn on the First National Bank of Columbus, Georgia, dated 17 March 1944, payable to order of Cash, made and uttered to Bill Nelson, Idaho Falls, Idaho, and fraudulently obtaining thereby \$30 in merchandise.

Specification 36: Same form as Specification 2, but alleging check drawn on the First National Bank of Columbus, Georgia, dated 20 March 1944, payable to order of Cash, made and uttered to Bill Nelson, Idaho Falls, Idaho, and fraudulently obtaining thereby \$20 in merchandise.

Specification 37: Same form as Specification 2, but alleging check drawn on the First National Bank of Columbus, Georgia, dated 21 March 1944, payable to order of Cash, made and uttered to Bill Nelson, Idaho Falls, Idaho, and fraudulently obtaining thereby \$20 in merchandise.

Specification 38: Same form as Specification 2, but alleging check drawn on the First National Bank of Columbus, Georgia, dated 21 March 1944, payable to order of Cash, made and uttered to Bill Nelson, Idaho Falls, Idaho, and fraudulently obtaining thereby \$15 in merchandise.

Specification 39: Same form as Specification 2, but alleging check drawn on the First National Bank of Columbus, Georgia, dated 23 March 1944, payable to order of Cash, made and uttered to Pete Westergard and Viggo Westergard, Co-partners doing business as "The Club," Dillon, Montana, and fraudulently obtaining thereby \$50.

Specification 40: Same form as Specification 2, but alleging check drawn on the First National Bank of Columbus, Georgia, dated 23 March 1944, payable to order of Cash, made and uttered to Pete Westergard and Viggo Westergard, Co-partners doing business at "The Club," Dillon, Montana, and fraudulently obtaining thereby \$50.

Specification 41: Same form as Specification 2, but alleging check drawn on the First National Bank of Columbus, Georgia, dated 28 March 1944, payable to order of Cash, made and uttered to John A. Gavan, Beaver Bar, Butte, Montana, and fraudulently obtaining thereby \$25.

Specification 42: Same form as Specification 2, but alleging check drawn on the First National Bank of Columbus, Georgia, dated 28 March 1944, payable to order of Woodrow H. Sylvester, made and uttered to Woodrow H. Sylvester, Naval Construction Battalion, Camp Parks, California, and fraudulently obtaining thereby \$100.

Specification 43: Same form as Specification 2, but alleging check drawn on same bank, dated 4 April 1944, payable to order of Cash, made and uttered to H. J. Elbert, Plaza Bar, Three Forks, Montana, and fraudulently obtaining thereby \$100.

Specification 44: Same form as Specification 2, but alleging check drawn on same bank, dated 4 April 1944, payable to order of Cash, made and uttered to H. J. Elbert, Plaza Bar, Three Forks, Montana, and fraudulently obtaining thereby \$100.

Specification 45: Same form as Specification 2, but alleging check drawn on same bank, dated 4 April 1944, payable to order of Cash, made and uttered to H. J. Elbert, Plaza Bar, Three Forks, Montana, and fraudulently obtaining thereby \$25.

Specification 46: Same form as Specification 2, but alleging check drawn on same bank, dated 4 April 1944, payable to order of Cash, made and uttered to H. J. Elbert, Plaza Bar, Three Forks, Montana, and fraudulently obtaining thereby \$25.

Specification 47: In that Second Lieutenant Charles D. Gambs, Company M, 242d Infantry, did, at Three Forks, Montana, on or about 5 April 1944, with intent to defraud, wrongfully and unlawfully make and utter to Russell M. Dunbar, Three Forks, Montana, a certain instrument in words and figures as follows, to wit:

Muskogee, Oklahoma April 5 1944 No.

Pay to the  
Order of Cash \$200.00

Two Hundred Dollars & no cents DOLLARS

Hq Co 3rd Bn 242 Inf  
Camp Gruber, Okla.

Charles D. Gambs  
2nd Lt 242 Inf 0-1321765

and by means thereof did fraudulently obtain from the said Russell M. Dunbar, the sum of \$200.00, lawful money of the United States, he, the said Second Lieutenant Charles D. Gambs then well knowing that he did not have and not intending that he should have any funds for the payment of such instrument.

Specification 48: In that Second Lieutenant Charles D. Gambs, Company M, 242d Infantry, did, at Reno, Nevada, on or about 13 March 1944, with intent to defraud, wrongfully and unlawfully represent to Jack W. Duels, Reno, Nevada, that he, the said Second Lieutenant Charles D. Gambs was the owner of a certain 1940 Ford Convertible Coupe, motor #18-

5770517, 1944 Georgia License No. C-28389, and that he had the right to sell the same, and did then and there purport to sell such automobile to said Jack W. Duelks for the sum of \$650.00, and did then and there deliver such automobile to the said Jack W. Duelks, and by means thereof did on or about 13 March, 1944, obtain the sum of \$100.00, lawful money of the United States and did on or about 14 March 1944 obtain the sum of \$75.00 lawful money of the United States, from the said Jack W. Duelks, as part payment of the purchase price of such automobile, which such representations were false as he, the said Second Lieutenant Charles W. Gambs then well knew, in that the said automobile was the property of Second Lieutenant Thomas J. Gwin, Company M, 242d Infantry, and he, the said Second Lieutenant Charles D. Gambs had no authority to transfer or sell the same.

Specification 49: In that Second Lieutenant Charles D. Gambs, Company M, 242d Infantry, did, on or about 22 March 1944, at Dillon, County of Beaverhead, Montana, enter into a bigamous marriage with one Gwendlyon Barnson, Idaho Falls, Idaho, he, the said Second Lieutenant Charles D. Gambs, being then and there married to Elfreda Karoline Ziem's Gambs, Mapleton, Iowa, who was then and there living and which marriage was then and there in full force and effect, undissolved by decree of divorce or otherwise.

The accused pleaded not guilty to, and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for twenty years. The reviewing authority disapproved the finding of guilty of Specification 31 of Charge III, 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. The evidence for the prosecution shows that the accused and Second Lieutenant Thomas J. Gwin were members of the same company at Camp Gruber, Oklahoma, from the last week of August to about the middle of October, 1943. They became "fairly close friends," and, when they were subsequently temporarily assigned to Fort Benning, Georgia, for further instruction in their respective specialties, they continued to see one another occasionally. Twice, upon expressing a desire to visit Columbus, Georgia, some ten miles away, the accused had been granted permission to borrow Lieutenant Gwin's automobile. In both instances it had been used overnight and returned the following day in good condition (Pros. Ex. 4).

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Lieutenant Gwin on 8 January 1944 traded the car for a green 1940 Ford convertible coupe with "white sidewall tires." In this newly acquired vehicle he, upon the completion of his course, travelled the 3,000 miles to Camp Gruber, arriving there on 23 January 1944. Not long after the accused also returned from Fort Benning, and the two men immediately resumed their friendly relationship (Pros. Ex. 4).

The accused on 12 February 1944 requested a loan of the coupe for a trip to nearby Muskogee, Oklahoma. Lieutenant Gwin "didn't particularly want to let him have it" but finally consented at noon after being asked "about five times." It was agreed that the car would be "back at two o'clock the following day, which was Sunday" (Pros. Exs. 4, 105-106).

Later that same Saturday afternoon the accused obtained a "VOCO" granting him leave until Monday morning, 14 February 1944 (Pros. Ex. 1). He immediately left Camp Gruber and drove not to Muskogee as he had represented he would but to Tulsa, Oklahoma. There he proceeded to get drunk (Pros. Ex. 105, 106). When Monday morning arrived, he failed to report back to Camp Gruber. His Commanding Officer, First Lieutenant Jack W. Gollust, was initially not unduly disturbed because a snowstorm over the week-end suggested a possible reason for a delay. When, however, the accused was found not to have been either within the company area or at Division Headquarters at any time during the day, Lieutenant Gollust concluded "that he was absent without leave and made an entry to that effect in the Headquarters Company morning report" (Pros. Exs. 1, 2, 3). Not until 26 April 1944, some two and one half weeks after he had been apprehended in Livingston, Montana, was the accused again present for duty (R. 27, 57; Pros. Ex. 2).

During this period of absence without leave he travelled extensively in Gwin's car and by train through the southwest, west, and northwest and "was drunk a good share of the time" (Pros. Exs. 105, 106). To finance his long itinerary he executed and uttered a series of worthless checks against the First National Bank and Trust Company of Muskogee, Oklahoma, and the First National Bank of Columbus, Georgia. He had made a deposit in the first institution on 3 February 1944 but none thereafter (R. 45; Pros. Exs. 19, 21). On that date he personally called for and received a statement showing the exact status of his account (R. 44-45; Pros. Ex. 20). His net balance was then \$122.26. As of 11 February it had dropped to \$1.76 (Pros. Ex. 19). By 24 February 1944 even this sum was consumed by various charges, and the account was closed (R. 46-47; Pros. Ex. 19). The accused had never had an account with the First National Bank of Columbus, Georgia (Pros. Ex. 80).

The checks which were drawn by him against the First National Bank and Trust Company of Muskogee, Oklahoma, were as follows:

<u>Cashing Parties</u>	<u>Date</u>	<u>Amount</u>
Mayo Hotel, Tulsa, Okla.	13 Feb. 1944	\$25.00 (R.49-50; Pros.Ex.22).
Mayo Hotel, Tulsa, Okla.	13 Feb. 1944	18.00 (R.50-51; Pros.Ex.23).
Adams Hotel, Tulsa, Okla.	14 Feb. 1944	15.00 (R.52-53; Pros.Ex.24).
Clarke's, Tulsa, Okla.	15 Feb. 1944	15.00 (R.53-54; Pros.Ex.25).
Nat'l Bank of Tulsa, Tulsa, Okla.	15 Feb. 1944	20.00 (R.55-56; Pros.Ex.26).
Republic Nat'l Bank, Dallas, Tex.	17 Feb. 1944	20.00 (Pros.Ex. 27, 28, 29).
Republic Nat'l Bank, Dallas, Tex.	18 Feb. 1944	25.00 (Pros.Ex. 27, 30, 31).
Mrs. Alfred Andersen, Dallas, Texas	19 Feb. 1944	10.00 (Pros. Ex. 32, 33).
Ring and Brewer, Dallas, Tex.	19 Feb. 1944	20.70 (Pros. Ex. 34, 35, 36).
H. E. Collins, Dallas, Tex.	21 Feb. 1944	10.00 (Pros. Ex. 37, 38).
Miss Ruth McClintock, Dallas, Texas	21 Feb. 1944	10.00 (Pros. Ex. 39, 40).
Glenn Bartoo, Anthony, N.Mex.	22 Feb. 1944	5.00 (Pros. Ex. 41, 42, 43).
Dana Bros., Tempe, Ariz.	23 Feb. 1944	10.00 (Pros. Ex. 44, 45).
B. P. Hale, Los Angeles, Cal.	23 Feb. 1944	20.00 (Pros. Ex. 46, 47).
Bank of America, Monterey Park, Cal.	23 Feb. 1944	20.00 (Pros. Ex. 48, 49).
Burnrose Enterprises, Inc., Hollywood, California	23 Feb. 1944	20.00 (Pros. Ex. 50, 51, 52).
Burnrose Enterprises, Inc., Hollywood, California	29 Feb. 1944	40.00 (Pros. Ex. 50, 51, 53).
Burnrose Enterprises, Inc., Hollywood, California	29 Feb. 1944	40.00 (Pros. Ex. 50, 51, 54).
Burnrose Enterprises, Inc., Hollywood, California	2 Mar. 1944	25.00 (Pros. Ex. 50, 51, 55).
Hollywood State Bank, Hollywood, California	25 Feb. 1944	20.00 (Pros. Ex. 56, 57).
Southern Calif. Enterprises, Inc., Hollywood, Cal.	25 Feb. 1944	10.00 (Pros. Ex. 58, 59, 60).
Bank of America, Hollywood, California	28 Feb. 1944	20.00 (Pros. Ex. 61, 62, 63).
Bank of America, Hollywood, California	29 Feb. 1944	25.00 (Pros. Ex. 64, 65).
Security-First Nat'l Bank, Los Angeles, Cal.	1 Mar. 1944	25.00 (Pros. Ex. 66, 67).
Security-First Nat'l Bank, Los Angeles, Cal.	1 Mar. 1944	25.00 (Pros. Ex. 68, 69).
Security-First Nat'l Bank, Los Angeles, Cal.	2 Mar. 1944	25.00 (Pros. Ex. 68, 70).

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<u>Cashing Parties</u>	<u>Date</u>	<u>Amount</u>
Bank of America, Camp Roberts, Cal.	8 Mar. 1944	\$40.00 (Pros. Ex. 71, 72).
Bank of America, Camp Roberts, Cal.	9 Mar. 1944	50.00 (Pros. Ex. 71, 73).
Joseph A. Lowy, Los Angeles, Cal.	3 Feb. 1944	5.00 (Pros. Ex. 74, 75).
First Nat'l Bank, Reno, Nev.	13 Mar. 1944	25.00 (Pros. Ex. 78, 79).
H. J. Elbert, Three Forks, Montana	4 Apr. 1944	100.00 (Pros. Ex. 98, 99).
H. J. Elbert, Three Forks, Montana	4 Apr. 1944	100.00 (Pros. Ex. 98, 100).
H. J. Elbert, Three Forks, Montana	4 Apr. 1944	25.00 (Pros. Ex. 98, 101).
H. J. Elbert, Three Forks, Montana	4 Apr. 1944	25.00 (Pros. Ex. 98, 102).

The following instruments were drawn by the accused against the First National Bank of Columbus, Georgia:

<u>Cashing Parties</u>	<u>Date</u>	<u>Amount</u>
First Security Bank of Utah, Ogden, Utah	15 Mar. 1944	\$20.00 (Pros. Ex. 81, 82).
Bill Nelson, Idaho Falls, Ida.	15 Mar. 1944	20.00 (Pros. Ex. 83, 84).
" " " "	" 17 Mar. 1944	30.00 (Pros. Ex. 83, 85).
" " " "	" 20 Mar. 1944	20.00 (Pros. Ex. 83, 86).
" " " "	" 21 Mar. 1944	20.00 (Pros. Ex. 83, 87).
" " " "	" 21 Mar. 1944	15.00 (Pros. Ex. 83, 88).
Pete Westergard & Viggo Westergard, Dillon, Montana	23 Mar. 1944	50.00 (Pros. Ex. 89, 90, 91).
Pete Westergard & Viggo Westergard, Dillon, Montana	23 Mar. 1944	50.00 (Pros. Ex. 89, 90, 92).
John A. Gavan Butte, Montana	28 Mar. 1944	25.00 (Pros. Ex. 93, 94, 95).
Woodrow H. Sylvester, Butte, Montana	28 Mar. 1944	100.00 (Pros. Ex. 96, 97).

Good and valuable consideration in the form of cash or merchandise was paid for these checks at their full face value. All the checks were returned because of insufficient funds or because of the non-existence of the drawee account. No reimbursement has been made by the accused for the sums which he received.

The accused left Tulsa, Oklahoma, on 15 or 16 February 1944 (Pros. Exs. 27, 28, 29, 105, 106). His trail thenceforward can be traced by noting the dates of the checks listed above and the addresses of his victims. The route leads to Dallas, Texas; Anthony, New Mexico; Tempe, Arizona; Los Angeles, Hollywood, Monterey Park, and Camp Roberts, California; Reno, Nevada; Ogden, Utah; Idaho Falls, Idaho; and Dillon, Butte, and Three Forks, Montana. All of the journey from Tulsa to the first eight named places was made in Lieutenant Gwin's coupe (Pros. Exs. 105, 106). In Reno the accused decided to sell the car. He arrived in that town on 13 March 1944, accompanied by Seaman Second Class Laura Marguerite Albertus whom he had met in Hollywood. They had previously made other trips together to Camp Roberts, Paso Robles, and Monterey, California, and she was under the impression that the purpose of the present one was their marriage (Pros. Ex. 12).

About 3:00 o'clock that afternoon they drove into the garage of Mr. Jack W. Duelks, an automobile dealer, and asked him to buy the coupe (R. 28). After some bargaining, a price of \$650.00 was agreed upon (R. 29; Pros. Exs. 105, 106). The accused of course did not have a certificate of title or any other evidence of ownership, but he represented that he had purchased the car from Lieutenant Gwin and had taken steps to record the transfer in Georgia (R. 29; Pros. Ex. 12). Relying upon the truth of these remarks, Mr. Duelks offered to pay \$100 immediately and the balance upon receipt of confirmation from the Georgia Motor Vehicle Department. This arrangement having been declared by the accused to be "all right," a check for \$100.00 was delivered to him and was promptly cashed by him at the Toscano Hotel (R. 29-31; Pros. Ex. 5). In return he executed an instrument purporting to be an informal bill of sale (R. 31-32; Pros. Ex. 6).

A night letter inquiring as to the ownership of the coupe was dispatched to the Georgia Motor Vehicle Department (R. 32). The reply came by wire the following day, 14 March 1944 (R. 29, 32; Pros. Ex. 12). Upon learning that title was in Lieutenant Gwin, Mr. Duelks went to see the accused at the dining room of the Toscano Hotel (R. 32). When confronted with the telegram from the Georgia Motor Vehicle Department, the accused characterized the information furnished as a "lot of 'hocey'", insisted that the car was his, and even offered to pay for a telephone call to Lieutenant Gwin to prove the fact (R. 32-33). Mr. Duelks has summarized the conversation which then ensued as follows:

"He said 'There must be something wrong there, because the car belongs to me, and if you don't believe that, I will pay for a telephone call to Gwin at Camp Gruber' and I said, 'I don't believe that is necessary.' He said 'The papers for that automobile are in my footlocker, and as soon as I get back I will send them to you.' He said, 'If there is a question to the title, and Gwin is on maneuvers, I will get in a jeep and go out and get it straightened out.' I said, 'If you

are going to be AWOL, I will give you the money to get back to camp' so I went over to the railroad station with him and he told me the fare was \$38.00. I questioned him about that and he said 'Well, I am on furlough and I get a reduced rate'. I said, 'Well, there's your wife, you will have to send her back'. I said 'You are going to have to have more than that,' so I said, 'I will give you an additional \$75.00 so you can eat and won't be embarrassed by not having any money'. He said 'I am going right back there, and I will send the papers to you.' So I gave him an additional \$75.00." (R. 33).

The check for this sum was also cashed at the Toscano Hotel (R. 33; Pros. Ex. 11). The accused was also given a note for the balance of \$471.27 (Pros. Ex. 7). "It was an odd amount because he had agreed to pay for the telegram" (R. 35). He, on his part, signed two powers of attorney and a formal bill of sale (R. 34; Pros. Exs. 8, 9, 10). All three of these instruments were also executed by Seaman Second Class Albertus as "Mrs. C. D. Gams." She affixed her signature at the request of the accused and upon his assurance that "it was all right since we were going to be married that afternoon" (R. 34; Pros. Ex. 12). This promise was apparently not kept. It could not lawfully have been performed because the accused was then, and had been since 14 April 1941, married to Elfreda Karoline Ziemas Gams of Mapleton, Iowa (Pros. Exs. 13, 14).

After waiting several days for the title papers, Mr. Duelks wrote a letter and then sent a telegram inquiring about them (R. 36). Having received no reply, he wired the accused's Commanding Officer. This time he obtained a prompt answer, and shortly thereafter the car was seized by the police (R. 36). No part of the deposit of \$175 was ever repaid to Mr. Duelks. In his opinion the fair cash market value of the coupe was \$650.00 (R. 36, 37).

From Reno the accused travelled by train first to Ogden, Utah, and then to Idaho Falls, Idaho (Pros. Ex. 105, 106). He was in this latter town about a week and spent most of his time with Miss Gwendlyon Barnson with whom he became acquainted in "Gill's Cafe" (Pros. Exs. 15, 105, 106). On 22 March 1944 they went through a marriage ceremony in Dillon, Montana, before Justice of the Peace Louis Stahl (Pros. Exs. 16, 17, 105, 106). She knew that he had been married before but acted in good faith, believing that he was divorced (Pros. Ex. 15). Elfreda Gams was, however, still his lawful wife (Pros. Exs. 13, 14, 105, 106). He and Gwendlyon lived together for only three days. They parted on 26 March 1944 upon his representation that he "was going to see [his] brother in Bozeman [Montana] and then return to camp at Muskogee, Oklahoma" (Pros. Exs. 15, 105, 106).

Enroute to Bozeman he stopped off at Three Forks, Montana, on 5 April 1944 (Pros. Exs. 105, 106). After getting drunk and becoming involved in a poker game, he passed several checks as already noted in the list of defrauded parties above. At the Plaza Bar he met Mr. Russell McGinnis Dunbar, a railroad man. While playing the punch board, the accused remarked that "he was just back from overseas, and had saved \$3000.00 which he thought he might as well spend while he had the chance" (Pros. Ex. 103). In the course of the evening he asked Mr. Dunbar to cash a check in the sum of \$200 for him. The name of the bank on the instrument had been lined through, and the words "Muskogee, Okla." had been written above. Mr. Dunbar either did not notice or did not attach any significance to the omission of the name of any drawee institution, for he accepted the instrument at face value and paid \$200.00 for it. Subsequently, upon learning that a friend of his had had another one of the accused's checks returned for insufficient funds, Mr. Dunbar did not bother to deposit his (Pros. Ex. 103).

The accused was apprehended at the bar of the Park Hotel in Livingston, Montana, on 7 April 1944, by Mr. Edward W. Mayer, a Special Agent of the FBI, and two deputy sheriffs (R. 57). After being warned of his right to remain silent and to retain counsel, the accused freely made and signed a voluntary statement setting forth all of his peregrinations and admitting all of the offenses outlined above (R. 57-59; Pros. Exs. 105, 106).

4. After being fully advised of his rights as a witness, the accused elected to remain silent. No evidence was adduced on his behalf.

5. The Specification of Charge I alleges that the accused "did, without proper leave absent himself from his organization at Camp Gruber, Oklahoma, from about 14 February 1944 to about 26 April 1944". This offense was laid under Article of War 61.

The "VOCO" under which the accused left Camp Gruber expired on the morning of 14 February 1944. For seventy-two days thereafter he was absent from his organization. He did not return of his own free will but only after he had been apprehended by civilian authorities. Beyond a reasonable doubt he is guilty of the Specification of Charge I.

6. The Specification of Charge II alleges that the accused did, "on or about 12 February 1944, feloniously embezzle, by fraudulently converting to his own use, one 1940 Ford Convertible Coupe automobile . . . of the value of about \$650.00, the property of Second Lieutenant Thomas J. Gwin..., entrusted to him, the said [accused], by the said Second Lieutenant Thomas J. Gwin." This was set forth as a violation of Article of War 93. Specification 1 of Charge III alleges that the accused "did, on or about 17 February 1944, in violation of Section 408, Title 18, U.S. Code, unlawfully and wrongfully transport in interstate commerce

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between Camp Gruber, Oklahoma, and Reno, Nevada, a stolen vehicle to wit: 1940 Ford Convertible Coupe ....., the property of Second Lieutenant Thomas J. Gwin ....., he, the said accused well knowing the said vehicle to have been stolen." Specification 48 of Charge III alleges that the accused did on or about 13 March 1944, "with intent to defraud, wrongfully and unlawfully" make certain representations to Jack W. Duelks, "did then and there purport to sell" and did deliver the said coupe to him, and "by means thereof" did on that day "obtain the sum of \$100.00... and did on or about 14 March 1944 obtain the sum of \$75.00" from him, "as part payment of the purchase price of such automobile, which such representations were false as he, the said accused then well knew, in that the said automobile was the property of Second Lieutenant Thomas J. Gwin....and, he, the said accused had no authority to transfer or sell the same." These last two acts were stated to be in contravention of Article of War 96.

The coupe came into the hands of the accused lawfully. In loaning it to him for the weekend of 12 to 13 February 1944 Lieutenant Gwin relied upon their friendship of long duration and upon their past dealings. The relationship between them was clearly one of complete confidence. By failing to return the car and by using it as a means of transportation for an extended tour through the Southwest and West, the accused committed a fraudulent conversion and breach of trust constituting embezzlement. His fraudulent intent is conclusively shown by his subsequent sale to Mr. Duelks.

Section 408, Title 18, of the United States Code reads in part as follows:

"Whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than \$5000, or by imprisonment of not more than five years, or both."

In construing this provision, District Judge Miller said in United States v. Adcock, 49 F. Supp. 351 (D.C. W.D. Ky. 1943) that:

"I am of the opinion that the word 'stolen' is used in the statute not in the technical sense of what constitutes larceny, but in its well known and accepted meaning of taking the personal property of another for one's own use without right or law, and that such a taking can exist whenever the intent to do so comes into existence and is deliberately carried out regardless of how the party so taking the car may have originally come into possession of it."

Crabb v. Zerbst, 99 F. (2d) 562 (C.C.A., 5th, 1938) and United States v. Handler, 142 F. (2d) 351 (C.C.A., 2nd, 1944) are to the same effect. The accused, being himself the embezzler, knew of course that the coupe was "stolen." Since he used it in interstate commerce to travel from Oklahoma to Texas, New Mexico, Arizona, California, and Nevada, he obviously violated Section 408 quoted above.

Throughout the transaction with Mr. Duelks his conduct was calculated to mislead and cheat. He well knew that he was not the owner, that he had no right to sell, and that he had no title to transfer. His representations and acts to the contrary were obviously false and fraudulent and with intent to deceive. His acceptance of the two checks aggregating \$175.00 furnishes conclusive evidence of his pernicious motives. Specification 48 of Charge III as well as Specification 1 of that Charge and the Specification of Charge II have been proved beyond a reasonable doubt.

7. Specifications 2 to 30, 32, and 43 to 46 allege that the accused on various dates between 13 February and 4 April 1944 did, "with intent to defraud, wrongfully and unlawfully make and utter" to certain parties some thirty-four different checks ranging in amount from \$5.00 to \$100.00, and "by means thereof did fraudulently obtain from the said" parties the face value of the said checks in cash or merchandise, or both, he "then well knowing that he did not have and not intending that he should have any funds in the First National Bank and Trust Company of Muskogee, Oklahoma, for the payment of such" checks. Specifications 33 to 42 allege that the accused on various dates between 15 March and 28 March 1944 committed the same offense against several other parties with respect to ten more checks ranging in amount from \$15.00 to \$100.00, he "then well knowing that he did not have and not intending that he should have any account in the First National Bank of Columbus, Georgia, for the payment of such" checks. These acts were all laid under Article of War 96.

The accused obtained a statement from the First National Bank and Trust Company of Muskogee, Oklahoma, on 3 February. From that moment he was on express notice of the exact condition of his account. Within the next eight days he wrote a number of checks reducing his net balance to \$1.76. With his account at this low ebb he began to make and utter a stream of bad checks. The very first was in the sum of \$25.00 and on its face was greatly in excess of the \$1.76 standing to his credit. Since he had accurate knowledge of his balance, the only construction which can reasonably be placed upon his drawing checks against the First National Bank and Trust Company of Muskogee, Oklahoma, is that he intended to defraud. The same is even more true of the instruments drawn against the First National Bank of Columbus, Georgia. Having never had any account with that institution, he could not have honestly expected them to be honored. His motive was patently to cheat and to defraud the men and women who trustingly gave him cash and merchandise for his worthless paper. Specifications 2 to 30, and 32 to 46 have been sustained beyond a reasonable doubt.

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8. Specification 47 of Charge III alleges that the accused did, "on or about 5 April 1944, with intent to defraud, wrongfully make and utter to Russell M. Dunbar ... a certain instrument ... and by means thereof did fraudulently obtain from the said Russell M. Dunbar, the sum of \$200.00 ..., he, the said [accused] then well knowing that he did not have and not intending that he should have any funds for the payment of such instrument." This was set forth as a violation of Article of War 96.

The purpose and the result of the transaction between the accused and Dunbar were identical with those associated with the forty-four worthless checks forming the gravamen of Specifications 2 to 30 and 32 to 46. The sole distinctions are that in this case the name of the drawee bank was inadvertently omitted from the face of the instrument and that Dunbar, upon learning that no funds were available, made no presentation for payment. Neither circumstance diminishes the gravity of the offense. The accused, knowing that the instrument was worthless, deceitfully and fraudulently obtained \$200 in cash for it upon the false pretense that it was a bona fide check redeemable at face value. That Dunbar did not present the instrument for payment is immaterial, for a defrauded party will not be required to perform a futile act to protect his rights. Specification 47 is supported beyond a reasonable doubt by the record.

9. Specification 49 of Charge III alleges that the accused did, "on or about 22 March 1944," "enter into a bigamous marriage with one Gwendlyon Barnson ..., he the said [accused] being then and there married to Elfreda Karoline Ziems Gams, ... who was then and there living and which marriage was then and there in full force and effect, undissolved by decree of divorce or otherwise." This offense was also charged in contravention of Article of War 96.

The prior marriage of the accused to Elfreda Karoline Ziems Gams on 14 April 1941, the uninterrupted continuance of their marital union to and after 22 March 1944, and the marriage ceremony on the last date by which the accused attempted to take unto himself a second wife, while still legally bound to his first, have all been proved by competent evidence. Bigamy has been conclusively established.

10. The accused is married and about 29 years old. The records of the War Department show that he was graduated from high school; that between April of 1937 and September of 1940 he was successively employed as a "packer" in the forest service, a trail foreman, a shop foreman, a grout machine operator, a sales and service man for a cattle ranch, and a sales and service man for a hardware, auto supplies, and radio store; that he had enlisted service from 19 September 1940 to 4 July 1943; that he was commissioned a second lieutenant on 5 July 1943; and that since the last date he has been on active duty as an officer.

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 as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Articles of War 61, 93, or 96.

Abner E. Lipscomb, Judge Advocate.

+ Henry Blum, Judge Advocate.

Francis H. Golden, Judge Advocate.

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SPJGN  
CM 264556

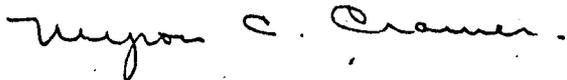
1st Ind.

War Department, J.A.G.O., **28 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 Second Lieutenant Charles D. Gambs (O-1321765), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures imposed be remitted, that the sentence as thus modified be ordered executed 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 foregoing recommendation, should such action meet with approval.



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

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

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(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 633, 24 Nov 1944)

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

(177)

SPJGK  
CM 264561

3 OCT 1944

UNITED STATES	)	1ST HEADQUARTERS AND HEADQUARTERS DETACHMENT
	)	SPECIAL TROOPS, ARMY GROUND FORCES
v.	)	
Private PETER CICHETTI	)	Trial by G.C.M., convened at
(12093494), Headquarters	)	Fort Ord, California, 15
Company, 18th Armored	)	September 1944. Dishonor-
Group.	)	able discharge and confine-
	)	ment for ten (10) years.
	)	Disciplinary Barracks.

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HOLDING by the BOARD OF REVIEW  
LYON, HEPBURN and MOYSE, Judge Advocates.  
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1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

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

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

Specification: In that Private Peter Cicchetti, Headquarters Company, 18th Armored Group, did, without proper leave, absent himself from his station at Fort Ord, California from about 31 January 1944, to about 23 February 1944.

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

Specification: In that Private Peter Cicchetti, Headquarters Company, 18th Armored Group, did, while enroute from Los Angeles, California, to Fort Ord, California, on or about 29 February 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Los Angeles, California, on or about 1 August 1944.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of one previous conviction for absence without leave in violation of Article of War 61 was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for twelve years. The reviewing authority approved the sentence but reduced the period of confinement to ten years and 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 50 $\frac{1}{2}$ .

3. The record of trial is legally sufficient to support the finding of guilty of absence without leave from 31 January 1944 to 23 February 1944, as charged in the Specification of Charge I. Original unauthorized absence, as shown by proper entry in the Morning Report of accused's organization, the 726th Amphibious Tractor Battalion, Fort Ord, California (Ex. 1), was fully corroborated by accused's confession, which, it was stipulated, he made on 2 August 1944 (R. 6; Ex. 4). The Board of Review, however, is of the opinion that this confession, standing alone, is legally insufficient to support the finding of guilty of desertion, on or about 29 February 1944, as charged in the Specification of Charge II. Without this confession, the record of trial is devoid of any proof whatsoever to establish or suggest accused's desertion while en route from Los Angeles to Fort Ord on or about 29 February 1944 or any absence without leave at any time after 23 February 1944. An extract copy of the Morning Report of the Ninth Service Command Military Police Station at Los Angeles, California, shows that accused was placed in confinement on that day, and was released with guard on 28 February 1944. Except for the confession the record is completely silent concerning the activities of the accused from the latter date until 1 August 1944, when the Morning Report of Ninth Service Command Military Police Station Detachment, Los Angeles, California, shows that accused was placed in confinement on that date. Another entry on the Morning Report of that organization shows that accused was released with guard on 10 August 1944. Other than the confession these entries on the Morning Report constitute the sole offerings by the prosecution, which introduced no witnesses. It is apparent, therefore, that there is no evidence whatsoever, corroborative of the confession, which even touches the corpus delicti, namely, an absence without leave on or about 29 February 1944. This confession, without any such evidence, does not constitute sufficient legal proof to establish desertion, as charged (CM 143744, CM 145555, sec. 416 (7a), Dig. Op. JAG 1912-40; CM 202213, sec. 395 (11), (idem); CM ETO 1042, Collette).

4. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge II and its Specification; and legally sufficient to support the findings of guilty of Charge I and its Specification and the sentence.

Ray E. Zou, Judge Advocate.

Charles E. Plum, Judge Advocate.

Norman W. Mayne, Judge Advocate.

1st Ind.

4 - OCT 1944

War Department, J.A.G.O.,  
1st Headquarters and Headquarters Detachment,  
Forces, Fort Ord, California.

- To the Commanding General,  
Special Troops, Army Ground

1. In the case of Private Peter Cicchetti (12093494), Headquarters Company, 18th Armored Group, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge II and its Specification, legally sufficient to support the findings of guilty of Charge I and its Specification and the sentence, which holding is hereby approved. Upon disapproval of the findings of guilty of Charge II and its Specification you will have the authority to order the execution of the sentence.

2. Although the sentence is legal in view of the disapproval of the Specification and Charge involving desertion, it is suggested that some appropriate reduction be made in the period of confinement.

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

(CM 264561).



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.

(181)

SPJGH  
CM 264593

15 DEC 1944

UNITED STATES )

14TH ARMORED DIVISION

v. )

Trial by G.C.M., convened at  
Camp Campbell, Kentucky, 11  
September 1944. Dismissal.

Second Lieutenant BILLIE  
E. LONG (O-1177890), Field  
Artillery. )

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OPINION of the BOARD OF REVIEW  
TAPPY, MELNIKER and GAMBRELL, Judge Advocates

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

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

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

Specification 1: In that Second Lieutenant BILLIE E. LONG, Attached Unassigned 14th Detachment Special Troops Second Army, did, without proper leave absent himself from his duties and organization at Camp Campbell, Kentucky, from about 3 July 1944 to about 5 July 1944.

Specification 2: In that Second Lieutenant BILLIE E. LONG, \* \* \*, did, without proper leave absent himself from his duties and organization at Camp Campbell, Kentucky, from about 29 July 1944 to about 1 August 1944.

Specification 3: In that Second Lieutenant BILLIE E. LONG, \* \* \*, did, without proper leave absent himself from his duties and organization at Camp Campbell, Kentucky, from about 8 August 1944 to about 16 August 1944.

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

Specification: In that Second Lieutenant BILLIE E. LONG, \* \* \*, being indebted to the Planters Bank and Trust Company of Hopkinsville, Kentucky, in the sum of \$75.00 which amount became due and payable on or about 16 July 1944, evidenced by a certain promissory note dated June 26, 1944, of which he was principal and Second Lieutenant ROBERT B. RANDALL was co-maker, did at Camp Campbell, Kentucky, from about 16 July 1944 to about 19 August 1944, dishonorably fail and neglect to pay said debt.

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

Specification 1: In that Second Lieutenant BILLIE E. LONG, \* \* \* having received a lawful order from Colonel GEORGE M. FEEK, his Commanding Officer, the said Colonel FEEK, being in the execution of his office, to settle his accounts before he left Camp Campbell, Kentucky, for his new station, did at Camp Campbell, Kentucky, on or about 8 August 1944, fail to obey the same.

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

Specification 3: (Finding of not guilty).

He pleaded guilty to Charge I and its three Specifications and not guilty to all other Charges and Specifications. He was found not guilty of Specification 3 of Charge III and guilty of all other Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for two years. The reviewing authority approved only so much of the findings of guilty of the Specification of Charge II and Charge II as involves a finding of guilty of the Specification in violation of Article of War 96, disapproved the finding of guilty of Specification 2 of Charge III, approved only so much of the sentence as provides for dismissal from the service, and forwarded the record of trial for action under the 48th Article of War.

3. To prove commission of the offenses alleged in Specifications 1, 2 and 3 of Charge I, the prosecution introduced evidence showing that accused absented himself without leave on three occasions, viz: (a) from 0730 hours on 3 July 1944 to 1000 hours on 5 July 1944 (R. 7, 8, 13; Pros. Ex. D); (b) from 0730 hours on 29 July 1944 to 1200 hours on 1 August 1944 (R. 7, 8, 13; Pros. Ex. E), and (c) from 1300 hours on 8 August 1944 to 0130 hours on 16 August 1944 (R. 13; Pros. Ex. F).

To prove commission of the offense alleged in the Specification of Charge II, the prosecution introduced evidence showing that on 26 June 1944 accused negotiated a loan of \$75 for a term of twenty days, from Planters Bank & Trust Company of Hopkinsville, Kentucky, as evidenced by accused's promissory note cosigned by Second Lieutenant Robert B. Randall. Accused received a total of \$73.50 from the bank, the minimum interest charge of \$1.50 having been deducted in advance from the funds loaned (R. 9; Pros. Ex. A). This note was due and payable on Sunday, 16 July 1944. On Saturday, 15 July 1944, accused telephoned the bank and stated he would pay it the following Monday but he failed so to do. Later that week he made another appointment to call at the bank and discharge this obligation but again he did not do so. Thereafter accused telephoned the bank several times, each time giving some excuse for his failure to keep a previous appointment to pay this note and promising to call at the bank at some future time so to do. Finally, sometime shortly prior to 2 August 1944, the bank informed Colonel George M. Peek, accused's superior officer, of the situation (R. 10, 11). This note had still not been discharged by accused at the time of trial (R. 10; Pros. Ex. B).

To prove commission of the offense alleged in Specification 1 of Charge III, the prosecution introduced evidence showing that on 2 August 1944, Colonel Peek summoned accused to his office and informed him that he knew of accused's two recent absences without leave and also stated that Planters Bank & Trust Company had complained of accused's overdue note and of his unkept promises to appear at the bank and attend to it. Colonel Peek knew that accused had received, or was soon to receive, orders transferring him to an overseas replacement depot and, believing it possible that accused had other outstanding obligations in addition to the note, he then told accused "that he would settle his financial obligations before he left the camp" (R. 11, 12). Under date of 2 August 1944, the same day Colonel Peek had this conversation with accused, orders were issued assigning accused to Army Ground Forces Replacement Depot No. 1, Fort George G. Meade, Maryland, and directing him to proceed to his new station so as to arrive during the daylight hours of 10 August 1944 (R. 12; Pros. Ex. C).

About 3 p.m. on 9 August 1944, Colonel Peek was informed that accused had not received clearance on his transfer to the replacement depot because he could not be located (R. 12). In fact accused was absent without leave from 8 August 1944 to 16 August 1944 (R. 13; Pros. Ex. F). Colonel Peek then contacted the mess officer and discovered that accused's mess bill for July in the amount of \$34.56, which was due and payable on or before 5 August 1944, had not been paid (R. 12, 14; Pros. Ex. G). The mess officer, First Lieutenant Harvey E. Johnson, testified, when asked if accused had given any reason why his mess bill had not been paid, that accused had not received any pay since 1 July 1944. He further testified that Colonel Peek told him that accused's pay was being withheld and that he (Lt. Johnson) would be notified when it was released so that he could obtain payment of the mess bill directly from the Finance Officer (R. 15).

4. After accused's rights had been explained to him, he elected to remain silent and the defense introduced no evidence.

5. The evidence fully sustains the court's findings of guilty of Charge I and Specifications 1, 2 and 3 thereof.

Although, under Charge II and its Specification, the court found accused guilty of dishonorably failing and neglecting to pay his indebtedness of \$75 to Planters Bank & Trust Company, in violation of Article of War 95 as charged, the reviewing authority approved only so much of the finding of guilty as involves a violation of Article of War 96. To establish the offense of failing and neglecting to pay debts in violation of Article of War 95, the evidence must disclose dishonorable conduct involving false representation, fraud, deceit or an evasion of payment in connection with the debts (CM 235676, Davis, 22 B.R. 201). The lesser included offense under Article of War 96 involves a neglect or failure to pay a debt to the discredit of the military service (CM 240754, Raquet, 26 B.R. 115). It is well settled, however, that neglect on the part of an officer to pay his debts promptly is not per se sufficient grounds for charges against him (Davis case, supra, and cases there cited). Furthermore, if the evidence reveals that during the time an officer failed to discharge his obligations he was never possessed of sufficient funds to pay them, charges cannot properly be maintained against him (CM 237138, Kohlhepp, 23 B.R. 271); nor has an offense cognizable by the Articles of War been committed if the officer used every reasonable means at his disposal to secure funds with which to pay his debts (Raquet case, supra).

Accused's indebtedness of \$75 on the 20 day note was payable on 16 July 1944. On several occasions after the date of maturity and until 2 August 1944, he contacted the bank and made successive appointments to pay this note but failed to keep any one of them. The amount and duration of the loan, i.e. \$75 payable 20 days after 26 June 1944, indicate that it was one which could have been satisfied from the pay accused received the last of June 1944 and one which he probably so intended to pay. Apparently, however, he took no precautions to earmark any part of his June pay for that purpose. Thus, until he received his July pay he would not again be in a position to discharge this debt from his Army income. Instead of presenting this financial picture to the bank, accused was content to make a series of appointments to pay this debt, none of which he kept, when it must have been obvious to him that as each day of the month passed his ability grew less to make even a payment on account from his salary. From this it is apparent that, although accused was possessed of funds to pay this debt, he failed to use reasonable means to insure application of such funds in payment of it and he was not averse to making successive promises promptly to pay it, after it became overdue, even though he must have known he could not respect any of them until after receipt of his July pay. It is clear that accused, well aware of his indebtedness, hoped to prevent his creditor from taking any drastic steps

to collect it until he could obtain funds to pay it. He intended by his specious promises to postpone payment of it rather than completely evade it. Such conduct, however, tended directly to discredit the military service. The evidence sustains the findings of guilty as approved by the reviewing authority.

The evidence adduced under Specification 1 of Charge III demonstrates that on 2 August 1944, accused's superior officer ordered him to settle all his financial obligations "before he left the camp", apparently meaning before accused was transferred from Camp Campbell to an overseas replacement depot. When this order was given, accused owed \$75 to the bank and \$34.56 to the Officers' Mess. His transfer was effective on 10 August 1944 and he had not complied with the order by that time. However, he had not been paid since 1 July 1944 and there is no evidence that he possessed any other funds available to discharge these debts. Indeed, his negotiation of a bank loan of \$75 for 20 days is consistent with and indicative of a weak cash position. Apparently because of these facts the reviewing authority disapproved the court's finding that accused was guilty of dishonorably failing and neglecting to pay the mess bill which came due on 5 August 1944 (See p. 3, Staff Judge Advocate's Review of Record). The evidence is sufficient to raise a very substantial doubt in our minds that accused had the financial ability to obey the order and, because of that doubt, the finding of guilty of Specification 1 of Charge III cannot be sustained. It thus becomes unnecessary for us to consider whether the order, relating as it did to a personal indebtedness rather than performance of a military duty, was a legal order (MCM, 1928, par. 134b and see CM 196923, Frakes, 3 B.R. 47), or whether, since accused never officially left the camp, he disobeyed an order to pay his obligations before leaving it.

6. Accused is 28 years of age. He enlisted in the Regular Army in May 1935, after completing high school, and remained on active duty until his transfer to the Regular Army Reserve in August 1939. In October 1939 he returned to active duty as an enlisted man. He served a total of over seven years in the Field Artillery before receiving his commission as a second lieutenant on 18 February 1943, after attending Officer Candidate School, Field Artillery School, Fort Sill, Oklahoma.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Charge III and Specification 1 thereof, and legally sufficient to support all other findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61 or Article of War 96.

Thomas N. Jobby, Judge Advocate.  
Admiral, Judge Advocate.

-5- William H. Gambrell, Judge Advocate.

(186)

SPJGH  
CM 264593

1st Ind.

War Department, J.A.G.O., DEC 22 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 Billie E. Long (O-1177890), Field Artillery.

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 Charge III and Specification 1 thereof (failure to obey lawful order of his commanding officer to settle his accounts before he left camp for a new station), but legally sufficient to support all other findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

3. 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 - Dft. Ltr. for  
sig. S.W.
- Incl 3 - Form of action.

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(Findings of guilty of Charge III and Specification 1 thereof disapproved. Sentence as approved by reviewing authority confirmed. G.C.M.O. 52, 27 Jan 1945)

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

(187)

SPJGQ  
CM 264595

UNITED STATES

v.

Second Lieutenant DONALD  
O. EVANS (O-821243), Army  
of the United States

12 OCT 1944

FIRST AIR FORCE

Trial by G. C. M., convened  
at Langley Field, Virginia,  
5 September 1944. Dismissal.

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OPINION of the BOARD OF REVIEW  
ANDREWS, FREDERICK and BIERER, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War

Specification: In that Second Lieutenant Donald O. Evans, Air Corps, Section "E", 111th Army Air Forces Base Unit, was at Richmond, Virginia, on or about 7 August 1944, in a public place, to wit, in front of the Greyhound Bus Station, drunk and disorderly while in uniform.

He pleaded not guilty to and was found guilty of the Specification 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 but recommended that the execution of the sentence be suspended, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, briefly summarized, is as follows:

On the evening of 7 August 1944 at about 8 p.m. two military policemen who were on duty in the City of Richmond, Virginia, saw the accused, accompanied by a girl, walking along Broad Street, past the entrance to the Greyhound Bus Station (R. 6, 7, 15, 16). Broad Street is

the main thoroughfare of the city (R. 9). As he went along, the accused was talking in a loud voice and staggering (R. 7, 16). He was wearing a complete uniform of an Army officer (R. 16, 29).

At about 9 o'clock p.m. the accused again appeared upon the street in the vicinity of the bus station. He was still accompanied by the girl and his condition "seemed worse" (R. 7-9). Accordingly, the military policemen stopped him and asked to see his "AGO card". The accused willingly showed his identification card but the girl protested that the police had no right to do such a thing, whereupon the accused stated that he would "take no orders from any god-damned Pfc" (R. 7, 8, 12, 16, 17).

One of the police testified: "that sort of got us" (R. 8, 13), and both then took the accused aside into the entrance passage of a store adjacent to the bus terminal. Here they tried to reason with the accused who refused, however, to listen to them and became abusive, calling them "sons-of-bitches", "god-damned MP's", and "chicken-shit MP's". The girl made efforts to stop him by putting her hand over his mouth and at one time when the accused threatened to hit one of the policemen she interposed and caught the accused's arm (R. 8, 17, 37, 41, 44). By this time the altercation had attracted such a large crowd of men and women that a civilian policeman attempted to make the people move on (R. 9, 17, 22, 36, 45), whereupon the military police determined to call the officer of the day at headquarters. He was not in, but the sergeant of the guard promised to respond (R. 8, 17, 22).

Meanwhile another Army officer approached the military police and asked them to release the accused to him but was told that, having called the sergeant of the guard and reported the incident, they were unable to do so (R. 8, 13, 18).

When the sergeant of the guard arrived at the scene, the accused asserted that he was not the proper person to take him into custody and insisted that, if the sergeant wanted to get him to his car, he would have to drag him. Thereupon the sergeant and another military policeman took the accused by the arms and walked toward the car with him and, after going half-way, the accused "walked willingly". On the street and before reaching the car, the accused, addressing other soldiers who were passing, called the police "chicken-shit MP's" and "sons-of-bitches" (R. 9, 17, 23, 26, 31, 44).

When they arrived at the car the accused insisted that they would have to use force to get him into it (R. 9). The sergeant then gave him a shove, telling him he was taking him to headquarters, whereupon the accused got into the car. Just before starting off, the accused told the sergeant he would take his glasses off and knock "the hell" out of

him. When he made a pass at the sergeant, the driver of the car came to the sergeant's assistance and the accused's knee hit the driver in the stomach, probably by accident (R. 24, 31). Eventually, however, they left and the accused was taken to military police headquarters where he was confined (R. 24, 32, 46).

Private Robert J. Bauman, one of the military policemen, and Private First Class Joseph J. Malinowski, Jr., the driver of the police car, testified that the accused was drunk and that they could smell alcohol on his breath (R. 9, 35); but Malinowski said he was "not too drunk" (R. 35).

Private James W. Fitzpatrick, the other military policeman, stated that the accused "had some alcoholic beverages. You could smell it" and he saw him stagger and heard him talk "in a loud tone of voice" (R. 18).

L. J. Saady, civilian police officer, said that the accused was "very disorderly" (R. 37), was weaving from side to side, and, in his opinion, was drunk (R. 38); but Robert Coleman, a civilian bystander, thought that, although the accused was under the influence of liquor, he was not drunk (R. 45).

First Lieutenant Reginald F. Hawkins, an officer of the Military Police Detachment in Richmond, Virginia, saw the accused at 11 o'clock p.m. after he had been brought to police headquarters, and he was of the opinion that the accused was "intoxicated" (R. 46).

#### 4. Testimony for the defense, briefly summarized, is as follows:

By deposition, Ruby Francis, personnel manager for the Union News Company, located in the Greyhound Bus Station in Richmond, Virginia, testified that she saw the accused drinking in the bus station in company with another lieutenant and two girls. She later saw them leave, and watched through the door of the station as the military police accosted them. While they had been "pretty loud" in the bus station, she had not heard any profane language used by any of them then or later on the street. After the officers and the girls had gone out into the street, she continued to hear them talking loudly—"not so terribly loud" but sufficient so "you could tell they had been drinking". She remained standing at the door of the bus station until the police car came and did not hear the accused nor any of his companions say anything to the military police during this period of between twenty minutes and a half hour. She saw the patrol car stop in front of the bus station where she could see all that happened, and both the accused and his officer companion got into the car without any resistance (R. 46; Ex. A).

Second Lieutenant John D. Roberts, an officer of the accused's organization and well acquainted with him as the co-pilot of the accused's crew, was with him, accompanied by two girls, in the Greyhound Bus Station in Richmond, Virginia, on the evening of 7 August 1944. After

eating sandwiches they left the station, and went to a neighboring lunch room, after which Lieutenant Roberts left and did not see the accused until later when his attention was attracted by a group of people standing on the sidewalk in front of a store entrance next to the station. As he approached he saw the accused with two military policemen standing in the entrance passageway to the store. He asked the police whether he could take charge of the accused and take him back to the Base, but was told that it was too late. He remained there until two other military policemen arrived in a car, and saw the accused walk off with them to the automobile. He admitted that he and the accused had been drinking together earlier in the evening and that the accused was intoxicated, but he did not hear the accused use any profane language, nor did he see him offer any resistance to the police. He testified further that he had never known the accused to conduct himself in any manner other than as a gentleman, that his general reputation was "high", and that the accused was regarded by the members of his crew as "one of the finest" pilots (R. 47-51).

Second Lieutenant Harold D. Osmun, tactical officer of the 111th Army Air Forces Base Unit, whose duty it is to take care of the records of the officers and enlisted men of the unit, testified that the records in his possession show no disciplinary action against the accused and no delinquency noted since the accused had joined the unit in the early part of July 1944 (R. 51-53).

Second Lieutenant Harry J. Klyapp, bombardier of the accused's crew, stated that he had never seen the accused drunk and that the accused is held in highest esteem by all men of the witness' acquaintance (R. 54, 55).

Second Lieutenant Russell B. Newton, who knew the accused at Maxwell Field, Alabama, as a fellow Aviation Cadet and pilot, testified that the accused's reputation was very good (R. 55, 56).

Corporal James W. Shipp, a member of the accused's crew since 17 April 1944, stated that among the members of the crew the accused's reputation was "among the tops" (R. 57).

By deposition it was shown that Captain Sellew R. Dewitt, Flight Commander at Gunter Field, Alabama, came to know the accused intimately at Maxwell Field, Alabama, where they had the same instructor, attended the same classes and flew in the same airplane. Based upon his association with the accused he is of the opinion that the accused is "definitely officer material not only in appearance and military bearing, but in his judgment, flying ability and leadership". The members of the accused's crew held him in highest regard as to capability and leadership. Witness had never seen him drunk or acting other than as a gentleman (R. 57; Ex. C).

Second Lieutenant Leo A. Feneis, an officer of the accused's organization, likewise testified by deposition. He had been acquainted with the accused since 19 January 1944 and they had flown together for two months. In his opinion the accused's character and general reputation are good and his reputation as a pilot is very good. Witness had

gone out socially with the accused and others, and had never seen the accused drunk nor conducting himself otherwise than as a gentleman (R. 57; Ex. "D").

Defense counsel, who is Acting Adjutant of the accused's organization and, in the absence of the commanding officer, custodian of the records of the officers of the command, testified that the commanding officer was unable to be present and that, in his absence, he had with him the accused's WDAGO Form 66-2; that said form, under the heading "Performance Rating" showed an entry "Excellent" for the period from 16 April to 6 July 1944; and that it also showed under the heading "Military record" that the accused was entitled to wear the "Good conduct" medal and the "American Defense" ribbon (R. 58).

The accused, having been advised of his rights, elected to make an unsworn statement as follows:

". . . What happened on the night of August 7th, I am very sorry for. That is putting it mildly. It is the first time I have gotten into any trouble and I can say without a doubt in my mind and regardless of the result of this Court-Martial that such a thing will never happen again. That is all I have to say" (R. 58).

5. The Specification alleges that the accused was drunk and disorderly in a public place while in uniform, and is laid under the 95th Article of War. It is therefore necessary to determine whether the conduct of the accused, under all the circumstances, was unbecoming an officer and a gentleman within the meaning and purpose of Article of War 95.

In citing instances of offenses chargeable under an identical article (A.W. 61, American Articles of War, 1874), Colonel Winthrop mentions:

"Drunkenness of a gross character committed in the presence of military inferiors, or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused."; and

"Engaging in unseemly altercations or brawls with military persons or civilians, breaches of the peace, or other disorderly or violent conduct of a disreputable character in public". (Winthrop's Military Law and Precedents (2d Ed. Rep.) pp. 717-718).

The evidence clearly shows, and it is uncontradicted, that the accused, after previously drinking with another officer and two female companions, became engaged in a controversy with two military policemen on the main thoroughfare of the City of Richmond, Virginia, at a point

immediately adjacent to a bus station. He was in uniform and there were civilian men and women present in the vicinity, of a number variously estimated to have been from 30 to 100, from time to time during the episode out of which the Charge against the accused arose.

There is no doubt that the accused showed plain evidence of his drinking. The smell of alcohol was on his breath, he was seen to weave and stagger as he walked, and the tone of his voice while engaged in the argument with the police was sufficiently loud to be heard by the civilians who were passing by, some of whom, attracted by the altercation, crowded around the spot where it was taking place. But whether the loud and boisterous talking was the result principally of anger or alcoholic stimulation is in doubt.

It is unfortunate that the good offices of his companion were not exercised in behalf of the accused before the intervention of the police, for it is reasonable to assume that if his friend had taken the accused back to the base after they had left the bus station, the later events would not have transpired. As it was, however, the police, noticing the irregular conduct of the accused for a second time, and deeming his condition worse than when they had first seen him, approached him with the request that he show his identification card. This the accused did willingly but thereafter, apparently goaded by the insistence of his girl companion that the police could not do such a thing to him, the accused informed the police that he would "take no orders from any god-damned Pfc." What followed may well have been as much the result of anger on the part of both the police and the accused as of the condition of the accused which first occasioned the controversy; for one of the police testified that this remark of the accused "sort of got us", and they thereupon took the accused aside and determined to report the incident to headquarters. The situation may also have been aggravated in the mind of the accused when his friend and brother officer approached and was denied the privilege of taking the accused back to his station at the base.

However, the accused was certainly not justified, whatever his mortification may have been because of his detention, in using the profane and indecent language which he directed against the police, both at the place where the altercation took place and while walking along the street toward the police car. That it was heard by others than those immediately involved is evident from the testimony of two civilian witnesses.

But, except for the unsteadiness of his gait and such of his boisterous language as can be attributed to intoxication, there is no evidence

of such gross drunkenness on the part of the accused as is contemplated in the instances above cited. The "drunkenness committed in the presence of military inferiors or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself" must be "gross drunkenness". That the accused was drunk is reasonably certain. One of the military policemen and the driver of the police car testified that he was drunk, and the officer in charge of military police headquarters, as well as the accused's companion, stated that he was "intoxicated". The other military policeman when asked the question: "Would you say the accused was drunk?" answered: "He had some alcoholic beverages. You could smell it" and "He was staggering and talking in a loud tone of voice".

The civilian policeman said he was drunk, but one of the civilian bystanders stated that, while he appeared to be under the influence of liquor, witness could not say he was drunk. The degree of his intoxication is thus left to conjecture and under the circumstances and in the light of all the evidence touching the accused's conduct and demeanor it has not been shown, with that certainty which is required, that he was grossly drunk at the time in question.

Nor can it be said that the dispute between the accused and the military police was of such a grave character as necessarily to fall within that described as "engaging in unseemly altercations or brawls with military persons or civilians, breaches of the peace, or other disorderly or violent conduct of a disreputable character in public".

The parties to the argument had withdrawn from the public sidewalk into a passageway to a store, and to that extent the matter was public only to those inquisitive persons who stopped, in going by, to look and listen. It was at night, and there is no evidence that the store was open or that any other person had occasion to use the passageway. The accused, while he threatened resistance, actually offered none to the military police and engaged in no violent actions, nor was there anything tumultuous about the matter which could be deemed a breach of the peace. True, the altercation was unseemly and disorderly but not of such a violent or disreputable nature as to come clearly within the intent and meaning to be attributed to the instances above named. The same is true of the opprobrious epithets directed toward the military police as the accused was accompanying them down the street toward the police car. Clearly this, as well as the acts which preceded, was misbehavior on the part of the accused which must not be countenanced and cannot be condoned, but all of it was of such a nature that it cannot be said to have transcended the line of demarcation between service discrediting conduct in violation of Article of War 96 and the more reprehensible conduct violative of Article of War 95. The record of trial is, therefore, deemed legally insufficient to support the finding of guilty of the Specification as a violation of Article of War 95.

There is, however, no doubt that the conduct of the accused in directing profane, indecent, and opprobrious remarks toward the military police within the hearing of civilians in a public place such as the main thoroughfare of a city at a time when he was patently under the

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influence of intoxicating liquor and in uniform, is of such a nature as to bring discredit upon the military service as well as to constitute a disorder to the prejudice of good order and military discipline in violation of Article of War 96.

6. Attached to the record of trial is a unanimous recommendation by the court and a recommendation by defense counsel that the sentence of dismissal be suspended during good behavior because of the "accused's outstanding military record," "the confidence in, and high regard for, the accused evidenced by his fellow officers" and "his excellent reputation for character and integrity". Attached to this recommendation is a letter from the accused's commanding officer stating that the accused "appeared to be an outstanding officer and had an unblemished record"; that, in his opinion, "he made a mistake but learned a lesson he will never forget", and likewise requesting that the sentence of the court be suspended.

7. Records of the War Department disclose that the accused was born in Montana, is 24 years of age and unmarried. He attended public schools to and including the 10th grade. He was employed in forestry service for one year, as an orderly in a hospital for one year, and was attending a welding school at the time of his induction on 21 October 1941. Having completed the prescribed course of training and instruction at the Army Air Forces Pilot School (Advanced 2 Engine) at George Field, Illinois, he was commissioned a second lieutenant, Army of the United States on 7 January 1944 and assigned to the Army Air Forces Pilot School (Specialized 4 Engine) at Maxwell Field, Alabama.

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

Fletcher R. Andrews, Judge Advocate

Herbert B. Frederic, Judge Advocate

W. H. Givens, Judge Advocate

SPJGQ  
CM 264595

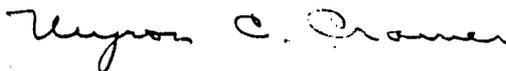
1st Ind.

War Department, J.A.G.O., 19 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 Second Lieutenant Donald O. Evans (O-821243), Army of the United States.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves a finding of guilty of the Specification in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof. In view of the unanimous recommendations of the court and of the reviewing authority that the sentence be suspended, I recommend that the sentence be confirmed but that it be suspended during good behavior.

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 the above recommendation into effect, 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 Executive  
action.

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(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but execution suspended. G.C.M.O. 624, 17 Nov 1944)



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

SPJGH  
CM 264675

25 OCT 1944

UNITED STATES

CENTRAL PACIFIC BASE COMMAND

v.

Trial by G.C.M., convened at  
APO 958, 28 and 29 August 1944.  
Dishonorable discharge and con-  
finement for life. Penitentiary.

Private DENNIS G. GRIMES  
(34324415), 385th Aviation  
Squadron, APO 951.

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REVIEW by the BOARD OF REVIEW  
TAPPY, MELNIKER and GAMBRELL, Judge Advocates

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Dennis G. Grimes, 385th Aviation Squadron, did, at APO 951, on or about 6 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Corporal Joe Adams, 385th Aviation Squadron, a human being by shooting him with a carbine.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for 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. The prosecution introduced competent evidence to show that sometime between 5 and 6 p.m. on Sunday, 6 August 1944, accused, who was a quiet, retiring individual, a Corporal Gist and one or two other colored enlisted men were drinking beer in the beer garden of the Post Exchange which was

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located across the road from the area of the 385th Aviation Squadron, and but a short distance from Bellows Field, Territory of Hawaii. Corporal Joe Adams, the deceased, was drinking beer at a nearby table. He and accused were both members of the 385th Aviation Squadron and were personally acquainted, the former being quartered in barracks No. 1 in the squadron area while accused was housed in barracks No. 7. The rear entrance of barracks No. 7 was located opposite the front entrance of barracks No. 1 (R. 17-20, 32-35; Ex. 11).

Adams arose from his table in the beer garden, approached accused's group and commenced to quarrel with Corporal Gist (R. 20, 50). Accused peered over his shoulder at Adams whereupon the latter charged accused with desiring to participate in the argument. As he spoke, Adams raised a beer bottle over his shoulder in position to hurl it (R. 20, 35). Accused sprang from the ground where he had been seated and tossed a beer bottle at Adams, but it missed its mark. Adams promptly hurled his bottle at accused but failed to hit him. Accused grasped a second bottle and flung it at Adams striking him on the head and causing it to bleed. Adams fell or stumbled backward to the ground, accused advanced toward him but was pushed aside by other soldiers (R. 20, 21, 36-38). Accused then fled from the beer garden and ran through his squadron area and to his barracks with Adams in hot pursuit (R. 21, 22, 38).

When next observed, accused was prone on the ground near barracks No. 7 and Adams was astride him with a knife in his right hand raised above accused. The latter was clutching Adams' wrist to prevent use of the knife. Private First Class William B. Frierson came to accused's rescue, wrested the knife from Adams' hand and subsequently turned it over to the military police (R. 22, 38-40). The fracas was then concluded and Adams thereafter proceeded to the dispensary for treatment of his head injury while accused went to the washroom of his barracks. Accused thereafter sat on his cot for a few minutes reading a newspaper and then around 6 p.m. repaired to the horseshoe pit adjacent to his barracks to engage in a game of horseshoes with Frierson and several other enlisted men (R. 23, 24, 45, 58, 70).

After the game had progressed awhile, Adams emerged from barracks No. 1 and called to accused saying he wished to speak to him. Accused responded to the call and Adams in an angry mood opened the conversation by asking accused, "What the Goddam hell you cut me side of my head". Accused denied he had cut Adams, saying he had not possessed a knife since he had been in the Army. Adams then asked accused if he was drunk or mad when he hit him. Accused replied in the negative, and then asked Adams to forget the incident and suggested they be friends. Adams spurned accused's overtures, stating that he had no desire to be friendly with him (R. 25,

46, 48, 58, 59, 70, 71, 76, 77). Adams then inserted his hands in his pockets and accused asked him if he was reaching for his knife, to which Adams made no reply (R. 71, 77, 78).

Accused left the horseshoe pit and walked toward the rear entrance of barracks No. 7, followed by Adams, who continued the conversation and accented his remarks by pointing his finger at accused, while accused said little or nothing. Private James Lavender passed by and suggested they cease their argument but his suggestion went unheeded (R. 25, 26, 53, 54, 59, 71, 73, 78). Within a few minutes accused cried to Adams, "I'm tired of fucking with you" (R. 54). He then ran into his barracks while Adams stepped close to the barracks and stood to the side of the rear door. Soon thereafter accused, armed with a carbine, dashed from the barracks through the rear door, ran a short distance toward barracks No. 1, stopped, whirled about, saw Adams standing within a few feet of the rear door of barracks No. 7, and raising the carbine to his waist he fired at him (R. 26-28, 56, 59-61, 72-74). Adams then fled, dog-trotting around the side of barracks No. 7. Accused followed him, sighted him diagonally off the front of the barracks, and, as Adams turned to look back, accused fired a second shot, whereupon Adams collapsed to the ground. Several enlisted men ran to Adams, unfastened his clothing and discovered he had been wounded in the neck and side (R. 30, 31, 72, 75). Promptly thereafter, Master Sergeant Riley Brown, first sergeant of the squadron, approached the scene, instructed accused to surrender the carbine to him and accused complied (R. 75).

Within ten minutes after this shooting, military police and an ambulance arrived at the scene. It was then a few minutes after 7 p.m. (R. 75, 81-84). Adams was promptly removed to the dispensary, arriving there about 7:15 p.m. (R. 10, 84). Captain Edward C. Edlkrout, base surgeon, examined him immediately and found that he was bleeding from two bullet wounds, one in the right breast which extended through the lungs and had a posterior opening at the base of the right wing bone, and the other in the hollow of the neck. The chest wound had caused a massive hemorrhage of the lungs. The bullet which had entered the neck had lodged in Adams' spine. Adams was unconscious, pulseless and had but a faint heart-beat. He died within five minutes after admission to the dispensary. His death was due to the lung hemorrhage and the shock produced by the presence of the bullet in his spinal cord (R. 10, 11).

No weapon was found on or near Adams by the enlisted men who tended him at the scene, nor was any weapon found in his clothing after removal to the dispensary (R. 12, 32).

4. The defense presented the testimony of several enlisted men of accused's organization, all of whom stated that accused was a quiet, unassuming, truthful individual who was well liked by the members of his organization. He read a great deal, particularly newspapers, and most of the men in his organization were accustomed to visit him to inquire about the progress

of the war, since accused both knew and understood the news relative thereto (R. 86-89, 96, 100, 102, 111). Accused's first sergeant affirmed these tributes to accused's character and stated further that he was a good soldier who had never caused any previous trouble in the squadron (R. 105). Adams, on the other hand, was a quarrelsome, hot-tempered, argumentative individual who was particularly overbearing after he had been drinking (R. 92, 93, 97, 106). He was both taller and heavier than accused, and was boastful of his strength (R. 111). After Adams had returned from the dispensary on this particular day and about ten minutes before he was shot, he had asked Sergeant John W. Jackson, who had assisted Frierson when the latter wrested the knife from him at the time he was astride accused, "Didn't you keep me from killing that boy? I could have killed him, couldn't I?" (R. 95).

5. Murder is the unlawful killing of a human being with malice aforethought. Unlawful means without legal justification or excuse. If one kills in self-defense, the killing is legally excusable. However, the doctrine of self-defense is only applicable if the person killing (a) was not the aggressor, (b) has reasonable grounds to believe he must kill to save his own life, and (c) has retreated as far as possible (MCM, 1928, par. 148a). Although there is some evidence in the record to indicate that accused was suspicious that Adams might bring his knife into play, Adams certainly had not done so when accused left to procure his carbine and when he returned and shot Adams. From the evidence, no reasonable grounds existed to cause accused to believe he must kill to save his own life. Furthermore, accused had not retreated as far as possible, but instead he chose to become the aggressor when he procured his carbine and shot Adams the first time and then shot him again while the deceased was in full retreat. It is quite apparent from this that accused was not acting in self-defense when he killed Adams.

Malice aforethought, an essential element of the offense of murder, is established by proof of intent to inflict grievous bodily harm upon any person or knowledge that the act which causes death will probably cause grievous bodily harm (MCM, 1928, par. 148a). The intent to inflict such bodily harm is conclusively established by accused's use of a lethal weapon in a manner which was likely to result in death or grievous bodily harm.

The evidence does not indicate that accused's offense was the lesser crime of voluntary manslaughter rather than that of murder. A killing committed in the heat of sudden passion caused by legal provocation is voluntary manslaughter (MCM, 1928, par. 149a). However, the provocation must be such as the law deems adequate "to excite uncontrollable passion in the mind of a reasonable man" and "the act must be committed under and because of the passion" (MCM, 1928, par. 149a). Although an assault or battery inflicting actual bodily harm is considered adequate

provocation, the use of insulting or abusive words or gestures is not adequate provocation (MCM, 1928, par. 149a). Adams had previously assaulted accused with a knife but that incident had passed and accused had thereafter offered to be friends with Adams. It is clear from this that when he shot Adams, accused was not laboring under any emotion excited by that assault. No further assault was being made on accused when he shot Adams. Accused may have then been subjected to insulting or abusive language but, as stated above, that does not constitute sufficient provocation. Accordingly, the evidence does not establish that accused's offense was the lesser crime of voluntary manslaughter.

We are not unmindful of the fact that, from the entire record, it is quite apparent that Adams' offensive conduct induced accused to act as he did. However, that is matter to be considered by the appropriate authority in determining whether any mitigation of accused's sentence is warranted. The evidence is sufficient to sustain the findings of guilty of the Charge and its Specification.

6. There is attached to the record of trial a recommendation for clemency signed by five of the six members of the court who heard and decided this case. They recommend that the dishonorable discharge be suspended and that the period of confinement be reduced to ten years. The reasons motivating this recommendation were expressed in the following language, viz:

"This recommendation is based upon the fact that evidence showed that the accused is a person of excellent character and reputation and had a clear record for the past ten years; he apparently stands high in the esteem of his fellow men and his superior officers. There was evidence that he is intelligent, well-read, and an intellectual leader among his associates. There was also ample evidence to show that he is a timid, shy, retiring and peaceable individual and not at all argumentative. He is of slight stature."

A letter recommending clemency signed by defense counsel and assistant defense counsel is also attached to the record of trial.

7. The accused is 26 years of age. He was inducted into the military service on 22 August 1942.

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support

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the findings of guilty and the sentence. Death or imprisonment for life, as a court-martial may direct, is mandatory upon conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement under Section 275, Criminal Code of the United States (18 U.S.C. 454).

Thomas W. Jaffey Judge Advocate

Admiral, Judge Advocate

William H. Lawrence Judge Advocate

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

(203)

SPJGQ  
CM 264677

1 DEC 1944

UNITED STATES )

v. )

Private GEORGE S. WASHINGTON )  
(38549054), Company F, 1326th )  
Engineer General Service )  
Regiment, Camp Claiborne, )  
Louisiana. )

EIGHTH SERVICE COMMAND  
ARMY SERVICE FORCES

Trial by G.C.M., convened at  
Camp Claiborne, Louisiana,  
15 September 1944. Dishonor-  
able discharge and confine-  
ment for life. Penitentiary.

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REVIEW by the BOARD OF REVIEW  
ANDREWS, FREDERICK and BIERER, Judge Advocates.  
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1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

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

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

Specification: In that Private George S. Washington, Company F, 1326th Engineer General Service Regiment, did, at Camp Claiborne, Louisiana, on or about 16 August 1944, attempt to create a mutiny in Camp Claiborne, Louisiana, by unlawfully assuming control of about three soldiers of said 1326th Engineer General Service Regiment, and in the execution of such control causing said soldiers concertedly to disregard and defy the lawful orders of Colonel FRANK T. LEILICH, their commanding officer, to disperse, with intent to override for the time being lawful military authority.

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

Specification: In that Private George S. Washington, Company F, 1326th Engineer General Service Regiment, having received a lawful command from Major Lawrence O. Drachman, his superior officer, to go to his hut and go to bed, did, at Camp Claiborne, Louisiana, on or about 16 August 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous conviction 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 confined at hard labor at such place as the reviewing authority may direct for the rest of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution, briefly summarized, is as follows:

The accused was on 16 August 1944 in the military service as a member of Company "F", 1326th Engineer General Service Regiment (R. 26). At about 11 o'clock p.m. on that date Second Lieutenant Raymond Link, Jr., who, as the duty officer, had just completed bed-check, was in the orderly room discussing with the Charge of Quarters, who had also made a bed-check, the possible reason why so many men were missing. While they were talking someone came in and said that some white men were roaming through the area and Lieutenant Link upon going out to investigate found the area in an uproar (R. 26, 32, 33). Lights were on in Company "C" across the street from Company "F" and Lieutenant Matthews of Company "C" was standing near a jeep addressing the whole company. As Lieutenant Link approached the crowd he recognized some of his (Company "F") men in the crowd, among them, the accused, who was standing by the left front wheel of the jeep (R. 26). Lieutenant Link told him it would be better if he were over in his own company area, that he had nothing to do with what was transpiring. The accused replied that he was going to stay there but was interrupted by Lieutenant Matthews who called for silence. Lieutenant Link then returned to his orderly room inasmuch as Lieutenant Matthews seemed to have things under control. All of a sudden "everything went haywire again". Everyone started running around, racing from the barracks. The accused came into the area "yelling for everybody to get their guns, go out and get the sons-of-bitches" (R. 27, 45). They were intending to go down into the woods to search out white people who were supposed to be down there. They then "went around the corner" and "there was quite a bit of shooting. Tracers were flying all around after that". They again quieted down and came back into the area and there were groups around the orderly room trying to determine what to do next (R. 27, 46).

At this time, Colonel Frank T. Leilich, 1326th Engineer General Service Regiment, in response to a telephone call regarding disturbances (R. 15) arrived in the vicinity of Company "C" and Company "E" areas accompanied by Major (then Captain) Lawrence O. Drachman. They found a gathering of men who were talking "rather violently", some "excitedly". A company commander was talking to the men trying to pacify them, assuring them "there was nothing to worry about". All the officers then told the men that "everything was being taken care of" and that they had nothing to fear whereupon, within a few minutes, practically all of them did go back to their quarters (R. 8, 9).

The Colonel and Captain Drachman continued down the street to the vicinity of Company "F" Area where they found another group of men between two buildings. They were being "addressed" by several men who appeared to be the leaders. One of the company officers was also present (R. 9). This group was more excited than the other (R. 9) and was boisterous (R. 20). It consisted of at least 50 to 75 men 40 percent of whom were armed, among them, the accused, who carried a rifle on his shoulder (R. 9, 10, 22, 44, 46, 50, 52). The rifles were supposed to be locked up in racks but the racks were very inadequate and Colonel Leilich saw one which had been broken open (R. 15, 31). Some men were also armed with bayonets (R. 32).

The Colonel listened to what the company officer was saying and then followed him with a few words of his own. He was interrupted, from time to time, by questions and remarks from soldiers back in the group. The accused stated that he had just come back from several months in the Pacific and "he was convinced that the enemies of his people were here and not there" (R. 9, 11, 14, 16, 20, 31). He also asked a number of questions regarding white policemen and sheriffs who were said to be combing the area particularly as to whether such officers could take them and under what conditions a soldier was turned over or allowed to be carried off by "the whites" (R. 8, 9, 12, 13). He appeared to be talking for the benefit of the group impressing them with the idea that "these whites" were coming after them and that they were in grave danger (R. 10, 11). The accused was saying "bad things" and "using very vile language" (R. 29). He repeated the statement about the enemies of the colored people being here and not in the Pacific several times and the fact that he was reported to have been among the enemies of our country in the Pacific apparently carried considerable weight (R. 11). There were rumors to the effect that civilians were roaming the area with dogs and were stopping soldiers and many of the men seemed to be really frightened (R. 13).

Colonel Leilich reassured the accused, answering the group generally, that the matter was well in hand; that the camp was in the control of "the military" and not "the whites or white civilian sheriffs"; that they had nothing to fear; and, that they would not be taken away. He then ordered them to go back to bed (R. 9, 10, 11, 20, 27, 28). One or two started to wander off and the Colonel, thinking that if they saw him and the other officers leave they would disperse, then walked away for a short distance (R. 10). Captain Drachman, however, remained with the men (R. 15). Very few of the men left and the accused continued to talk to them and when the Colonel returned to the group 10 or 15 minutes later he (the accused) "was still going" (R. 10, 12, 17, 18, 19).

Meanwhile Captain Drachman had mingled in the crowd and when Colonel Leilich gave the order for the crowd to disperse and go back to their barracks and they refused to obey, Captain Drachman repeated the order but the men did not move (R. 20). During this period a car drove up and the accused

worked the bolt of his rifle, as though he were loading it, saying: "There they come now" (R. 21, 49, 50). All the while he had been, theretofore, making "figurative gestures" with his hand on his rifle" (R. 28). Captain Drachman stepped between the accused and the car telling him to have no fear; that no one was going to hurt him. Whereupon the accused said "No, you run away" but the Captain replied "No, I'm staying here". Upon investigation, no civilians were found in the car which was occupied by about 8 or 9 negro soldiers who were looking for Service Club No. 2 (R. 21, 28). Again the Captain told them to go back to their barracks and, approaching the accused, directly ordered him to do so (R. 21, 22, 24, 29). In answer the accused said: "I will stay here; I'll be damned. I will stay here all night"; and that he was not going to bed (R. 22, 24, 29); that he did not "want to be killed in (his)bed" (R. 27). There was more talk "about being killed in their beds and people being shot up as they were sleeping" (R. 28) and about being treated badly in the matter of passes and furloughs (R. 30). The accused also remarked that "he was a bad man, he wasn't going to take anything from anybody and if anybody hurt him he was going to take them right along with him" (R. 28). He loudly claimed "there were a lot of people in the woods; they were going to get them" and he tried to get a group together to go into the woods. He and two or three others started out to go there but the group did not join them (R. 21, 23, 24, 29, 51). The woods were about 100 to 120 yards away and the motor pool was between them and Company "F" area (R. 43). Lieutenant Matthews and the officer of the day then went over to the woods in a jeep and after investigation came back and reported that there were no civilians there other than those who were employed in the sewage disposal plant and who lived near the camp (R. 46). While searching they had difficulty with their headlights which went on and off and they also used flashlights. This blinking "rather perturbed" the crowd as the men thought the officers were misleading them (R. 46, 47). Although the accused was more boisterous than the others and kept the rest stirred up, the group finally broke up (R. 21, 22, 28).

In the opinion of Colonel Leilich the accused was sober during the evening (R. 12) and although Captain Drachman remained in the crowd for an hour and a half after ordering the accused to go to quarters he never obeyed in that time (R. 51). Although the "ground rules" required the men to be in their barracks by 11 p.m. the disturbances lasted from 12 p.m. until 2:30 a.m. (R. 12, 13, 17).

4. The accused, having been informed of his rights, elected to be sworn as a witness and testified, substantially, as follows:

At about 11 p.m. on the night of 16 August 1944 he was in bed asleep after the charge of quarters had made his check (R. 33). Later some one reported that Company "C" had fallen out and the noise woke them up. The accused and others went over to Company "C" area and saw the company commander, the officer of the day and Lieutenants McElroy and Lane. The

officers were trying to find out what was troubling the men and were told that white people had killed some of the men out in "the 1327th bivouac". Seeing lights "in the woods" the men thought civilians were in there. Lieutenants Matthews, McElroy, Lane and another officer then went over to the woods in a jeep. The men saw "spotlights on the OD's jeep" which they thought were thrown upon it by civilians who appeared to be armed with Government rifles. After some discussion the "OD's jeep" left and two civilian cars pulled out behind it but the flashlights were still seen through the woods. "Eventually there was an uproar". Someone sent for Colonel Leilich and he came and talked to the men. The accused asked the Colonel whether white civilians had any right on the post and what were they doing over in the woods to which the Colonel replied that they had no right on the post but that the place indicated by the accused was not Government property (R. 34). The accused "let it go at that". The Colonel "just went on talking" and "everybody was talking loud". The accused "didn't say nothing but just looked, like the rest of them". When Colonel Leilich asked how many of the men wanted to go overseas everyone said they did and the accused "just mentioned to Colonel Leilich that (he) had already been over there" and "just came back March 5th". He told the Colonel he "would rather be over there than to be over here". The accused stated that he did not see Major (Captain) Drachman or Lieutenant Link that night and that after "the Major got through, (he) personally went on to bed". He maintained that he had witnesses which he could get to prove that he went to bed and to the hospital the next day (R. 35).

On cross-examination he admitted hearing Colonel Leilich's order to go back to his hut and go to bed and stated that he did go "after the Colonel left" (R. 35, 36, 37). He denied that he was armed in any way that night (R. 36, 37, 39) and stated that he did not even have an issue rifle in his possession since June (R. 36, 38, 41). He also denied going to the woods or leaving the company area (R. 35) and when asked why he had walked toward the woods with the three men as had been testified, he answered: "What three men?" (R. 36). He likewise denied telling the others to get their rifles, go down to the woods and "kill these sons-of-bitches" (R. 36, 37). He stated that they could see civilians in the woods 400 yards away turn spotlights on the officers' jeep and that they were armed with "civilian arms" (R. 38, 39). However, he saw no white civilians in his company area that night but did see them outside of the area (R. 39). He admitted that there was firing that night in Company "C" area but not in his company area (R. 40, 41). When asked in what battles he had participated in the Pacific he replied: "Guadalcanal, New Guinea, Oran, Persian Gulf, Bombay, Calcutta, Australia". When pressed for details he said he was just in an air raid in New Guinea; that he had never been in ground combat but was in the merchant marine for which he had volunteered as a

fireman and was eventually shipped as a loader (R. 42).

In rebuttal Lieutenant Link testified that the accused had an issue rifle on 16 August 1944 and that when the company was checked on the next morning he had in his possession the rifle which had been issued to him (R. 43, 44) and the serial number of the rifle which the accused personally handed to the lieutenant at the inspection on the morning of 17 August was then checked by the supply sergeant and found to be the number of the rifle which had been issued to him (R. 44, 48). Both Major Drachman and Colonel Leilich reiterated that they had seen the accused carrying a rifle on the night of 16 August 1944 (R. 50, 52).

5. Mutiny may be defined as consisting in an unlawful opposition or resistance to, or defiance of military authority, with a deliberate purpose to usurp, subvert or override the same, or to eject with authority from office (Winthrop, "Military Law and Precedents", 2d Edition (Rep. 1920) p. 578). Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority. The concert of insubordination contemplated in mutiny need not be preconceived nor is it necessary that the act of insubordination be active or violent. It may consist simply in a persistent and concerted refusal or omission to obey orders, or to do duty, with an insubordinate intent. The intent which distinguishes mutiny is the intent to resist lawful authority in combination with others. The intent to create a mutiny may be declared in words, or, as in all other cases, it may be inferred from acts done or from the surrounding circumstances. A single individual may harbor an intent to create a mutiny and may commit some overt act tending to create a mutiny and so be guilty of an attempt to create a mutiny, alike whether he was joined by others or not, or whether a mutiny actually followed or not. An attempt to commit a crime is an act done with specific intent to commit the particular crime and proximately tending to, but falling short of its consummation. There must be an apparent possibility to commit the crime in the manner specified. Voluntary abandonment of purpose after an act constituting an attempt while material in extenuation is not a defense.

The proof required to convict is (a) an act or acts of accused which proximately tended to create a certain intended (or actual) collective insubordination; (b) a specific intent to create a certain intended (or actual) collective insubordination; and (c) that the insubordination occurred or was intended to occur in a company, party, post, camp, detachment, guard, or other command of the Army of the United States (MCM, 1928, par. 136 (a)).

The evidence discloses that on the night of 16 August 1944 the enlisted personnel of certain sections of Camp Claiborne, Louisiana, became aroused and excited because of rumors that certain men of the command who were

in a bivouac area had been killed by white civilians. This excitement soon spread beyond the bounds of ordinary reaction which could be expected under the circumstances and it is apparent that what resulted was caused by the actions of certain individuals who, by their conduct, incited the crowds until they became mobs and inflamed the mobs until they resorted to collective insubordination. Among those who, by their overt acts, caused the mutinous conduct on this occasion was the accused.

At about 11 o'clock p.m. he was discovered among those present in a company area across the street from his own. He had no business there and when seen by one of his officers was so told and advised to go back to his own company but he, at that time, refused the advice and said he would stay. The members of the adjoining company were in an uproar at the time but the company commander apparently got things under control and the disorder subsided. However, some time thereafter, the officer who had first observed the accused in the adjacent company area saw him come into his own company area "yelling for everybody to get their guns, go out and get the sons-of-bitches". Following this everyone began to run around aimlessly, going into and out of the barracks and eventually the mob went around a corner after which there was considerable shooting.

In this act alone it might, with propriety, be found that the accused was then intent upon inciting a mutiny. He directed his unlawful and unwarranted orders to "everybody" and thus hoped to attain a concert of action by two or more in what he then contemplated. The intent in mutiny may be implied from acts done as, for example, from the assumption of the command which belongs to a superior and the taking up of arms and assuming a menacing attitude (Winthrop, supra, p. 580). Here there was an assumption of the authority to give orders to a group of soldiers in a command over which the accused knew he had no authority whatsoever and for a purpose which he knew was unlawful. There was likewise a taking up of arms by the accused and others and their use not only in a menacing but in the most dangerous fashion. No one was entitled to carry a rifle at the time and the arms had been locked up in racks from which some were forcibly removed. Although there is no evidence that the accused had been directly ordered to leave the adjacent company area when it was in an uproar, he did hear the commanding officer of that company remonstrate with the men in order to reduce them to order and discipline and he had been advised by his own superior officer to go to his own area inasmuch as the matter did not concern him. Under the circumstances it is plain that the accused intended to provoke the events which followed with a full understanding of their possible consequence.

A short time later, he again resorted to overt acts which evidenced an intent, upon his part, to still further incite and inflame the mob which he had urged into riotous misconduct. Thus, while the regimental commander, who had come upon the unruly mob, tried to assure them that their fears were groundless and that they had nothing to fear because

the military authorities had the situation well in hand, the accused several times remarked, for the benefit of the crowd, that he had just returned from several months of service in the Pacific and was convinced that the enemies of his people (the negroes) were here (presumably in and around Camp Claiborne) and not over there.

Under the circumstances of the occasion this was not merely an honest expression of opinion but was clearly calculated as countervailing advice to any of his associates who might have been impressed with the reasoning and judgment of the commanding officer of their regiment and as such tended to incite them to the concerted insubordination which followed. The Colonel ordered them to disperse and go to their barracks and, as a few wandered off, he left the scene temporarily in the hope that others would obey. They did not do so. The accused, still carrying a rifle with which he made significant gestures from time to time, working the bolt as if alert to exercise force of arms if necessary, became involved in an altercation with another officer who had remained when the Colonel left and who was repeating the Colonel's assurances and orders. When a strange automobile approached, the accused sought to arouse both fear and resentment in the others against supposed "white" intruders although it was discovered that the occupants of the car were a group of negro soldiers who were merely looking for a service club. Although he was then directly ordered by the officer to go back to his barracks he defiantly stated that he would not do so and urged the mob to accompany him to the woods, about 100 to 120 yards away and beyond the motor pool area which lay between the men and the woods, with the avowed purpose of "getting" a lot of people who were imagined to be roaming through them. The accused, and two or three others, started off in that direction but the effort was abortive and they returned, after which the disorder subsided, the mob eventually broke up, and the men left, apparently to go to their barracks.

There can be no reasonable doubt that an actual mutiny took place when the men of the accused's company and other organizations not named, took up arms, riotously discharged some of them in a disorderly determination to avenge themselves for an imaginary grievance against white civilians in the vicinity of camp, and then, when ordered to disperse and go to their barracks concertedly refused to do so. That no violence was done to anyone in authority or any other person was merely fortuitous as the testimony shows that tracer bullets were flying in all directions at one time during the melee; nor was any act of violence necessary to make the offense of mutiny complete. It may consist simply in a persistent and concerted refusal or omission to obey orders with an insubordinate attempt (CM 249636; Bull. JAG, June 1944, p. 234). As heretofore stated, it is required only that the proof under Charge I and its Specification show that the accused was guilty of acts which proximately tended to create an intended collective subordination with intent to create such intended result. A fortiori he is guilty if his acts, with such intent, proximately tended to create an actual collective insubordination.

The conclusion is inescapable that, from the time when the accused stood by attentive to what the commanding officer of the adjoining company was telling the disorderly soldiers in an effort to quiet and control them, he harbored an intent to override authority and urge others to join him in doing so. When told that he should leave the place where he had no good reason to be and return to his own company he refused to do so but later did return shouting in a boisterous manner the unwarranted and unlawful order for the men to arm themselves and join him in a search for white civilians. He continued to incite those who joined him by suggestions designed to controvert the orders of the regimental commander. After refusing to obey the command to disperse and go to barracks he openly urged others to join him in going into the adjacent woods and prevailed upon some to join him in doing so although the expedition was abandoned. All these acts tended proximately to bring about the conditions which ensued and clearly prove the accused's guilt under Charge I as well as his later participation in the mutiny which he had not only overtly attempted to cause but did cause or aid and abet in causing.

An examination of the Specification of Charge I discloses an allegation of "attempt to create a mutiny" and a description of the attempt in language from which it could be said that the accused's joinder in the mutiny attempted to be created was necessarily implied. Even though the pleading could be deemed duplicitous on that account and therefore, multifarious, no objection was made thereto, nor to the introduction of evidence in support thereof. Under such circumstances the faulty pleading has been held harmless (CM 192530, Browne, 1 B.R. 383; CM 195772, Wipprecht, 2 B.R. 273; CM 218876, Wyrick et al, 12 B.R. 157) and its multifarious character is not of itself sufficient reason in the light of Article of War 37 for setting aside a finding of guilty (CM 202601, Sperti, 6 B.R. 171).

Inasmuch as proof of the offense of attempting to create a mutiny alleged in the Specification of Charge I did not require proof of participation by the accused in the mutiny which followed, the allegation and proof of the separate and distinct offense of willful disobedience of the order of a superior officer as alleged in the Specification of Charge II did not constitute an unreasonable multiplication of charges arising out of the same offense (Cf. CM 249636, Supra).

It was clearly shown that the accused not only willfully refused to obey the direct order to go to his barracks given to him by an officer known by him to be his superior but intentionally embarked upon an unlawful venture in defiance thereof.

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6. The Charge Sheet discloses that the accused is 19 years of age and was inducted into service on 23 May 1944. He has had no prior service.

7. The court was legally constituted and had jurisdiction of the person and of the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. The sentence imposed is authorized upon conviction of a violation of Article of War 66. Confinement in a penitentiary is authorized by Article of War 42 for the offense of attempting to create a mutiny, an offense of a civil nature and so punishable by penitentiary confinement for more than one year by sections 1, 3 and 5, Act of 28 June 1940 (54 Stat. 670, 671; 18 U.S.C. 9, 11, 13).

(on leave)

\_\_\_\_\_, Judge Advocate.

*Herbert B. Frederica*

\_\_\_\_\_, Judge Advocate.

*[Handwritten Signature]*

\_\_\_\_\_, Judge Advocate.

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

(213)

SPJGH  
CM 264724

5 FEB 1945

UNITED STATES )

16TH ARMORED DIVISION

v. )

Private MELVIN K. BAUSWELL )  
(35895682), Headquarters )  
Company, 64th Armored )  
Infantry Battalion. )

Trial by G.C.M., convened at  
Camp Chaffee, Arkansas, 8  
September 1944. Dishonorable  
discharge (suspended) and con-  
finement for two (2) years.  
Rehabilitation Center.

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HOLDING by the BOARD OF REVIEW  
TAPPY, GAMBRELL and TREVETHAN, Judge Advocates

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

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

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

Specification: In that Private Melvin K. Bauswell, Headquarters Company, 64th Armored Infantry Battalion, did, without proper leave, absent himself from his organization and station at Camp Chaffee, Arkansas from about 14 February 1944 to about 19 July 1944.

CHARGE II: Violation of the 65th Article of War.  
(Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification: In that Private Melvin K. Bauswell, \* \* \*, having been duly placed in arrest at Camp Chaffee,

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Arkansas, on or about 13 February 1944, did, at Camp Chaffee, Arkansas, on or about 14 February 1944, break his said arrest before he was set at liberty by proper authority.

Accused pleaded not guilty to all Charges and Specifications, was found not guilty of Charge II and its Specification, was found guilty of Charge I and its Specification and by appropriate exceptions and substitutions was found guilty under Charge III and its Specification of breach of restriction in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement for five years. The reviewing authority approved the sentence, reduced the period of confinement to two years, suspended execution of the dishonorable discharge and ordered the balance of the sentence executed, designating the Rehabilitation Center, Camp Bowie, Texas, as the place of confinement. The proceedings were published in GCMO No. 62, Hq 16th Armored Division, 21 September 1944.

3. The record of trial was held legally insufficient to support the sentence by the Military Justice Division of the Office of The Judge Advocate General because the trial-judge advocate who acted at the trial had not been duly designated by the appointing authority and, accordingly, the court was not properly constituted. The validity of that conclusion will be first considered herein.

4. By 1st Indorsement dated 23 August 1944, these proceedings were referred for trial to Captain Owen H. Page, Jr., trial judge advocate of the general court-martial appointed by paragraph 20, Special Orders No. 182, Headquarters 16th Armored Division, 3 August 1944, as amended by paragraph 9, Special Orders No. 196, same headquarters, 19 August 1944. Captain Page had in fact been detailed as trial judge advocate of the court by said Special Orders No. 182. The amendment promulgated by said Special Orders No. 196 is not material to the matters here under consideration.

Pursuant to paragraph 13, Special Orders No. 212, same headquarters, 6 September 1944, the law member of the court was relieved and Captain Page was detailed as law member although there was no express provision in the orders relieving Captain Page as trial judge advocate or appointing another individual as trial judge advocate in his stead.

Pursuant to paragraph 13, Special Orders No. 214, same headquarters, 8 September 1944, Captain Page was removed as a member of the court and Lieutenant Colonel James E. Norvell was designated as law member. Paragraph 43 of these same orders thereafter provided as follows:

"So much of par 13 SO 212 this Hq cs as amended by par 13 SO 214 this Hq cs as pertains to CAPT OWEN H PAGE JR Law Member is rescinded."

The trial of the instant case commenced on 8 September 1944 at 7 p.m. and was concluded at 10:55 p.m. that same day with Captain Page serving as trial judge advocate. The reviewing authority who took action on this case was the same individual who promulgated Special Orders No. 214, the pertinent parts of which are detailed in the next preceding paragraph hereof. General Court-Martial Orders No. 62 covering this case was promulgated under date of 21 September 1944.

5. No citation of authority is necessary to buttress the elementary proposition that the same person cannot be both law member and trial judge advocate on the same court. The effect of the action taken by the appointing authority on 6 September 1944 (par. 13, Special Orders No. 212), detailing Captain Page as law member of the court, was to relieve him as trial judge advocate even though the action did not expressly so provide. When a member of the detail for a court-martial is expressly relieved he is "taken off the court entirely." When a trial judge advocate is expressly relieved he is "wholly and completely removed as trial judge advocate" (CM 211561, Self, 10 B.R. 99). The legal result is the same whether he be relieved by express provision or by implication as in this case. Thus, on 6 September 1944, Captain Page had been removed as trial judge advocate.

On 8 September 1944, by paragraph 13, Special Orders No. 214, Captain Page was removed as a member of the court and Lieutenant Colonel Norvell was detailed as law member. This order did not operate to reappoint Captain Page as trial judge advocate. It removed him from the court and did nothing more.

We now come to the final order, paragraph 43 of these same Special Orders No. 214 which "rescinded" so much of paragraph 13, Special Orders No. 212 (appointment of Captain Page as law member) as amended by paragraph 13, Special Orders No. 214 (removal of Captain Page as a member of the court) as pertained to Captain Page. In interpreting paragraph 43 of Special Orders No. 214, it must be borne in mind that an appointing authority may legally designate a trial judge advocate in any manner by which he chooses to express his will. He may designate him by telephone call or by telegram. The manner or vehicle by which the appointing authority expresses his intent is immaterial (Self case, supra). Thus, the crux of the instant question is, what did the appointing authority intend to accomplish by paragraph 43 of Special Orders No. 214 when he "rescinded" two previous orders.

The verb "rescind" means "to abrogate; annul; cancel" or "to vacate and make void" (Webster's New International Dictionary, 2d ed.). Rescission is "the complete undoing of a thing done and

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in the case of contracts, returns the parties to status quo" (Words and Phrases, Perm. Ed., Vol. 37, p. 117, 119). It thus becomes apparent that the appointing authority intended to vacate, make void and completely undo so much of paragraph 13, Special Orders No. 212 and paragraph 13, Special Orders No. 214 as pertained to Captain Page. He intended the series of Special Orders to stand as if the vacated portions had never been promulgated. By this rescission those portions were rendered void ab initio. Striking these rescinded portions from the series of Special Orders pertaining to the instant court there remains the orders appointing Captain Page as trial judge advocate (par. 20, SO No. 82) and Lieutenant Colonel Norvell as law member (par. 13, SO No. 214). That the appointing authority intended his action to have this effect of clearing the record of all mention of Captain Page except as trial judge advocate is apparent when we consider that he not only rescinded Captain Page's appointment as law member but also his removal as law member. Thus, he intended to obliterate from the series of orders any mention whatsoever of Captain Page other than in his capacity as trial judge advocate.

The question may be asked, how can Captain Page's appointment as trial judge advocate be revived when it was killed by his appointment as law member? Has he not been wholly and completely removed as trial judge advocate so that he cannot now be restored to that position except by a new order expressly so appointing him? The answer to these questions is clear. When certain portions of Special Orders were rescinded the intent of the appointing authority was to strike them from the record and leave the series of Special Orders as if these portions had never in fact been promulgated. Their effect was uprooted with them. So far as the series of Special Orders are concerned they were returned to the condition they were in prior to the promulgation of the rescinded orders. Thus, the net result, after rescission of these two orders, was then to restore to full force and effect the order appointing Captain Page as trial judge advocate.

Does our opinion do violence to any established rules of law? Let us consider first whether it offends principles relative to repealed and repealing statutes. At common law when a statute was enacted repealing a former statute "the effect was, without formal words for that purpose to restore the law as it was before the passage of" the repealed statute (United States v. Philbrick (1886), 7 S. Ct. 413, 120 U.S. 52, 30 L. ed. 559). In other words, the common law gave the same effect to a repealing statute as we here give to the appointing authority's order of rescission. Subsequent to the above decision Congress passed a statute, similar to many which have been enacted by state legislatures, providing as follows, viz:

"Whenever an Act is repealed which repealed a former Act, such former Act shall not thereby be revived unless it shall be expressly so provided" (R.S. 12, 1 U.S.C. 28).

This statute is neither controlling nor helpful in determining our question. It applies only to Acts of Congress. Moreover, it applies to "repealed" and repealing Acts. We are not here concerned with a repealing order; we are concerned with a rescinding order. Although rescission and repeal may have been synonymous in legal effect at common law, the meaning of the latter term has been circumscribed by the foregoing statute with respect to Acts of Congress. We are not compelled to ascribe, nor indeed are we warranted in ascribing, to the word "rescind" a legal effect provided by statute for an entirely different word when used in reference to a particular situation not pertinent here.

We are not unmindful of an opinion of The Judge Advocate General wherein it is stated that "The revocation of an order does not render it void ab initio, but simply stays its execution at the point of revocation" (SPJGA 1943/524.03). However, we are concerned here not with a revoking order but with an order rescinding earlier orders.

Furthermore, stepping outside the narrow fields of etymology and philology we find that the record as a whole supports the conclusion that Captain Page was intended as trial judge advocate by the appointing authority. Captain Page acted as trial judge advocate during the trial and he so verified the record of trial. The results of that trial were approved by the appointing authority. Such action completely denies any intent of the appointing authority not to have Captain Page as trial judge advocate of this court. In all this series of orders no person other than Captain Page was ever designated as trial judge advocate by the appointing authority. That fact is not irrelevant in revealing the intent of the appointing authority and is consistent with our conclusion with respect thereto. Finally, if we hold that the appointing authority did not intend Captain Page as trial judge advocate we are holding in net effect that he intended to accomplish nothing by paragraph 43, Special Orders No. 214. Such a conclusion is obviously incorrect. He did intend to accomplish something and clearly that was the restoration of Captain Page as trial judge advocate of this court. Though the form in which the intent was expressed may have been inartful and cumbersome we cannot deny legal effect to its substance when it is apparent.

Accordingly, the Board of Review is of the opinion that Captain Page was properly detailed by the appointing authority as trial judge advocate in this case.

6. An examination of the record of trial reveals that it is legally sufficient in all other respects to support the findings of guilty and the sentence as approved by the reviewing authority.

Thomas M. Jaffey, Judge Advocate.

Concurring Opinion, Judge Advocate.

Robert C. Brewster, Judge Advocate.

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

SPJGH  
CM 264724

5 FEB 1945

UNITED STATES )

16TH ARMORED DIVISION

v. )

Trial by G.C.M., convened at  
Camp Chaffee, Arkansas, 8  
September 1944. Dishonorable  
discharge (suspended) and con-  
finement for two (2) years.  
Rehabilitation Center.

Private MELVIN K. BAUSWELL )  
(35895682), Headquarters )  
Company, 64th Armored )  
Infantry Battalion. )

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CONCURRING OPINION by GAMBRELL, Judge Advocate

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1. I do not concur in the conclusion reached in the majority opinion that paragraph 13, Special Orders No. 212, 6 September 1944, had the legal effect of removing Captain Page "wholly and completely \* \* \* as trial judge advocate." If such were the effect of that paragraph, then it would be my opinion that Page could be restored as trial judge advocate only by a new appointment of him to that office.

2. In my view, the order which purported to appoint Page as law member (paragraph 13, Special Orders No. 212) did not have the automatic effect of "removing" him as trial judge advocate, but instead gave him a dual status which could be corrected, and which was corrected two days later, on 8 September 1944, by paragraph 13, Special Orders No. 214, removing him as a member of the court and appointing a new law member. It is, of course, true that a general court-martial is incapable of taking valid proceedings if the trial judge advocate of the court is also a member of the court, but that was not attempted here. The inadvertence of naming Page as law member was corrected before the court convened and commenced to function.

The situation here presented would seem to be no different, in effect, from the case where the original order appointing a general court-martial inadvertently names the same officer both as trial judge advocate and as law member. Could there be any doubt that, in the supposed case, the mistake could effectively be corrected before the

court transacted any business merely by an amending order substituting another officer as law member? It is believed that such corrective action would be entirely in order.

It is evident that, in the instant case, the naming of Page as law member was due to an inadvertence. An examination of the entire series of orders can lead to no other conclusion than that the appointing authority intended to retain Page as trial judge advocate. It is to be noted, in this connection, that the order which named him as law member neither made any reference to the fact that he had already been designated as trial judge advocate nor proceeded to appoint a new trial judge advocate. When the mistake was discovered, steps were taken immediately to correct it by substituting a new law member (paragraph 13, Special Orders No. 214, 8 September 1944).

For the reasons mentioned, it is my opinion that Captain Page was duly authorized to serve as trial judge advocate at the trial of this case.

3. As indicated in paragraph 1 above, however, if the conclusion reached in the majority opinion that Page was removed "wholly and completely" as trial judge advocate by the order purporting to appoint him law member, to the same extent as if he had been expressly relieved, be accepted as sound, then it is my opinion that Page was not reinstated as trial judge advocate by either paragraph 13 or paragraph 43 of Special Orders No. 214, 8 September 1944. Paragraph 13, in terms, deleted from the order appointing Page as law member (paragraph 13, Special Orders No. 212, 6 September 1944) the entire line which referred to Page, viz:

"CAPT OWEN H PAGE JR 01283124 INF 18th Armd Inf Bn-  
Law Member"

Notwithstanding such deletion, paragraph 43 purported to rescind so much of the same order (paragraph 13, Special Orders No. 212), "as amended" by the deleting order, as pertained to Page. It is urged in the majority opinion that special significance attaches to the word "rescind." Reference is made to contract rescission, where the parties are returned to the status quo, and it is said that, by rescinding the intervening orders, paragraph 43 "revived" Page's original appointment as trial judge advocate. I am not persuaded that the term "rescind", as commonly used in War Department orders and regulations, carries any such special significance. In the absence of any authoritative precedent that it does carry the special significance urged in the majority opinion, it is my view that the term "rescind" is used in War Department orders and regulations synonymously with the terms "vacate", "delete" and "revoke" and, as so used, has the same meaning as those terms. That all of these terms are synonymous in common usage is indicated by their definitions in the standard dictionaries.

The majority opinion states that when certain portions of the Special Orders "were rescinded the intent of the appointing authority was to strike them from the record and leave the series of Special Orders as if these portions had never in fact been promulgated." This argument imputes a retroactive effect to paragraph 43, namely, that it goes back and revives a portion of an order which had been "killed" and thus "restores" Page as trial judge advocate. This is contrary to the established principle that, except for the purpose of correcting errors or supplying facts or data omitted, orders cannot be given retroactive effect (SPJGA 1943/524.03; SPJGA 1943/3800; SPJGA 1942/4757; SPJGA 1942/6256; SPJGA 1942/5005; 15 Comp. Gen. 935).

Considerable reliance has been placed upon the apparent intent of the appointing authority to "restore" Page as trial judge advocate, and this has been used to bolster the argument for giving paragraph 43 a retroactive effect. However strong the inference of such intent may be, it cannot properly be given the effect contended for in the absence of an unequivocal expression of the intent. Any other rule would prove to be mischievous, and would make for uncertainty. It is to be noted, for instance, that the original order appointing the court here under consideration named an assistant trial judge advocate as well as a trial judge advocate. As an argument against the presumed intent here asserted, it may be pointed out that it was not necessary that Page's appointment be "revived." The assistant trial judge advocate might have acted (CM 211561, Self, 10 B.R. 99). Also, with reference to the strength of the inference of the intent of the appointing authority to "restore" Page as trial judge advocate, it is to be observed that the appointing authority was not limited in the expression of his intent to the use of any particular term, such as "rescind." He could easily have added a paragraph to Special Orders No. 214 expressly reappointing Page as trial judge advocate. The due appointment of the trial judge advocate must not be left to the conjecture which would result from indulgence in inferences of unexpressed intents. Absence of a duly appointed trial judge advocate is jurisdictional, and requires that the findings and the sentence be vacated (CM 200734, Burns, 5 B.R. 1). On jurisdictional questions it is particularly important that no vital link be left in an uncertain status.

Reference is made in the majority opinion to United States v. Philbrick (120 U.S. 52; 7 S. Ct. 413), which purports to state the common law rule as to the effect of the repeal of a repealing statute by a subsequent repealing statute, and the following comment is made with reference to the rule so stated:

"In other words, the common law gave the same effect to a repealing statute as we here give to the appointing authority's order of rescission."

While the law held in the Philbrick case to have been "revived" actually was not statute law, it is not doubted that the same result would have been reached had it been statute law. In so far, however, as the reference in the majority opinion to the Philbrick case is intended to imply that the so-called common law rule announced in that case currently applies to War Department orders and regulations I express a dissent. I have seen no authority supporting the proposition that if the War Department were to issue Order C today, vacating Order B which was issued one year ago and which by its terms revoked Order A, the last mentioned Order would be automatically revived. My understanding of the administrative practice is that Order A, having once been revoked by competent authority, remains inoperative unless and until it is expressly revived by competent authority.

Finally, the fact that the action sheet was signed by the same officer who issued Special Orders No. 212 and Special Orders No. 214 may be taken as adding strength, if any be needed, to the inference that the appointing authority intended that Page should serve as trial judge advocate; but, since the due appointment of the trial judge advocate is jurisdictional (Burns case, supra), such appointment cannot be accomplished, nunc pro tunc, through the execution of the action sheet.

4. For the reasons stated in paragraph 2 of this opinion, it is my opinion that Captain Page was duly authorized to serve as trial judge advocate at the trial of this case. Also, I concur in the majority opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

William H. Campbell, Judge Advocate.



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

SPJGN  
CM 264725

24 NOV 1944

UNITED STATES )

SECOND AIR FORCE

v. , )

) Trial by G.C.M., convened at  
) Colorado Springs, Colorado,  
) 9 September 1944. Dismissal  
) and total forfeitures.

) Second Lieutenant GEORGE  
) J. GIESSNER (O-722049),  
) Air Corps. )

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OPINION of the BOARD OF REVIEW  
LIPSCOMB, O'CONNOR and GOLDEN, Judge Advocates  
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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant George J. Giessner, Air Corps, 269th Army Air Forces Base Unit, Section E, did, in the vicinity of the City of Alva, Oklahoma, on or about 2 August 1944, wrongfully fly a P-47 type aircraft at an altitude of less than five hundred (500) feet in violation of Paragraph 16a (1) (d), Army Air Forces Regulation 60-16, dated 6 March 1944.

He pleaded not guilty to and was found guilty of the Charge and its Specification. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 2 August 1944 the

accused was "briefed" for a low altitude cross-country flight from Strother Field, Winfield, Kansas, to Alva, Oklahoma, which was scheduled to be performed at an altitude of from 200 to 500 feet. He was definitely "briefed", however, to perform the flight at an altitude of about 400 feet and it was unnecessary to descend lower to accomplish the mission (R. 16-22). He took off at about 1300 o'clock in a P-47 plane and returned about an hour later. According to the testimony of the plane's crew chief, it was in "flying shape" and undamaged when the accused embarked but when the accused returned the left wing tip was slightly damaged and had dirt on it which the witness observed as he was parking the plane (R. 8-10, 40). The damaged part was removed, properly identified and admitted into evidence (R. 11-16; Ex. 1). The accused immediately after landing had remarked to a witness that "it may go kind of tough on me" (R. 14).

Shortly after returning from the mission the accused voluntarily stated to his flight leader and the assistant operations officer that he had been flying low and had evidently struck a knoll or some rise in the ground (R. 23-25, 32-34). He likewise made a similar voluntary admission to the investigating officer and, after being apprised of his right to speak or remain silent, he executed and delivered to such officer a sworn statement as follows: "On 2 August 1944 I was on a Low Level Navigation Flight from Strother Field, Winfield, Kansas, to Alva, Oklahoma, and return. On the way to Alva, Oklahoma, I flew below the altitude prescribed in Strother Field Operations Order No. 30" (R. 27-29; Ex. 2). The investigating officer also testified that Operations Order No. 30 scheduled the flight for an altitude of between 200 to 500 feet, that he had inspected the area over which the flight was made which he described as "of a rolling nature, gullies and small mounds, and sort of broken country, very sparsely settled" and that he attributed the incident to the accused's inexperience (R. 29-32). The court took judicial notice of Army Air Forces Regulation 60-16, dated 6 March 1944 (R. 7).

4. The evidence for the defense shows that the accused's instructor, his flight leader, the investigating officer and the assistant operations officer, all of whom had testified for the prosecution, as witnesses for the defense attributed to the accused an excellent reputation both as to character and military proficiency, described him as a diligent and eager student with more than average ability and attested that he had previously always obeyed orders (R. 36-37, 37-38, 38-39).

The accused elected to make the following unsworn statement:

"Sir, I would like to make a statement, saying that I joined the Air Corps for the purpose of going overseas

and fighting, and that's one of my biggest ambitions. I always have been wanting combat all along, and I can't see where any mistake in training or something like that should forfeit your chance of doing good on the other side. I would like to continue on my training and go overseas as soon as I can. That's all, sir" (R. 41).

5. The Specification alleges that the accused on or about 2 August 1944 in the vicinity of Alva, Oklahoma, wrongfully flew a P-47 type aircraft at an altitude of less than 500 feet in violation of paragraph 16a (1) (d), Army Air Forces Regulation 60-16, dated 6 March 1944. The named regulation prohibits the operation of aircraft within 500 feet above the ground except over obstructions, populous places or assemblies of persons where the limit is 1000 feet and except when an altitude of less than 500 feet is authorized as necessary for the proper execution of a tactical flight, engineering or training mission. "Disobedience of standing orders" is conduct prejudicial to good order and military discipline (MCM, 1928, par. 152a).

The evidence for the prosecution conclusively shows that the accused, although embarking upon a flight scheduled to be performed at an altitude between 200 and 500 feet, was definitely "briefed" to perform it at about 400 feet. The accused must be presumed to have knowledge of the provisions of the controlling regulation of which the court appropriately took judicial notice and the evidence shows that he also had actual knowledge thereof. The testimony of the plane's crew chief and the damaged wing tip unquestionably establishes the corpus delicti of the alleged offense which was committed by the accused when he deviated both from his "briefed" instructions and his scheduled orders because, although authorized to fly at less than 500 feet, he was "briefed" to fly at about 400 feet and was scheduled to fly in no event at less than 200 feet. The evidence of the prosecution, the admissions of the accused and his sworn statement clearly establish his guilt of the offense alleged. His previous good character and excellent reputation and inexperience, while furnishing a basis for mitigation, constitute no defense. The evidence, therefore, beyond a reasonable doubt supports the findings of guilty of the Charge and its Specification.

6. The accused is about 22 years old. The War Department records show that he is a high school graduate and is unmarried. From June 1941 until February 1943 he was employed as an "electrical switchgear assembler" by a manufacturing concern. He has had enlisted service from 30 June 1943 until 15 April 1944 when he was commissioned a second lieutenant upon completion of Officers' Candidate School and that he has had active duty as an officer since the latter date.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the Charge and its Specification and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipecomb, Judge Advocate.

Robert G. Kemmer, Judge Advocate.

Frank H. Golden, Judge Advocate.

SPJGN  
CM 264725

1st Ind.

War Department, J.A.G.O., **NOV 30 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 J. Giessner (O-722049), 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 \$75 per month for six months and that the sentence as thus modified be ordered executed.
3. Consideration has been given to the attached letter from Mrs. Helen E. Giessner.
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,  
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 Mrs. Helen E. Giessner.
  - Incl 5 - Memo from Commanding General, Army Air Forces.

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(Sentence confirmed but commuted to forfeiture of \$75 per month for six months. G.C.M.O. 7, 5 Jan 1945)



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

(229)

SPJGQ  
CM 264727

18 OCT 1944

UNITED STATES )

ALASKAN DEPARTMENT

v. )

) Trial by G.C.M., convened at  
) APO 980, c/o Postmaster,  
) Seattle, Washington, 29 August  
) 1944. Each: Dismissal.

) Lieutenant Colonel GEORGE  
) E. MAKI (O-371539), 94th  
) AAA Gun Battalion, and  
) Lieutenant Colonel EARL H.  
) KELSO (O279109), 364th  
) Infantry, Adak, Alaska. )

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OPINION of the BOARD OF REVIEW  
ANDREWS, FREDERICK and BIERER, Judge Advocates.

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

2. The accused were tried at common trial, by their consent, upon separate Charges and Specifications as follows:

As to Lieutenant Colonel Maki:

CHARGE: Violation of the 85th Article of War.

Specification: In that Lieutenant Colonel George E. Maki, Coast Artillery Corps, Ninety-Fourth Anti-Aircraft-Artillery Gun Battalion was, at United States Troops Adak, Alaska, on or about 4 August 1944, found drunk on duty as Commanding Officer of the Ninety-Fourth Anti-Aircraft-Artillery Gun Battalion.

As to Lieutenant Colonel Kelso:

CHARGE: Violation of the 85th Article of War.

Specification: In that Lieutenant Colonel Earl H. Kelso, Infantry, Third Battalion, Three Hundred and Sixty-Fourth Infantry was, at United States Troops Adak, Alaska, on or about 4 August 1944, found drunk while on duty as Commanding Officer of the Third Battalion, Three Hundred and Sixty-Fourth Infantry.

Each of the accused pleaded not guilty to the Charge and to the Specification. Each was found guilty of the Charge and of the Specification applicable to him. No evidence of previous convictions was introduced. Each was sentenced to be dismissed the service. The reviewing authority approved the sentences and forwarded the record of trial for action under Article of War 48.

3. The case for the prosecution, established by competent evidence plus facts proper for judicial notice, was as follows.

Adak Island is a part of the Aleutian Group in the Territory of Alaska. It is an advanced base located in a theater of operations and in a designated defense area, officially defined as an area subject to attack (R. 79, 111; General Order Number 67, War Department, 16 October 1943; Memorandum Number 170, Joint Chiefs of Staff, 30 December 1943; Circular 328, War Department, 9 August 1944). The area was regarded as a combat zone in the sense that outposts were placed on 24-hour duty at the times here pertinent (R. 10). On 3 August 1944 the President of the United States and his official party visited the island and remained until 4 August 1944 (R. 28, 72, 77; Exs. 1, 2, 3).

On 3 and 4 August 1944, the accused were stationed on Adak. Lieutenant Colonel Kelso was Commanding Officer of the 3d Battalion, 364th Infantry, a labor battalion performing duties for the resident engineer. The battalion was a part of the regiment (R. 8). Lieutenant Colonel Maki was Commanding Officer of the 94th Anti-aircraft Artillery Gun Battalion, a part of the 210th Anti-aircraft Artillery Group. Colonel John F. Goodman was in command of the 364th Infantry Regiment and Colonel Robert F. Gleim of the 210th Anti-aircraft Artillery Group, and as such they were the Commanding Officers, respectively, of the accused (R. 6, 12).

The Anti-aircraft Artillery on the island was placed by orders in status "green", condition "one", during the stay of the President and his party on the island. That is an operational status, wherein gun crews, at the order of the battery commander and upon his decision, are to fire upon any aircraft definitely identified as hostile. It is distinguished from status "yellow", a clearance for fire upon all aircraft not identified as friendly. Condition "one" calls for all units to be ready to deliver immediate fire from all weapons, with normal crews. It is appropriate where air attack is imminent. These orders were fully communicated to anti-aircraft artillery personnel, and had been discussed at a meeting attended by Lieutenant Colonel Maki on 2 August 1944, preparatory for the occasion (R. 13; Ex. 4).

On the evening of 3 August 1944, Lieutenant Colonel Kelso acted as host at a seafood dinner party at the 3d Battalion Officers' Club, where he took an active and leading part in the actual preparation and cooking of the food. Lieutenant Colonel Maki attended as his

guest. Drinks were served and generally partaken of by the officers present, to such extent as their individual inclinations and discretion dictated. According to First Lieutenant Phillips, Manager of the Club, both of the accused became "extraordinarily hilarious and loud," more so than the other officers; were "unsteady on their feet," and were, in his opinion, drunk when they left the Club at about 9:00 p.m. (R. 33, 36, 38). That was also the opinion of First Lieutenant Stiles (R. 66).

Captain Beaver, Lieutenant Colonel Kelso's Executive Officer, who shared his quarters, brought two bottles of bourbon whiskey from quarters to the Club at Lieutenant Colonel Kelso's request and remained from shortly before 6:30 to shortly after 8 o'clock (R. 54-55). Both the accused were drinking, as were the other officers, but both were in good shape then (R. 60). At about 9 or 9:30 o'clock, Captain Beaver went to his quarters and found both the accused there, where he remained with them until about midnight. "For the most part, they were drinking and talking". Captain Beaver was not drinking. (R. 55-56, 60)

About 10:30, Colonel Gleim had called Lieutenant Colonel Maki's phone and been placed in touch with him by his Executive within five minutes, at Lieutenant Colonel Kelso's quarters. Colonel Gleim informed Maki that his battalion was on "A" alert status to prepare to return to the continental United States, and advised him to leave the party and go home, as there was a lot of work to be done the next day (R. 12). On that occasion, Maki's conversation was entirely coherent (R. 13).

Lieutenant Colonel Maki was talking to Colonel Gleim on the telephone when Captain Beaver arrived. Maki hung up the phone, turned to Lieutenant Colonel Kelso and said "Kelly, we're going home." He seemed enthusiastic and excited (R. 60). About eleven o'clock, Captain Beaver, at Lieutenant Colonel Kelso's request, made a pot of coffee, which they drank. Captain Beaver offered to take Lieutenant Colonel Maki home, as Maki's "peep" was stuck in the mud. Maki decided to stay all night in Beaver's bed, and Kelso and Maki undressed. Kelso got in bed, Maki was getting into bed. Beaver left, about midnight, and went to other quarters nearby (R. 56, 57, 60, 61). The accused were intoxicated, in Captain Beaver's opinion, but not drunk, in the sense that they could get around without help (R. 59). In a statement during the investigation, Captain Beaver had expressed the opinion that they were drunk (R. 62). He testified that they had not reached the stage where, in his opinion, the rational and full exercise of their faculties would be seriously impaired (R. 61). The quarters were then in good order (R. 57).

About midnight, Colonel Goodman received a telephone call from Lieutenant Colonel Kelso, whose voice, agitated and frightened, said "Colonel, I had a little party over here in my battalion, and then I don't know what happened. I killed two of my officers. Come and get me." He asked Colonel Goodman to call the Military Police to "send

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everything they had out there." Colonel Goodman told him to stay where he was, and sent Lieutenant Colonel Utter, Regimental Executive, and Captain White, his Adjutant, over "to see what was the matter with him." Colonel Goodman then "got" Lieutenant Colonel Brunner, commanding the First Battalion, and his Adjutant to "go over and take care of the Third Battalion." He then called the Provost Marshal and the Post Executive, after finding, by a call to the Military Police, that Lieutenant Colonel Kelso had ordered an ambulance sent out (R. 7).

Colonel Gleim received a telephone call from Lieutenant Colonel Maki about one o'clock, saying that there was "some sort of trouble out there." Maki's conversation was not entirely coherent. Colonel Gleim asked to talk to Kelso, but "got no intelligent information out of him." He advised Maki to get out of there and return to his own area. Maki said he would do so and call back in fifteen or twenty minutes, but was detained by the arrival of Lieutenant Colonel Utter to investigate the situation (R. 13).

The ambulance arrived at Lieutenant Colonel Kelso's quarters. The driver found both the accused there, apparently all right. They said the ambulance was not needed, so he left immediately. Lieutenant Colonel Maki had a pistol in his hand (R. 10-12).

About 1:15 a.m., Lieutenant Colonel Brunner and his Adjutant, Captain Barton, arrived at Lieutenant Colonel Kelso's quarters. Kelso was trying to make a phone call to Captain Beaver. Maki was beside him. Both called Lieutenant Colonel Brunner by name. Maki handed him two loaded pistols to smell and see if they had been fired. The pistols were in Maki's belt, out of holsters. Brunner removed the clips and examined them, also one hanging in a holster on the wall, and Captain Barton did likewise. None had been fired. Asked what the trouble was, Kelso said he did not remember and Maki that he did not know. Maki's lip was cut and he had blood on his face. Kelso had a small spot of blood on his nose (R. 15-17, 46).

Lieutenant Colonel Utter; Regimental Executive, and Captain White, Adjutant, arrived shortly after. Kelso did not know what had happened. He said he had been at battalion officers' club at a dinner. He did not know where the officers were who had been at the dinner, and did not remember what had happened. He remembered calling Colonel Goodman, but not what he had told him. Lieutenant Colonel Utter sent Captain White and Captain Barton to find Captain Beaver and round up the officers of the Third Battalion to see if anyone had been hurt (R. 25). They did so, and the officers assembled in the other room of the hut (R. 34, 35, 46-47, 57).

Captain Beaver returned about two a.m., 4 August, being awakened and informed that he was wanted there. The table then had been moved out from the wall and its varied contents had fallen to the floor. There were a jug of coca-cola syrup, two whiskey bottles, one broken, and other articles on the floor (R. 59). In the wall,

about six and a half feet from the floor, there was a hole about an inch or an inch and a quarter in diameter, with a dent in the wall above it, which Captain Beaver had not seen before. The accused were dressed. Each of them had some blood on his face. Lieutenant Colonel Brunner, Captain White and Captain Barton were there. Lieutenant Colonel Utter came in. Lieutenant Colonel Maki left with some of these officers and Captain Beaver remained the rest of the night (R. 58).

Captain Hays, Provost Marshal, arrived about 1:30 to 1:50. He found Lieutenant Colonel Utter trying to find out what had happened and unable to do so. Lieutenant Colonel Maki said he did not know what had happened until he woke up on the floor, hearing Lieutenant Colonel Kelso calling Colonel Goodman (R. 73). Maki was not sure whether anybody had been hurt, and had turned the pistols over to Lieutenant Colonel Brunner, saying he did so to make sure that they got into the right hands and that they had not been fired. Maki had blood on his face, about his mouth and nose. Kelso had blood on his face and also his hands, where he had cuts. Both the accused staggered. Kelso's speech was not too coherent. They were fully dressed. The room was in disorder. Captain Hays examined the pistols, which had not been fired (R. 74-75).

After conducting their investigation and finding that nobody had been injured, the officers, except Lieutenant Colonel Kelso and Captain Beaver, left the hut about 3:45 to 3:55 a.m. Lieutenant Colonel Maki left with Lieutenant Colonel Brunner, Captain Barton and Captain Hays. Arrived at the main road in front of his unit, Maki said he could make it to his quarters all right, and did so with no trouble (R. 23).

Lieutenant Colonel Brunner's first opinion was that the accused were intoxicated. When he took Maki home, he would not say that Maki was drunk to the extent of not having his faculties about him. He could carry on an intelligent conversation. He stood practically the entire time they were in the room and walked without trouble (R. 23). In the witness' opinion, both Lieutenant Colonel Kelso (R. 20) and Lieutenant Colonel Maki (R. 24), at the time he left, were able to take command of their battalions. It was not necessary for Lieutenant Colonel Brunner to take command of Lieutenant Colonel Kelso's battalion, and he did not do so (R. 24).

Lieutenant Colonel Utter regarded both accused as under the influence of liquor when he arrived, but found them able to converse and answer questions, except that neither knew what had happened, and both could function mentally and physically. In his opinion, both were in full and rational exercise of their faculties while he was in the room (R. 27).

Captain Barton observed that Lieutenant Colonel Maki's condition improved while he was there. He regarded both the accused as

intoxicated at the time of his arrival (R. 49, 50). Lieutenant Colonel Kelso's conversation made sense. The witness would not say that his faculties were wholly impaired (R. 51). Lieutenant Colonel Maki was in control of his faculties during the ride home, and directed the group to his quarters.

Captain Hays, the Provost Marshal, stated his opinion that both the accused were drunk when he saw them in Lieutenant Colonel Kelso's quarters (R. 75). Lieutenant Colonel Maki was considerably sobered when they took him home (R. 76), and then had full control of his faculties (R. 79).

Lieutenants Phillips and Stiles, who had regarded the accused as intoxicated when they left the officers' club, were among the officers rounded up at Lieutenant Colonel Kelso's quarters about 2:30 in the morning. They, with several other officers, remained in the other room of the two-room hut. The place was hot and stuffy and full of cigarette smoke (R. 45). Lieutenant Stiles had insufficient opportunity for observation to form an opinion of the accuseds' condition at that time (R. 67). Lieutenant Phillips thought they were drunk then (R. 36), but that a cup of coffee and a little fresh air would have made a difference at that time.

4. For the defense, each of the accused officers stated that he was familiar with his rights and testified in his own behalf.

Lieutenant Colonel Kelso testified as to his duties (R. 88), that he was told shortly after his arrival on the island that his battalion would be under the resident engineer for work details and labor, and it had been so ever since. After a reorganization in the Engineers Department, they had not even bothered him about furnishing the details. His men were under the resident engineer and did whatever work he had to do. Administratively, Lieutenant Colonel Kelso had done nothing but the usual "housekeeping" duties, looking after sanitation and the housing, feeding and clothing of his men. His battalion was operating as a part of the regiment (R. 90) and he had no powers of a detached battalion commander, such as court-martial or the transfer, promotion or demotion of his men. He had never been called to conference with the Post Commander, as was customary in the case of unit commanders. He did not consider the area as one of active hostilities, nor himself as being on duty on the night in question, except as every member of the service is subject to call to duty. He felt that he was entitled to certain leisure hours (R. 90).

Lieutenant Colonel Kelso testified as to the events in question that he had planned to have his company commanders together for a little feed on some salmon that he and another officer had caught (R. 88). Originally planned for an earlier time, the dinner had been deferred to the evening of 3 August by reason of Colonel Goodman's having called the battalion commanders together and told them of the arrangements made for that day. There were to be no activities required after

sometime earlier on 3 August. Kelso and a sergeant went to work in the kitchen at the officers' club about 4:30 in the afternoon and prepared the dinner. Maki came in at some time before dinner and remained with Kelso. They had a drink of bourbon, which they sipped until dinner. There was a drink in front of them during dinner. They were talking and having fun, and Kelso did not think they were out of line in any way. Maki was anticipating his organization being relieved and returned to the States. Kelso knew they were not intoxicated, because they needed no help to get to the car when they left, about nine o'clock. Maki's car got stuck in the mud of a temporary road to Kelso's hut, and Kelso invited Maki to come in and spend the night and they would get his car out in the morning. They went to Kelso's quarters and had another drink. Maki called his executive officer to let him know where he was, and called Colonel Gleim. After talking to Colonel Gleim, Maki announced that his organization was "going home." They were elated. Shortly thereafter, Captain Beaver came in. They were still "hilarious" over Maki's going home. Captain Beaver, at Kelso's request, made some coffee (R. 89). There was no more liquor drinking. They drank the coffee after it had ceased to be too hot. Maki decided to stay all night, Beaver went to quarters nearby, and Kelso and Maki undressed and went to bed (R. 90). Kelso did not remember, from then on, what caused him to wake up or what caused the telephone calls that someone had been hurt. He was trying to piece things together when Lieutenant Colonel Brunner and Captain Barton came, then Lieutenant Colonel Utter and the Provost Marshal (R. 90). He knew that he spoke to them when they came in. He did not remember the phone calls after Maki's call to Colonel Gleim around 10:30 (R. 91) nor calling for the ambulance, nor the ambulance driver coming, nor how the coffee pot and other things got on the floor, nor getting dressed, nor how the hole got in the wall. He cut his fingers earlier, in the kitchen, fixing the dinner at the club (R. 91). The arrival of the officers upset him, and the first thing he remembered was finding himself dressed and asking Lieutenant Colonel Brunner what the hell he was doing there (R. 92).

Lieutenant Colonel Maki testified (R. 96) that the last leave he had was in August 1941; that he left the continental United States 6 July 1942, and arrived on Adak 31 October 1942, as a battery commander in his then regiment, later organized into a group. Living conditions on the island then were quite primitive. He had become battalion executive in June 1943, and commander in October 1943. He understood that on 3 August 1944 the anti-aircraft was on "green" status and condition "one" readiness (R. 97). In the gun battalion, the responsibility for opening fire is on the senior officer of the gun battery then present, not the battalion commander. The battalion commander would have only administrative matters to look after in case of a raid. He would be responsible to see that the batteries were operated, that ammunition was supplied and casualties properly evacuated, and "things like that" (R. 97). Each battery had sufficient ammunition reserves on hand (R. 100). Maki had left his battalion headquarters that morning

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around 9:30 to attend the reception for the President. There, Kelso had invited him to the seafood dinner at the club that evening. In the afternoon, Maki had served as aide to Colonel Gleim, who was commander of troops in a review held for the President. After that, Maki returned to battalion headquarters and told his executive where he was going. He left there about 5:30 and arrived at third battalion officers' club around six o'clock (R. 97). Policy was that either the battalion commander or the executive should be present at battalion headquarters, and Colonel Gleim had so ordered. Neither had any definite days off, as did the other officers and men, so the battalion commander could take time off as he saw fit and conditions in the area warranted (R. 98).

Lieutenant Colonel Maki attended the seafood dinner, had a drink in the kitchen with Kelso while it was being prepared, left with Kelso around nine o'clock, got his car stuck in the mud on the way to Kelso's hut, and went to Kelso's quarters. There he called Major Carpenter, his executive, who later called him and told him Colonel Gleim had called. Maki called Colonel Gleim and learned that the battalion was placed on "A" alert to go home 7 August. He then called Major Carpenter back and "talked over the move." That was around 10:30 (R. 98). Colonel Gleim had said that he had better be going home, as there was a lot of work to do the next day, and Captain Beaver arrived and wanted to take him home, but it had been a tiresome day and they decided he had just as well stay there and leave the next morning. "Everything was in control at the battalion." (R. 98) Some time later they had coffee, sat around and talked a while, then Captain Beaver went to other quarters and Kelso and Maki undressed and went to bed (R. 99).

The next thing Maki remembered was that he woke up and heard Kelso calling Colonel Goodman, and some talk of shooting. He did not know whether there had been any or not, so called Colonel Gleim and told him there had been some trouble. Colonel Gleim said he had better go home, and he said he would as soon as the trouble was straightened out. Maki dressed and started rounding up the pistols to see if any had been fired. They had not, to the best of his knowledge. He had not heard anyone call for an ambulance, but an ambulance driver came. Maki told him they did not need it. Then Lieutenant Colonel Brunner and his Adjutant came, and Maki asked Lieutenant Colonel Brunner to check the pistols and verify his observation that they had not been fired. Then Lieutenant Colonel Utter came in, and, being unable to get a satisfactory explanation as to what the trouble was, started rounding up the officers to see if anyone had been hurt (R. 99).

Maki regarded himself as off duty that night (R. 99).

On cross-examination, Maki testified that they were drinking whiskey while Maki was at Kelso's quarters. Maki did not remember falling out of bed or finding himself on the floor. He attributed any incoherence in his later conversation with Colonel Gleim to being upset over the suggestion that someone had been hurt and his having no knowledge

about it (R. 101). He had a drink before dinner and maybe two or three after dinner at the club. He declined Captain Beaver's offer to take him home because it was too long a ride and the weather was nasty. He attributed any disorderly condition which developed in Kelso's quarters to the fact that the table was in such a place that it could easily be bumped into by one coming through the door, and the same applied to the clothes (R. 102). The conversation he overheard (Kelso calling Colonel Goodman) took all other thoughts out of his mind. He had the pistols out of the holsters to examine them, two stuck in his waistband and one in his hand, when the ambulance driver came. He knew nothing about the hole in the wall (R. 102-103). Kelso had given him one pistol out of the drawer because he asked for it, and the other two were hanging up in their holsters. He found out they were loaded (R. 104).

The only alert status discussed with Colonel Gleim during Maki's first telephone conversation with him was the "A" alert for returning to the United States (R. 104). Maki's Anti-Aircraft Artillery was always ready to fire at a moment's notice, and had been since 24 December 1941 (R. 103).

Captain Little stated his opinion that the accused were not intoxicated at the officers' club, though buoyant and happy, and that they could then have performed any duties that might have been required (R. 85).

The stipulated testimony of Major Carpenter, battalion executive (R. 92), corroborated Lieutenant Colonel Maki as to the arrangements made with him to keep in touch with Maki and the disposition of battalion affairs while Maki was away from headquarters. Lieutenant Colonel Forderbrugen (R. 105-107) corroborated him on the orders and policy permitting battalion commanders to be absent from their areas when their executive officers were present; and distinguished conditions on Adak from those on Kiska Island as luxurious by comparison. The battalion commander of anti-aircraft artillery should be where he can answer questions and take care of problems concerning food, ammunition, and so forth, and is always subject to call, but normally does not have much to do. Witness and Maki alike were absent from their battalion areas a great deal of the time on 3 August under the green one status, as they were practically ordered to attend the President's reception in the morning and "that other thing in the afternoon" that they "called a review."

Major Huttig (R. 107) was Fighter Wing Commander. There had been no contact with enemy aircraft over Adak in the fifteen months he had been there (R. 109). On 3 and 4 August 1944, the weather was extremely poor for flying and tactical operations would have been extremely improbable. This was substantiated by the weather report, Defense Exhibit C (R. 80). The log kept by Post Security Central (Defense Exhibit F) showed no enemy aircraft or submarine in the vicinity

(R. 95). The prosecution offered to agree that the area was not as active as it had been a year and a half before, and suggested that the court knew the condition there. The law member stated that judicial notice had been taken of conditions in the area (R. 109).

Colonel Goodman, Lieutenant Colonel Kelso's commanding officer, who had testified for the prosecution as to the conditions prevailing at the time in question and as to Lieutenant Colonel Kelso's duties, including his responsibility for the battalion and his being subject to call at any moment, as well as to his connection with the events of the night in question, was recalled as a witness for the defense. He testified (R. 81-82) that, from a tactical standpoint, Lieutenant Colonel Kelso's duties on 3 and 4 August were no different from any normal day, and that any officer there or elsewhere in the military service was subject to call at any time. He testified further that Lieutenant Colonel Kelso had been under his command nearly two years, that he considered him between a high "excellent" and a low "superior" and that he was the best battalion commander the witness had. Also, that although the witness had ordered Lieutenant Colonel Brunner to take command of the third (Kelso's) battalion on the night in question, if necessary, Lieutenant Colonel Brunner did not do so because it was not necessary (R. 82). Lieutenant Colonel Utter (R. 83), Lieutenant Colonel Kelso's superior officer for about twenty months, testified generally to the same effect.

Neither Lieutenant Colonel Kelso (R. 82) nor Lieutenant Colonel Maki (R. 97) had been relieved of his command after the events in question, up to the time of trial.

5. The status of the accused officers as on duty, and the extent to which they were on duty under the circumstances in evidence in the case, is regarded as primarily a matter of military law. There were no immediate specific duties in fact requiring their attention. Either was subject to call if required, and each, as battalion commander, was under the duty of constant alertness to respond to the call of any specific duty that might arise.

Circumstances affecting the probability of the occurrence of an actual emergency involving the instant need for the presence of the accused for specific duty concern largely the gravity, rather than the establishment, of the offense. In this connection, the fact that the post was in a theater of operations, declared subject to enemy attack, heightened the duty of vigilance. The presence of the President of the United States was properly regarded by the command as calling for the exercise of unusual precautions, and for that reason the military personnel of the island were in fact ordered on the alert.

The occurrence of bad weather had two pertinent results. On the one hand, it made attack less probable, as less feasible. On the

other, it detained the President and his party from their intended departure and extended the contemplated period of extra precautions during his stay. The actual planned occasions for the officers to appear before the President had passed during the day, but the President was still there. The alert orders remained in effect.

The absence of any actual hostilities in the area for many months before, together with the state of the weather which rendered attack unlikely, were circumstances affecting the quantum of diligence necessary to maintain a condition of complete preparedness for attack, but not the duty so to be prepared. That duty remained constant.

The provision found in M.C.M. 1928, par. 145, p. 160, that "in time of war and in a region of active hostilities the circumstances are often such that all members of a command may properly be considered as being continuously on duty" within the meaning of Article of War 85, was held in C.M. 230201 Eubanks, decided 20 March 1943, 17 BR 311 (2 Bull. JAG 142, April 1943), to have been extended by the necessities of modern warfare to include a combat zone, defined as comprising "that part of a theater of operations required for the active operations of the combatant forces." (Field Manual 100-5, entitled "Field Service Regulations: Operations," 22 May 1941, p. 1). There the offense occurred at Fort Glenn, Alaska, on 25 October 1942. The place, on the mainland, was less exposed to enemy attack than was Adak Island, though the enemy's capacity for attack against our defense may have been greater at that time. The enemy had bases within flying distance, naval bombardment was feasible, and incidents of enemy activity had occurred in the vicinity. The accused, a battalion executive officer, was held to have been continuously on duty within the meaning of Article of War 85 under those circumstances.

The Eubanks case, supra, followed the prior decision of the Board of Review in C.M. 222739 Seemes, decided 28 July 1942 (1 Bull. JAG 105, July 1942), where the executive officer of the garrison of an island outpost was held to be on continuous duty, the island having been shelled by a hostile submarine two months before, an island forty-nine miles distant having been shelled that day, and the garrison having been denied passes and cautioned to be alert. Although the accused was not required to be in his office, he was held to be on duty within the meaning of Article of War 85 when found drunk in his quarters at 10:30 at night.

In MacIachlan, C.M. NATO 1045, 27 December 1943 (3 Bull. JAG 284, July 1944), the fact that his battalion formed a part of a Field Artillery Brigade, so that he had no tactical control of its units, was held not to relieve a battalion commander, retaining administrative control, from continuous duty when bivouacked in a combat zone, a few

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hundred yards from Brigade Headquarters, with a portion of his headquarters battery. He had his responsibilities as battalion commander and his duties as adviser to the brigade commander.

While the circumstances of the instant case may have rendered the possibility of attack more remote than in the cases above cited, it is believed that the same principles govern as to the duty status of the accused, and that the court was fully justified in finding that they were on duty at the time in question.

The degree of intoxication sufficient to sustain the conclusion that an accused was "drunk" is that which is "sufficient sensibly to impair the rational and full exercise of the mental and physical faculties" (M.C.M. 1928, par. 145, p. 160). The standard set in Winthrop's Military Law and Precedents, page 612, Second Edition, 1920 Reprint, is generally accepted:

"The state of drunkenness contemplated by the Article may be said to be one which incapacitates the officer or soldier, mentally or physically, for the proper performance of the duty upon which he has entered. There are, of course, various grades of intoxication, and, under those which are less pronounced, the party may be able to perform the duty imperfectly - to get through it after a fashion - but not properly. In any such case he is in general to be held to be 'drunk' in the sense of the Article equally as if he were totally incapacitated; a due, proper and full execution being that which is required of him, and his offense being complete where, by becoming intoxicated, he has rendered himself either more or less incompetent for the same. \* \* \* But where the party is in fact qualified to perform the duty, as it was intended to be, or should be, performed, the circumstance that he is enlivened or made dull or unwell by his indulgence, will not alone render him chargeable under the Article."

This standard was fairly applied as the basis for the examination of witnesses at the trial, and the evidence, from the testimony of witnesses and the admitted actions of the accused, was ample to sustain the findings that the accused were drunk.

6. Seven of the eight members of the court which tried the case signed a written recommendation for clemency, pointing out that the court applied rigidly the rules pertaining to constant duty status of a commanding officer in a theater of operations, whereas the existing conditions and relatively inactive status of hostilities in that immediate theater present the question whether that standard should prevail in the ultimate disposition of the case. Recommendations for clemency, signed by Defense Counsel, are attached to the record. The reviewing authority, by separate letter attached to the record, calls attention to the excellent military records of the accused officers,

states his opinion that the Army will be benefitted by their retention in the service, and recommends that, in the event of confirmation, the sentences be suspended.

7. War Department records show that Lieutenant Colonel Earl H. Kelso will be 44 years old on 22 October 1944. He is married. He attended high school in his native state of Nebraska for three and a half years, but was not graduated. As a civilian, he was an insurance salesman, previously a route auditor and supervisor for a dairy company, department store cashier, and railroad payroll clerk. After service in enlisted status in the Nebraska National Guard from 20 January 1922, he was commissioned second lieutenant of Infantry, Officers Reserve Corps, 19 December 1930, first lieutenant, National Guard, 4 April 1934, captain, National Guard, 5 July 1938. He completed the National Guard and Reserve Officers' course at The Infantry School, Fort Benning, Georgia, 24 May 1940. He entered upon active duty 23 December 1940, as captain, and was temporarily promoted to major, 3 April 1942, and to lieutenant colonel, 4 January 1944. His ratings are "excellent."

War Department records show that Lieutenant Colonel George E. Maki is 33 years of age, and is married. His record in the Adjutant General's Office does not show that he has a child, but his Defense Counsel's letter recommending clemency refers to his child. He is a native of Michigan, of Finnish extraction. His parents were naturalized in 1917. He was graduated from the University of Detroit in 1934, with the degree of Bachelor of Science in Architectural Engineering. As a civilian, he was an engineering draftsman for the Ford Motor Company. He served in enlisted status in the Michigan National Guard from June 1933, was appointed second lieutenant, Field Artillery, National Guard, 22 August 1938, first lieutenant 20 September 1939, first lieutenant, Coast Artillery Corps, National Guard, 13 February 1941, and captain, Coast Artillery Corps, Army of the United States, 25 November 1941. He entered upon active duty as a captain 24 February 1941, was temporarily promoted to major 5 June 1943, and to lieutenant colonel 15 April 1944. His ratings are "excellent" and "superior."

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as to each accused, and their respective sentences, and to warrant confirmation of the sentences. Dismissal is mandatory upon conviction of a violation of Article of War 85.

Fletcher R. Andrews, Judge Advocate.

Herbert R. Frederex, Judge Advocate.

W. B. G. G. G., Judge Advocate.

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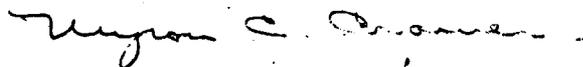
War Department, J.A.G.O.,

- 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 Lieutenant Colonel George E. Maki (O-371539), 94th AAA Gun Battalion, and Lieutenant Colonel Earl H. Kelso (O-279109), 364th Infantry, Adak, Alaska.

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 sentences and to warrant confirmation of the sentences. The accused officers are both National Guard officers of long training and experience and of previous good character. Lieutenant Colonel Kelso is nearly 44 years old, Lieutenant Colonel Maki is 33. Clemency is recommended by seven of the eight members of the court which tried the case and by letters of the Defense Counsel, all attached to the record. Lieutenant General Delos C. Emmons, the reviewing authority, recommends suspension of the sentences, in the event of confirmation, by separate letter attached to the record. Although the conduct of the accused was reprehensible, I believe that each may be of further value to the service as an officer and that under the circumstances the imposition of suitable reprimands and forfeitures will satisfy the demands of justice, and will do so more effectively than would suspension of the sentences to dismissal. I therefore recommend that the sentence in the case of each officer be confirmed but commuted to a reprimand and forfeiture of \$150 pay per month for six months, and that, as thus commuted, the sentences 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 the above recommendation into effect, should such action meet with approval.



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

3 Incls.

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

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(Sentence in case of each officer confirmed but committed to reprimand and forfeiture of \$150 per month for six months. G.C.M.O. 674, 26 Dec 1944)

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

(243)

SPJGK  
CM 264728

14 NOV 1944

U N I T E D S T A T E S	)	GUADALCANAL ISLAND COMMAND
v.	)	Trial by G.C.M., convened at
First Lieutenant JOSEPH A.	)	Headquarters Guadalcanal Island
PRICE (O-1583530), Quarter-	)	Command, APO 709, 26 August 1944.
master Corps.	)	Dismissal, total forfeitures and
	)	confinement for five (5) years.

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OPINION of the BOARD OF REVIEW  
LYON, HEBBURN and MOYSE, Judge Advocates.  
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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that First Lieutenant Joseph A. Price, 3766th Quartermaster Truck Company, did, at APO 709, on or about 5 April 1944, feloniously embezzle by fraudulently converting to his own use, one camera, value \$95.00, property of the United States, which he had taken from Private Donald E. Wright at an official show down inspection.

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

Specification 1: In that First Lieutenant Joseph A. Price, 3766th Quartermaster Truck Company, did, at APO 709, on or about 18 April 1944, with intent to deceive, wrongfully tell Private Donald E. Wright that if he, Wright, were questioned about a camera which Lieutenant Price had taken from Private Wright, that he, Private Wright, was to say that he had found the camera and had sold it to Lieutenant Price for \$50.00, he, Lieutenant Price, well knowing that such a statement was and would be untrue.

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Specification 2: In that First Lieutenant Joseph A. Price, 3766th Quartermaster Truck Company, did, at APO 709, on or about 5 April 1944, wrongfully and unlawfully deliver to First Lieutenant Paul Jones, one (1) camera for an agreed price of \$50.00, which camera was not the property of Lieutenant Price and Lieutenant Price well knowing that he had no right, title or interest therein and had no right to sell or otherwise dispose of it to Lieutenant Jones.

Specification 3: In that First Lieutenant Joseph A. Price, 3766th Quartermaster Truck Company, did, at APO 709, on or about 5 April 1944, wrongfully and dishonorably offer and agree to pay to Private Donald E. Wright, \$100.00 for two (2) cameras which he, Lieutenant Price, had taken from Private Wright, well knowing that Private Wright had no right or authority to sell or otherwise dispose of same.

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

Specification 1: In that First Lieutenant Joseph A. Price, 3766th Quartermaster Truck Company, did, at APO 709, on or about 2 April 1944, wrongfully accept as a gift from Private Nathan G. Ottman, an enlisted man in his command, four (4) Eversharp fountain pens, to the prejudice of good order and military discipline.

Specification 2: In that First Lieutenant Joseph A. Price, 3766th Quartermaster Truck Company, did, at APO 709, on or about 2 April 1944, wrongfully and unlawfully sell one bottle of whiskey to Sergeant Harry P. Wilkinson and Corporal William D. Bazydlo, for the sum of \$30.00.

Before accused pleaded to the general issue, defense counsel moved that Specification 2 of Charge III be stricken on the ground that it failed to state an offense and was insufficient to apprise accused of the nature of the offense sought to be alleged. The law member denied the motion but directed that the Specification be amended by adding thereto the words, "to the prejudice of good order and military discipline". This ruling was made without objection from any member of the court, and the accused stated that he did not desire a continuance to enable him to prepare to defend against the amended Specification. The accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of any previous conviction was introduced at the trial. 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 a period of 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. Evidence for the prosecution. (Note: Some of the Specifications will be dealt with out of their numerical order for the sake of continuity in the subject matter.)

At all times pertinent to the issues involved, as well as at the time of trial, the accused was in the military service, assigned for duty with the 3766th Quartermaster Truck Company, APO 709 (R. 6,9).

Charge I and its Specification (Embezzlement - AW 93).

During a "showdown" inspection made in the 3766th Quartermaster Truck Company, APO 709, on 5 April 1944, the accused discovered a Rollei-cord camera among the effects of Private Donald E. Wright, who was a member of the organization (R. 6). Private Wright testified that he acquired possession of the camera while engaged in hauling supplies "from Lunga Beach to the 4th Marine Base Depot". He had diverted and withheld from delivery a box on the side of which appeared the word "Cameras" and the insignia of the United States Marine Corps (R. 6,9). Upon reaching his base motor pool APO 709 (R. 9), he took from this box one camera and "gave the others to Trunnell, Holcomb, and R. V. Gray" (R. 7).

Either during or shortly after the above-mentioned inspection, the accused acquired possession of the camera. Private Wright's entire testimony concerning the manner in which accused acquired possession of the camera was as follows:

Direct Examination.

"Q. Tell the court how he came to your attention.

A. There was a showdown inspection, and I had a camera, and he found it at the showdown inspection.

\* \* \* \* \*

Q. What did you do with the one [camera] you had?

A. Lieutenant Price got it.

\* \* \* \* \*

Q. Going back to the showdown inspection, at the time you had the showdown inspection did Lieutenant Price ask you anything about that camera (indicating camera on table)?

A. Yes, Sir. He did.

Q. What did he ask you?

A. First he asked me if I got it from home.

Q. What did you tell him?

A. No.

\* \* \* \* \*

Q. What else did he ask you?

A. He asked me where I got it.

Q. What did you tell him?

A. I said, 'I pilfered it, Sir.'

Q. What, if anything, happened as far as Lieutenant Price is concerned after he took the camera away from you?

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A. He gave me a check for \$75.00.

Q. What was that check for?

A. That camera.

\* \* \* \* \*

Cross Examination:

Q. You testified on direct examination that, at a shake-down inspection, Lieutenant Price took a camera from you. Is that right?

A. Yes, Sir.

Q. Isn't it true that at the time of the shakedown inspection you referred to you were not there.

A. That's right. I was taking a shower.

Q. Can you explain to the court how you can say he took the camera from you when you were not even there?

A. I came back from the shower. I was there a few minutes. And he came up to the tent.

\* \* \* \* \*

Q. Isn't it true that at the time he asked you about these cameras and admired them he asked you if you would sell him one?

A. Yes, Sir. He did.

Q. And didn't he then write you a check for \$75.00 for the camera?

A. First he asked me where I had gotten it.

Q. Just what were your exact words to Lieutenant Price when he asked you where you got the camera.

A. I couldn't give you the exact words, but he first asked me if I had gotten it from home. I said, 'No, Sir.'

By the Court:

Q. How do you know that Lieutenant Price took the camera from you at a showdown inspection when you were taking a shower?

A. He didn't then. He took it from me after I came back from the shower" (R. 6,7,8,9).

On or about 8 April 1944, Sidney R. Liebman, Special Agent, Counter Intelligence Corps, Headquarters Guadalcanal Island Command, APO 709, G-2 Section, had a conversation with accused in regard to cameras which, without objection by defense counsel, he recounted as follows:

"He told me he had in his possession a Rolleicord camera, and that he had obtained this camera from a Private in his company by the name of Donald Wright, and that he obtained this camera during a shakedown inspection, and that he had arranged to purchase this camera from Wright and had agreed to pay, I believe the price was \$75.00, for that camera. I asked him whether he had questioned Wright or not as to the manner in which Wright had obtained the camera, and he stated that Wright had either told him that he had stolen the camera or found it, and that Wright had been evasive in answering that question.

\* \* \* \* \*

"\* \* \* He told me that the camera was being used by himself, and that he could not turn it over to me that day, but that he would secure it for me and turn it over to me the following day." (R. 12).

On or about 18 April 1944 the accused delivered to Liebman and Special Agent Arnim Rappaport a Rolleicord camera which Liebman identified at the trial (R. 12). At the same time, accused, after being first duly warned of his rights, voluntarily made and signed a written statement in the presence of Liebman and Rappaport with reference to his possession of this camera (R. 11). Both the camera and the statement so made by accused were introduced in evidence without objection (R. 13; Ex. A,B). The pertinent portions of the statement were as follows:

"About 10 days ago, while conducting a showdown inspection in the company I found a camera (a Rolleicord 120 mm) in the possession of PFC Wright, a truckdriver in the 3766 QM Truck Company. I took this camera from Wright and put it in my footlocker. I asked Wright where he had obtained the camera and he was evasive in his answers and refused to say whether he had purchased or stolen the camera. I offered to buy the camera from him for \$50. I took the camera to my quarters and put it in my footlocker. I have turned this camera over to the Investigating Agents on this date. No subsequent conversation has ensued between Wright and myself regarding this camera and no payment had been made."

Evidence was introduced to show that the pre-war value of a Rolleicord camera of the type introduced in evidence (Ex. A) was between \$90 and \$100 and that the present value of the camera introduced in evidence is about \$250 (R. 15).

Specification 3, Charge II (Agreeing to pay \$100 to an enlisted man for two cameras which he knew the latter had no right to sell - AW 95).

After he had, as above set out, acquired possession of the camera which he had discovered among Wright's effects (whether on the same or a subsequent day is not made clear by the record), the accused made known to Private Wright that he would like to have another camera (R. 7). Private Wright testified that he thereupon obtained from "Trunnell" the camera which the latter had gotten from him in the motor pool, as hereinabove set out (R. 7). He delivered this camera to the accused in Sergeant Frauenberg's tent, at which time accused "said he would give me \$100 for the 2 of them" (R. 8). The accused did not give him the \$100 (R. 8). In response to a question by the court, "Did you tell him accused where that second camera came from?", Private Wright answered, "Yes, Sir. He knew." (R. 9).

In his voluntary, pre-trial, written statement, above referred to, the only allusion made by the accused to the transaction now under discussion was as follows:

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"After the showdown mentioned herein, I spoke to Wright and asked him if there was any more cameras in the company and told him that I might know of someone who might be interested in purchasing it. Wright said he believes (d) that there was another camera in the company."

Specification 1, Charge II (Requesting enlisted man to make a false official statement - AW 95).

Private Wright testified that during the time special agents of the G-2 Section were conducting an investigation, the accused had yet another conversation with him about the cameras in question. "He told me if they question me to tell them he paid me \$50.00 for them and that would save the company" (R. 8).

Specification 2, Charge II (Delivering camera to another officer for an agreed price of \$50, knowing that he had no title thereto and no right to dispose of same - AW 95).

First Lieutenant Paul Jones, 3766th Quartermaster Truck Company, testified that on or about 5 April 1944, at APO 709, upon seeing in the possession of accused a camera which he liked, he told accused that he would like to have one like it. The accused "said he would see if he could get me one", and later during the same day accused delivered to Lieutenant Jones a Rolleicord camera similar to the one introduced in evidence as the prosecution's Exhibit A (R. 13-14). At the time of delivering the camera, the accused stated that he had arranged for the purchase of it "from one of the men in the company" at a price of \$50 (R. 14). Lieutenant Jones did not have \$50 at the time, and arranged with the accused to pay for the camera for him, he to pay accused at a later date (R. 14).

Specification 1, Charge III (Accepting gifts from an enlisted man - AW 96).

Technician Fifth Grade Nathan G. Ottmann, 3766th Quartermaster Truck Company, testified that on or about 2 April 1944, at APO 709, he "gave" the accused four Eversharp fountain pens, and that accused accepted them (R. 10-11). At the time this transaction took place, Ottmann was an enlisted man in the same company as the accused but was not in the latter's platoon (R. 11).

Special Agent Liebman testified that during an interview which he had with accused at Tulagi sometime after 8 April 1944, the accused "stated that he had obtained a number of fountain pens, I think about 8 in all; that he obtained these from an enlisted man in the company by the name of Ottmann; and that he retained one of the fountain pens for himself" (R. 12).

Specification 2, Charge III (Selling bottle of whiskey to enlisted men - AW 96).

Staff Sergeant Howard J. Frauenberg, 3766th Quartermaster Truck Company, APO 709, testified that on or about 2 April 1944 the accused asked him if he "knew of anybody who wanted to buy a quart of liquor for \$30" (R. 9). Frauenberg replied that he "would find out", whereupon accused instructed him, "try not to sell it in our own outfit" (R. 9). Sergeant Frauenberg, however, knew no one outside his own company who might be interested, so approached two of its members, Sergeant Wilkinson and Corporal Bazydlo. These two were willing to pay the stipulated price and each of them delivered \$15 to Sergeant Frauenberg (R. 10). The latter delivered the \$30 thus collected to the accused, who told him that he would find the whiskey on his (Frauenberg's) bed that night. Frauenberg did find a quart of Three Feathers whiskey on his bed that night and delivered it to Sergeant Wilkinson (R. 10). Sergeant Frauenberg estimated that a quart of Three Feathers whiskey would sell at retail in the United States for approximately \$4.85 (R. 10).

#### 4. For the defense.

Lieutenant Colonel Robert D. Hodge, Commanding Officer, 161st Quartermaster Battalion, testified that he had known accused for about 20 months, had had him under his command, and had had numerous opportunities to directly observe him and his work. Colonel Hodge recounted several specific examples of what he considered demonstrations of exceptional efficiency by the accused in handling a variety of difficult assignments. He also testified that all who knew of accused's work spoke highly of it. Because of his efficiency, military bearing, and exceptionally neat appearance, accused was chosen upon one occasion as aide to a post commander who was engaged in the important mission of bestowing a Medal of Honor. Colonel Hodge rated accused "excellent" as to both character and military efficiency. So far as he knew, accused had never been reprimanded or subjected to any disciplinary punishment (R. 16).

Lieutenant Colonel Marlin R. Kopp, 84th Quartermaster Battalion, likewise testified that he had known accused for approximately 20 months. Accused always carried out orders willingly and quickly. Colonel Kopp had never had to reprimand him and never supervised his work except in a command way. He also rated accused "excellent" as to both character and military efficiency (R. 17).

Having had his right to testify under oath, to make an unsworn statement, or to remain silent explained to him, the accused elected to remain silent.

5. It is alleged in the Specification of Charge I, as a violation of Article of War 93, that the accused "did, at APO 709, on or about 5 April 1944, feloniously embezzle, by fraudulently converting to his own use, one camera, value \$95.00, property of the United States, which he had taken from Private Donald E. Wright at an official showdown inspection".

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come. (Moore v. U.S., 160 U.S. 268).

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

It was apparently the theory of the prosecution, first, that acting in his official capacity as an officer of the Army of the United States, and with knowledge that the camera which he discovered among the effects of Private Wright during the inspection on 5 April 1944 was property of the United States which had been stolen from it, the accused, in the proper discharge of his duties, lawfully repossessed the camera from Private Wright for the benefit of the Government; secondly, that, as a result either of the office which he held or of the duties which he was performing, a fiduciary relationship existed between the accused and the Government, by virtue of which he took possession of the camera, and as a result of which, such taking and his subsequent holding of the camera was by operation of law in trust for the Government; and thirdly, that accused breached his trust by fraudulently converting the camera to his own use.

It is not necessary to pass upon the correctness of this theory as an abstract proposition of law, because the Board of Review is of the opinion that the evidence of record is legally insufficient to establish or support the major premise of the theory, that is, that the accused, while acting in an official capacity and by virtue of a fiduciary relationship existing between himself and the Government, lawfully repossessed the camera from Private Wright for the benefit of the Government. Despite such expressions as "Lieutenant Price got it", and, "He took it from me after I came back from the shower", used by the witness Wright in reference to accused's acquisition of the camera in question, and despite his failure to negative the assumption contained in one of the questions propounded to him by counsel for the prosecution, that accused took the camera away from him, the evidence as a whole negatives the theory that accused took the camera from Wright in the sense of manually possessing himself of it by dint of superior right or authority, and completely refutes the theory that accused acquired possession of the camera for the benefit of the Government or by virtue of any fiduciary relationship existing between himself and the Government. There is no evidence of record from which to conclude that accused even knew that the camera was Government property. There was no showing that it bore any markings to identify it as such, and no contention was made that Wright informed him that it was Government property. Before possessing himself of the camera the accused asked Wright if he would sell it, and

contemporaneously with acquiring possession thereof he gave Wright a check for \$75 in payment for it. If it should be argued that these facts do not necessarily establish a meeting of the minds of the parties and the consummation of a voluntary sale by Wright to the accused, they are nevertheless so inconsistent with the theory that accused took possession of the camera in his official capacity, as an agent of, and for the benefit of the Government, as completely to dispel the idea. The only logical conclusion to be drawn from the evidence of record is that the accused acquired possession of the camera in his individual capacity, with the intent from the beginning to apply it to his own use. Since, therefore, the record of trial fails to establish that accused acquired possession of the camera in a fiduciary capacity, or that he held it in trust for the Government, it is legally insufficient to support the finding of guilty of embezzlement.

Specification 1, Charge II.

It is alleged in this Specification that accused -

"\* \* \* did \* \* \*, with intent to deceive, wrongfully tell Private Donald E. Wright that if he, Wright, were questioned about a camera which Lieutenant Price had taken from Private Wright, that he, Private Wright, was to say that he had found the camera and had sold it to Lieutenant Price for \$50.00, he, Lieutenant Price, well knowing that such a statement was and would be untrue."

The only evidence of record to support the finding of guilty of this Specification is the testimony of Private Wright, "He told me if they investigators question me to tell them he paid me \$50.00 for them cameras and that would save the company". Obviously, therefore, so much of the finding of guilty as involves the finding that accused requested or instructed Private Wright to tell the officers conducting the investigation that he (Wright) found the camera is wholly without support in the evidence. When this portion of the Specification or finding is deleted or disregarded, the only thing remaining which accused is alleged and found to have instructed or requested Private Wright to tell the investigators is that he sold the camera to accused for \$50. The evidence of record does not warrant the conclusion that such a representation, had it been made by Private Wright, would have been false. On the contrary, it more justifiably warrants an affirmative finding that Private Wright did in fact sell the accused two cameras, one of which was the camera in question, for an agreed price of \$100. As hereinabove concluded, the record negatives the theory that accused took the camera from Wright in the sense of manually possessing himself of it by dint of superior right or authority. The record of trial is legally insufficient to support the finding of guilty of this Specification.

Specification 2, Charge II.

This Specification alleges that accused -

"\* \* \* did \* \* \* wrongfully and unlawfully deliver to First Lieutenant Paul Jones, one (1) camera for an agreed price of \$50.00, which camera was not the property of Lieutenant Price and Lieutenant Price well knowing that he had no right, title or interest therein and had no right to sell or otherwise dispose of it to Lieutenant Jones."

While there is no direct evidence absolutely identifying the camera which accused delivered to Lieutenant Jones on 5 April 1944 as one of the two which he obtained from Private Wright, the uncontroverted sequence of events leading up to the delivery, all occurring within a limited time, compels the conclusion that it was. When Lieutenant Jones saw and admired the Rolleicord camera that accused had procured from Private Wright, accused offered to try to get one for him. Private Wright had given three of the four cameras that he had stolen to other enlisted men. Upon accused's making known to him his desire for a second camera, stating, in substance, that he had a sale for it, Private Wright got back one of these three cameras and turned it over to accused, who at that time promised to pay him one hundred dollars for the two cameras. The camera which accused delivered to Lieutenant Jones was a Rolleicord camera, similar to the first one that accused obtained from Private Wright; it was delivered on the same day that accused obtained the first camera from Private Wright, and at the time of delivering it to Lieutenant Jones, accused told the latter that he had arranged for its purchase "from one of the men in the company" for fifty dollars. As is hereinafter more fully discussed in connection with Specification 3 of Charge II, the evidence is deemed legally sufficient to show that accused knew that Private Wright had stolen both of the cameras which accused obtained from him. Under these circumstances, the evidence is, legally sufficient to show that accused wrongfully and unlawfully delivered the camera to Lieutenant Jones for an agreed price of \$50, well knowing that he had no right to do so, an act which involved moral turpitude and constituted a violation of Article of War 95. It is immaterial whether he intended to or did perpetrate a fraud or practice deceit on Lieutenant Jones.

Specification 3, Charge II.

This specification alleges, as a violation of Article of War 95, that accused -

"\* \* \* did \* \* \* wrongfully and dishonorably offer and agree to pay to Private Donald E. Wright \$100 for two (2) cameras which he, Lieutenant Price, had taken from Private Wright, well knowing that Private Wright had no right or authority to sell or otherwise dispose of same."

The gravamen of the offense alleged is that accused agreed to pay an enlisted man for two cameras which accused knew the enlisted man had no right to sell or otherwise dispose of, thereby encouraging dishonesty on

the part of the enlisted man and evidencing in himself a lack of that degree of integrity considered essential in an officer and a gentleman. The allegation of the Specification, "which he, Lieutenant Price, had taken from Private Wright", is merely descriptive of the cameras and it was not necessary to prove a wrongful or unlawful taking in order to prove the offense alleged.

The record clearly establishes that Private Wright stole the two cameras in question from the Government and that accused acquired from him possession of both, agreeing to pay him therefor the sum of \$100. The only question requiring discussion, therefore, is whether the evidence is legally sufficient to establish beyond reasonable doubt that accused knew at the time he agreed to purchase the cameras or to pay for them that Private Wright had stolen them or that he had no right to dispose of them. Private Wright testified on direct examination that he told accused that he had "pilfered" the first camera which accused got from him. He receded somewhat from this positive assertion on cross-examination, but accused's pre-trial statements which were introduced in evidence show clearly that theft of the camera was a subject of discussion between accused and Private Wright and leave little room to doubt that the latter did in fact disclose to accused the manner in which he had acquired the camera. In his oral pre-trial statement made on 8 August, the accused stated that Private Wright had " \* \* \* either told him (accused) that he had stolen the camera or found it \* \* \* ". It would have been most extraordinary under the circumstances that accused should have suggested the possibility that Private Wright had admitted stealing the camera if Private Wright had not in fact made such an admission. However, if Private Wright was merely evasive and refused to say whether he had stolen or found the camera, as claimed by accused in his written pre-trial statement, these facts, particularly his refusal or failure promptly to disclaim theft, were sufficient to have put a reasonably prudent person on notice that Wright had, in all probability, acquired the camera in an illegal or questionable manner, and should certainly have caused accused to eliminate himself as a prospective purchaser. It may be safely assumed that when accused, shortly after acquiring the first camera from Private Wright either with actual knowledge that the latter had stolen it or with knowledge of facts which should have put him on notice that Private Wright did not own it, returned to the same source to obtain another camera of the same kind, he anticipated that Private Wright had acquired this second camera in the same manner as he had the first one and had no better title to it. In addition, Private Wright testified that at the time of delivering the second camera he told accused where he had obtained it. The evidence is legally sufficient to establish beyond reasonable doubt that accused knew that Private Wright had no right to sell or otherwise dispose of either of the cameras in question and by purchasing and agreeing to pay for the cameras under the circumstances the accused was guilty of conduct unbecoming an officer and a gentleman and violated Article of War 95.

Specification 1, Charge III - Wrongfully accepting a gift from an enlisted man, in violation of Article of War 96.

Technician Fifth Grade Nathan G. Ottman, an enlisted man in accused's company, testified that, at the time and place alleged in the specification, he "gave" accused four Eversharp fountain pens and that accused accepted them. It is apparent from the context that the witness Ottman used the word "gave" in the sense of bestowing a gratuity. The acceptance by an officer of gratuities from enlisted personnel is subversive of good order and military discipline, is contrary to the customs of the service, and to the spirit of paragraph 2e(6)(a), AR 600-10, 8 July 1944, and is prima facie a violation of Article of War 96. In the absence of evidence to show that it was not improper under the circumstances for accused to accept the fountain pens from Ottman, the record of trial is deemed legally sufficient to support the findings of guilty.

Specification 2, Charge III.

This Specification, before amendment, alleged that accused -

"\* \* \* did, at APO 709, on or about 2 April 1944, wrongfully and unlawfully sell one bottle of whiskey to Sergeant Harry P. Wilkinson and Corporal William D. Bazydlo, for the sum of \$30."

The objection made by counsel for the defense that the Specification stated no offense and was insufficient to apprise accused of the offense sought to be charged was without merit, and his motion to strike was properly denied. The amendment made by the law member, with approval by the other members of the court, neither added to nor detracted from the legal import of the Specification. No error was committed in the rulings made or action taken in this respect.

The evidence is legally sufficient to establish beyond reasonable doubt that, by using Sergeant Frauenberg as his agent, the accused sold a quart of whiskey to the two enlisted men named in the Specification, and at the time and place and for the consideration therein alleged. It is also clear from the evidence that this whiskey was sold and delivered to members of the accused's own company, upon premises used for military purposes by the United States.

"The sale of or dealing in beer, wine, or any intoxicating liquors by any person in any post exchange or canteen or any Army transport, or upon any premises used for military purposes by the United States, is hereby prohibited." (Sec. 38, act of Feb. 2, 1901 (31 Stat. 748); 10 U.S.C. 1350; Sec. 310 M.L. 1939.)

By making the sale of liquor under the circumstances revealed by the record, the accused violated the statute quoted and, in turn, the 96th Article of War.

Furthermore the holding in CM 235382, Singletary (21 B.R. 389), wherein the Board of Review was passing upon the legality of a sale of liquor by an officer to enlisted men engaged on maneuvers, is considered sound and equally applicable to the facts of the instant case. It was there said:

"Apart from the statute, supplying the men of his command with intoxicating liquor is certainly prejudicial to good order and military discipline, whether it is viewed from the standpoint of currying favor with the troops or from the standpoint of the possible result of the effect on the men the intoxicating liquor might have during field exercises. It is therefore a direct violation of the 96th Article of War which expressly prohibits all disorders or neglects to the prejudice of good order and military discipline."

The findings of guilty of this Specification and of the Charge are amply supported and justified by the record.

6. War Department records disclose that this officer is 24 years of age and single. He is a high school graduate. In civil life he was employed as a stock clerk by Marshall Field and Company, Chicago, Illinois. He entered the service as an enlisted man with a National Guard unit on 5 March 1941. As an enlisted man, he attained the grade of staff sergeant before entering Officers Candidate School, Quartermaster Supply. He was appointed and commissioned a temporary second lieutenant, Army of the United States, on 13 November 1942, entered on active duty the same date, and was promoted to the grade of first lieutenant on 18 March 1944.

7. The court was legally constituted and had jurisdiction of the person and the offenses. Except as herein pointed out, 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 Charge I and its Specification, and of Specification 1 of Charge II, legally sufficient to support the findings of guilty of Specifications 2 and 3 of Charge II, and of Charge II, of Specifications 1 and 2 of Charge III and of Charge III, and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 96.

Lucas E. Jones, Judge Advocate.  
Charles H. Stearns, Judge Advocate.  
Norman Hays, Judge Advocate.

(256)

1st Ind.

War Department, J.A.G.O., DEC 6 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 Joseph A. Price (O-1583530), Quartermaster 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 Charge I and its Specification and Specification 1 of Charge II, legally sufficient to support the findings of guilty of Specifications 2 and 3 of Charge II and Charge II, the Specifications of Charge III and Charge III, and the sentence and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed but, in view of the previous good record of accused overseas and his efficiency as an officer, as testified to by his superior officers, I further recommend that the forfeitures and confinement 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 above recommendation should such action meet with approval.



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.

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(Findings of guilty of Specification, Charge I, and Specification 1 of Charge II, disapproved. Sentence as approved by reviewing authority confirmed but forfeitures and confinement remitted. G.C.M.O. 78, 26 Feb 1945)

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

(257)

SPJGQ  
CM 264795

8 DEC 1944

UNITED STATES )

v. )

First Lieutenant JACK BOYT )  
(O-361140), Air Corps. )

ARMY AIR FORCES  
EASTERN FLYING TRAINING COMMAND

Trial by G.C.M., convened  
at Spence Field, Moultrie,  
Georgia, 11 September 1944.  
Dismissal.

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OPINION of the BOARD OF REVIEW  
ANDREWS, FREDERICK and BIERER, Judge Advocates

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

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

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

Specifications 1-13 inclusive: (Findings of not guilty).

Specification 14: In that First Lieutenant Jack Boyt, Air Corps, AAF Pilot School (Advanced Single Engine), Spence Field, Moultrie, Georgia, did, at Maxwell Field, Montgomery, Alabama, on or about 31 October 1942, cause to be presented a claim against the United States, for payment by causing to be presented to the Finance Officer at Maxwell Field, Montgomery, Alabama, Station 707, an officer of the United States, duly authorized to pay such claim, a pay and allowance account in the net amount of two hundred and fifty-six dollars and seventy cents (\$256.70), which claim was false in that it set forth no debit for Class E Allotments, although said First Lieutenant Jack Boyt had theretofore, on or about 8 August 1941, authorized a Class E Allotment of his pay in the amount of five dollars and twenty-eight cents (\$5.28) per month, commencing 1 September 1941, and on or about 4 April 1942, authorized a Class E Allotment of his pay

in the amount of one hundred dollars (\$100.00) per month, commencing 1 May 1942, making a total of one hundred and five dollars and twenty-eight cents (\$105.28) in Class E Allotments, and was then known by the said First Lieutenant Jack Boyt to be false.

Specifications 15-27 inclusive: These are the same in form as Specification 14, varying only in place of offense, date of offense, place of presentation, and amount, which are as follows:

<u>Spec.</u>	<u>Place of offense</u>	<u>Date of offense</u>	<u>Place of presentation</u>	<u>Amount</u>
15	Maxwell Field, Montgomery, Ala.	30 Nov. 1942	Maxwell Field, Montgomery, Ala., Station 707	\$256.00
16	Same	31 Dec. 1942	Same	256.70
17	Same	31 Jan. 1943	Same	388.92
18	Same	28 Feb. 1943	Same	211.27
19	Same	31 Mar. 1943	Same	213.37
20	328th College Training Detach- ment, Duquesne Univ., Pittsburgh, Pa.	30 Apr. 1943	Pittsburgh, Pa. Station 757	272.67
21	Same as Spec. 20	31 May 1943	Same as Spec. 20	273.37
22	Same	30 June 1943	Same	259.07
23	32nd College Training Detach- ment, Dickinson College, Pa.	31 July 1943	Carlisle Bar- racks, Pa., Station 190	266.57
24	Same as Spec. 23	31 Aug. 1943	Same as Spec. 23	266.57
25	63rd College Train- ing Detachment, Univ. of Tennessee, Knox- ville, Tenn.	30 Sept. 1943	Knoxville, Tenn. Station 472	265.87
26	Same as Spec. 25	31 Oct. 1943	Same as Spec. 25	282.57

<u>Spec.</u>	<u>Place of offense</u>	<u>Date of offense</u>	<u>Place of presentation</u>	<u>Amount</u>
27	Same	30 Nov. 1943	Same	322.75

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

Specification 1: (Finding of not guilty).

Specification 2: In that First Lieutenant Jack Boyt, Air Corps. AAF Pilot School (Advanced Single Engine), Spence Field, Moultrie, Georgia, having, on or about 4 April 1942, authorized a Class E Allotment of his pay in the amount of one hundred dollars (\$100.00) per month for twelve (12) months commencing 1 May 1942 and expiring 30 April 1943, which allotment was subsequently continued for an indefinite period and was in effect during each month thereafter to and including the month of November 1943, and which allotment was duly paid for each of the months commencing with the month of May 1942 to and including the month of November 1943, did, at Maxwell Field, Montgomery, Alabama, Duquesne University, Pittsburgh, Pennsylvania, Carlisle Barracks, Pennsylvania, and University of Tennessee, Knoxville, Tennessee, from 15 September 1942 to and including November 1943, in disregard of the fact that such allotment had been authorized and was being paid, and in violation of his duty to ascertain the truth and correctness of the pay and allowance accounts made by him, wrongfully certify as true and correct his pay and allowance accounts for each of the said months from September 1942 to and including November 1943, which said accounts were incorrect and his certifications were false, in that the amount of Class E Allotment of one hundred dollars (\$100.00) per month had not been entered as a debit on said accounts.

He pleaded not guilty to the Charges and Specifications. He was found not guilty of Specifications 1 to 13, inclusive, of Charge I, and Specification 1 of Charge II, guilty of Specifications 14 to 27, inclusive, of Charge I, excepting in each Specification the words, "on or about 8 August 1941, authorized a Class E Allotment of his pay in the amount of five dollars and twenty-eight cents (\$5.28) per month, commencing 1 September 1941, and" and "making a total of one hundred and five dollars and twenty-eight cents (\$105.28) in Class E Allotments"; guilty of Charge I; guilty of Specification 2 of Charge II excepting the words "15 September 1942", substituting therefor the words "9 October 1942"; and guilty of Charge II. He was sentenced to dismissal and total forfeitures. No evidence of previous convictions was introduced. The reviewing authority approved the sentence, remitted the forfeitures, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution is as follows: On 18 April 1942 accused, following considerable correspondence, refinanced an old loan with the National Bank of Fort Sam Houston, San Antonio, Texas. The new loan was for \$600 (\$564 net after discount and charges), the proceeds going to pay off the balance of an old loan and to provide additional funds which accused desired to send to his mother (Pros. Ex. 5A, E, F, G, H, I, J, K). The bank required a Class E allotment in its favor of not less than \$100 per month (Pros. Ex. 5A, J). On 4 April 1942 accused executed WD AGO Form No. 29 authorizing a Class E allotment to the bank for \$100 per month effective 1 May 1942, to continue for 12 months (Pros. Ex. 1; Stip. Ex. 2). This allotment was later continued for an indefinite period (Pros. Ex. 1). Twelve notes for \$50 each were executed and delivered to the bank by accused, one note to be charged to accused's account each month (Pros. Ex. 5A, I, J).

Beginning with the month of May 1942, the Treasurer of the United States remitted to the bank each month the sum of \$100, which respective amounts were placed to the credit of accused's regular checking account (Pros. Exs. 1, 5B, 5L). The payments were received by the bank commencing 6 June 1942, the last payment with which we are concerned having been received on 7 December 1943 (Pros. Exs. 5B, 5L). Accused executed each month and presented for payment, pay and allowance vouchers, WD AGO Form 336-A Revised, beginning in May 1942 and continuing through November 1943 (Pros. Ex. 1; Stip. Exs. 11-29). The amounts varied, due to changes in pay status and subsistence, but no deductions were entered on any of the vouchers for the \$100 allotment. The vouchers were submitted to various finance officers because of changes of station, and were in turn presented to disbursing officers serving the respective localities. The vouchers directed that the proceeds be placed to the credit of the payee at the National Bank of Fort Sam Houston, San Antonio, Texas.

On 25 January 1943, accused wrote the Fort Sam Houston bank, asking the first date upon which the bank had received the Class E allotment, and stating that this information was needed in order to clear up a discrepancy between the Finance Officer at Maxwell Field and the Finance Officer at Washington, D. C., which discrepancy "they" had requested accused to "clear" by writing the bank (Pros. Ex. 5D). On 1 February 1943 the bank replied to accused's letter, informing accused that a copy of the allotment indicated that it was to be effective 1 May 1942. The letter stated also that the first allotment check was received by the bank on 6 June 1942 (Pros. Ex. 5C).

On 29 April, 30 April, and 21 July 1944, accused, having been properly advised of his rights, made statements to First Lieutenant Lionel J. Billeaud, Air Corps, Camp Ritchie, Maryland. Lieutenant Billeaud was officially investigating the case. The statements were introduced in evidence (R. 7; Pros. Exs. 2, 3). All three statements were designated as Prosecution's Exhibit 3. Since they cover substantially the same ground, they will be considered as a unit. In substance the statements are as follows:

Accused applied for the Class E allotment for \$100 in favor of the National Bank of Fort Sam Houston, Texas, and the allotment was put into effect and received by the bank. The allotment was for the purpose of paying a loan in the amount of \$600 made by the bank to accused. The sum of \$50 per month was paid on the loan and the remaining \$50 was applied to the personal account of accused at the bank. From the bank statements accused was aware of the receipt by the bank of the \$100 per month allotment. Realizing that the allotment had been made effective as of May 1942, and had not been deducted from the accused's pay, accused wrote a letter on 9 October 1942 to the Allowance and Allotment Branch in Washington, asking "all necessary information" with regard to the allotment. In that way accused placed the branch "on notice of the existence of the discrepancy". Accused received no reply to his letter. He knew that it was his responsibility as an officer to see that his pay voucher was correct when submitted. About 16 March 1943 he was transferred from Maxwell Field, Alabama, and as yet no deduction had been made from his pay. He wanted "to clear this allotment up"; however, "there was fear or fright from this subject due to the fact that this Class 'E' Allotment was being received illegally." When he arrived at Pittsburgh, Pennsylvania, on 17 March 1943 he determined to submit the information to the finance officer but "never got enough confidence" in himself to submit all the information which should have been "included in the finance records".

On 15 July 1943 accused was transferred to Dickinson College, Carlisle, Pennsylvania. While there, he "had actually come to the conclusion" that he had "enough confidence to submit all the discrepancy that concerned the Class 'E' Allotment". Accused was stationed at Carlisle only a short time, after which he was transferred to the College Training Detachment, Knoxville, Tennessee. No information on the subject was ever given to a finance officer until word was received at Knoxville from the Fiscal Director, Paying Allotment and Audit Section, Newark, New Jersey, about 20 December 1943, after which the accused received no further pay.

The accused knew that prior to December 1943 no deductions for the allotment were made from his pay voucher. He knew that "this money" was "illegally accruing" to his benefit and account in The National Bank of Fort Sam Houston, Texas. Except for the letter of 9 October 1942 he made no official effort to rectify the situation. Having placed the Allowance and Allotment Branch "on notice that there was something wrong" with his allotment, he knew that at some time he would receive instructions from them and he "just waited". After December 1943 he continued to neglect making an effort to rectify the matter. He "became confused" as to how to "handle the situation" and did not know how he could raise the money to refund the Government. His account in the bank was practically exhausted. He wanted to make restitution to the Government and had intended to do so all along.

The Chief, Class E Allotment Division, Office of the Fiscal Director, Office of Dependency Benefits, into which the Allowance and Allotment Branch of The Adjutant General's Office was merged, testified that there was no record of the receipt of a letter from accused, dated 9 October 1942, and that no such letter appeared in the files.

4. The evidence for the defense is as follows: Major Rhoads, accused's immediate commanding officer, testified that in his current assignment as Assistant Provost Marshal for the past 30 days, accused had shown initiative and performed his duties in an excellent manner. Witness desired to have the accused continue his duties in that department (R. 8-9).

Mr. Kennedy, a resident of the accused's home town in Georgia, testified that accused's character and reputation were excellent (R. 10).

First Lieutenant Frederick Oster, Jr., Finance Department, Spence Field, Moultrie, Georgia, testified that he was familiar with the case and that all moneys due the United States had been repaid; that he has observed a number of similar occurrences regarding allotments not being deducted on pay vouchers, due primarily to ignorance of regulations concerning allotments; and that he usually worked out an arrangement for repayment to the Government, if satisfied it was not intentional (R. 12, 13).

The accused, after having his rights fully explained, elected to testify. He stated that he did not know that the \$100 allotment should have appeared on his pay voucher and that he did not know the voucher was false. It was in August or September 1942 when he first realized that no money was being withheld from his pay for the allotment. On 9 October 1942, he wrote the letter to the Allowance and Allotment Branch, previously referred to. A copy of the letter was received in evidence (Def. Ex. A). No answer was received, and in January 1943 he wrote his bank at the suggestion of a sergeant in the Finance Department. The bank's answer was received in February 1943. (Accused was referring to Prosecution's Exhibits 5C and 5D). At this time he was quite busy with 6,000 to 7,000 cadets and was transferred in March 1943 to Duquesne University, Pittsburgh, Pennsylvania (R. 15, 16). His father was having nervous spells and there was domestic trouble at home that required his attention. All of this, with other transfers and "an enormous amount of work", caused him to leave his "personal affairs somewhat neglected" (R. 17). At Knoxville, Tennessee, in December, 1943, he received a letter from the Fiscal Director, through channels, advising him of the discrepancy. The letter had been forwarded from the Finance Department at Carlisle Barracks, Pennsylvania. Accused conferred with "Major Anderson", who agreed to hold up an indorsement on the communication for ten days. This was to permit accused to go home on leave and attempt to secure a loan. Accused wanted to repay the money in a lump sum. He was unable to do this on the four-day leave which was taken. Accordingly, the indorsement, requesting that reimbursement be made by pay deductions, was submitted to the Fiscal Director (R. 17). The Government did not agree to this method of reimbursement, and his pay was "held up" from November 1943 through July 1944. In July 1944 he repaid the Government in full (R. 18). Accused never intended to defraud the Government (R. 18). When, in his statement of 29 April 1944, he admitted knowledge that "this money was being illegally accruing" to his account in the bank, he was referring to the fact that he discovered the "discrepancy" in September 1942, after which he wrote the letter (R. 19). He did not ask any finance officer at his various stations about the matter. He received monthly bank statements, but did not pay particular attention to the deposits, "just noticed" the balances (R. 20). He did not realize until August or September 1942 that the bank was receiving the \$100 allotment and that the Government was paying him \$100 too much (R. 20-23). On occasion he had overdrawn his account (R. 21).

5. In the Specifications of Charge I, upon which there was a finding of guilty, the accused was charged with causing false claims to be presented to the Government from October 1942 through November 1943, knowing such claims to be false. The undisputed evidence shows that, effective 1 May 1942, the accused authorized a Class E allotment of \$100 per month, payable to the named bank, and that this allotment

continued in force during the period charged, and was regularly paid to the bank by the Treasurer of the United States. The undisputed evidence shows likewise that on the months in question the accused signed, certified, and filed with the proper official his pay and allowance vouchers, omitting therefrom any deduction for the Class E allotment. By reason of the omission of the deduction, the claims were false. By the accused's own admissions, extrajudicial and as a witness, he was perfectly aware of the falsity of the claims thus presented. From his bank statements he knew that the bank was receiving the allotment, and by August or September 1942, if not before, he realized that no deduction appeared on his pay voucher and that the monthly allotment was not being withheld from his pay. Nevertheless, he continued for a period of more than a year to file pay and allowance vouchers without inserting the deduction or without consulting any finance officer about the matter. Admittedly he knew that he was receiving \$100 per month illegally, and his failure to "clear up" the matter resulted from fear of exposure. His denial of an intent to defraud the Government and his avowal of a continuous intention to make restitution do not constitute a defense. The gist of the offense is knowledge that the claim is false (Winthrop, Military Law and Precedents, 2nd ed. Rep., p. 701). Such knowledge was clearly proved.

With reference to Specification 2, Charge II, the court found in substance that the accused, having authorized the allotment, which was paid monthly to the bank as directed, did, at his various stations, from 9 October 1942 through November 1943, in violation of his duty to ascertain the truth and correctness of his pay and allowance accounts, wrongfully certify those accounts as true and correct, which certifications were false by reason of the omission of the allotment. The evidence already recapitulated in connection with the Specifications of Charge I is sufficient to prove the offense alleged in Specification 2, Charge II. In addition, the accused admittedly knew of his responsibility as an officer to see to it that his pay vouchers were correct when submitted. Since the accused knew that his vouchers were false, his conduct was unbecoming an officer and a gentleman in violation of Article of War 95. Although this Specification covers the transactions charged in the Specifications of Charge I, there is no illegal duplication of charges (par. 151, M.C.M., 1928).

6. The defense objected to the introduction of the three statements (Pros. Ex. 3) made by the accused to the investigating officers, for the reason that two other statements made by accused on 10 July 1944 and 21 July 1944 were not offered in evidence. The prosecution contended that neither of these statements constituted any part of the confession. It was further stated by the prosecution that one of the statements was an agreement to enter into a stipulation, which stipulation had already been introduced. According to the prosecution, the second statement,

dated 21 July 1944, was a sworn statement by the accused, voluntarily submitted, relating what he did from the time he first made the allotment. The defense counsel did not dispute the assertion of the prosecution as to the contents of the statements, but indicated that "they could refute his confession, or that which the prosecution is alleging is a confession." Neither of the statements is attached to nor included in the record. Under paragraph 114a, Manual for Courts-Martial 1928, it is stated:

"Evidence of a confession or supposed confession cannot be restricted to evidence of only a part thereof. Where a part only is shown, the defense by cross-examination or otherwise may show the remainder so that the full and actual meaning of the confession or supposed confession may appear."

There was no ruling that these other statements were not admissible. The defense was privileged to offer them, but did not elect to do so. The accused testified fully and at length regarding his efforts to straighten out the "discrepancy". Under the circumstances, no prejudicial error occurred by reason of the admission of the three statements.

7. The accused is 28 years of age, married, and has no children. He is a high school graduate and attended Gordon Military College for 1½ years. He was later graduated from Copiah-Lincoln Junior College. The records of the Adjutant General's Office show that accused had enlisted service in the Georgia National Guard for approximately four (4) years. He was commissioned a second lieutenant, Infantry Reserve, 27 December 1937, and promoted to first lieutenant, Army of the United States, 29 August 1942. He had active duty as a commissioned officer from 21 March 1938 to 20 September 1938; from 13 August 1939 to 26 August 1939; from 12 August 1940 to 13 August 1940, and since 16 August 1940.

8. The court was legally constituted and had jurisdiction of the person and subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, as approved by the reviewing authority, and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of a violation of Article of War 94, and is mandatory upon conviction of a violation of Article of War 95.

Fletcher R. Andrews, Judge Advocate.

Herbert R. Frederick, Judge Advocate.

A. S. Jones, Judge Advocate.

(266)

SPJGQ  
CM 264795

1st Ind.

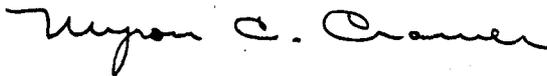
War Department, J.A.G.O., **DEC 18 1944** - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Jack Royt (C-361140), 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 as approved by the reviewing authority, and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

3. Consideration has been given to a letter from Honorable Richard B. Russell, United States Senate, dated 29 November 1944, and to letters from Honorable A. Sidney Camp, House of Representatives, dated 3, 9 and 18 October 1944, and to five affidavits inclosed therein. The letters and inclosures accompany the record of trial.

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



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

7 Incls.

Incl 1 - Record of trial.

Incl 2 - Dft. ltr. for  
sig. S/W.

Incl 3 - Form of action.

Incl 4 - Ltr. fr. Hon. Richard  
B. Russell/29 Nov. 1944.

Incl 5 - Ltr. fr. Hon. A. Sidney  
Camp/3 Oct. 1944.

Incl 6 - Ltr. fr. Hon. A. Sidney  
Camp/9 Oct. 1944.

Incl 7 - Ltr. fr. Hon. A. Sidney  
Camp/18 Oct. 1944.

(Sentence as approved by reviewing authority confirmed.  
G.C.M.O. 44, 27 Jan 1945)

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

(267)

SPJGK  
CM 264800

19 Oct. 1944.

UNITED STATES )

ELEVENTH ARMORED DIVISION

v. )

) Trial by G.C.M., convened at Camp  
) Kilmer, New Jersey, 26 September 1944.  
) Dishonorable discharge and confine-  
) ment for five (5) years. Disciplinary  
) Barracks.

) Private SHING FONG (39286161),  
) Headquarters Battery, 491st  
) Armored Field Artillery Battalion. )

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HOLDING by the BOARD OF REVIEW  
LYON, HEPBURN and MOYSE, Judge Advocates.  
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1. The Board of Review has examined the record of trial in the case of the soldier named above.

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Shing Fong, Headquarters & Headquarters Battery, 491st Armored Field Artillery Battalion, did, aboard a military train, on or about 13 September 1944, have in his possession 10 grains, more or less, of a habit forming drug, to wit opium, said drug not having been ordered by a medical officer of the Army.

He pleaded not guilty to and was found guilty of the Charge and its Specification. Evidence of one previous conviction for absence without leave, for which accused was sentenced to confinement at hard labor for twenty days and forfeiture of \$15.00 of his pay, was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Eastern Branch, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. The evidence supports the findings of guilty. The only question requiring consideration is the legality of the sentence. It is to be noted that the place of the commission of the alleged offense is not designated in the specification. It merely charges that accused had in his possession "on a military train" ten grains of opium which had not been ordered by a medical officer of the Army. It is clear that the charge is based on Paragraph 4, General Orders 25, War Department, 1918, which provides as follows:

"The possession by any person subject to military law of any habit-forming drug not ordered by a medical officer of the Army, shall be taken and considered as a disorder to the prejudice of good order and military discipline and as conduct of a nature to bring discredit upon the military service, and any such person offending shall be brought to trial under the 96th Article of War."

This conclusion is further borne out by the fact that the specification closely follows the form suggested at page 255 of the Manual for Courts-Martial, 1928. The "Table of Maximum Punishments" (M.C.M., 1928, par. 104c) contains no reference to the punishment for the possession of a habit-forming narcotic drug, but a limitation of two years is provided for the offense of introducing such a drug into command, quarters, camp or station for sale, and of one year where the introduction is for any other purpose. The offense herein charged is so closely related to the latter offense that, unless the specification sets forth an offense under one of the Federal laws hereinafter discussed, or unless the offense is of a civil nature for which a longer period of confinement is impossible under the Code of the District of Columbia, the Board of Review, in accordance with the principles enunciated in paragraph 104c of the Manual for Courts-Martial, is of the opinion that the maximum imposable sentence is dishonorable discharge, total forfeitures, and confinement at hard labor for one year (CM 156134, Dig. Op. JAG 1912-40, 454(73)).

An analysis of the laws enacted by the Congress of the United States for the regulation and suppression of the sale and use of narcotics nationally and in the District of Columbia, and of the decisions by the courts interpreting these laws leads to the conclusion that the specification contains insufficient facts to constitute a violation of any of them. The two Federal statutes that have a nation-wide application are the "Narcotic Drugs Import and Export Act" of 9 February 1909 (35 Stat. 614), as amended (now secs. 171 to 185, Title 21, U.S.C.A.) and the act of 17 December 1914, commonly known as the Harrison Narcotic Act (38 Stat. 785) as amended (now secs. 2550 to 2565 and secs. 3220 to 3228, Title 26, U.S.C.A.). Primarily, the first statute regulates the importation of narcotics and its subsequent disposition. The latter act, while intended to suppress illegal traffic in narcotics, is essentially a revenue measure, and has consistently been held to be such by the Federal courts. In addition the act of 20 June 1938 (52 Stat. 785) made applicable to the District of Columbia the Uniform Narcotic Drug Act (now secs. 401 to 425, Title 33, D. of C. Code, 1940 Ed.). These three statutes will be considered seriatim in connection with the specification under which accused was tried.

The "Narcotic Drugs Import and Export Act" (supra) makes it unlawful to "import or bring any narcotic drug into the United States", except as specifically permitted under the terms of the statute (sec. 173, Title 21, U.S.C.A.), and makes it an offense -

"\* \* \* if any person fraudulently or knowingly imports or brings any narcotic drug into the United States \* \* \* contrary to law, or

assists in so doing or receives, conceals, buys or sells or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law \* \* \* (sec. 174, idem.).

This latter section likewise provides that -

"\* \* \* Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury".

By Section 181 (idem) it is provided that -

\* \* \* all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported contrary to law, and the burden of proof shall be on the claimant or the accused to rebut such presumption".

While proof of possession creates a presumption of illegal importation, the gravamen of the offense is the illegal importation or "bringing into the United States" of the prohibited drug or the knowledge of the possessor that the drug was illegally imported. An indictment which does not set forth one of these essential elements is fatally defective (Pon Wing Quong v. United States, 111 Fed. (2d) 751). Since there is no such allegation in the present specification, it may not be urged successfully that the mere charge of possession constitutes a violation of this act.

Section 1 of the Harrison Anti-Narcotic Act, as amended (supra) provides for the payment of a special tax by any person who "imports, manufactures, produces, compounds, sells, deals in, or gives away opium or coca leaves" (Sec. 3220, Title 26, U.S.C.A.), and requires an annual registration by persons engaged in such activities (Sec. 3221 (a), idem). Section 8 of the same act (Sec. 3224(c), idem) makes it unlawful for any one who has not registered and paid the tax to have any of these drugs in his possession or control and stipulates that possession and control of any such drugs shall be presumptive evidence of a violation of Section 3220, Section 3221 and other sections of the code not pertinent to the present discussion. This section, however, was interpreted by the United States Supreme Court as applying only to persons required to register and pay the tax (United States v. Jin Fuey Moy, 241 U.S. 394, 60 L. Ed. 1061). It was held accordingly that where the indictment merely charged unlawful possession without any allegation that the possessor fell within the class required to register and pay the tax, it was fatally defective. This ruling has been consistently adhered to (13 A.L.R. 858, 39 A.L.R. 236). Since the specification in the

present case is equally lacking in such an allegation, accused's mere possession of the opium does not constitute an offense under the sections above referred to.

The Harrison Anti-Narcotic Act (supra) contains further taxing provisions in connection with the sale of opium that are now found in Sections 2550 and 2552 of Title 26, United States Code Annotated. Under these sections there are levied special additional taxes, represented by stamps to be affixed to the original package. Section 2553 (idem) provides in pertinent part as follows:

"It shall be unlawful for any person to purchase (underscoring added), sell, dispense, or distribute any of the drugs mentioned in Section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found \* \* \*".

This section has been given a far broader interpretation than Section 8 (supra). One who purchases such drugs except in or from the original stamped package is subject to its provisions to the same extent as the seller; and the possession by a purchaser of such drug in an unstamped original package is deemed to be prima facie evidence of a violation of this section (Hayden v. United States, 284 Fed. 852) (Killian v. United States, 29 Fed. (2d) 455). A mere allegation of possession by the purchaser, however, is not sufficient. It is necessary that there be an affirmative allegation that the accused acquired the drug in or from an unstamped original package, possession of the drug without the tax-paid stamps not being an offense but merely an item of proof which creates a prima facie case against the accused that may be rebutted (Di Salvo v. United States, 2 Fed. (2d) 222, Reese v. United States, 14 Fed. (2d) 606). Since there is no allegation in the specification charging accused with having purchased the drug in an illegal manner, the mere allegation of possession of the prohibited drug does not constitute an offense under Section 2553.

The Uniform Narcotic Drug Act, which has been adopted by many of the states, was made applicable to the District of Columbia by act of Congress of 20 June 1938 (52 Stat. 785), and now forms a part of the Code of the District of Columbia (1940 Edition) as Sections 401 to 425, Title 33. Sections 402 and 421 contain the following provisions:

"Sec. 402 - It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized in this chapter.

"Sec. 421 - In any complaint, information or indictment, and in

any action or proceeding brought for the enforcement of any provision of this chapter, it shall not be necessary to negative any exception, excuse, proviso, or exemption, contained in this chapter, and the burden of proof of any such exception, excuse, proviso, or exemption, shall be upon the defendant".

The object of this act, as pointed out by the Supreme Court of Louisiana (one of the states which has adopted it) in the case of State v. Martin (192 So. 694, 193 La. 1036), is "to regulate and control the traffic in and the use of substances or preparations that are extremely injurious to the moral qualities and physical structures of human beings". The court held that, in furtherance of this object, it was the clear legislative intent to impose the penalty provided for in the act not only upon the illegal manufacturer or dispenser of the drug but upon the purchaser, and that an allegation of unlawful possession of the prohibited drug by the accused, without defining his status, was sufficient under the act. It carefully differentiated this act from the Harrison Anti-Narcotic Act, as interpreted by the United States Supreme Court in the case of United States v. Jin Fuey Moy (supra). If the specification in the instant case had charged the accused with the unlawful possession of a certain quantity of opium, it would have set forth an offense in a jurisdiction that has adopted the Uniform Narcotic Drugs Act. The specification now under consideration, however, neither alleges unlawful possession nor does it designate where the offense occurred. The Board, therefore, concludes that it must be guided in fixing the maximum punishment by the provisions of paragraph 104c of the Manual for Courts-Martial, previously referred to. In adopting the uniform act, the legislatures of the various states have exercised their discretion in fixing the imposable punishment. The Congress of the United States has fixed the maximum applicable to offenders in the District of Columbia as a fine of \$1000 and imprisonment for one year for the first offense, and a fine of \$5,000 and imprisonment for not more than ten years for any subsequent offense.

4. For the reasons above stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

Wm. C. Gou , Judge Advocate.  
Paul Stebbins , Judge Advocate.  
Samuel Mayer , Judge Advocate.

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1st Ind.

War Department, J.A.G.O.,

20 OCT 1944

- To the Secretary of War.

1. In the case of Private Shing Fong (39286161), Headquarters Battery, 491st Armored Field Artillery Battalion, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Charge and the Specification thereunder, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures, and confinement at hard labor for one year.

2. I concur in the holding of the Board of Review and for the reasons therein stated recommend that so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year be vacated, and that the United States Disciplinary Barracks, Eastern Branch, Greenhaven, New York, be designated as the place of confinement.

3. This case is submitted for the action of the Secretary of War in order to avoid the delay which would be involved in transmitting the approved holding overseas for the action of the reviewing authority.

4. Inclosed is a form of action designed to carry into effect the recommendation hereinbefore made, should such action meet with approval.

*Myron C. Cramer*

Myron C. Cramer,  
Major General,

The Judge Advocate General.

2 Incls.

Incl.1-Record of trial.

Incl.2-Form of action.

(Sentence vacated in part in accordance with recommendation of The Judge Advocate General, by order of the Secretary of War. G.C.M.O. 607, 7 Nov 1944)

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

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SPJGQ  
CM 264801

24 OCT 1944

UNITED STATES )  
                  ) )  
                  v. )  
                  ) )  
First Lieutenant WILLIAM )  
R. BROOKS (O-791896), Air )  
Corps. )

ELEVENTH AIR FORCE

Trial by G.C.M., convened  
at Fort Richardson, Alaska,  
2 and 4 September 1944.  
Dismissal.

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OPINION of the BOARD OF REVIEW  
ANDREWS, FREDERICK and BIERER, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that First Lieutenant William R. Brooks, Air Corps, 399th Base Headquarters and Air Base Squadron, having received a lawful order from Lieutenant Colonel John M. Cross to refrain from using the bunks in the infirmary, and to stop visiting said infirmary except during regular hours when the opportunity presented for ultra-violet ray treatments, the said Lieutenant Colonel John M. Cross being in the execution of his office, did, at Naknek, Alaska, on or about 3 August 1944, fail to obey the same.

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

Specification 1: In that First Lieutenant William R. Brooks, Air Corps, 399th Base Headquarters and Air Base Squadron, did, at Naknek, Alaska, on or about 5 August 1944, with intent to deceive Lieutenant Colonel John M. Cross, Commanding Officer of Naknek Air Base, officially state and represent to the said Lieutenant Colonel Cross that he had

just received a letter from his wife stating that her brother, who was a crew member on a B-17, had been killed in Germany, or words to that effect, which statement was known by said Lieutenant Brooks to be untrue in that he had not received a letter advising him that his brother-in-law had been killed in Germany, said statement having been made by Lieutenant Brooks to Lieutenant Colonel Cross at a time when pending court-martial charges against said Lieutenant Brooks were being investigated at Naknek, Alaska, and in such manner as to deceive, solicit sympathy of, and influence Lieutenant Colonel Cross in his action in his official capacity of Commanding Officer with respect to said pending court-martial charges.

Specification 2: In that First Lieutenant William R. Brooks, Air Corps, 399th Base Headquarters and Air Base Squadron, did, at Naknek, Alaska, on or about 4 August 1944, with intent to deceive First Lieutenant Joe G. Duvall, Investigating Officer, appointed by the Commanding Officer of Naknek Air Base, officially state and represent to said First Lieutenant Duvall that his brother-in-law, his wife's only brother, had just been killed in action, or words to that effect, which statement was known by the said Lieutenant Brooks to be untrue, in that his brother-in-law had not been killed in action, said statement having been made by said Lieutenant Brooks to Lieutenant Duvall at a time when pending court-martial charges against said Lieutenant Brooks were being investigated at Naknek, Alaska, and in such manner as to deceive, solicit sympathy of, and influence Lieutenant Duvall in his action in his official capacity of Investigating Officer with respect to said pending court-martial charges.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous conviction was introduced at the trial. He was sentenced to be dismissed the service and to be confined, at such place as the reviewing authority may direct, for nine (9) months. The reviewing authority approved only so much of the sentence as provides for the accused to be dismissed the service and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, briefly summarized, is as follows:

The accused, since 12 June 1944, was a member of the 399th Base Headquarters and Air Base Squadron commanded by Lieutenant Colonel John M. Cross, and stationed at Naknek, Alaska (R. 5, 6). He was the Operations and Air Transport Officer and as such was "on call" twenty-four hours a day (R. 6, 8, 10, 21, 22).

The accused was taking ultra-violet ray treatments at the dispensary of the station (R. 6, 9), which was part of a group of three huts known as the Intransit Infirmary. The hut nearest operations office was used as the dispensary and the middle hut contained cots for the use of intransit patients, and the group was commonly called "the infirmary" (R. 11).

Some time in the latter part of July (R. 6, 10, 12, 14, 15) Colonel Cross went to the infirmary and, contrary to orders he had previously given to the accused, found the accused apparently asleep at about 1:30 a.m. He thereupon escorted the accused to the building where both the Colonel and the accused had their quarters (R. 6) where, in the presence of two other officers he repeated prior orders that he, the accused, should keep off the bunks in the infirmary, do all his sleeping and lounging in his quarters and keep away from the infirmary building, and he specifically characterized the instructions as a direct order (R. 6, 7, 9, 14, 15).

The accused brought up the matter of his sun-ray treatments and the Colonel stated then that he was not to go to the infirmary except for treatment (R. 14, 15). In the afternoon of the same day the accused apologized to the Colonel for being caught in the infirmary and excused himself on the ground that he had been there for ultra-violet treatment. The Colonel told him he did not believe him and again repeated the order forbidding him from going to the infirmary except for treatments and that on such occasions he should go during regular, daylight hours and that such permission did not necessarily include the right to "lay on the bunks in the infirmary" (R. 6, 9, 10).

On 3 August 1944 the Colonel had a telephone call from the operations office inquiring for the accused because they had been unable to locate him. Colonel Cross thereupon went to the operations office and discovered that a plane which was expected had arrived and was "letting down". He then went over to the infirmary and, after looking through the dispensary section, went to the adjacent hut where, after he switched on the lights, he found the accused on a bunk apparently asleep although he jumped up when the lights were turned on. The accused was clothed in his ordinary dress, somewhat crumpled, and had been lying slightly on his side with his face down (R. 7, 10). Captain Wilcox, the Base Surgeon, was also lying on a bunk (R. 7). As a result of what he had discovered Colonel Cross preferred a charge against the accused and both he and Captain Wilcox were relieved of their duties (R. 7, 8). A statement made and signed by Colonel Cross during the investigation was admitted in evidence out of order, as a defense exhibit. Substantially it contained the following:

That as a result of previous lounging and sleeping by the accused in the infirmary he had in the presence of other officers verbally ordered the accused "to refrain from using the bunks in the infirmary and to stop visiting there regardless of the circumstances". Later on the same day

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he amended the order by telling the accused he could "report to the infirmary during regular hours when the opportunity presented for ultra-violet ray treatments." At about 0200 on the morning of 3 August 1944, upon receiving a report from operations office, he went to accused's quarters, found his bed had not been slept in, learned that he had not been seen at the operations office for a considerable time, and then found him fully clothed, lying on a bunk in the infirmary with the lights turned out (R. 10; Def. Ex. A).

On 4 August 1944, First Lieutenant Joe G. Duvall, 399th Base Headquarters and Air Base Squadron, who had been appointed investigating officer of the charge brought against the accused, had an interview with the accused. After being duly warned of his rights, the accused declared the Specification false and stated that he had gone to the infirmary for ultra-violet treatment at about 1:45 a.m. and was there until Colonel Cross found him. He had just completed his treatment and was lying on a bunk until an airplane arrived (R. 20). He stated, also, that he had just received word that morning that his wife's only brother had been killed six days previously. Lieutenant Duvall paid little attention to this and did not ask to see the letter conveying the news to the accused (R. 21, 22). A signed statement made by the accused at the time of the interview was admitted in evidence. In substance the accused said that on the day in question he was at the infirmary for treatment of acne of his back; that Colonel Cross had given him permission to go there for two treatments a day when he (the accused) was not busy. When he was discovered by Colonel Cross he had just finished his treatment and was "resting on the bed awaiting the arrival of an incoming plane due in about ten minutes". He did not understand that he was to restrict his treatments to daytime hours only, although he admitted they were to be taken during regular hours. The infirmary, however, is open twenty-four hours a day. He maintained that he had strictly adhered to Colonel Cross' verbal orders (R. 21; Pros. Ex. 1).

On 5 August 1944 while Colonel Cross was in his quarters conversing with Captain deRose who had recently reported to the station, the accused requested permission to see him. The colonel told him he was busy but the accused insisted, said he could not stand it any longer, and that something had to be done about his trouble. Colonel Cross again told him he was busy whereupon the accused started to weep and said "he had just received a letter from his wife saying his brother-in-law had been killed and that he couldn't stand to have the charges go on; that he was young and couldn't bear to have his family hear about it" and "that he would do anything" if the Colonel "would drop the Charges." Colonel Cross told him to brace up, that he hadn't been hurt and that he would see him later (R. 8). Captain deRose's version of the matter differed slightly. He stated that the accused appeared to have been crying when he came in and that there were tears in his eyes. After telling of the letter from his wife regarding the death of his brother-in-law, he stated that he was a young fellow and this trouble was getting him down and requested that he be allowed to do something as the inactivity was "driving him nuts". He stated further that the loss of his brother-in-law had broken

him up; that he didn't want his family to know he was in any kind of trouble and suggested that he be allowed to go back to work and "let the matter drop" (R. 16, 17).

Colonel Cross disbelieved the statement of the accused regarding the death of his brother-in-law and directed Captain deRose to have a talk with the accused and try to see the letter in question (R. 8, 16). Accordingly, on the next day (6 August) Captain deRose called on the accused at his quarters and, in conversation, mentioned that his own nephew had been shot down recently in France. He asked the accused to read the part of the letter referring to the death of the accused's brother-in-law. Accused replied that he did not have it - that it had been torn up. Captain deRose then asked the accused definitely whether it was true that his brother-in-law had been shot down and the accused thereupon admitted it was untrue and that it was merely a friend who had been killed (R. 16). He asked Captain deRose to do what he could with the Colonel, if anything, to get the matter dropped so that he could get back to work. Some time later the accused produced the letter from his wife, and Captain deRose read the part referring to the accused's friend being killed (R. 18).

On or about 7 August 1944 the accused also showed the letter to the investigating officer, Lieutenant Duvall, and admitted that his prior statement regarding the purported death of his brother-in-law was untrue (R. 22).

Meanwhile additional charges had been preferred against the accused, and First Lieutenant Fred W. Traxler, of the accused's organization, was appointed investigating officer. After being duly informed of his rights the accused made a signed statement which was admitted in evidence. In substance he stated therein that on the day he was arrested he happened to get a letter from his wife informing him that his best friend, who was like a brother-in-law, had been killed. He then went to Colonel Cross' quarters and was very much perturbed and upset about the whole proceeding and the "dubious" charge Colonel Cross had preferred against him. The Colonel would not even talk to him and has continuously refused to discuss the accusation. As to the death of his friend, "there was never any indication as to receiving any sympathy whatsoever or any favors from anyone concerned in the case." When asked a few days later by Captain deRose and Lieutenant Duvall if his "brother-in-law" was killed he "immediately replied a very negative 'no'". The friend of his who had been killed had been to him "as a 'brother' in the actual sense" (R. 22, 23; Pros. Ex. 2).

4. The accused, having been advised of his rights, testified substantially, as follows:

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He was Operations Officer, Transport Officer and Weights and Balance Officer of his organization stationed at Naknek, and on duty twenty-four hours a day meeting planes that came in at any hour of the day or night. Although he was not on sick call during July or August 1944 he was taking ultra-violet ray treatments at the dispensary every 12 hours on the order of Captain Wilcox, the Base Surgeon (R. 24).

He had taken two such treatments on 24 July 1944 (R. 24) and Colonel Cross had then told him he was to go to the dispensary only for such treatments. On the night of 29 July 1944 the Colonel had likewise ordered him not to go to the dispensary except for treatments but no regular hours were specified. He did, however, understand Colonel Cross' instructions to be a direct order (R. 26). On the morning of 3 August the accused was to meet a plane coming in at around 2:30 a.m.. During the afternoon he had taken a treatment at 1 o'clock and this morning he went over to the infirmary to take another treatment at 1:45 a.m. He had previously called the dispensary to have them turn on the lamp. The period of a treatment lasted about 25 or 30 minutes. On this occasion, because of repairs to the dispensary, the equipment had been moved to the adjoining hut which contained 14 cots, and, having had some medical training, the accused operated the ultra-violet ray machine without assistance (R. 25, 26).

He had just finished the treatment at about 2:25 or 2:30 a.m., put on his clothes, and was sitting on the side of a bed, the fourth or fifth away from where the lamp was, putting on his shoes when Colonel Cross arrived. Captain Wilcox, the surgeon, was lying on a cot across from the lamp, which was still burning. When the Colonel asked him what he was doing there the accused answered that he had just finished a treatment (R. 26, 27).

The accused had not spoken to Captain Wilcox during that entire evening and neither he nor Colonel Cross spoke to Captain Wilcox nor did Captain Wilcox speak to them on this occasion (R. 27).

On cross examination he again stated that he was sitting on a bed putting on his shoes when Colonel Cross arrived notwithstanding his memory was refreshed by examination of his signed sworn statement in which he said he "was resting on the bed awaiting the arrival of an incoming plane due in about ten minutes" (R. 31).

With regard to the letter he admitted he had received it from his wife and that it contained a reference to the death in Europe of the friend of his "who was like a brother, rather a brother-in-law, to (him)" and that it upset him very much. In mentioning the circumstance to Colonel Cross he had no intention of confusing the issue but merely wanted to go back to duty as he had been in the Army three years (R. 26). He had stated to Colonel Cross "that this not working was kind of getting (him) down. (He) didn't understand the charges, and was very much upset over the fellow that

was just like a brother-in-law". The Colonel said he was sorry but wondered what could be done whereupon the accused said "I would like to have the whole thing dropped and get back to work". He further testified that, with him, the words "brother" and "brother-in-law" and "mother" and "mother-in-law" are in the same scale (R. 28). He admitted that his wife "knew" the friend who had been killed, but "not too well" - "she had met him a number of times" and although the accused had seen the letter in question a few days prior to trial he had not brought it with him (R. 29).

Captain John W. Wilcox, formerly Base Surgeon at Naknek, testified that he had never received any orders as to the time at which the accused should take his ray treatments but that ordinarily they were taken during the day. The accused's treatments, which had been approved by the witness, were spaced at 12 hour intervals (R. 34), and the accused had been taking them daily since the second week in June. With reference to those subsequent to 27 July 1944 he had never seen the accused at the infirmary except when he was about to take, was taking or had just finished a treatment (R. 35).

On the evening of 2 August 1944 witness was told at about 10:30 p.m. that an injured merchant seaman was expected to reach Naknek at about 1:30 a.m. the next morning for treatment at the infirmary. Under the circumstances it seemed best to go to the infirmary and wait there, which he did, going to bed there. The next thing he recalled was his night-man awakening him and telling him Colonel Cross had come in. Witness sat up in bed, and, looking to the far end of the hut, saw Colonel Cross standing at the foot end of the bed where the accused, fully dressed, was either reclining or sitting on the bed. Colonel Cross then left and while the accused laced up his shoes witness learned that the seaman had arrived and Colonel Cross had attended to him himself and sent him on. The ultra-violet lamp had been burning when Colonel Cross was there but witness did not see the accused taking a treatment that night (R. 35, 36). On cross-examination he admitted telling the trial judge advocate and assistant trial judge advocate that the accused had frequently come to the infirmary for the purpose of witnessing whatever small surgical and medical treatments were given there, from the time of accused's arrival at the base until 3 August 1944 (R. 39). Corporal Richard R. Wright, a member of the Base Medical Detachment, testified that the accused came to the infirmary on the night or early morning of some day in August 1944 (date not disclosed) and said he wanted to take an ultra-violet ray treatment. Witness accordingly turned on the machine, talked with the accused while he was undressing and then, as the accused lay down on the bed, witness went back to the laboratory. The accused had requested witness to call him when the plane came in at 2:50 a.m. if he was still under the lamp. It was then 1:45 a.m. Later he heard the door to the hut open and, as he came out of the laboratory, he saw Colonel Cross leaving the building (R. 41, 42).

Private First Class Lewis H. Milbury, also a member of the Base Medical Detachment, stated that he was on duty at the dispensary on the night of 2/3 August. The accused came into the dispensary, said he was going to take a sunlamp treatment and asked witness to tell him when the plane expected around 2:20 a.m. was coming in. Witness returned to writing letters, did not see the lamp turned on nor did he see the accused taking a treatment. At about 2:20 a.m. Colonel Cross came into the section where witness was writing and when they heard a plane droning outside, witness told the Colonel he had promised to tell the accused when the plane came in. Together they went to the ward where accused was, the Colonel preceding, who, as he came to the room, switched on the ceiling lights and witness saw the accused lying down fully dressed. The ultra-violet ray lamp was burning. The accused thereupon sat up and asked: "What are you doing here, Colonel" but the Colonel made no immediate answer but turned and, as he reached the door said: "I have a plane to meet" (R. 44, 46).

On cross-examination Milbury stated that he had seen the accused in the infirmary earlier on that night, at about 9 p.m. at which time Captain Wilcox was also present but he did not see the accused leave (R. 45, 46).

5. In rebuttal, the prosecution recalled Colonel Cross who repeated that on the morning in question the accused sprang from a bed in the infirmary, but added that he then said: "Sir, I can explain everything". Witness was then asked: "What is the reputation of Lieutenant Brooks for truth and veracity at the Air Base at Naknek, Alaska?" to which he answered, "His reputation for truth is bad" (R. 49, 50).

First Lieutenant Traxler, upon being recalled, stated that the portion of the letter to the accused from the accused's wife which witness read was to the effect that "a certain person had been killed in France and that while the writer had not met the person, she knew that he was close to Lieutenant Brooks or to someone else". He assumed it was some other man. When asked "Do you know what the reputation of Lieutenant Brooks at Naknek for truth and veracity is?" he replied "Yes" and upon further question stated "I would say that the accused's reputation is poor" (R. 51).

Captain deRose again stated that when he had asked the accused to see the letter from his wife he said he had torn it up although sometime later he produced and showed witness a letter which stated that some very good friend of the accused's had been killed (R. 51). First Lieutenant Duvall, upon recall, said that on 7 August 1944, while he was still investigating the first charge, he had a conversation with the accused in which he asked the last name of his brother-in-law. Accused refused to tell him, though he mentioned the bombardment squadron in

which he was serving. Witness then told the accused that if it were true about the death of his brother-in-law he would recommend that the Charge be dropped but if untrue he would recommend trial by general court-martial. Accused still refused to tell his brother-in-law's last name and witness thereupon advised him that he would find out by wiring The Adjutant General or the accused's "folks". Thereupon the accused pleaded with witness to forget that the accused had ever mentioned it in the first place and then stated that his wife had stated in the letter that a "friend" had been killed, and admitted it was not his brother-in-law as he had stated (R. 54, 55). Witness was asked: "Do you know the reputation of Lieutenant Brooks at the Air Base at Naknek for truth and veracity?" to which he answered: "Among the officers that I have contacted I think it is rather poor" (R. 52).

6. The Specification of the Charge alleges that the accused, having received a lawful order from Lieutenant Colonel John M. Cross, then in the execution of his office, "to refrain from using the bunks in the infirmary, and to stop visiting said infirmary except during regular hours when the opportunity presented for ultra-violet ray treatments", failed to obey the same.

The order embraced within this Specification was clearly a lawful order. It related to military duty and was such as the accused's superior officer was authorized to give, under the circumstances. Colonel Cross was the Commanding Officer of the Base where the accused was on duty and, therefore, his superior. That it was a direct order and so given and understood appears from the accused's own testimony.

It is evident from the situation portrayed by the evidence that the accused's conduct as Operations officer, had, for some time, been a matter of concern to his commanding officer, Colonel Cross. Instead of diligently watching for the arrival and departure of planes during his 24 hour period of duty during which he was subject to call, the accused had been derelict and addicted to sleeping on cots in the base infirmary. He was found by Colonel Cross doing so on 29 July 1944 and the order set forth in the Specification, which was a specific and direct repetition of similar orders given in the past, was the result.

It is true that the prosecution may not evidence the doing of an act by showing the accused's former misdeeds as a basis for an inference of guilt. But, when guilty knowledge in respect of the act is an element of the offense charged, evidence of other acts of the accused, not too remote in point of time, manifesting that guilty knowledge, is not inadmissible by reason of the fact that it may tend to establish the commission of an offense not charged. (Par. 112 (b), M.C.M., 1928). Thus, the evidence of the accused's course of conduct shortly prior to the commission of the offense charged, showing his disregard of instructions not to rest or sleep in the infirmary, conclusively demonstrates a guilty knowledge with regard to the disobedience charged in the Specification, and its admission was not error.

The accused stoutly maintained that he was not violating the order on the occasion specified because he was, in fact, taking a violet-ray treatment at the time when Colonel Cross discovered him on a bed in the infirmary. This specious contention cannot be accepted. The order set forth in the Specification, and shown to have been given and understood substantially as alleged, was simple and plain. The accused was not forbidden to take his treatments but he was ordered specifically "to keep off the bunks in the infirmary" and to take his treatments "during regular hours when the opportunity presented". The testimony shows that on the day when Colonel Cross gave the direct order to the accused in the presence of others, he had found the accused asleep in the infirmary. It was this conduct on the part of the accused which induced the giving of the order and that the accused was conscious of the Colonel's attitude is evident from the fact that he did, on the same day, apologize to the Colonel and attempt to explain and justify his actions. He understood the implications contained in the terms of the order and knew that he was to attend to his business as Operations officer and that, if inclined to rest or sleep, he should do so in his quarters where he would be under the observation of the Colonel. Even the treatments which he was permitted to take at the infirmary were to be taken "during regular hours when the opportunity presented". This limitation in connection with the rest of the order clearly imported that they should not be taken at night or when duty interfered. Certainly he was to take none at a time when he should have been at his post attending the arrival or departure of a plane.

At this point attention is again invited to the phraseology of the Specification. It is alleged that, having been given an order (1) "to refrain from using the bunks in the infirmary" and (2) "to stop visiting said infirmary except during regular hours when the opportunity presented for ultra-violet ray treatments", the accused failed to obey the same. Thus, it will be seen that the pleading is multifarious or duplicitous, as the second part of the order could be violated without violation of the first and as a result of the allegations, it might well be deemed to allege two offenses. While this defect made the Specification subject to objection there was none and it has been held that, under such circumstances, disturbing the findings is not justified in the light of Article of War 37 inasmuch as the substantial rights of the accused have not been violated thereby. (CM 202601, Sperti 6 B.R. 171, p. 207). When, then, on the occasion described in the Specification, the accused went to the infirmary in the middle of the night and at a time when the arrival of a plane was imminent and expected by him, he violated one of the provisions of the order. It matters not that he may have taken treatments on other nights because of the fact that his course of treatment had been spaced at 12 hour intervals. He was not to go for treatment outside of regular hours and certainly not when he had duties to perform. But he did more. Since there is

nothing in the evidence from which it could reasonably be inferred that resting on a cot was an essential part of the sun-ray treatment, when the accused undertook to lie down upon a cot in the infirmary, however short the period of his relaxation may have been, he also violated a provision of the order in question.

In determining whether the accused is properly found guilty of conduct unbecoming an officer and a gentleman because of his false statements regarding the death of his fictitious brother-in-law, it is only necessary to view his conduct in the light of the attending circumstances. When he was aware that a charge had been preferred against him for his actions on the morning of 3 August 1944 and while the officer designated to do so was investigating the facts of the case, the accused volunteered the information that he had just received word from his wife of the death in France of his brother-in-law. The investigation occurred on 4 August. On the next day, without invitation and on his own initiative he went to the quarters of Colonel Cross and in the presence of another officer, broke down, wept, said he couldn't stand his situation any longer and that something had to be done about his trouble. He then repeated the tale about the death of his brother-in-law and stated that he was young, couldn't bear to have his family hear about his trouble, and would do anything if the Colonel would drop the charges. When Colonel Cross disbelieved the statement about the death of the brother-in-law and sent Captain deRose to question the accused further about it, the accused admitted its falsity and asked the Captain to use his influence with Colonel Cross to do what he could to get the matter dropped so that he could get back to work.

There is no question about the falsity of the statements. At the trial the accused testified that he had said the person killed was a friend who was "like a brother - rather brother-in-law" to him. Such an adroit explanation might have been more convincing if the investigating officer had not testified that when he asked for the name of the brother-in-law and threatened to find out from The Adjutant General or the accused's "folks" when the accused refused to tell him, he then admitted the falsity of his statement and stated that the deceased was only a good friend.

The only reasonable assumption which can be drawn from these voluntary statements made by the accused to officers who were both obliged to take official action regarding his conduct which was then under investigation, is that they were made with intent to deceive and were calculated to solicit the sympathy and influence the judgment of the Colonel who had preferred the Charge and of the investigating officer who would be required to recommend the action to be taken with regard thereto. That it did tend to influence the latter is evident from his testimony; for he said that he had determined to recommend that the charges be dropped if he found the statement to be true.

Such conduct is not only reprehensible but palpably injurious to that relationship of loyalty and confidence based upon honesty and integrity which must be maintained between officers of the Army in their official capacities. It can make no difference that the false information given by the accused was, in each instance, volunteered and not given in response to official inquiry. The interest of the accused in the result he hoped to accomplish by the method he chose to employ is apparent and clothed his acts with an official character which made his conduct a violation of the code of honor of both an officer and a gentleman.

In the attempt to impeach the credibility of the accused the prosecution proceeded erroneously in two instances. Although there is no inflexible rule as to the form of the questions which may be put in examining a witness for the purpose of impeaching his veracity, it is the better practice to lay the predicate by asking whether the witness knows the general reputation of the person for truth and veracity in the community in which he resides. If the impeaching witness replies in the affirmative, the next question should be: "What is that reputation?" In the instant case Colonel Cross was permitted to testify as to the accused's reputation, over objection, without having been asked the qualifying question. Lieutenant Duvall was permitted to state his personal opinion and before being asked whether he knew the general reputation of the accused. Inasmuch, however, as the testimony at the trial showed sufficient contradictions to justify the court in rejecting the testimony of the accused irrespective of the erroneous attempts at direct impeachment, and since the impeaching evidence of Lieutenant Traxler was properly adduced, it cannot be said that the accused suffered any injury because of these errors.

7. Consideration has been given to a letter of defense counsel to the Commanding General, Eleventh Air Force, dated 9 September 1944 in which a new trial was requested because stenographers had inadvertently omitted a substantial part of the record which, because of inability to accurately reconstruct the omitted portion from memory, renders the record incomplete and "not sufficiently accurate to judge the fairness of the trial or the verdict". In a letter by way of reply, signed by the president and trial judge advocate of the court, it is stated that, at one point in the trial, when it became evident that the reporters experienced some difficulty in reading back certain portions of the accused's testimony theretofore given, another reporter was thereupon obtained and substituted; that defense counsel has "consistently refused to point out specific instances of the omissions and inaccuracies claimed and his letter fails to indicate in what specific respects the record is inaccurate and what specific evidence 'which might well be considered by the reviewing authorities as favorable to the accused' is missing from the record"; and, that both the president of the court and the trial judge advocate have read the record and discussed the contentions of

defense counsel with him, and, "fully aware of their full responsibilities to insure that a full measure of justice is accorded the accused", they are "certain beyond any doubt that the record is substantially true, accurate and complete and that there are no omissions or inaccuracies that might have an effect upon the result."

It is provided that "the record . . . will set forth a complete history of the proceedings had in open court in the case, and all the material conclusions arrived at in both open and closed sessions". (par. 85b, M.C.M., 1928). The record is prepared by the trial judge advocate under the direction of the court, but the court as a whole is responsible for it. It is immaterial to the sufficiency of a record whether the same was kept or written by the trial judge advocate or by a clerk or a reporter acting under his direction (Par. 85a Idem).

Under Article of War 33 the record shall be authenticated by the signature of the president and the trial judge advocate and this alone makes the reporter's transcript the record of trial (CM 237521, Withington, 24 B.R. 23), imports verity, and a general challenge of the authenticity of a record so authenticated which fails to specify any irregularity or omission in the preparation of the record cannot be entertained.

8. Records of the War Department disclose that the accused was born in Pulaski County, Virginia, is 26½ years of age and is married. He was graduated from high school, attended the Kennett School of Accounting, Roanoke, Virginia in 1935, University of Virginia Pre-medical School from 1936 to 1940 and thereafter attended the University of Virginia Medical School until he entered the service on 8 November 1941. On 18 December 1941 he became an aviation cadet and after completing the prescribed course of training at the Advanced Flying School, Turner Field, Albany, Georgia, was commissioned a second lieutenant, Air Reserve, on 30 September 1942. He served as Flight Instructor at Turner Field from 1 October 1942 to 24 February 1943 and in a similar capacity at FAAF, Seymour, Indiana, from 24 February to 12 April 1943. On 24 April 1943 he was promoted to first lieutenant.

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

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederica, Judge Advocate.

A. C. Bivens, Judge Advocate.

(286)

SPJGQ  
CM 264801

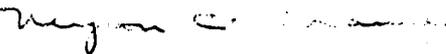
1st Ind.

War Department, J.A.G.O., <sup>2</sup> NOV 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant William R. Brooks (O-791896), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence. I recommend that the sentence, as approved by the reviewing authority, be confirmed, but, because of the prior good record of the accused and the possibility that he may yet render faithful service, I further recommend that the execution thereof be suspended during good behavior.

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 the above recommendation into effect, 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.

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(Sentence as approved by reviewing authority confirmed but execution suspended. G.C.M.O. 676, 29 Dec 1944)

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

(287)

SPJGQ  
CM 264814

14 OCT 1944

UNITED STATES )

97th INFANTRY DIVISION

v. )

Trial by G. C. M., convened at  
Camp San Luis Obispo, California,  
15 September 1944. Dismissal,  
Total Forfeitures, and Confine-  
ment for 10 Years.

Second Lieutenant ARNE H.  
AMUNDSEN, (O-1314240),  
Infantry. )

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OPINION of the BOARD OF REVIEW  
ANDREWS, FREDERICK, and BIEBER, Judge Advocates

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

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

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

Specification: In that Second Lieutenant Arne H. Amundsen, 386th Infantry Regiment, did, without proper leave, absent himself from his organization and station at Fort Leonard Wood, Missouri and Camp San Luis Obispo, California, from about 6 June 1944 to 24 July 1944.

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

Specification 1: In that Second Lieutenant Arne H. Amundsen, 386th Infantry Regiment, did, at Des Moines, Iowa, on or about 16 July 1944, with intent to defraud, wrongfully and unlawfully make and utter to Hotel Fort Des Moines, Des Moines, Iowa, a certain check in words and figures as follows, to wit:

(288)

16 July 1944 No.--

Natl. Bank of Commerce Lincoln Nebr.

Write Name of Your Bank (City and State) on This Line

PAY TO THE

ORDER OF

Cash

\$ 25<sup>00</sup>

Twenty-five &no/100----- DOLLARS

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

Arne H. Amundsen

0-1314240

TPS Ft Benning Ga.

Address

and by means thereof did fraudulently obtain from said Hotel Fort Des Moines, Des Moines, Iowa, twenty-five (\$25.00) dollars, lawful money of the United States, he the said Second Lieutenant Arne H. Amundsen, then well knowing he did not have and not intending he should have sufficient funds in any account with the National Bank of Commerce, Lincoln, Nebraska for the payment of said check.

Specifications 2-5, inclusive: These Specifications are identical in form and substance with Specification 1 of this Charge excepting the dates and, in certain instances, the names of payees and of the corporation alleged to have been defrauded, which items are, respectively, as follows:

<u>Specification</u>	<u>Date</u>	<u>Payee</u>	<u>Corporation Defrauded</u>
2.	7/18/44	Cash	Hotel Fort Des Moines
3.	7/19/44	Cash	Hotel Fort Des Moines
4.	7/8/44	Hotel Sherman, Inc.	Hotel Sherman, Inc.
5.	7/9/44	Hotel Sherman, Inc.	Hotel Sherman, Inc.

and excepting, further, with regard to Specifications 4 and 5, the certificate appearing upon the face of the check in these instances, is as follows:

"For value received I represent that the above amount is on deposit in said bank in my name. Subject to this Check and is hereby assigned to payee or holder thereof."

Upon the check set forth in Specification 4, there appears, in addition to the address of the maker, the following:  
"Rm. 747-A."

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

Specification 1: In that Second Lieutenant Arne H. Amundsen, 386th Infantry Regiment, did, at Madison, Wisconsin, on or about 29 June 1944, with intent to defraud, wrongfully and unlawfully make and utter to Hotel Loraine, Madison, Wisconsin, a certain check in words and figures as follows, to-wit:

Don't sign this check Until  
You Read It

Madison, Wis., 29 June 19 44

Schroeder Hotels

Pay To The  
Order Of HOTEL LORAINÉ

Twenty five & no/100 ----- DOLLARS, \$ 25.00

For value received, I represent that above amount is on deposit in said bank subject to this check and is hereby assigned to payee

TO Natl. Bk. of Commerce  
Name of Bank

/s/ Arne H. Amundsen

Lincoln Nebr.  
Address of Bank

0-1314240  
TPS Ft. Benning Ga.

and by means thereof did fraudulently obtain from said Hotel Loraine, Madison, Wisconsin, twenty-five dollars (\$25.00), lawful money of the United States, he, the said Second Lieutenant Arne H. Amundson, then well knowing he did not have and not intending he should have sufficient funds in any account with the National Bank of Commerce, Lincoln, Nebraska for the payment of said check.

Specifications 2, 3, and 8 to 13 inclusive:

These Specifications are identical in form and substance with Specification 1 of this Charge excepting the dates, and, in certain instances, the amounts and names of payees and the corporation alleged to have been defrauded, which items are, respectively, as follows:

<u>Specifi- cation</u>	<u>Date</u>	<u>Amount</u>	<u>Payee</u>	<u>Corporation defrauded</u>
2.	6/30/44	\$25.00	Hotel Loraine	Hotel Loraine
3.	7/1/44	\$20.00	Hotel Loraine	Hotel Loraine
8.	7/1/44	\$25.00	Hotel Schroeder	Hotel Schroeder
9.	7/3/44	\$25.00	Hotel Schroeder	Hotel Schroeder
10.	7/5/44	\$25.00	Hotel Schroeder	Hotel Schroeder
11.	7/5/44	\$25.00	Hotel Schroeder	Hotel Schroeder
12.	7/5/44	\$50.52	Hotel Schroeder	Hotel Schroeder
13.	7/6/44	\$25.00	Hotel Schroeder	Hotel Schroeder

and excepting further, from the face of the check set forth in Specification 10 the words "TPS, Ft. Benning, Ga." and the numerals "0-1314240" and from the face of the check set forth in Specification 13 the words "Lincoln, Nebr" in connection with the name of the drawee bank.

Specification 4: In that Second Lieutenant Arne H. Amundsen, 386th Infantry Regiment, did, at Milwaukee, Wisconsin, on or about 24 June 1944, with intent to defraud, wrongfully and unlawfully make and utter to Hotel Pfister, Milwaukee, Wisconsin, a certain check in words and figures as follows, to-wit:

The NORTH SHORE NATIONAL BANK  
of Chicago  
1737 Howard Street

Chicago, Ill., 24 June 1944  
Pay To The Order Of Cash \$ 20.00

Twenty & no/100 ----- DOLLARS

Ft Benning Ga

TPS

No. 23

/s/ Arne H. Amundsen  
0-1314240

and by means thereof did fraudulently obtain from said Hotel Pfister, Milwaukee, Wisconsin, twenty dollars (\$20.00), lawful money of the United States, he, the said Second Lieutenant Arne H. Amundsen, then well knowing he did not have and not intending he should have sufficient funds in any account with the North Shore National Bank, Chicago, Illinois for the payment of said check.

Specifications 5, 6 and 7: These Specifications are identical in form and substance with Specification 4 of this Charge except as to dates and excepting that Specification 5 bears the number; "26" and Specifications 6 and 7 bear no number and excepting further from Specification 5 the letters; "Ga." in connection with the letters and words; "TPS, Ft. Benning" and, from Specification 7, the letters and words; "TPS, Ft. Benning, Ga." The dates respectively are 25 June 1944, 26 June 1944, and 27 June 1944.

The accused pleaded guilty to and was found guilty of all Specifications and the 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 twenty-five years. The reviewing authority approved the sentence, reduced the period of confinement to ten years, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, briefly summarized, is as follows:

On 3 June 1944, the accused, then a student at the Parachute Training School, Fort Benning, Georgia, was relieved from duty as a student there and was transferred to the 386th Infantry, 97th Infantry Division, Fort Leonard Wood, Missouri. He left Company H, 1st Parachute Training Regiment, Fort Benning, Georgia, on the same day (R. 13; Pros. Ex. 1).

The travel time between Fort Benning, Georgia, and Fort Leonard Wood, Missouri, by rail, is 32 hours (R. 14).

The accused did not report to the 97th Infantry Division at any time thereafter (R. 14) but was returned to military control at Omaha, Nebraska, on 24 July 1944 (R. 15; Pros. Ex. 2).

It was stipulated in writing between the accused, defense counsel, and the trial judge advocate that the accused did make and cash, on the respective dates alleged, each of the eighteen checks which are the bases of the five Specifications under Charge II and the thirteen Specifications under the Additional Charge, and that the accused did obtain from the hotels named as the defrauded corporations in the Specifications, by means of the respective checks, the sums of money set forth in the Specifications (R. 15-17; Pros. Ex. 3).

Photostatic copies of the checks set forth in the Specifications are attached to and are identified in the stipulation.

Three of the checks were cashed at the Hotel Fort Des Moines, Des Moines, Iowa; two were cashed by the Hotel Sherman, Chicago, Illinois; three were cashed by the Hotel Loraine, Madison, Wisconsin; four were cashed by the Hotel Pfister, Milwaukee, Wisconsin, and the remaining six were cashed at the Hotel Schroeder, Milwaukee, Wisconsin.

Fourteen of the checks were drawn upon the National Bank of Commerce, Lincoln, Nebraska, and four were drawn upon the North Shore National Bank of Chicago, Chicago, Illinois.

It was admitted by the stipulation that none of the checks were paid upon presentation, and that they were all returned unpaid to the respective payees and holders (Pros. Ex. 3).

By deposition it was shown that the accused opened an account with the National Bank of Commerce, Lincoln, Nebraska, on 7 December 1943 with an initial deposit of \$100. This, however, became so depleted by withdrawals that by 22 June 1944 the account was closed and the final entry disclosed an overdraft of 37¢. Under these circumstances all checks issued by the accused and presented by the holders thereof subsequent to 22 June 1944 (which includes all the checks in the Specifications) were dishonored and returned unpaid (R. 18; Pros. Ex. 5 and attached statement).

Likewise, it was shown by a deposition of the Vice President of the North Shore National Bank of Chicago that payment of the four checks drawn by the accused upon that bank was, upon presentation, refused for the reason that the records of the bank failed to disclose any account in the name of "Arne H. Amundsen" at any time (R. 17; Pros. Ex. 4).

4. The accused, having been advised of his rights, elected to have his counsel make an unsworn statement in his behalf, the substance of which, briefly, is as follows:

The accused realizes fully that what he has done was very foolish and he does not wish to be placed in the position, through any remarks by counsel, of begging mercy from the court. However, the case should be reviewed in its proper perspective so that there may be consideration in the imposition of punishment.

The accused, who is about 24 years of age, was inducted in June 1942, was promoted to Corporal in December 1942, applied for and was admitted to the Officer Candidate School at Fort Benning, Georgia, from which he was graduated with a commission on 15 March 1943. His military career is without blemish during all of that period and up to the time of the offenses with which he stands charged. After his graduation and the receipt of his commission the accused attended the Administrative Officer Candidate School in Fargo, North Dakota until November 1943. Thereafter and until January 1944 he served with the ASTP units at Lincoln, Nebraska. Subsequently he served with the 386th Infantry Regiment. He made repeated requests for overseas assignment without avail. In April 1944 he attended the Parachute School at Fort Benning, Georgia, in the hope of getting into a more active branch with a likelihood of overseas service. On 1 June 1944 he was rejected through no fault of his own because of a leg injury causing physical incapacity. Thereupon he was ordered to return to Fort Leonard Wood. At the time he had every intention of proceeding thence and he had sent his clothing and equipment to Fort Leonard Wood. He started the return journey and at Memphis, Tennessee,

within the allotted travel time, he telephoned to the Assistant Adjutant of the 368th Infantry Regiment to request a delay en route, and he was under the impression that the delay had been granted.

From Memphis the accused went to Chicago. En route to the latter place he was in an accident and received a bump on his head but inasmuch as it was not serious he continued on his way. In Chicago, he realized that he was overdue at his station and then simply put off returning to Fort Leonard Wood. He went, in turn, to St. Paul, Milwaukee, Green Bay, Madison, Des Moines, Minneapolis and finally Omaha. The accused frankly admits that he does not know where or for what purpose all of the money he obtained by the cashing of the checks was spent. He was in a daze which he is unable to describe.

On three separate occasions the accused has been in hospitals, both military and civilian, for back, leg and head injuries but no question of the accused's mental condition at this time is suggested. He was examined at the request of defense counsel and found sane and mentally capable and responsible.

It was submitted that the accused's "prior honorable record and lack of financial difficulties up to June 1944 should not be blotted out by a hectic seven weeks during the months of June and July," and that the court consider whether the accused "or the military will be benefited by an extended and prolonged sentence."

5. Although the accused pleaded guilty to all of the Specifications and Charges, the prosecution nevertheless introduced sufficient competent evidence to establish the commission of each offense alleged.

Thus it was shown by duly certified abstract copy of the morning report of the accused's organization at Fort Benning, Georgia, that he was on 3 June 1944, transferred to 386th Infantry Regiment of the 97th Infantry Division, Fort Leonard Wood, Missouri, and that he left the organization on the same day, presumably to proceed to his new station.

It is perfectly evident from the expressions contained in the unsworn statement offered on behalf of the accused by defense counsel that the accused was fully aware of his duty to report promptly to the organization to which he had been assigned, for while in transit he telephoned from Memphis, Tennessee, to the Adjutant of the 386th Infantry Regiment at Fort Leonard Wood, Missouri, requesting a delay en route. It was intimated in the unsworn statement that the accused was under the impression that the request was granted. However true this tenuous excuse may be, it is incredible that the accused should have thought he was entitled to the delay which ensued. Without any authorization he thereafter toured about the country visiting

Chicago, Illinois; St. Paul and Minneapolis, Minnesota; Milwaukee, Madison and Green Bay, Wisconsin; Des Moines, Iowa; and Omaha, Nebraska, during the subsequent seven weeks. He was, finally, returned to military control at Omaha, Nebraska, on 24 July 1944, as was shown by duly certified abstract copy of the morning report of the 3753rd Service Unit, Seventh Service Command, of that date.

By depositions and stipulation it was clearly shown that the accused did make and utter each of the checks set forth in the Specifications of Charge II and the Additional Charge; that he received cash in exchange for each; and that the checks were drawn either upon a bank in which the accused never had an account or upon a bank in which there were insufficient funds of the accused to pay them when presented. In this fashion the accused obtained the total sum of \$450.52 in cash from the parties who cashed his checks and, irrespective of his pleas of guilty which admit all elements of the offenses charged, the only reasonable inference to be drawn from such a persistent and methodical course of action is that the accused intended to defraud the persons to whom he tendered his checks and from whom he received the cash in return therefor.

There is nothing whatever in the record of trial to raise the suspicion that the pleas may have been entered improvidently or through lack of understanding of their meaning and effect, nor were any statements made to the court, in testimony or otherwise, inconsistent with the pleas.

6. Records of the War Department disclose that the accused was born in Duluth, Minnesota, is 24 years of age and married. He was graduated from high school in 1938 and attended Duluth State College for 3½ years. He was inducted on 18 June 1942 at Fort Snelling, Minnesota. Upon completion of the prescribed course of instruction at the Infantry School, Fort Benning, Georgia, he was commissioned a Second Lieutenant, Army of the United States, on 15 March 1943. In civilian life he was employed as a grocery clerk, an ambulance driver and a brush salesman.

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 as modified by the reviewing authority, and to warrant confirmation thereof. Dismissal is authorized under Article of War 61 and Article of War 96.

Fletcher R. Andrews, Judge Advocate

Herbert B. Friedman, Judge Advocate

A. S. G. [Signature], Judge Advocate

SPJGQ  
CM 264814

1st Ind.  
25 OCT 1944

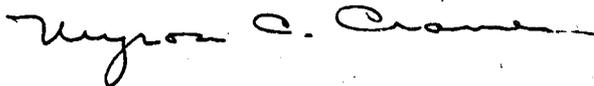
War Department, J.A.G.O.,

- To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Arne H. Amundsen (O-1314240), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority, and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed, but that the period of confinement be reduced to five years, and, as thus modified, that the sentence 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 of trial to the President for his action, and a form of Executive action designed to carry the above recommendation into effect, 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.

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(Sentence as approved by reviewing authority confirmed but confinement reduced to five years. G.C.M.O. 647, 16 Dec 1944)



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

(299)

SPJGQ  
CM 264826

8 DEC 1944

UNITED STATES )

89TH INFANTRY DIVISION

v. )

Trial by G.C.M., convened at  
Camp Butner, North Carolina,  
8, 9 September 1944. Dis-  
missal.

Second Lieutenant HOWARD  
G. RATLIFF (O-1304566),  
Infantry. )

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OPINION of the BOARD OF REVIEW  
ANDREWS, FREDERICK and BIERER, Judge Advocates

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

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

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

Specification 1: In that 2nd Lt. Howard G. Ratliff, Company F, 355th Infantry, did, knowingly and wrongfully at or near Raton, New Mexico, on or about 21 July 1943, contract and enter into an unlawful bigamous marriage with Lola Kathleen Hensley of McKinney, Texas without first being divorced from his living lawful wife, Violet Belle Ratliff.

Specification 2: In that 2nd Lt. Howard G. Ratliff, Company F, 355th Infantry, did at Camp Carson, Colorado, on or about 10 August 1943, wrongfully abandon and desert his wife, Violet Belle Ratliff.

Specification 3: In that 2nd Lt. Howard G. Ratliff, Company F, 355th Infantry, being liable for the support and maintenance of his wife, Violet Belle Ratliff, did at Camp Carson, Colorado on or about 6 August 1943,

wrongfully and dishonorably fail to support and maintain his said wife, Violet Belle Ratliff, which failure to support the said Violet Belle Ratliff, has continued from that date to on or about 20 March 1944.

Specification 4: In that 2nd Lt. Howard G. Ratliff, Company F, 355th Infantry, being liable for the support and maintenance of his child, Judith Ann Ratliff, did at Louisiana Maneuver Area, on or about 15 January 1944, wrongfully and dishonorably fail to support and maintain said Judith Ann Ratliff, his child, which failure to support and maintain said Judith Ann Ratliff has continued from that date to on or about 12 April 1944.

Specification 5: In that 2nd Lt. Howard G. Ratliff, Company F, 355th Infantry, did at Camp Carson, Colorado on or about 4 October 1943, wrongfully authorize a Class "E" Allotment to Lola K. Ratliff, represented by him to be his wife, when he well knew that the said Violet Belle Ratliff was his wife.

Specification 6: In that 2nd Lt. Howard G. Ratliff, Company F, 355th Infantry, did at Camp Carson, Colorado on or about 4 October 1943, falsely state and represent in an authorization for allotment of pay, that said Class "E" Allotment was for the sole benefit of his wife, Mrs. Lola K. Ratliff as his dependent, when he well knew that Violet Belle Ratliff was his wife and dependent.

Specification 7: In that 2nd Lt. Howard G. Ratliff, Company F, 355th Infantry, did at Hunter Liggett Military Reservation, on or about 10 March 1944, wrongfully and falsely state in his pay and allowance account, Form 336 A, that Lola K. Ratliff, Route #1, McKinney, Texas was his wife, when he well knew that Violet Belle Ratliff was his wife.

Specification 8: In that 2nd Lt. Howard G. Ratliff, Company F, 355th Infantry, did at Hunter Liggett Military Reservation, on or about 10 March 1944, wrongfully and with intent to conceal the names of his dependents, fail to disclose on his Voucher No. 10129, Pay & Allowance Account, that he was the father of Judith Ann Ratliff, an unmarried child under 21 years of age.

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



He pleaded not guilty to the Charges and Specifications. He was found not guilty of Specification 3 of Charge II, and guilty of all other Specifications and of the Charges. There was no evidence of previous conviction. He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The Charges and Specifications are based upon an alleged common law marriage with Violet Belle Griffin followed by a ceremonial marriage with Lola K. Hensley, known also as Kathleen Hensley. To avoid confusion we will refer to the two women by their given names. Since the prosecution's exhibits are designated by letter and the defense's by number, we will omit the terms "Pros." and "Def." in citing them.

The accused was born in 1921 (Ex. 1, p. 9) and is a second lieutenant in Company F, 355th Infantry, which organization he joined in December 1942 (R. 10, 11, 196).

Violet, who claimed to be accused's wife (R. 13), testified as follows:

At the time of trial she was 22 years old and resided in Wichita, Kansas (R. 13, 45). She became acquainted with accused on 16 March 1941 at Willow Springs, Missouri, where she lived with her father (R. 13, 77-79). Her mother had died previously (R. 79). At the time of her introduction to accused she was 18 years of age and he was 19 (R. 77). He was not in the military service (R. 13). Accused was visiting his mother, Mrs. Mae Ratliff, who lived in Willow Springs, and he remained there for about a week (R. 13, 14, 78). At that time, witness did not know Mrs. Ratliff (R. 14). During the week of accused's sojourn at Willow Springs, he and Violet saw each other every afternoon and evening, went to dances and "movies" together, and visited friends (R. 13, 15, 78-80). They came to know one another "quite intimately", and Violet fell in love with accused, who in her opinion seemed to reciprocate her love (R. 15). They talked about getting married (R. 78). Accused disliked dancing, did not know how to dance, and said that after their marriage there would be no more dancing (R. 126). About 23 March 1941, accused left Willow Springs to return to Pueblo, Colorado (R. 15, 78, 80). Witness remained in Willow Springs (R. 80).

While accused was away, they wrote each other nearly every day (R. 16). Accused asked Violet to marry him and sent her an engagement ring (R. 16-18, 120-121). There was an "understanding" between them (R. 18). Meanwhile, Violet's father died, and she went to live with her older sister in Willow Springs (R. 83). In the latter part of June accused returned to Willow Springs (R. 15, 19, 80, 82). Witness

and he saw each other every afternoon and evening, and she wore the engagement ring constantly (R. 19, 83). She met accused's mother at the latter's home (R. 36). Witness and accused discussed marriage (R. 19). Witness wanted to be married in West Plains, Missouri, but accused told her that he did not have enough money to be married there and would have to get money from his father (R. 20, 123). Accused wanted to be married in Raton, New Mexico, and although Violet did not want to be married at that place, she finally agreed (R. 19-20). They eliminated Pueblo as the place of marriage because of the delay incident to required blood tests (R. 123). Witness told her sister that they were going away to get married (R. 83).

On 5 July 1941 at about 8 or 9 a.m., witness and accused left by automobile, accompanied by Vincent Ballest, a friend of the accused's, and "another fellow", described meagerly as "Mullins" (R. 20, 82-84). Witness denied that en route to Pueblo accused told her that he had changed his mind and was not going to marry her (R. 102-103).

Arriving in Pueblo about 5 a.m. 6 July after an all-night drive, the party deposited Ballest at his home, and, apparently having left Mullins somewhere along the line, witness and accused proceeded to the house at 124 or 128 "Midway" where accused's father lived in a single room (R. 20, 21, 84-86). The visit to accused's father was made for the purpose of getting money, and, after staying with him for about an hour, witness and accused headed for Raton (R. 20, 21, 85, 86). On the way, they stopped for lunch for about an hour (R. 86-88). Witness did not remember the names of any cities or towns through which they passed, although when asked whether they went through Trinidad, she answered that she believed they did. She did not remember whether they passed through any "good-sized" towns or cities (R. 87, 91, 92). She did not know the distance between Pueblo and Raton, but testified that it was "not very far" (R. 87, 92). She could not recall any landmarks in or near the outskirts of Raton, and did not remember whether they crossed a large river or a long, low plain, or whether they came down a very steep mountain just before entering the town. She did not know whether Raton was a "mountainous" city or a "valley". She recalled that it was "not very big". This was her only visit there (R. 89-91).

They arrived at Raton about 6 or 7 p.m. the same day, before dark (R. 21, 22, 88). Accused drove directly to the home of a person who he said was a minister and whom witness believed to be a minister (R. 22, 89, 92). Witness understood that the purpose of going there was to get married (R. 22). They entered the house, which was a one-floor, white bungalow. The "minister" was in the living room (R. 92, 93).

He was a "middle-aged" man, whose hair was "turning gray", and he was dressed in a dark blue suit. Witness did not recall the kind of collar or necktie which he wore (R. 23, 94). She did not know his name; in fact, accused did not call him by name nor introduce him to witness (R. 22, 94, 95, 97). Accused told him that they wanted to be married (R. 95). Accused "had something with him that was supposed to be a marriage license". Witness did not know where he had obtained it. She did not see it until "later", and, having subsequently seen her sister's marriage license, did not think that the document produced by accused resembled a marriage license, although it was about the same size (R. 22-23).

Witness had never before attended a wedding and was only 19 years old at the time (R. 23, 97). She and accused stood before the "minister", and there was a "lady" present, seated on a couch (R. 23-25, 93, 95). The "man" had a Bible, and witness "guessed" that he "went through a regular ceremony" (R. 23, 95, 96). After testifying that she did not remember what the "minister" said (R. 96, 97), Violet testified that he asked her whether she took accused to be her "lawful wedded husband or whatever it is", to which she answered "'I do'", whereupon he asked accused "the same question", to which accused likewise responded "'I do'". The "minister" gave them "the vows" and pronounced them man and wife (R. 23, 24, 96). Accused put the "wedding band" or "marriage ring" on her finger (R. 24, 121). Accused "wrote on something", but witness did not know what it was. Witness did not sign any papers (R. 25). At the termination of the proceedings, witness believed that she was married to accused, and her belief in their marital status continued (R. 99).

After the ceremony, they returned to Pueblo, having been in Raton about an hour (R. 25, 97). They made no stops on the return trip and arrived in Pueblo about midnight (R. 25, 97, 98). Witness did not know why the journey to Raton took so much longer than the journey back. Accused drove both ways (R. 99). At Pueblo they went to the room occupied by Mr. Ratliff, accused's father. Upon their arrival, accused said to his father, "Well, Pop, I have brought you a new cook, my wife, Violet". Mr. Ratliff seemed "very happy", and all three spent the night there, the father on the cot and accused and witness in the bed (R. 25-27).

The next day they rented and moved into a three-room apartment at 306 Broadway, where all three lived for about a month, accused and witness occupying one bed in the bedroom, and Mr. Ratliff using a cot in the living room (R. 27-29). Accused introduced Violet as his wife to the person from whom they rented the apartment, and the receipt for the rent was made out to Mr. and Mrs. Howard Ratliff (R. 27, 28). During this period accused worked on the day shift at the "steel works"

in Pueblo (R. 30). Violet extended to him "all the privileges and rights of a husband", and they engaged in sexual intercourse together. Nothing was said to alter her belief that they were husband and wife (R. 29, 30).

From 306 Broadway, accused, witness, and Mr. Ratliff moved to a three-room apartment at 128 Midway, where the father occupied the living room and the young couple occupied the bedroom. They remained there for about two months, during which period accused worked on the night shift (R. 33-34).

During the three months covered in the foregoing testimony, Violet cooked, did the housework, and took care of accused's clothes (R. 30, 35). Accused handled their financial affairs and made the necessary purchases on credit, witness sometimes accompanying him to the stores (R. 30, 31, 34, 118). The credit was extended to accused personally (R. 31). Accused did not give Violet any cash for the purpose of paying bills or otherwise (R. 35, 119). He did not buy her any clothes, but she did not need any (R. 35).

Accused introduced Violet to a number of people as his wife. Among them were Mrs. Ballest (Vincent Ballest's mother), Mr. and Mrs. Benjamin, Miss Rice ("the lady next door"), and Mrs. Gregory, who lived in one of the apartments at 128 Midway (R. 32, 33, 34, 116, 117). So far as witness knows, accused never introduced her after their "marriage" as Violet Belle Griffin (R. 118).

In October 1941, Violet went to Springfield, Missouri, to visit her sister. Mr. Ratliff, accused's father, traveled with her by train, took her to her sister's apartment, and then went on to Willow Springs to see his wife (R. 35, 36, 127). Witness denied that Mr. Ratliff stopped in Springfield or West Plains to search the marriage records in order to find out whether witness and accused had been married there. She never told Mr. Ratliff that they had married in either of those places and never told anyone that she had been married elsewhere than Raton (R. 127).

Violet did not see accused again until around 1 January 1942, when he came to Springfield and took her to Willow Springs to visit his mother (R. 36). Accused told his mother that Violet was his wife, and his mother seemed pleased to see her (R. 37). They remained about a week, occupying the same bed in the upstairs bedroom. Other members of accused's family occupied other rooms in the house. These included accused's married sister, Hazel, her husband, and a "small sister" (R. 37).

From Willow Springs, witness and accused returned to Springfield, where accused introduced her as his wife to his cousin Clay Ratliff. Accused remained in Springfield about two hours, then left for Pueblo, accompanied by his cousin Clay (R. 38).

After accused's return to Pueblo, he and witness corresponded, and witness received letters from him three or four times a week (R. 38, 39). The prosecution introduced as Exhibit A a letter dated 10 January 1942, written by accused, mailed from Pueblo, and addressed to "Mrs. Howard Ratliff", 519 South Jefferson, Springfield, Missouri. The letter was identified by Violet. It starts "Hi Darling" and ends "Lots of Love". In it the accused mentions that he is in bad shape financially and plans on leaving Pueblo, moving to his mother's or some other place, and letting his bills "go to hell". He asks her what she thinks about their staying at his mother's, and expresses the opinion that she could stay there until his return in case he had to go into the Army. In various parts of the letter he refers to her as "darling" and "sweetheart", and tells her that she had "better behave" herself "or else". He asks to be remembered to "Fern" and "Mack" (Ex. A). Fern is Violet's sister, with whom she was staying in Springfield. Mack is Fern's husband (R. 41).

The prosecution introduced another letter from accused in Pueblo to Violet in Springfield. The letter is dated 31 January 1942 and is addressed to "Mrs. Howard Ratliff" (R. 58-59; Ex. C). The letter starts, "Hello Sugar. How is my little baby doll?", and ends "Lots of love". Accused writes that he probably will have to go into the Army soon, and hopes to come to see her before he goes. He also mentions that his "bill collectors" are about to "hound" him "to death" (Ex. C), presumably because of his impending Army career.

Continuing her testimony, Violet stated that while she was in Springfield, she and accused's mother wrote to one another (R. 59). Exhibit D was received in evidence. It consisted of an envelope post-marked 2 February 1942, containing a letter written 31 January 1942 by accused's mother to Violet, addressed to "Mrs. Howard Ratliff". The body of the letter was not offered in evidence.

About 13 February 1942 accused came to Springfield and took witness for a two-week stay at accused's mother's house at Willow Springs (R. 41, 42, 46). There at the time were accused's mother, his sister Hazel, his brother-in-law Paul, his younger brother and sister (Loren and Margie), and his cousins Clay and Vera. Accused and witness occupied an upstairs bedroom and slept in the same bed (R. 42). Witness "lived" with accused as his wife (R. 45-46). In speaking of witness, Hazel referred

to her as accused's wife (R. 45). While at Willow Springs, witness and accused visited various friends and went out together, usually being accompanied by members of accused's family (R. 42, 43).

After the visit at Willow Springs, accused, witness, accused's mother, Loren, Margie, Clay, and Vera proceeded by automobile to Pueblo, stopping overnight at the home of accused's aunt in Rocky Ford, where accused and witness were the sole occupants of a room containing one bed (R. 46-47). In Pueblo, accused, witness, accused's mother, and Margie spent the night together in the same hotel room, accused and witness sleeping in the same bed (R. 48). Then all four, together with Loren, took an apartment at "503 West Corcora" in Pueblo (R. 48, 49). This was in the latter part of February 1942 (R. 48). While they lived there, accused and witness slept together, Margie and accused's mother did likewise, and Loren slept in the living room. Witness helped accused's mother with the housework and cooking (R. 49). From time to time, Violet met friends of accused and of the family, including a Mrs. Heath and a Mrs. Hard. Accused's mother, in introducing witness to Mrs. Heath, referred to witness as her "daughter-in-law", accused's "wife", and accused always introduced her to his friends as his wife. Both parents always referred to her as accused's wife (R. 49-51, 107).

Accused and Violet lived together in the apartment until the end of March 1942, when accused left to join the Army (R. 49). During the whole period at Pueblo and Willow Springs, they lived together "in the relationship of husband and wife" (R. 38). After accused went away, witness continued to live with the family in the same apartment (R. 51).

On 1 June 1942, witness and accused's mother went to Abilene, Texas to see accused, who was stationed at Camp Barkley, Texas (R. 51, 52). They took an apartment in Abilene, which had only one bedroom and one bed (R. 52, 53). Accused paid the rent (R. 53, 54). Accused's mother stayed about two weeks, during which time the accused did not stay overnight at the apartment. After the mother's departure, Violet stayed on, and accused came in from camp about one day during each week and "about every weekend" (R. 53). He stayed overnight and they slept together (R. 53, 54). Mrs. Russell, the landlady, called witness "Mrs. Ratliff" (R. 54). Witness stayed between one and two months, after which she left because accused told her that he was to attend an officer candidate school (R. 53, 55). She returned to accused's "folks" at the Pueblo apartment, and, having no money of her own, she obtained employment at the Whitman Hotel, working nights. She continued on this job for almost a year (R. 55, 64, 100, 101, 118).

While accused was at school at Fort Benning, the couple corresponded by letter (R. 55). A letter dated 29 November 1942 and an envelope postmarked 11 December 1942 were admitted in evidence, Violet having

identified them as written by accused (R. 55-57; Ex. B). The envelope was addressed to Mrs. Violet Ratliff, was postmarked Fort Benning, Georgia, and contained a return address from that post. The letter begins "Hi Darling" and ends "Loads of Love & Kisses". In the letter accused writes that if he "makes it", he will be "home", and that they will have a "big time". He says that he will have "a whole week to spend at home" and that it is "up to her" to see that he doesn't "waste a minute of it". The letter continues, "This is one time sweetheart that you have got to show me a good time so please don't let me down", and "I think I will get you fixed up while I am at home so you will have a little 'Hard' to keep you company until this war is over and I can come home and then you can get rid of him don't you think that is a swell idea honey." The letter also states, "So you had better watch yourself when I come home honey. Or you will be getting fat in the middle. Ha Ha". He asks her to "be a good girl" for him (Ex. B).

Around 19 December 1942, accused, then a second lieutenant, "came home" from Fort Benning on a ten-day leave, and they lived together in a downstairs bedroom which Violet had rented in the same apartment building. There was one bed in the room and they slept together in it. Violet did not work during the leave (R. 62-64, 113). At the termination of his leave, accused went to Camp Carson, Colorado (R. 62, 63, 108). Violet continued to live in the same room and ate her meals in the Ratliff apartment upstairs. Accused left his personal belongings locked in a trunk in Violet's room. While stationed at Camp Carson, accused came to Pueblo "about every week-end", and he and Violet "lived together" in her room (R. 63-64). They also wrote letters to each other (R. 65). A letter from accused dated 19 January 1943, together with an envelope postmarked Camp Carson, Colorado, 20 January 1943, were received in evidence as Exhibit E. The envelope was addressed to "Mrs. Violet Ratliff". The letter commences "Hi Sweetheart" and ends "Love as always and lots of it". It mentions that accused has received \$211.80 pay, but that Violet will have to wait until he is able to get some cash. In the letter he tells Violet to be "a good little girl" for him (Ex. E). The prosecution also introduced a letter dated 13 December 1943, written on Camp Carson stationery. Witness testified that she did not hear from accused in December 1943 (R. 66). She testified further that she received the letter and that accused must have made a mistake in dating it (R. 67). Over the objection of the defense, the letter was received in evidence as Exhibit F (R. 67, 68). The letter begins "Hi darling", and ends "With all the Love in the world". It contains the following postscript: "How is our junior coming along. How is your waist line? Ha Ha". In the letter accused states that he may not be able to get home

the following weekend and that if he does, she will have to "baby" him. He inquires whether she is being "a good little girl" for him. He asks her to find out whether Hazel has called up about his money, and says that he will give Violet a "nice cut of it" if he gets it. He tells her not to neglect writing him even though he is "so close to home", and states that he will be home as soon as he gets a chance (Ex. F). From the tenor of this letter, it is evident that it was written while accused was at Camp Carson and that it was erroneously dated.

At a date which Violet did not recall, accused left Camp Carson for the "Texas maneuvers" (R. 65), from which he returned in April 1943 (R. 68). After his return, he introduced her to a Lieutenant Merle Benner as his wife (R. 128-129). The trial judge advocate announced at this point that he had checked the records, that Lieutenant Benner was a member of the 355th Infantry, and that he was overseas at the time of trial (R. 129).

Continuing her testimony, Violet stated that in the latter part of April while in their bedroom, she told accused that she was pregnant. He told her that he did not want her to have the baby, that he would give her the money "to get rid of it", and that he wanted her to go to "one of those doctors" (R. 69, 70, 114). He did not say that the child was not his (R. 114). He told her that he was going to be "shipped out" (R. 69, 124). When he returned the next weekend, he was very angry because she had done nothing about "getting rid of" the baby (R. 69, 70). She told him that she would not do so and he said that he would not support the baby (R. 70). He told her that their marriage was illegal (R. 70). She had never questioned the legality of their marriage (R. 70, 75). He offered no further explanation, and she did not ask for one (R. 70). She had always given accused everything which in her opinion a husband and man in his circumstances might reasonably expect from his wife (R. 75).

That evening accused and his mother went to Rocky Ford, and thenceforth, witness and accused "didn't get along", "quit speaking to each other", and did not "live" together (R. 71, 114, 122). Witness did not write him thereafter (R. 122, 124, 125). Accused came to see his mother quite often, and talked to witness once or twice (R. 71, 114). Witness denied that either accused or his father asked her to leave their home at any time before they learned of her pregnancy (R. 115).

During the period when witness lived with accused, he gave her only \$25, and he bought her nothing except a pair of slippers, a manicure set, and a set of rings (R. 74, 99). However, until April 1943, he provided her with shelter and "subsistence" (R. 75). He did

not take her to parties or dances, did not take her to a "picture show" very often, and did not take her out much. He did not dance. From time to time he went out himself, leaving her at home with his parents (R. 100, 102). After April 1943, he did not provide her with shelter, subsistence, or clothing (R. 75). Witness stayed with accused's "folks" until 6 August 1943 (R. 49, 55, 71, 75). Since then, no member of the Ratliff family has provided her with "any of such items as food, shelter, and clothing" (R. 75).

Witness went to Centerline, Michigan, and in December 1943 brought "this proceeding" to the attention of the military authorities (R. 71, 122). On 15 January 1944, a girl was born to Violet in a hospital at Selfridge Field, Michigan (R. 69, 71). Violet was admitted to the hospital under the name of Mrs. Howard Ratliff (R. 71, 116), and she named accused as the father, since the child was "conceived" by him (R. 69, 72). She named the child Judith Ann (R. 69). A certified copy of the birth certificate of Judith Ann Ratliff was received in evidence (R. 72; Ex. G). Violet testified that certain charges in connection with Judith Ann's birth, amounting to \$22, were paid by Violet's sister (R. 73, 74; Ex. H).

Violet did not notify accused of the child's birth, as she did not know his whereabouts, but she notified his "folks" (R. 74, 125). She had no word from accused (R. 128). None of the Ratliffs have provided anything for the child (R. 75). In January 1944, accused's sister Hazel wrote witness that accused had married Lola Kathleen Hensley (R. 128). There was received in evidence as Exhibit U a certified copy of a marriage certificate, evidencing the marriage of accused and Kathleen Hensley before a justice of the peace at Raton, New Mexico, on 21 July 1943. The name of Hazel Fisher (accused's sister) appears as one of the witnesses (R. 157-158; Ex. U).

Witness denied having discussed with accused the advisability of having a child while he was in the Army. Accused disliked children. Witness knew that accused was only teasing her by the references in his letters to "fixing her up", "junior", her "waistline", and the like (R. 110).

Joseph L. Ratliff, father of the accused, testified by deposition as follows: When he first met Violet about 7 July 1941, she was not introduced as accused's wife and nothing was said about a marriage at West Plains or Springfield, Missouri. At a time which may have been during August 1941, Violet told witness that they had been married at either West Plains or Springfield. Accused was not present during the conversation. Witness corroborated Violet's testimony that she, accused, and witness lived together at 306 Broadway and at 128 Midway, in Pueblo. At the former place Violet and accused occupied the same room, and, so far as witness knew, they "used the same room" in the latter place,

although witness never saw them in it together and did not know whether they lived "as husband and wife". On 15 September 1941, witness and Violet went by train to Springfield, Missouri, witness going on to Willow Springs to see his wife. He checked the marriage license records in Springfield and West Plains, and found no record of the issuance of a license to accused and Violet.

In January 1942, witness saw a telegram from Violet's sister, Fern, to accused, asking accused to come at once, as Violet might not live. Accused left but was away only about four days. He said there was nothing wrong with Violet. In the latter part of February 1942, Violet, accused, and the others mentioned in Violet's testimony, moved into the apartment at 503 West Corona. Witness did not live there then. Accused and Violet did not occupy the same room and did not live as husband and wife. After accused joined the Army on 28 March 1942, witness moved into the apartment, and Violet continued to live there. Hazel and her husband arrived, and witness rented another room in the same building. Hazel's husband subsequently left. During the spring of 1943, when accused was stationed at Camp Carson, he sometimes came home on weekends, usually bringing a friend. Accused never stayed overnight, and he and Violet did not live together in the apartment. Usually, Violet was not home during these visits, as she worked in the evenings at the Whitman Hotel.

Since Violet was "nothing" to the family, and accused would not come home if she happened to be there, witness asked her on numerous occasions to leave and to "go back to her folks". However, she continued to live there until August 1943. Witness never heard accused tell anyone that he was married to Violet (Ex. N).

Mrs. Hazel Fisher, accused's sister, testified by deposition, as follows: Witness lived in Willow Springs, and in July 1941 accused introduced her to Violet. Witness came to Pueblo about April 1942 with her husband. Violet was living with the Ratliffs at 503 West Corona. Accused was in the Army and not living there. Witness and her husband took an "additional room" at the same address. Her husband left in September 1942. Marjorie, Violet, and witness always slept together.

When accused came in from Camp Carson on weekends, he slept on the couch in the "front room". Witness never saw Violet and accused sleep in the same bed. Near the end of February accused was transferred to Texas. He came back to Camp Carson about the middle of April 1943. Thereafter, he did not come to visit Violet on weekends, but did visit witness, who was still living at the same place. Witness never saw accused with Violet during this period.

In April or May 1943, Violet told witness that she was pregnant, but did not say by whom. In July 1943, Hazel Fisher was a witness at accused's marriage in Raton, New Mexico, to Lola, who is the same person as Kathleen Hensley. When witness returned to Pueblo, she told Violet about accused's marriage to Lola. After Violet went away in August 1943, witness corresponded with her while Violet was in Michigan. Witness admitted having written Violet in January 1944 and having addressed the letter to Violet Ratliff. She so addressed it for Violet's sake and because she supposed that Violet's sister in Michigan believed that Violet was married to accused. However, witness also testified that she did not know what Violet's sister thought and did not know whether Violet was living with her sister at the time.

Witness did not remember whether Violet ever told her that she was married to accused or whether Violet ever told her the contrary. Accused and Violet never stated in the presence of witness that they were married. Accused never told "his friends and neighbors" that he was married to Violet. He did not "hold out" Violet to the public as his wife. Witness did not know whether Violet and accused were "known generally to the community as husband and wife". Witness did not remember whether on 11 July 1944 she stated that she "guessed they were". Witness never lived in the same town as Violet and accused, and did not know whether they lived together as man and wife. They did not conduct themselves as though they were married. Witness never introduced Violet by the name of Ratliff (Ex. O).

Mrs. Minnie Hard testified by deposition as follows: She was the person who leased the apartment at 503 West Corona to the Ratliff family in February 1942. Witness lived in the same building. Accused and Violet lived in the apartment, but witness "could not say" whether they lived together as man and wife. Accused and his mother referred to Violet as accused's wife, and she was "held out and represented" by accused to be his wife. She was so "generally held out to the public." Accused did not actually tell witness that they were married, but Violet did. Witness did not hear Violet introduced as accused's wife to friends and neighbors living in the community. Violet "generally conducted" herself as accused's wife. After accused joined the Army, he never said anything about Violet, although she continued to live with his family and they considered her a member of the household and treated her as such. Witness considered Violet to be accused's wife. On 4 October 1942, Violet rented a room downstairs, but she ate upstairs with the family and slept upstairs with them part of the time. In the spring of 1943, witness saw accused on several visits which he made at 503 West Corona. During these visits, Violet and accused occupied the same room and lived together as husband and wife. Witness did not rent

a room to Mr. and Mrs. Fisher. While Violet lived there, she went by the name of Violet Ratliff and received mail so addressed (Ex. P).

William H. McWhirt testified by deposition as follows: He lived at 503 West Corona. When the Ratliffs moved into the apartment, Violet was introduced to him as accused's wife. Witness did not remember who made the introduction or whether accused was present. Witness did not know how the family "split the bedrooms up". After accused went into the Army, he and Violet occupied the additional room. (Apparently witness referred to the occasions when accused came home for visits). Witness regarded accused and Violet as man and wife, and according to his "understanding", Violet was "known and held out to the public generally" as accused's wife (Ex. Q).

Mr. Arthur H. Benjamin testified by deposition as follows: He has known the Ratliff family and has known accused for six years. Violet was introduced to witness by either accused or witness' son as accused's wife. Accused was present and did not deny the marital relationship. Before accused entered the military service, he and Violet came over to witness' home two or three times. They acted like a married couple, and there was "joshing" about their being "newlyweds". Witness believed they were married, although accused never actually said so. Everyone in the neighborhood who knew them regarded them as man and wife. Witness lived ten or eleven blocks from 503 West Corona. When he referred to the people in the "neighborhood", he meant the families living in the building where he lived (Ex. R).

Mrs. A. H. Benjamin testified by deposition as follows: She has known accused for about six years and has known Violet since the winter of 1941. Accused brought Violet to witness' home and introduced her as his wife. There was "joshing" about their marriage. They called on witness about three times before accused went into the Army. Witness did not know whether accused and Violet were known to the public generally as man and wife, because witness never talked to anyone about it (Ex. S).

Mrs. J. B. Johnston testified by deposition as follows: She has known the Ratliff family, including accused, for about eight years. She lives in Pueblo. She met Violet in the fall of 1942, but did not see accused and Violet together. (It will be recalled that accused entered the service in March 1942.) At witness' home, accused's sister Hazel introduced Violet to witness as accused's wife. Violet was "known" to witness as accused's wife. Witness' opinion that Violet and accused were husband and wife was based partly on what Violet said and partly on what members of the Ratliff family said (Ex. T).

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On 4 October 1943, at Camp Carson, Colorado, accused signed and filed with the Finance Officer, 89th Light Division, an authorization for allotment of pay (W.D. A.G.O. Form No. 29), authorizing an allotment of \$175 per month payable to a named bank for the credit of "Mrs. Lola K. Ratliff, Wife." The document contained a printed statement above accused's signature that the purpose of the allotment was "solely for the support of wife, child, or dependent relatives" (R. 130; Ex. I) (Specifications 5 and 6, Charge I).

On 29 February 1944, at Hunter Liggett Military Reservation, accused signed and filed with the Finance Officer, 89th Light Division, W. D. Form No. 336, "Pay and Allowance Account", for pay and allowances for March 1944. The document names Lola K. Ratliff, Route 1, McKinney, Texas, as accused's lawful wife. The space after the printed words "Unmarried children under 21 years of age" is not filled in (R. 130; Ex. I) (Specifications 7 and 8, Charge I).

A fourth indorsement, dated 19 December 1943, to "C.O. 355th Inf.", was written and signed by accused and delivered to Colonel R. F. Walthour in his official capacity as commanding officer of the 355th Infantry (R. 131; Ex. J). The indorsement reads as follows:

La. Maneuver Area

4th Indorsement

Dec. 19, 43

To: C.O. 355 Inf.

In compliance with basic communication;

I am not married to this girl and I never was. I am married to a girl who is in Texas now. We were married on July 21, 1943.

This girl stayed at my home for quite some time. But I had nothing to do with her what so ever. My folks let her stay there because she had no place to go. As far as her child I know nothing of that (Ex. J) (Specification 1, Charge II).

In his "Application for Appointment and Statement of Preferences for Reserve Officers" (W.D.A.G.O. Form No. 170), dated 17 August 1942, accused stated that he was single (R. 132; Ex. K) (Specification 2, Charge II).

4. The accused testified. Much of his testimony coincided with Violet's, and he agreed that her testimony concerning dates and places was "approximately correct" (R. 222-223). The pertinent portions of accused's testimony are as follows: Pueblo has been his home since he

was a small boy (R. 196-197). He met Violet in March 1941 while visiting his mother in Willow Springs, and went out with her nearly every day during his week's stay there. They went to dances and "shows". At that time accused danced (R. 197-198). Although accused did not discuss marriage with Violet during the week at Willow Springs, he thought himself in love with her and they became engaged (apparently after his return to Pueblo) (R. 198, 199, 223). He bought an engagement ring and sent it to her in May 1941 (R. 199, 223, 262).

In the last part of June 1941, accused went to Willow Springs to see Violet, and on either 4 or 5 July, they left together for Pueblo, accompanied by accused's friend, Ballest (R. 198-200). At the time of their departure, they intended to get married (R. 199, 232). Accused told his mother of their contemplated marriage, and his mother did not "like it", cried about it, and thought that accused was "doing wrong" (R. 202-203). During the 800 mile trip to Pueblo, accused "got to thinking" about what his mother had said, and he reached the decision not to marry Violet. Shortly before their arrival at Pueblo, he told Violet that he did not intend to marry her (R. 200, 201, 203, 223, 233). At first, Violet thought he was teasing, but he was not (R. 233). Violet wanted to marry accused, and insisted on living with him in Pueblo (R. 224). Accused continually tried to persuade Violet to go back home, and told her that he did not want her around (R. 223-225, 244). He even offered to give her the money to get home (R. 250, 251).

Accused denied having gone to Raton, New Mexico, with Violet, and denied having "gone through" a marriage ceremony, "fake" or real, with her (R. 201, 202, 222, 233). He "never took any vows" with Violet "anywhere by anybody" (R. 222). Raton is between 130 and 150 miles distant from Pueblo. About fifty miles from Pueblo on the way to Raton, the country becomes mountainous. Just before arriving at Raton, the traveler crosses Raton Pass. The approach to Raton is from the top of a mountain, from which one sees the city below as if from an airplane. The road descends in a series of hairpin turns into the city (R. 201-202).

Two or three days after their removal to 306 Broadway, accused and Violet took a two-day fishing trip "up in the mountains" (R. 203, 204, 233, 234). While they and accused's father lived together at 306 Broadway, accused was earning about \$150 per month at the steel mill and was not indebted to any great extent (R. 204, 236). There had been no threat of garnishment proceedings against him (R. 236). Accused's father did most of the cooking at the apartment, although Violet did some. She also "cleaned the house" and "to a certain extent" took care of accused's clothes (R. 235).

During their residence at 306 Broadway, accused had intercourse with Violet "off and on" and "slept with her all night" in the same bed. She wanted to marry accused, but he told her again that he would not marry her (R. 204, 234). After their removal to 128 Midway, accused continued to have sexual intercourse with Violet from time to time. There was no agreement between them that they were to live together as man and wife, and accused did not regard her as his wife and kept telling her that he was not going to marry her (R. 205, 206). He did not want her with him (R. 224-225).

In the middle or latter part of August 1941, Violet insisted on having a wedding ring because she was planning to visit her sister and wanted her sister to think she was married. Because of Violet's insistence, and for the purpose of "saving his own face", he bought her a wedding ring for about \$12 (R. 232, 234, 238, 239, 262).

When Violet and accused's father left Pueblo in September 1941 (Violet to visit her sister), as related in the prosecution's testimony, accused had no intention of ever seeing her again and he "wanted her to realize and forget about it" (R. 205, 206, 216, 240, 241, 251). They did not communicate with one another until about the 6th of January 1942, when Violet sent accused a telegram stating that she was not expected to live (R. 206, 240, 241). Thereupon accused went to Springfield and found Violet apparently in excellent health (R. 206, 241). He took her to visit his mother in Willow Springs and introduced her as his wife. They stayed only a little over one day, and accused did not "live with" or "sleep with" Violet (R. 207, 241, 242).

After accused's return to Pueblo, he wrote Violet two or three times (R. 207, 241, 242). Exhibit A (his letter of 10 January 1942) is in his handwriting (R. 213). He addressed it to "Mrs. Howard Ratliff" because Violet was living with her sister and wanted her sister to believe she was married (R. 224). Accused wrote Exhibit C (letter of 31 January 1942) (R. 251).

In the middle or latter part of February 1942, accused went to Willow Springs to bring his mother and "the children" to Pueblo. On his way to Willow Springs he stopped at Springfield to see Violet. He did not know why he stopped to see her. She "insisted" on returning to Colorado (R. 207). He took her to his mother's home at Willow Springs, and they remained there about a week, during which time he had intercourse with Violet and slept in the same bed (R. 243, 249-250). So far as accused knew, his mother believed at that time that Violet was his wife (R. 243). Accused let Violet come back to Colorado because he knew that he would be leaving for the Army in a few weeks and because Violet "had no folks" and "had nowhere to go", and if she "wanted to stay with the folks that was all right", inasmuch as accused would not be there (R. 207, 226, 263).

During their residence at 503 West Corona, accused and Violet did not live in a room together by themselves, although on a few occasions they indulged in sexual intercourse (R. 207-209). During this period they did not "enter into any agreement" to be husband and wife, and accused did not consider her as his wife and did not take her to see his friends (R. 208). He often went out by himself to call on his friends, leaving Violet at home. He did not take her to parties given by his friends nor to dances (R. 208, 218). He did not take her to "a show" over three or four times (R. 218). Except for the sexual intercourse, he did not treat her as his wife and he has never considered her as his wife (R. 208, 216). He continued to ask her to leave the apartment and go back to her home (R. 216). He never made an agreement with Violet "of any nature along the line of being man and wife", and Violet knew that they were not married (R. 260, 269), although she held herself out as his wife (R. 270).

Accused told his father that he and Violet were not married (R. 226). He introduced Violet as his wife to Mrs. Ballest, the mother of his friend Ballest, out of consideration for Violet and himself (R. 208, 209). He did not introduce Violet as his wife to either Mr. or Mrs. Benjamin, although he believed that they went to the Benjamins' home on one or two occasions in March 1942 (R. 214, 261). He did not introduce Violet as his wife to Mrs. J. B. Johnston nor to any of the friends with whom he had gone to school (R. 215, 218). When he entered the Army on 28 or 29 March 1942, he considered himself a single man and had so stated on his induction papers. In making that statement he did not intend to deceive anyone (R. 197, 220, 222, 226). He believed that until his entrance into the Army, his mother thought that he and Violet were married, but at the time she signed his "papers" (stating that he was single), he "guessed" that she read them (R. 226).

After induction, accused was sent to Fort Logan, Colorado, and during his four weeks there, he did not correspond with Violet (R. 209). He was stationed at Camp Barkley, Texas, from the middle of April until the latter part of September (R. 209, 210). He did not "have any intention" that Violet come to Texas (R. 245). However, Violet and his mother came to visit him there and rented an apartment. Accused paid the bills. Accused's mother remained only four or five days. Violet stayed between two and three weeks. Accused visited her four or five times, and when he came in from camp on Saturday nights, he slept with her. He was still "coaxing" her to go home (R. 212, 244, 245, 249).

Accused wrote Violet once from Fort Benning (R. 244). Exhibit B (29 November 1942) was written by him (R. 228-229). The trial judge advocate read part of the letter and asked accused whether it sounded as though accused wanted Violet to go home. Accused replied that Violet

was there and he was going home and "figured" that he "might as well have a good time out of her" if he could (R. 230). His references in the letter to "home" and to getting Violet "fixed up" were made in a "joking" manner. The letter was a "joking letter". It had no meaning and Violet knew it (R. 231-232). Violet knew that they were not married, and accused told her that "it didn't mean anything" (R. 232). He wrote numerous letters urging her to go home (R. 231).

When accused came to Pueblo on leave about 22 December 1942, he and Violet did not have a room to themselves. However, they "engaged in sexual relations" two or three times (R. 210, 264).

Accused wrote Violet twice from Camp Carson (R. 244). Since January 1943 he has not written her (R. 213). While she was in Pueblo he addressed his letters to her as Mrs. Violet Ratliff or Mrs. Howard Ratliff. He did so in order "to save his own face as well as hers" from his mother, sisters, and brothers (R. 239, 240). Exhibit E (letter dated 19 January 1943) is in accused's handwriting. He was asked whom he was trying to fool by addressing that letter "Mrs. Violet Ratliff", since at that time his father and mother "knew" that he was not married. In reply he testified that he was not certain whether his mother knew that he was not married, as she might not have noticed the statement in the Army "papers" that he was single (R. 227).

Accused came to Pueblo only three or four times during his stay at Camp Carson, and saw Violet only once, although she was living with his family. On these visits home, he and Violet did not occupy the same room (R. 211, 266). Since the latter part of December 1942, they have not "engaged in sexual relations" (R. 211).

Exhibit F (the letter dated 13 December 1943, which date is erroneous) is in accused's handwriting (R. 213). He did not write Violet on that date and was 1500 miles from Pueblo at the time, so obviously could not come home for a weekend, as contemplated in the letter (R. 214). References in his letters to the possibility of Violet's having a baby were made "in a joking manner", and Violet so understood them (R. 216).

Near the end of February 1943, accused was sent to Camp Bullis, Texas (R. 211, 212, 264, 265). In that month he met Lola in San Antonio, Texas. She was an Army nurse (R. 219).

About 23 April 1943, he was sent back to Camp Carson and he stopped off in Pueblo for a couple of hours to see his family. Violet was there (R. 211, 212, 246, 248, 258, 265, 266). He did not have intercourse with her at that time (R. 248). Two or three days later, his mother telephoned him at Camp Carson and reported that Violet was pregnant (R. 217, 245, 257, 266). Accused came to Pueblo about the end of April and talked to

Violet (R. 217, 245-247). Violet told him that she was pregnant, but did not accuse him of being the father (R. 245, 269). He knew that the baby was not his, for he had not had intercourse with her during 1943 (R. 217, 246, 247). Furthermore, they had always used "contraceptives" (R. 250). Accused told Violet that he was not the father and that he was not under obligation to support the child (R. 217, 245, 246). He also told her that he was under no obligation to support her (Violet) because he was not married to her (R. 217). Accused denied having offered to pay Violet "to get rid of the baby" (R. 263). Accused refused to "maintain" either Violet or the child (R. 246).

Accused testified to his marriage with Lola in Raton, New Mexico (R. 220). Between 23 or 24 April and 5 November 1943, he did not go home over three, four, or five times, and he endeavored not to see Violet on these occasions (R. 267, 268). On 5 November, he went to Camp Forrest, Tennessee, for two weeks, thence to the Louisiana maneuver area, where he stayed until 22 January 1944 (R. 214, 265, 266). He first learned of the child's birth when he was "served the paper" in California (R. 263).

Accused and Lola have attended the regimental and battalion dances, and accused danced with Lola at those affairs (R. 219).

Accused stated that if he had contracted a lawful marriage with Violet, he would be guilty of wrongfully and dishonorably failing to support and maintain her on and after 6 August 1943, since he did not ever give her any money except possibly for a pair of shoes (R. 250, 252, 260). By the same token, if he were lawfully married to Violet, his Class E allotment of 4 October 1943 to Lola would be wrongful (R. 253).

Accused identified the communication copied into Specification 1 of Charge II, and stated that he made the indorsement and handed it to Colonel Walthour as a result of the latter's request that he reply by indorsement to the basic communication. The transaction arose from the fact that Violet had written to Colonel Walthour. The indorsement was given to Colonel Walthour in connection with "this matter of Violet Ratliff and her child and her relationship to" accused (R. 248, 249, 254). Accused's written statement in the indorsement was true (R. 221, 254). His statement that he "had nothing to do with her Violet whatsoever" was true during the time that he had been an officer. He "wasn't going back" to when he was an enlisted man, as he was not then expected to "live up to" the same "standard" (R. 254). He was asked to explain Exhibit E (his letter of 19 January 1943) in the light of his statement in the indorsement that he had nothing to do with Violet (R. 254). In reply, he testified that the letter was addressed to her as Mrs. Ratliff in order to lead his mother, brothers, and sisters to believe that he was married to her, and that he could have corresponded

with her and "still not physically have anything to do with her" (R. 255). He was then confronted with the fact that his letter (Exhibit E) ended, "Love as always lots of it". He testified that such language "wouldn't mean anything particularly, wouldn't have anything particularly to do with them" (R. 255). He was next shown the paragraph of Exhibit E stating that he had received \$211.80 pay, but that he still had "a fist full of checks" and that Violet would have to wait until he was able to get some cash, and he was asked whether that "might have been a brief discussion of financial matters" (R. 255-256). He replied "No, sir, I wouldn't say that. It is still a fact that I had some coming and was writing to her what I had" (R. 256). With reference to Exhibit F, the erroneously dated letter which undoubtedly was written after he had received his commission, he was asked about the part stating that Violet would find him in bed if he came home for the weekend and exhorting her to be a good little girl for him. He testified that "those letters were nothing but just joking letters" (R. 256). He admitted that after he had received his commission, he had intercourse with Violet two or three times during the week when he was home from Fort Benning on leave. He was asked how, in view of this, he could explain his testimony that he had nothing to do with Violet after having received his commission. To this he replied, "I hadn't slept there, hadn't taken her out or anything" (R. 257). In testifying that he tried to persuade Violet to go home, he meant to her sister's home in Springfield (R. 262). His attention was called to that part of his fourth indorsement reading: "My folks let her stay there because she had no place to go". Accused testified that when he was in the Army, that was the truth: Her sister was married and she had "no folks". She "had nowhere to go" and accused "figured" that he was going into the Army and would not be home, "and if she wanted to be there after that time I didn't care" (R. 263).

Accused did not make the written statement (in the fourth indorsement) with the intention of deceiving Colonel Walthour in any way (R. 221).

Mrs. J. L. Ratliff, accused's mother, testified by deposition for the defense (R. 173; Ex. 1). She testified that accused never held out Violet as his wife and that witness did not consider Violet as such. Witness admitted having written Exhibit D (postmarked 2 February 1942) and having addressed it to Mrs. Howard Ratliff. She addressed it in that manner because Violet had written and signed her name "like that". She thought it strange that Violet was using the name "Ratliff". Witness did not know what she thought about whether Violet and accused "might have gotten married". Before receiving the letter from Violet, witness did not know of any marriage entered into by accused. Accused did not write that he was married. Witness had "heard in a round about way" that accused was married, but did not remember who told her that he was married to Violet. Asked whether she considered Violet her son's wife when she wrote Exhibit D, witness answered: "I don't know whether I did or not."

Mrs. Ratliff testified about the living arrangements at Pueblo. She stated that accused and Violet did not occupy the same room or bed. Accused told witness that he was not married to Violet, and witness never heard accused tell anyone the contrary. Upon accused's entrance into the Army, witness signed papers stating that he was single. Although Violet continued to live at 503 West Corona, accused "had nothing to do" with her after he joined the Army. So far as Mrs. Ratliff knew, he "had nothing to do" with Violet after their arrival in Pueblo in February 1942. When accused occasionally came home from Camp Carson during the winter of 1942-1943, he did not stay overnight and did not come home if Violet was there. Witness was "convinced" that Violet was either accused's wife or his "girl friend". No other "girl friend" of accused ever stayed overnight in the apartment (Ex. 1).

Mrs. Elizabeth Heath, of Pueblo, testified by deposition (R. 175-176; Ex. 2). She has known the Ratliffs, including accused, for about twelve years and has been "very good friends" with them. She was introduced to Violet by accused's mother, who referred to her simply as "Violet". Witness worked from 5 p.m. to 1 a.m., and one night after accused had joined the Army, she saw Violet in "the Bluebird". Violet was with a couple of soldiers and was "intoxicated". She was "talking pretty loud" and "falling all over" the soldiers, who finally took her out. The incident occurred after 1 a.m. On other occasions late at night, witness saw Violet on the street with a soldier. Witness once asked Violet whether accused sent her an allotment. Violet answered, "'Hell, no. He never did give me a God Damn penny'". No one ever told witness that accused and Violet were married, and she never heard Violet referred to as Violet Belle Ratliff. In witness' opinion, they did not act as husband and wife. Witness thought that "possibly" they were married. Witness thinks highly of the Ratliff family and of accused. She did not think that Violet was "anything to shout about" (Ex. 2).

In her testimony, Violet denied having gone out or drunk with soldiers except that in July 1943 she went to a "show" with a Lieutenant Roth (R. 107, 115, 116, 123, 125). She denied the conversation about the allotment, in which she was supposed to have said, "'Hell, no, he has never given me a damned cent'", and also the manner of speaking thus attributed to her (R. 109).

Mabel Matthews, of Pueblo, testified by deposition as follows: She has known the Ratliff family, including accused, for nine or ten years. In May 1942, Hazel Fisher introduced her to Violet, referring to her merely as "Violet". Witness was never informed whether or not accused and Violet were married, but she did not think they were. She thought that Violet was a friend of the family. After accused had joined the Army, witness secured employment at "the Blue Bird Cab". On several occasions during June and July 1943, while she was at work, she saw

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Violet after 11 p.m. with different soldiers. Violet and the soldiers had their arms around each other. On two or three occasions, Violet was not sober (Ex. 3).

In her testimony, Violet denied walking through the taxicab office late at night in the company of soldiers and drinking with soldiers (R. 107).

Several officers testified to the efficiency and excellent character and reputation of accused (R. 177-194; Exs. 4, 5). Two of them saw him at organization dances. One of these two testified that accused danced (R. 190). The other, who saw him at only one dance, testified that on that occasion he did not dance (R. 194, 195).

5. Joe E. Gobin, District Attorney of Pueblo County, Colorado, duly qualified and practicing attorney at law in Colorado since 1916, testified for the prosecution by deposition (R. 134; Ex. M) as an expert witness to prove the law of the state of Colorado as a fact. In substance, he stated his opinion that the common law prevails in Colorado as to the marriage relation and that common law marriage has been recognized there for about fifty years; that common law marriage is a civil contract resting upon the mutual consent of the parties, which may be proved by evidence of cohabitation as husband and wife, with the reputation among neighbors and acquaintances with whom they associate that they are living together as husband and wife. Once so consummated, a marriage cannot be dissolved without a divorce, each party is incapacitated to marry again, and a second marriage by either within the state of Colorado would constitute bigamy by Colorado law; if the second marriage occurred outside the state, it would have such effect as the law of the state where it occurred attached to it. On a hypothetical question stating essentially the facts in evidence for the prosecution, assuming that only a "mock" marriage took place between the accused and Violet at Raton, New Mexico, in July, 1941, it was the opinion of the witness that a valid common law marriage took place between them in Colorado, and that they were husband and wife, based on their acts in Colorado, with or without the mock marriage in New Mexico.

6. The focal issue in the case generally is the establishment of the marriage relation between the accused and Violet Griffin Ratliff. Except as hereinafter noted with regard to particular Specifications, the charges are predicated upon the existence of that relation. The evidence amply sustains the court's conclusion that it did exist.

In some respects the testimony is sharply in conflict - so sharply, indeed, that the foregoing extensive exposition is regarded as necessary in order fairly and comprehensibly to summarize it. Insofar as the evidence is in conflict, that conflict is resolved by the findings of the court against the accused. Though much of the testimony was by deposition, the court had the opportunity to observe the principal

witnesses on each side and appraise their credibility and veracity as to matters in dispute. The findings are accorded their due weight here. (CM 243674, Bever, 28 BR 43). To a rather surprising extent on such a record evidentiary facts of compelling probative force are undisputed. The accused did transport Violet Griffin on an eight hundred mile journey from her home in Missouri to Pueblo, Colorado, under an agreement to marry her. He did live with her over a long period of time under circumstances appropriate only to an existing status of marriage. She did live as a member of his immediate family, in his presence and in his absence, under circumstances consistent with no other decent relation. This cohabitation was open and apparent, and had all of the obvious and objective character necessary to establish repute in the community and to represent Violet to the community as the wife of the accused. She was uniformly so addressed in the written communications in evidence, by the accused, by his mother and by his sister. In the face of the admitted facts, his preposterous and obscene contention that he told her on the way to Pueblo that he had changed his mind and would not marry her, and for her to go on home, and that thereafter she lived with him and with his parents and family just for a place to stay, while he enjoyed all the benefits of matrimony with none of the burdens of the connubial state, lies so ill in his mouth that it merits only contempt, not credence, and was properly rejected by the court. The testimony of the members of his family and friends, inconsistent among themselves as with his own and with the admitted facts, is entitled to no more than the merciful veil of indulgence drawn over a misguided manifestation of consanguine solidarity and affectionate desire to protect the accused from the consequences of his misconduct. To believe it is impossible, for if it were true, the passive acceptance by his mother, sister, father and friends of the meretricious relation thus established, carried on by the accused in the very bosom of their home, would itself show such depravity as to brand any testimony they might give as unworthy of credence.

Violet Ratliff's testimony to the occurrence of something in the nature of a ceremonial marriage at Raton, New Mexico, standing alone, would very doubtfully establish a marriage. Accordingly, the case for the prosecution assumed that this was no more than a "mock marriage" and proceeded upon the theory of a common law marriage thereafter in Colorado. A defective foreign marriage may be cured by the occurrence of facts establishing a common law marriage in a state which recognizes common law marriage as valid. (*Stone v. Stone*, 111 NJ Eq. 579, 163 Atl. 5, cited in Beale, "Conflict of Laws", p. 676).

Whether the legal status of marriage is created by the acts and intentions of the parties is determined by the law of the place where the acts occur. If that law attaches to such conduct the consequence of a valid marriage, then that marriage is valid everywhere, and the parties

are husband and wife. This is true of a common law marriage, as of any other, regardless of the rule as to validity of its own common law marriages prevailing in the other jurisdiction. (Beale, Conflict of Laws, p. 671; 133 ALR 764; Clark and Marshall, Crimes, 4th Ed., page 625). Whether certain acts, under the circumstances in which they occur, constitute a criminal offense is determined by the law of the place where the acts occur - the law which must attach the consequences to the acts. Thus, the commission of bigamy is determined by the law of the place where the second "marriage" occurs. (CM 245510, Carusone, 29 BR 195; Clark & Marshall, Crimes, 4th Ed., page 687). Accordingly, we look to the law of Colorado for the marriage in this case and to that of New Mexico for the bigamy.

By Colorado law, marriage is a civil contract, resting upon the consent of the parties (Colo. Stats. Annot., 1935, Ch. 107, Sec. 1). A marriage by agreement, consummated by cohabitation as husband and wife, is valid. The existence of the agreement may be proved by, and inferred from, evidence of such cohabitation and general repute, meaning the understanding among neighbors and acquaintances that the parties are living together as husband and wife and not in meretricious intercourse (Taylor v. Taylor, 10 Colo. App. 303, 50 Pac. 1049). The acceptance of common law marriage is firmly established. (Klipfel's Estate v. Klipfel, 41 Colo. 40, 92 Pac. 26; Peery v. Peery, 27 Colo. App. 533, 150 Pac. 329; Re Estate of Peters, 73 Colo. 271, 215 Pac. 128, 33 ALR 24; In re Danika's Estate, Colo., 230 Pac. 608; Clayton Coal Co. v. Industrial Commn., 93 Colo. 145, 25 P (2d) 170). Habit and repute are not essential to the legal existence of the marriage relation, but constitute a recognized basis for the inference of the consent upon which it rests. (Moffat Coal Co. v. Industrial Commn., Colo., 118 P. (2d) 769).

By statute, New Mexico expressly recognizes as valid within its jurisdiction all marriages outside the state which are valid by the laws of the place where they were "celebrated or contracted", and accords to them the same force within New Mexico as if celebrated in accordance with the laws of that state, (NM Stats. Ann. 1941, Ch. 65, Sec. 104), though common law marriages occurring in New Mexico are not valid by the law of New Mexico. (In re Garibaldi's Estate, 38 NM 392, 34 P. (2d) 672, 94 ALR 980). New Mexico Statutes penalize the crime of bigamy, (NM Stats. Ann. 1941, Ch. 41, Sec. 701), resorting to general law for its definition as clearly and commonly understood: "having two or more wives or husbands at the same time". (State v. Lindsey, 26 NM 526, 194 Pac. 877).

As a matter of general law, the offense of bigamy may be predicated upon a prior common law marriage. (Fuguay v. State, (Ala. 1927), 114 So. 898, 56 ALR 1264; Harvey v. State, (Okla. 1925) 238 Pac. 862, 51 ALR 321).

There is authority (that acts which constitute bigamy as historically understood) may constitute military offenses under Articles of War 95 and 96 without reference to state laws, in which case an erroneous application of state laws does not injuriously affect the substantial rights of the accused. (CM 245278, Yagel, 29 BR 153, citing CM 128111, Barry.)

Bigamy requires no specific criminal intent. All that is necessary is that the party shall intentionally marry again when he knows that he is already married. (Clark & Marshall, Crimes, 4th Ed., page 626). By the weight of authority, mistaken belief in the invalidity or termination of the previous marriage is no defense (CM 245510, Carusone, 29 BR 195; Clark & Marshall, Crimes, 4th Ed., p. 90 n.; 57 ALR 792, 793). It is so held in New Mexico. (State v. Lindsey, 26 NM 526, 194 Pac. 877). So, where the accused honestly believed, but without reasonable diligence to ascertain, that he had been divorced. (CM 230938, Carvill, 18 BR 127; CM 123267, Dig. Op. JAG 1912-40, Sec. 454 (18)). In the instant case, the evidence fully justifies the inference, not only that the accused was married, but that he knew he was married. Certainly it does not appear that he ever took counsel, or in any manner exercised any diligence to advise himself as to the legal status arising from his relations with Violet Ratliff.

As the Oklahoma court well said in Harvey v. State, 238 Pac. 862, 51 ALR 321, where the defendant lived with the woman for over a year and held her out as his wife, "he will not now be heard to say that the marriage was void and his relations with her were meretricious."

The record presents a question of capacity to marry in the first instance, as the accused and Violet were 19 years of age at the time of their first actions upon which the conclusion of their marriage is predicated, 6 July 1941. Violet had attained the legal age of majority, but the accused had not. Colorado Statutes Annotated, 1935, Ch. 107, Sec. 5 (c), requires parental consent for license to issue for the ceremonial marriage of a male under 21 or a female under 18. This appears among provisions for ceremonial marriages generally held to be directory only, and not to exclude common law marriage. (Taylor v. Taylor, 10 Colo. App. 303, 50 Pac. 1049; Meister v. Moore, 96 U.S. 76). Nonage ordinarily is held at most to render the marriage voidable only, not void, and valid unless annulled by competent decree (CM 118397, Dig. Op. JAG 1912-40, Sec. 454 (18)). In Colorado, the recognition of the common law of marriage has been said by respectable authority to carry with it its legal consequence that minors may contract marriage at the ages of 14 and 12 respectively, and that the marriage of persons above that age, without compliance with the directory statutes concerning ceremonial marriage, is not void or voidable, but valid (5 Denver Bar Assn. Record 19, abstracting the case of Rouse v. Stewart, Denver District Court, Division 5). The section of the Colorado statutes declaring certain types of marriages void (e.g. incestuous or miscegenous marriages) as

against public policy, does not include nonage. In any event, continued cohabitation as man and wife after the removal of the impediment is sufficient to establish and ratify the marriage (CM 120150, Dig Op JAG 1912-40, sec. 454 (18)).

The views herein expressed as to the law of the case, and the conclusion reached upon the record, render unnecessary a detailed discussion of certain particular legal contentions of the defense, all of which have had the consideration of the Board of Review.

Unlike Specifications 1, 2, 3 and 4, Charge I, charging bigamy and wrongful abandonment and nonsupport of the wife and child of the accused, Specifications 5, 6 and 7, Charge I and Specification 2, Charge II, charging wrongful representations as to his family status in connection with his allotments, his pay and allowance account, and his Officers' Application, Form 170, do require conscious and guilty misrepresentation by the accused, with knowledge or belief that the true facts were contrary to his statements (CM 120695, Dig. Op. JAG 1912-40, sec. 452 (7)). As heretofore observed, the evidence justified the court in inferring that the accused had that knowledge.

Specification 4, Charge I, alleges nonsupport of the child of the accused. His contention that he is not the father of the child is met by the testimony that he had access to the child's mother, his wife, at a time reasonably related to the birth of the child in the course of a normal period of gestation, and by the strongest presumption known to the law: that a child born to parents in lawful wedlock, with the possibility of access not precluded by the evidence, is the legitimate child of those parents. 7 Am. Jur., Title "Bastards", sec. 14, 15.

As to Specification 8, Charge I, however, the common custom of the service in the preparation of pay and allowance vouchers, to name in support of claims for allowances based upon dependents only the claimant's wife and not his children, where he has a wife living, is so universally recognized that the omission of reference to the child after naming a person as wife cannot be regarded as evidence of intent to conceal or disavow the child. The refusal of the accused to recognize the child is amply established by his own testimony, but the overt act here charged as the assertion of that refusal is inappropriate, as the preparation of the voucher did not require reference to the child after naming a wife, and the naming of the wrong wife is the basis of Specification 7 of the same Charge. Accordingly, Specification 8 must fail.

The proof is sufficient under Specification 1, Charge II, with or without knowledge by the accused that his first marriage was valid, as the deliberate evasion and lack of candor employed by the accused in his reply to his commanding officer's official inquiry in the matter were alone sufficient to render his statement knowingly false and deceitful. The knowledge which he had in fact renders it the more so.



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SPJGQ  
CM 264826

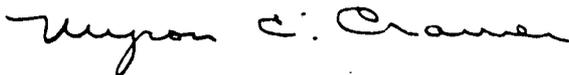
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War Department, J.A.G.O. **DEC 18 1944** - To the Secretary of War.

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 Howard G. Ratliff (O-1304566), 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 8 of Charge I but legally sufficient to support the findings of guilty of all other Specifications and the Charges, and to support the sentence and to warrant confirmation thereof. I recommend that the finding of guilty of Specification 8 of Charge I be disapproved, and 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 the above recommendation into effect, 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.

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(Finding of guilty of Specification 8 of Charge I disapproved.  
Sentence confirmed. G.C.M.O. 56, 27 Jan 1945)

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

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SPJGQ  
CM 264831

10 NOV 1944

UNITED STATES )

PERSIAN GULF COMMAND )

v. )

Trial by G.C.M., convened at  
Khorramshahr, Iran, 31 July  
and 7 August 1944. Dismissal.

Captain KENNETH E. TURNER, JR. )  
(O-453275), Ordnance Department.)

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- OPINION of the BOARD OF REVIEW  
ANDREWS, FREDERICK and BIERER, Judge Advocates .  
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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Kenneth E. Turner, Jr., Ordnance Department, Headquarters and Headquarters Squadron, 82nd Air Depot Group, did, at Abadan Air Base, Abadan, Iran, on or about 24 March 1944 with intent to defraud, falsely make in its entirety a certain voucher in the following words and figures to wit:

OFFICER'S CLUB  
ABADAN AIR BASE  
ABADAN, IRAN

Date 3-24-44

I certify that I have this day, paid  received from \_\_\_\_\_  
F. J. STAGEMAN MAJ. RIASC

Name of other Party Rank & Org., of Title and Address  
The sum of 150 Dollars and 00 Cents in payment for the following:

250 lbs beef carcas	@ 50¢ lb.	125.00
60 lbs Tea	@.415 lb.	<u>25.00</u>
		150.00

/s/ Kenneth E. Turner, Jr.  
Custodian  
Kenneth E. Turner Jr.  
Capt. Ord. Dept.  
Grade

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(Statement for other Party to Transaction)

Abadan Air Base  
3-24 1944

I certify that the payment referred to above has been received and had not previously been received and that the amount is just and correct.

/s/ F. J. STAGEMAN  
Signature  
Maj. R.I.A.S.C.  
Rank or Title

Voucher No. 35  
Date 3-24-44  
Amount 150.00

which said voucher was a writing of a private nature which might operate to the prejudice of another.

Specification 2: In that Captain Kenneth E. Turner, Jr., Ordnance Department, Headquarters and Headquarters Squadron, 82nd Air Depot Group, did, at Abadan Air Base, Abadan, Iran, on or about 27 March 1944 with intent to defraud, falsely make in its entirety a certain voucher in the following words and figures to wit:

OFFICER'S CLUB  
ABADAN AIR BASE  
ABADAN, IRAN

I certify that I have this day, paid X received from \_\_\_\_\_  
Date 3-27-44  
F. J. STAGEMAN MAJ RIASC

Name of other Party Rank & Org., of Title and Address  
The sum of 60 Dollars and -- Cents in payment for the following:

100 lbs tea @ 60¢ per lb.

\_\_\_\_\_  
Custodian  
ROY G. PERRY JR.  
1st Lt. Ord. Dep.  
Grade

(Statement for other Party to Transaction)

Abadan Air Base  
3-27 1944

I certify that the payment referred to above has been made--received and had not previously been made--received and that the amount is just and correct.

/s/ F. J. STAGEMAN

Signature

Major R.I.A.S.C.

Voucher No. 40  
 Date 3-27-44  
 Amount \$60.00

which said voucher was a writing of a private nature which might operate to the prejudice of another.

He pleaded not guilty to and was found guilty of the Specifications and the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48, with the recommendation that so much of the sentence as provides for confinement at hard labor for one year and for forfeiture of all pay and allowances due or to become due, be remitted.

3. The evidence for the prosecution is as follows:

It was stipulated (R. 9) that the accused assumed the duties of Mess Officer at the Officers' Mess, Abadan Air Base, Abadan, Iran, on or about 1 January 1944 and continued to perform said duties until 25 March 1944. The defense qualified this stipulation to the effect that accused was not appointed by order, either verbal or published, but assumed the duties mentioned.

Lieutenant Lucas (R. 9), as Base Administrative Inspector, checked the records of the Officers' Mess in late March or early April, 1944 and examined the council book and voucher file, which he received from Sergeant Gaston, the bookkeeper, whose immediate superior was the accused (R. 10). Certain vouchers for tea attracted his attention (R. 10), as two vouchers dated three days apart showed quite a difference in the price of tea purchased (R. 12). Prosecution's Exhibits 1 and 2 were these vouchers or "facsimiles" of them (R. 10, 11). The vouchers bore the purported signature of Major Stageman, a British officer, from whom the tea was supposed to have been purchased, and one of them bore the purported signature of the accused (R. 12, 13), which the witness could not identify (R. 13). The accused was not present in the Officers' Club, where the examination was made, nor did the witness inquire for him (R. 12). Witness left the vouchers in the file (R. 14).

Major Frederick J. Stageman, Royal Indian Army Service Corps (R. 14), knew the accused and had exchanged mess visits with him. The signatures of the two vouchers (Pros. Exs. 1 and 2), purporting to be the witness' signatures, were not signed nor authorized by him (R. 15).

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He did not receive \$150 nor \$60 from the accused, nor did anyone on his behalf, to his knowledge (R. 15). The defense admitted in open court that Major Stageman did not sign the vouchers (R. 15). Major Stageman delivered some tea to the Abadan Officers Mess, but did not sell it. It was traded to Captain Turner for something else. Major Stageman was reprimanded and transferred by the British Army for the transaction (R. 16). He did not deliver any beef to the accused (R. 16).

Lieutenant Book, Finance Department (R. 16), made an audit of the Officers' Mess 19 April 1944. There was a voucher in the file for \$150, dated 24 March 1944, (R. 17) and one for \$60 dated 27 March 1944 (R. 18). Witness received the file from Sergeant Gaston, whose immediate superior then was Lieutenant Perry, and whose immediate superior during March was the accused. Witness recalled nothing further about the vouchers, and accepted the signatures for the purpose of his audit (R. 17, 18, 19, 21-22). He took exception in his report to two other vouchers, irrelevant here.

Staff Sergeant Gaston (R. 24) was bookkeeper of the Officers' Mess in March, 1944, and kept the records, including the voucher file. He entered upon that duty during the preceding month and continued in that capacity at the time of trial. He recognized Prosecution's Exhibit 1 as a voucher out of the voucher file, in the witness' handwriting. He made it out on a blank form, except the signatures (R. 25). He testified (R. 25-26):

"Q. I call your attention to what appears to be the signature of F. J. Stageman, Major, R.I.A.S.C. Was that on there when you first saw it?

A. No, sir.

Q. It was not?

A. No, sir.

Q. Who put that on there?

A. I did.

Q. Is there anything on that voucher that you did not put on?

A. Yes, sir, the two signatures.

Q. What two signatures?

A. These two signatures here. (Indicating purported signatures of Captain Turner and Major Stageman)." \* \* \*

"Q. In order to clarify your testimony up to this point . . . what appears on that paper that you now have in your hand which you did not insert with your own hand?

A. These two signatures . . . whomever they belong to.  
(Indicating the purported signatures of Captain Turner and Major Stageman.)

Q. Did you see those two signatures inserted?

A. No sir.

Q. After you filled out the voucher to the extent that you did, what did you do with the paper itself?

A. It was filed in our voucher file in its proper place.

Q. Without signatures?

A. No sir, with signatures.

Q. With signatures on it?

A. Yes sir.

Q. Were those signatures affixed to that document after you filled out your part of it?

A. Yes sir.

Q. Well, immediately after you filled out as much of it as you did . . . immediately after that did you put it in the voucher file?

A. Yes sir.

Q. Were the signatures on it at that time?

A. No sir."

Witness' attention was next called to that voucher when Colonel Davis came and asked for it and another voucher. Witness withdrew the two vouchers from the file and gave them to Colonel Davis, who took them away with him (R. 26). Prosecution's Exhibit 2 was the other voucher, likewise filled out on a blank form by the witness, all but the purported signature of F. J. Stageman and the pencilled word "Turner", placed in the file and later turned over to Colonel Davis. Witness did not remember whether the purported signature was on it when filed, and did not know who put the signature on it (R. 28).

In the witness' opinion, based on his having seen Captain Turner write his signature "several dozen times", the signature on the upper half of Prosecution's Exhibit 1 is Captain Turner's signature (R. 27). The defense stipulated that there is a similarity between the admitted signature of the accused and his alleged signature on Prosecution's Exhibit 1 (R. 32).

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The accused instructed Sergeant Gaston to make out these vouchers and what to put on them (R. 29).

Sergeant Gaston saw some tea and meat in the kitchen at about the time covered by the vouchers and had reason to believe it was that covered by the vouchers (R. 30, 31). He did not see it delivered, nor know where it came from (R. 32).

The accused was Mess Officer at the time he told the witness to prepare Prosecution's Exhibit 1, to the best of witness' knowledge. Accused was relieved around 24 March 1944. (R. 33).

Lieutenant Colonel Redlund, Staff Judge Advocate for the (Persian) Gulf District (R. 33), identified Prosecution's Exhibits 1 and 2 as received from the Abadan Officers' Mess by Lieutenant Colonel Davis in the witness' presence, handed to the witness and remaining in the custody of the witness until delivered by him to other appropriate officers concerned with the charges, ultimately to the trial judge advocate. Prosecution's Exhibits 1 and 2 were then admitted in evidence (R. 34). Prosecution's Exhibit 3 was introduced in evidence as an admitted example of the true signature of the accused, so stipulated (R. 19).

Prosecution's Exhibit 1 is in words and figures as follows:

"OFFICER'S CLUB  
ABADAN AIR BASE  
ABADAN, IRAN

I certify that I have this day, paid  Date 3-24-44  
F. J. STAGEAN MAJ. received from RIASC

Name of other Party	Rank & Org., of Title and Address
The sum of <u>150</u> Dollars and <u>00</u> Cents in payment for the following:	
250 lbs beef carcas	@ 50¢ lb. 125.00
60 lbs Tea	@.415 lb. <u>25.00</u>
	150.00

/s/ Kenneth E. Turner, Jr.  
Custodian  
Kenneth E. Turner Jr.  
Capt. Ord. Dept.  
Grade

(Statement for other Party to Transaction)

Abadan Air Base  
3-24 1944

I certify that the payment referred to above has been received and had not previously been received and that the amount is just and correct.

/s/ F. J. Stageman  
 Signature  
Maj. R.I.A.S.C.  
 Rank or Title

Voucher No. 35  
 Date 3-24-44  
 Amount 150.00"

Prosecution's Exhibit 2 is on the same form, dated 27 March 1944, for \$60 for 100 pounds of tea at 60¢ per pound. It is prepared for the signature of First Lieutenant Roy G. Perry, Jr., to the voucher portion, as custodian, but shows no signature to that portion. The word "Turner" is pencilled in, without explanation. The purported signature of F. J. Stageman, Major R.I.A.S.C., appears on the receipt portion.

4. The accused, having been advised of his rights by defense counsel, elected to remain silent. The defense introduced in evidence, as Defense Exhibit 1 (R. 36), copies of a series of special orders of the command, certified to contain all orders affecting the accused or concerning the Mess Council for the period in question. The pertinent portions of these orders show that accused, after his arrival at the station, 5 November 1943, was assigned to duty as Base Ordnance Officer, with additional duty as Post Exchange Inventory Officer, Base Intelligence Officer, Public Relations Officer, Base Photographic Officer, Post Exchange Inventory Officer, and special duties as a member of Special Courts-Martial and to check the Agent Finance Officer's cash account. By orders dated 15 April 1944 a Mess Council was appointed, of which the accused was president. He was relieved as president and member 19 May 1944, by appointment of a Mess Council without him. Otherwise, no orders appear to connect him in any capacity with the mess. Orders dated 17 January 1944 appointed Lieutenant Perry Mess Officer, relieving another officer, and again orders dated 23 March 1944 appointed Lieutenant Perry officer in charge of Officers' Mess, without reference to anyone relieved.

Defense Exhibit 2 (R. 37), consists of four letters, all alike, dated 29 April 1944, each to one of four different officers on the Mess Council, not the accused, stating the intention of the commanding officer to impose punishment under Article of War 104 for failure to give proper inspection to the books and vouchers of the Officers' Mess, and calling for reply by indorsement acknowledging receipt and making any demand for trial which the officers addressed might wish to assert.

5. No rights of the accused were prejudiced by the action of the court in allowing a continuance of one week during the trial, over objection by the defense, in order to allow the prosecution time to obtain additional evidence made necessary by the failure of witnesses to qualify certain essential documents as expected, such continuance being a matter discretionary with the court, and no abuse of discretion being shown (R. 14, 23).

The defense entered a "plea in abatement and motion to quash" (R. 6), which was denied (R. 7). This was based upon the fact, disclosed by the charge sheet, that the accuser had laid the Charge under Article of War 95 and the Staff Judge Advocate, acting upon the charges under Article of War 70 and par. 35b, MCM 1928, had changed the Charge to violation of Article of War 96, over his initials, without reverification by the accuser or reinvestigation. No change was made in the specifications. The plea and motion were properly denied, as the change was an exercise of a proper function of the Staff Judge Advocate, to see that the charge sheet was in correct form, the specifications correctly stated and the Charge laid under the appropriate Article of War. (CM 233763, Lawther, 20 BR 111, 117, Bull. JAG, Aug. 1943, p. 308). Any change, even the re-drafting of the specifications, provided no change in substance results, is authorized. (MCM, 1928, par. 34). Here, no change was made in the specifications, and, as they had been duly verified by the accuser and investigated as required by Article of War 70, there was no occasion for return of the charge sheet for reverification or reinvestigation. The violation alleged by the facts stated in the specifications was a conclusion of law.

In a proper case, an officer may be tried for a particular offense under either the 95th or the 96th Article of War (MCM 1928, par. 152b). He may be tried under Article of War 95 for acts which are punishable by another Article of War, including criminal offenses (MCM 1928, par. 151), including forgery, though the same misconduct when charged under Article of War 95 is considered from a different aspect, as a military offense only, than when charged as a criminal offense under Article of War 93. (CM 218924, Foster, 12 BR 173, 182). It does not follow that he may be tried for forgery under Article of War 96, for the reason that that article, unlike Article of War 95, does not lie where the specific offense is made punishable under another Article of War. (MCM 1928, par. 152c). A voucher receipt is a document capable of forgery within the intentment of Article of War 93. (CM 189409, Iverson, 1 BR 163), as are receipts generally. (MCM 1928, par. 149j, page 175). Accordingly, the Charge in the instant case was erroneously laid under Article of War 96, and should have been laid under Article of War 93. However, the error in laying the Charge under the wrong Article of War did not injuriously affect the substantial rights of the accused, where no punishment was imposed upon him on conviction of the Charge submitted to the court that was not authorized on conviction of the appropriate Charge on the same specifications. (CM 151005, Reynolds, (1922); CM 118656 (1918); Dig. Op. JAG, 1912-40, sec. 394 (1)).

The assertions of error above mentioned have been considered for the purpose of their exclusion as ratio decidenda of the case. There was prejudicial error. The motion for findings of not guilty should have been sustained ( R. 36). The evidence is legally insufficient to support the findings of guilty.

There was proof, undisputed, that the purported signature of Major Stageman was spurious. There was proof that two vouchers with receipts bearing those spurious signatures were placed in the voucher file of the Officers' Mess. There was testimony that these vouchers were prepared in blank, though not signed, at the direction of the accused. It was admitted that the accused "assumed the duties" of Mess Officer, and there was testimony that he was exercising that function, although the orders of the command then in effect assigned another officer to that duty. This rather drastic assumption is unexplained, but as de facto Mess Officer, the accused had the responsibility of keeping an accurate account of receipts and disbursements. (Cf. par. 4, 5, AR 210-60, 11 November 1929). Inferentially, the purpose of having a voucher in the voucher file would be to support the account; to account for the expenditure of funds. When a fictitious voucher was found in the file, natural suspicion would suggest that the responsible officer in charge of the file had something to do with its presence there. But that suspicion standing alone is not a lawful foundation for an adjudication of guilt; neither is it the offense charged in this case. Nor was the accused the only person who had access to the file or interest in it. Sergeant Gaston had both. Lieutenant Perry was the de jure Mess Officer, under existing orders in evidence, at all pertinent times from 17 January 1944, and assumed or reassumed actual control on 25 March, under orders dated 23 March 1944. The first of the vouchers in question (Pros. Ex. 1) was dated 24 March 1944, and bears the purported signature of the accused as custodial officer, in handwriting which looks like his own (Pros. Ex. 3 and his receipt for his copy of the record) and may be regarded as authentic, although the letter "n" is omitted from "Turner" - a peculiar circumstance in the case of a person writing, neatly and legibly, his own name. The second voucher (Pros. Ex. 2) was dated 27 March 1944, at least two days after the accused was relieved, was prepared for the signature of his successor, and neither bears nor calls for the signature of the accused, authentic or otherwise.

The offense charged is the forgery of the vouchers in question, which necessarily refers to the forgery of the signature of Major Stageman. That is the false signature. The accused did not "forge" his own signature. There was no evidence of the factum of the Stageman signature. There was no testimony, expert opinion or otherwise, to any similarity in handwriting to attribute the factum of the Stageman signature to the accused, which is ordinarily the persuasive evidence in such cases. The obvious fact is that the handwriting of the two spurious Stageman signatures is totally dissimilar to the specimens furnished of the handwriting of the accused.

It is true that, in a proper case, the factum of a forgery may be inferred from circumstances, such as the possession and uttering by the accused of a forged instrument, (CA 152019, Baggett, (1922)), but no such circumstances are in evidence here. It is sought to make the accused's whole connection with the documents here involved a matter of inference. In that regard, it is notable that there was no evidence of shortage in the accused's accounts as Mess Officer, although an auditor

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and an investigator testified to their examination of such accounts. The casual reference by the Defense Counsel to a discrepancy in the results of an audit, addressed to another subject and patently not intended as an admission (R. 6), is not evidence. Inference cannot be based upon inference. (20 Am. Jur. 168, Evidence, Sec. 164). We cannot pile upon the Pelion of fraudulent accounts the Ossa of the forgery and then pile upon the Ossa of the forgery the Pelion of fraudulent accounts. The proof wholly fails to establish that it was the accused who falsely made either of the documents in question, an essential element of the case. (Par. 149j, MCM 1928, p. 176).

If, by laying the Charge under Article of War 96, it was desired to include other conduct or malfeasance of the accused, within that Article but not amounting to forgery, then the specification was inappropriate and does not permit that result. It alleged forgery, and forgery only, in the specific and highly technical language peculiar to that offense, as prescribed in Form 97, Appendix 4, MCM 1928, page 250. Even the offenses of uttering (CM 225479, Wright; CM 120113 (1918), Dig. Op. JAG 1912-40, p. 319, par. 451 (25)) and false pretenses (CM 234019, Mulhall), closely associated with forgery ordinarily, are not lesser included offenses of forgery. Certainly maintaining or permitting fictitious entries in records under the charge of a custodial officer, in violation of the 96th Article of War, is not an included offense of forgery, and an accused cannot be put upon his defense as to the one on accusation of the other. On the record, this case was tried as a forgery case and so treated in the forwarding command. Apparently, no attempt was made to show in evidence facts or circumstances appropriate to any other offense.

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

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederien, Judge Advocate.

W. B. Jones, Judge Advocate.

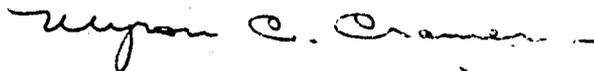
1st Ind.

War Department, J.A.G.O., **NOV 13 1944** - To the Commanding General,  
Headquarters Persian Gulf Command, United States Army, Teheran, Iran.

1. In the case of Captain Kenneth E. Turner, Jr., (O-453275), Ordnance Department, Headquarters and Headquarters Squadron, 82nd Air Depot Group, 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 50 $\frac{1}{2}$ , and that under the further provisions of that Article and in accordance with the fourth note following the Article (MCM 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 orders 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 264831).



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.

(341)

SPJGN  
CM 264864

13 NOV 1944

UNITED STATES )

CENTRAL PACIFIC BASE COMMAND

v. )

Trial by G.C.M., convened at  
APO 961, 7, 8 and 9 August  
1944. Death.

Private CORNELIUS THOMAS  
(38238522), 3297th Quarter-  
master Service Company. )

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OPINION of the BOARD OF REVIEW  
LIPSCOMB, O'CONNOR and GOLDEN, Judge Advocates.  
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1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Cornelius Thomas, 3297th Quartermaster Service Company, did, at APO 961, on or about 11 June 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Francis Timothy Silva, a human being, by shooting him with a pistol.

The accused pleaded not guilty to, and was found guilty of, the Charge and the Specification thereunder. Evidence was introduced of one prior conviction by a special court-martial for unlawfully entering a private home, annoying the family residing therein, and striking one Matsmo Iwami. The accused was thereupon sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence but withheld execution and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that in June of 1944, and for more than a year prior thereto, the 3297th Quartermaster Company was stationed on Puunene Road in the Town of Kahului, Island of Maui, and was quartered in five buildings of different sizes formerly occupied by a Japanese school (R. 13-14, 59, 69). Nearby was the Maui Jinsha Temple, a large Japanese religious edifice constructed of wood (R. 14, 69-70, 78-79). About a quarter of a mile to the south was the Puunene Dairy Camp, a settlement

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of one-story frame houses (R. 14, 20; Pros. Exs. 2, 3, 4). In one of these, designated as "Number 1510", lived Francis Timothy Silva, his wife Frances, and their nine month old child (R. 16-17, 20, 22-23; Pros. Ex. 23).

The accused was a member of the 3297th Quartermaster Company and had apparently come with it to the Island of Maui (R. 13, 60, 66; Pros. Ex. 22, p. 1). With Private Theodore B. Thomas he shared a small room adjoining the one in which Staff Sergeant Lewis D. Keyes lived (R. 14-15, 60, 70). The three men had been in the same organization together for about two years (R. 59-60, 69).

One evening in May of 1944 the accused had surreptitiously entered the house of a U.S.O. worker named Damkroger and had stolen a .45 caliber Colt automatic pistol from a "drawer" in "the bedroom" (R. 60, 67, 70; Pros. Exs. 7, 22, pp. 2, 14). This weapon was hidden by the accused in camp "right outside" his room (Pros. Ex. 22, p. 3). On two different occasions, not long after, he showed the pistol to his roommate and told him how it had been obtained (R. 70, 73; Pros. Ex. 22, p. 4). Theodore Thomas advised that it be disposed of and warned that "You are in the Army, you are not in civilian life". The accused followed this suggestion to the extent of finding a more appropriate cache in which to conceal the pistol. The place selected was underneath the front of the Japanese Temple (R. 71, 73, 79, 85; Pros. Ex. 8). Theodore Thomas was informed of the location (R. 71).

The Colt pistol was also brought to the attention of Staff Sergeant Keyes and Private George Clark. Keyes observed it in the accused's possession four times and Clark saw it twice (R. 61, 67). Like Theodore Thomas, Keyes was informed of the manner in which it had been procured and counseled the accused to "get rid of it for it would cause a lot of trouble" (R. 63, 76). On one occasion, after taking the pistol "all apart", the accused was unable to reassemble it and requested Keyes' assistance. Keyes tried to "fix it" but lacked the requisite technical knowledge. Clark "just looked at it" and said "he didn't know anything about it." It was finally restored to working order by someone in the Infantry or in Ordnance (R. 61-63, 68; Pros. Ex. 22, pp. 7-8).

Without knowledge of any of the officers of the Company Theodore Thomas gave a party on Saturday night, 10 June 1944, in the room which he jointly occupied with the accused. Cake, rum, and beer were served and before long a "couple of girls" respectively named Annie and Ida arrived to participate in the festivities (Pros. Ex. 22, pp. 5, 13). The presence of women in the barracks was not a common occurrence, but it was not without precedent (Pros. Ex. 22, pp. 15-16). The party terminated at about 11:00 p.m., and Theodore and all of the guests save the accused departed (Pros. Ex. 22, pp. 5-6).

Drinking always aroused the desire for sexual intercourse in the accused (Pros. Ex. 22, p. 7). Having partaken of the liquid refreshments, he now decided to find someone to satisfy his lust. His head "was going around a little bit," but he was not drunk (Pros. Ex. 22, p. 8). Leaving the barracks, he proceeded to the Japanese Temple, withdrew the pistol from its hiding place, and deposited it in his right rear pocket (Pros. Exs. 6-7).

He walked down Puunene Avenue for some distance until he reached "a dirt road" leading to the Dairy Camp. Turning off on the unpaved highway, he followed it to the immediate vicinity of the Silva home (R. 132; Pros. Ex. 22, p. 6). A light was on, and through a side window he was able to see Mr. and Mrs. Silva in bed sleeping (R. 133; Pros. Ex. 22, p. 6). Going to the rear, he found a small piece of roofing tin. With this crude implement he cut the screen door, unhooked it, and entered (R. 133-134; Pros. Exs. 17, 22, pp. 6-7). Crossing the dining room and a small "foyer", he arrived in the bedroom (R. 134; Pros. Ex. 22, p. 7).

Although Mrs. Silva was a complete stranger to him, he intended to wake her up without disturbing her husband and ask her "to come outside" for the purpose of indulging in sexual relations (Pros. Ex. 22, pp. 7-8). With this design in mind he touched her leg (R. 135; Pros. Ex. 22, pp. 7-8).

Mrs. Silva, who had been "fast asleep," opened her eyes and "saw this colored guy at the foot of the bed." Her first thought was that she was dreaming, but, when she realized that she was awake, she screamed. The accused raised the pistol, fired one shot, and fled (R. 24, 26, 31, 135; Pros. Ex. 22, p. 7). The bullet hit the third finger of her right hand and passed on through the left elbow and the chest of Mr. Silva (R. 27, 37, 40). After remaining in bed for awhile, he took a few steps down the hallway and collapsed. Mrs. Silva attempted to pick him up, but, being unable to do so, "ran out for help" (R. 24, 33). When neighbors arrived, he was heard to say "A nigger shot me up" (R. 34). At about 2:10 a.m. an ambulance came (R. 37). Mr. Silva was immediately removed to the Puunene Hospital where he died at 9:50 p.m. on the following day, 12 June 1944 (R. 39, 46). The cause of his death was "pulmonary hemorrhage and shock due to hemorrhage in the lung" caused by a bullet wound (R. 40).

Several members of the local police force arrived at the Silva home soon after the shooting (R. 47, 53). Under the dresser in the bedroom they found a shell and from the cotton mattress they extracted a .45 caliber bullet (R. 17, 47, 49, 52-54; Pros. Exs. 5, 6). The shell still smelled of powder (R. 55). Plaster casts of two heel prints in the soil outside the Silva home were made (R. 115; Pros. Exs. 20, 21). The dimensions and characteristics thus recorded were "similar" to those of the accused's shoes (R. 117-118; Pros. Ex. 15).

At about 3:00 a.m. on the morning of the shooting a bed check was made of the 3297th Quartermaster Company (R. 57). Four men were discovered to be missing, including the accused (R. 58, 64). He was observed entering his room "right after," dressed in "fatigue pants and undershirt." In response to a question from Keyes he stated that he had been in the latrine (R. 64-65; Pros. Ex. 22, p. 12).

During the interval between his abrupt departure from the Silva home and his return to the barracks the accused had continued his hunt for a woman. His first stop was at the Damkroger house where he hoped to leave the pistol. After "looking around," he decided not to enter and continued on his way (Pros. Ex. 22, p. 9). He then in quick succession visited four other houses and broke into three of them. In the last he found a woman, touched her, told her to be quiet or he would shoot, and desisted from pressing his attentions and departed only upon hearing her husband approach (Pros. Ex. 22, pp. 10-11). Abandoning his quest for sexual intercourse, the accused walked at a fast pace to the Japanese Temple, restored the pistol to its hiding place, and returned to his barracks. As he neared his quarters he heard someone remark "What they doing checking bed at this time of the night ?" (Pros. Ex. 22, p. 11). After a brief conversation with Keyes in which he asserted that he had been "to the latrine", he "pulled off his clothes and went to bed" (Pros. Ex. 22, p. 12). When subsequently questioned about the gun by Theodore Thomas, he stated that "it was in the same place". To a similar inquiry from Keyes the accused replied, "I hid it" (Pros. Ex. 22, p. 12).

The identity of Mr. Silva's slayer was not definitely ascertained by the police until 13 July 1944. On that day Keyes in the presence of the accused, two lieutenants, and Andrew S. Freitas, the Assistant Chief of Police for the County of Maui, revealed all that he knew concerning the .45 caliber pistol. The accused denied everything and accused Keyes of "lying" (R. 76). With Lieutenant Colonel John D. Hagon, the Provost Marshal of District Headquarters, APO 961, Freitas proceeded to Makawao Hospital to interview George Clark (R. 76-77, 125). Having completed their interrogation, Hagon and Freitas returned to the Police Station. Theodore Thomas, upon being brought before them for questioning, revealed the cache in which the pistol was concealed (R. 78, 126). Hagon, Freitas, Captain Gordon T. Charlton, and Theodore Thomas immediately drove to the Temple. After searching briefly, Captain Charlton found the weapon "under the rafters" (R. 78-79, 126). It was wrapped in a handkerchief and taken to the Police Station. An examination revealed no fingerprints (R. 80, 126).

In the presence of First Lieutenant Roy D. Asch and Hagon, Freitas informed the accused of Theodore Thomas' statements and showed him the pistol (R. 81). Hagon and Asch withdrew from the room, and Freitas for a few minutes continued the interrogation alone. The accused requested

to see the Hawaiian statute on murder so that he might ascertain for himself what the penalty for that crime was (R. 82, 94). A copy of the Revised Laws of Hawaii, 1935, was handed to him. When he had read the pertinent paragraph, he stated in reply to a question by Freitas, that "it was all right to bring in Colonel Hagon" (R. 82). After Hagon was recalled, the accused freely and voluntarily made a full oral confession (R. 82, 127-128). No inducements or threats were offered and no duress employed, but no warning "of his rights" was given to the accused (R. 83, 87). He had, however, received a proper warning about a month before on 15 June 1944 when first questioned (R. 87).

When the oral statement was finished, Tatsuo Murayama, a police officer with a knowledge of shorthand, was called to take a written statement. This time, before any questions were asked of the accused, he was warned by Hagon (R. 83-84, 90, 122, 130). Since the interrogation ended at 9:40 p.m., the transcription could not be completed that night (R. 84, 123, 130). The following morning the accused, upon being taken to the Silva home, there re-enacted the killing (R. 84-85, 131-136). Later at 2:55 p.m., after again being warned, he signed the statement recorded by Murayama the night before. Before affixing his signature he, in conformity with Freitas' suggestion, read the document carefully and made corrections (R. 84, 137-138). No inducement or duress of any kind was employed (R. 138-139). Lieutenant Colonel Hagon, who, in his own words, "was there for the purpose of seeing the accused's rights were protected," witnessed the signature (R. 138, 142).

The shell and bullet found in the Silva home were compared under the microscope with other bullets and shells fired from the pistol recovered from the hiding place in the Japanese Temple. The bullets had thirty-five or thirty-six elements in common and the shells nineteen. In the opinion of Mr. Joseph R. Mottl, a ballistics expert, they were all fired by the same gun (R. 98-111; Pros. Exs. 5, 6, 7, 9, 10, 11, 12, 13, 14).

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

5. The Specification of the Charge alleges that the accused did, "on or about 11 June 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Francis Timothy Silva, a human being, by shooting him with a pistol." This offense was laid under Article of War 92.

"Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse." Malice aforethought may be inferred from, among other things, an "intent to commit any felony", "preceding or coexisting with the act \* \* \* by which death is caused": MCM, 1928, par. 148a. The courts have accordingly held in numerous cases that a homicide committed in the perpetration of burglary is murder regardless of any precedent plan or design to kill: People v. Sullivan, 173 N.Y. 122, 63, LRG 353; In re Opinion of the Judges, 239 Pac. 676 (Crim. Ct. of App. of Okla., 1925); Hedrick v. State, 51 S.W. 252 (Ct. of Crim. App. of Tex., 1899); Conrad v. State, 78 N.E. 957 (Ohio), 6 LRG (N.S.) 1154 (1906); State v. Miller, 13 S.W. 832 (Mo. 1890). In the first case cited Judge Cullen remarked that:

"A party of several persons start along the street to commit burglary in the postoffice... The defendant and every one of the party at the time they left Albany were armed... The deliberation and premeditation necessary to make out the crime of murder in the first degree could well be found to have commenced at Albany when the defendants started out on their predatory excursion; they had carried out the design then formed, to shoot anyone who stood in their way."

Malice may also be deduced from the use of a dangerous weapon. Thus in Commonwealth v. Robinson, 305 Pa. 302, 1579th 689 (1931) the holding was that "the intentional, unlawful, and fatal use of a deadly weapon against a vital part of the body gives rise to the presumption of fact that malice and intent to kill existed." Jones v. State, 174 So. 547 (Miss. 1937) is to the same effect.

That the accused shot and killed Francis Timothy Silva has been proved beyond any reasonable doubt. The confession, the ballistics evidence, the heel prints, and the testimony of Keyes, Clark, and Theodore Thomas all definitely identify the slayer. By his own admission the accused broke and entered into the Silva home in the dead of night for the express purpose of having sexual intercourse with whatever woman he might find there. Since he came armed with a pistol, he obviously meant to overcome any resistance which might be offered by force. He was engaged in the perpetration of a burglary whose ultimate objective was rape. Frightened by Mrs. Silva's screams, he deliberately used the dangerous weapon in his possession to shoot and kill Francis Timothy Silva. This was murder.

The accused has filed two motions, one to quash the Charge and Specification on the ground that Article of War 70 was not complied with,

and one to vacate the sentence and verdict and to dismiss the Charge and Specification on the following grounds:

"1. That nowhere in the record does it appear that the accused was in the military service on June 11, 1944.

"2. That the court lacked jurisdiction."

No evidence was introduced in support of the first motion. As to the second, the fact that the accused was in the military service on the date mentioned is clearly established by the testimony of First Lieutenant Roy D. Asch, his commanding officer (R. 13).

While defense counsel has argued and attempted to prove that Freitas obtained the confession by "pressure," the record is not only devoid of any proof that coercion in any form was exerted but contains ample evidence that both the oral and written statements were freely and voluntarily made. Adequate warning had previously been given the accused a month earlier at the outset of the investigation and was repeated before the written statement was taken and again before it was executed. In any event the record contains sufficient evidence, exclusive of the confession, to prove beyond a reasonable doubt that the accused committed the murder of which he has been convicted.

6. The record shows that the accused is 22 years old and that he was inducted on 5 September 1942 for the duration of the war plus six months.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. A sentence of death or imprisonment for life may be imposed upon conviction of a violation of Article of War 92.

Abner E. Lipscomb, Judge Advocate.

Robert J. Cannon, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

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SPJGN  
CM 264864

1st Ind.

War Department, J.A.G.O.,

DEC 26 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 Cornelius Thomas (38238522), 3297th Quartermaster Service Company.

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 death be confirmed and ordered executed.

3. Consideration has been given to letters from Mr. F. S. K. Whittaker dated 15 August 1944 and 4 November 1944 and to a brief submitted by him bearing the last date.

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,  
Major General,  
The Judge Advocate General.

5 Incis.

- Incl 1 - Record of trial.
- Incl 2 - Dft. of ltr. for sig. Sec. of War.
- Incl 3 - Form of Executive action.
- Incl 4 - 2 letters from Mr. F.S.K. Whittaker.
- Incl 5 - Brief submitted by Mr. F.S.K. Whittaker.

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(Sentence confirmed. G.C.M.O. 333, 11 Jul 1945)

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

SPJGN  
CM 264903

UNITED STATES

v.

Second Lieutenant GUY S.  
FORCIER (O-706157), Air  
Corps.

9 NOV 1944

ARMY AIR FORCES  
CENTRAL FLYING TRAINING COMMAND

Trial by G.C.M., convened  
at Waco Army Air Field, Waco,  
Texas, 6, 8 September 1944.  
Dismissal.

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OPINION of the BOARD OF REVIEW  
LIPSCOMB, O'CONNOR and GOLDEN, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Guy S. Forcier, Air Corps, did, at or near Temple Army Air Field, Temple, Texas, on or about 24 August 1944, wrongfully pilot a military aircraft at an altitude of approximately 50 feet above the ground in violation of paragraph 16, Army Air Forces Regulation 60-16.

Specification 2: In that Second Lieutenant Guy S. Forcier, Air Corps, did, at or near Temple Army Air Field, Temple, Texas, on or about 24 August 1944, wrongfully violate paragraph 1b, Army Air Forces Regulation 60-16A, by flying an Army aircraft of which he was the pilot closer than 500 feet to another aircraft in flight when not in duly authorized formation.

He pleaded not guilty to Specification 2 and guilty to Specification 1 and the Charge. He was found guilty of the Charge and both 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 Article of War 48.

3. The evidence for the prosecution shows that at about 0800 o'clock on 24 August 1944 the accused was assigned a BT-13A plane, Field No. 177 J, to be used by him in controlling student cross-country flights in the vicinity of Hammond, Texas. In the performance of such duty at about 1030 o'clock he landed at the Temple Army Air Field which consists of about 18 buildings and several runways situated about 45 miles west of Hammond (R. 20-22, 29; Pros. Ex. 2, 3).

After conversing with Lieutenant Conrad A. Puerzer for a few minutes, the accused re-entered his plane and took off in a westerly direction (R. 22, 25, 28; Pros. Ex. No. 3). Flight Officer Smith C. Stoddard, piloting a BT-13 plane with Second Lieutenant James C. Grossman, Jr. as a passenger, was approaching the field for a landing and the accused turned and followed behind at a distance of about 50 feet for about one to three minutes before pulling up (R. 22-23, 31-32, 39; Pros. Ex. No. 1, 3). Stoddard was forced to land his plane on the right side of the runway in order to avoid, what appeared to him, an impending collision with the accused's plane (R. 32). Stoddard and Grossman alighted from their plane and observed the accused's plane as it buzzed the ramp at an altitude of from 10 to 50 feet while flying at a speed of about 180 miles per hour. The entire episode was also witnessed by Lieutenant Puerzer and Captain Donovan O. Leopold who was flying a plane in the immediate vicinity (R. 2, 4, 14, 23, 32; Pros. Exs. 1-3). The accused then flew away to the east (R. 12, 23).

The accused, after being apprised of his right to speak or remain silent, gave a sworn statement to the investigating officer in which he states that he followed Stoddard's plane in its landing as he intended to land again also but was too close to Stoddard's plane to accomplish the landing, that he thereafter flew over the field at an altitude of about 40 feet before leaving, that at such time he was neither drunk nor drugged and that his plane was in good mechanical condition and operating satisfactorily. The statement was properly admitted into evidence (R. 45-46; Prcs. Ex. 3).

The court announced that it would take judicial notice of Paragraph 16, Army Air Forces Regulation No. 60-16 and Paragraph 1b, Army Air Forces Regulation No. 60-16A (R. 58).

4. The evidence for the defense was elicited from the testimony of the accused who, after explanation of his rights as a witness, elected to testify. His testimony did not materially vary from that of the prosecution except that he had followed Stoddard's plane at a distance of about 175 feet for only  $1\frac{1}{2}$  minutes and had not landed because he had misjudged his "turn" which placed him too close to Stoddard's plane to effect a landing. He denied any intention to fly in formation with Stoddard or to make a formation landing. He attributed his subsequent "buzzing" of the field to a sudden impulse and contended that his speed was only 130 miles per hour and that he flew over the grassy area between the ramp and the runway thereby not flying over either buildings or aircraft (R. 49-53). Upon cross-examination he admitted that he had not made a second landing at Temple Army Air Field because he realized that he "had made a breach of flying regulations" and his impulse was to leave such field and return to Hammond (R. 54).

5. Specification 1 and 2, respectively, allege that the accused on or about 24 August 1944 at or near Temple Army Air Field, Temple, Texas, wrongfully operated a military aircraft at an altitude of approximately 50 feet above the ground in violation of paragraph 16, Army Air Forces Regulation 60-16, and that at the same time and place he wrongfully violated paragraph 1b, Army Air Forces Regulation 60-16A, by flying a military aircraft within 500 feet of another aircraft in flight when not in duly authorized formation. Paragraph 16 of the first of the two regulations, of which the court appropriately took judicial notice, prohibits the operation of aircraft within 500 feet above the ground except over obstructions, populous places or assemblies of persons where the limit is 1000 feet and except when an altitude of less than 500 feet is authorized as necessary for the proper execution of a tactical flight, engineering or training mission and paragraph 1b of the second prohibits the operation of an aircraft within 500 feet of another aircraft in flight unless upon duly authorized formation flying. "Disobedience of standing orders" is conduct prejudicial to good order and military discipline (M.C.M., 1928, par. 152a).

The evidence for the prosecution conclusively establishes by the testimony of four eye-witnesses the accused's commission of the two offenses as alleged and the accused's own testimony is corroborative thereof. The two violated regulations are of general application governing the operation of military aircraft within the continental limits of the United States and the accused had both constructive and actual knowledge thereof. Notwithstanding his disavowal of intentional violations the evidence, including his own testimony, permits no other conclusion except that reached by the court. The accused's plea of guilty to the

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Charge and the first Specification thereunder is abundantly supplemented by the evidence which also conclusively establishes his guilt of the offense alleged in the second Specification to which he pleaded not guilty. The evidence, therefore, beyond a reasonable doubt supports the court's findings of guilty of the Charge and both Specifications thereunder.

6. The accused is about 24 years old. The War Department records show that he is a high school graduate and unmarried. During the summer of 1936 he was a junior counsellor at a boys' camp; from June 1937 until December 1938 he was employed in general office work by the Reconstruction Finance Corporation; from December 1938 until November 1941 he was employed as a production supervisor by a bottling company; and from the latter date until January 1942 he was a "lubrication supervisor" for a construction company. He has had enlisted service from 23 February 1942 until 7 January 1944 when he was commissioned a second lieutenant upon completion of Officers Candidate School and has had active duty as an officer since the latter date.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and its Specifications and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate

Robert K. Hamer, Judge Advocate

Daniel F. Golley, Judge Advocate

SPJGN  
CM 264903

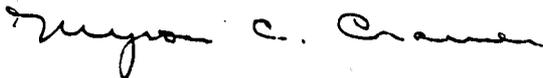
1st Ind.

War Department, J.A.G.O., NOV 16 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 Guy S. Forcier (O-706157), 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 \$75 per month for nine months and that the sentence as thus modified be ordered executed.

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



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

4 Incls.

- Incl 1 - Record of trial.
- Incl 2 - Dft. of ltr. for  
sig. Sec. of War.
- Incl 3 - Form of Executive  
action.
- Incl 4 - Memorandum from C.G.,  
Army Air Forces.

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(Sentence confirmed but commuted to forfeiture of \$75 per month for nine months. G.C.M.O. 14, 8 Jan 1945)

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

(355)

SPJGH  
CM 264936

19 DEC 1944

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

THIRD AIR FORCE

v.

Major SAMUEL SANSWEET  
(O-198020), Signal Corps.

Trial by G.C.M., convened at  
Tampa, Florida, 24, 25, 26,  
29 and 30 July 1944. Dismissal.

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

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

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

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

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

Specification 2: In that Major Samuel Sansweet, 7th Detachment, 301st Army Air Force Base Unit, formerly of First Training Regiment, Aircraft Warning Unit Training Center, being a married man, did, at or near Tampa, Florida, on divers occasions between 26 February 1944 and about 7 March 1944, inclusive, wrongfully solicit caresses and attention from one Helen Ackerman, the wife of Private Russell E. Ackerman, then a member of the same command, under such circumstances as to be conduct unbecoming an officer and a gentleman.

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

Specifications 1-4 incl.: (Findings of not guilty).

Specification 5: In that Major Samuel Sansweet, \* \* \*, did, at or near Tampa, Florida, on or about 15 December 1943, knowingly and wilfully misappropriate labor and services of certain enlisted military personnel, during duty hours, by having said personnel work about the home of said Major Sansweet, this to the prejudice of good order and military discipline.

Specification 6: In that Major Samuel Sansweet, \* \* \*, did, at Drew Field, Tampa, Florida, on or about 30 December 1943, wrongfully and unlawfully solicit labor and services of certain enlisted military personnel, to wit, Staff Sergeant James E. Frye, Sergeant Ivey L. Stroupe and Private First Class James E. Thompson, for work, during duty hours, in and about the home of said Major Sansweet, this to the prejudice of good order and military discipline.

Specification 7: (Finding of not guilty).

Specification 8: In that Major Samuel Sansweet, \* \* \*, did, at Drew Field, Florida, on or about 9 January 1944, wrongfully and unlawfully, issue and procure the issuance of furloughs to enlisted military personnel, then members of the same command, for the purpose of having the said enlisted personnel proceed to, or the vicinity of, Brooklyn, N. Y. to procure automobile tires for the personal use of said Major Samuel Sansweet.

Specification 9: In that Major Samuel Sansweet, \* \* \*, having, on or about 26 January 1944, received two automobile tires, value of more than \$50.00, from enlisted military personnel, then members of the same command, did, at Tampa, Florida, from on or about 26 January 1944 to about 21 June 1944, dishonorably fail and neglect to pay for said automobile tires.

Specification 10: (Finding of not guilty).

Specification 11: In that Major Samuel Sansweet, \* \* \*, did, at or near Drew Field, Tampa, Florida, on or about 15 January 1944, wrongfully receive and accept as a gift the painting of his automobile from military subordinates then members of the same command.

Specification 12: In that Major Samuel Sansweet, \* \* \*, did, at or near Drew Field, Tampa, Florida, on or about 10 February 1944, wrongfully receive and accept from Technical Sergeant Anthony E. Colini and Sergeant Jack J. Henock, both then members of the same command, a gift, to wit, a cigarette lighter, inscribed "Torpedo Men, Henock and Colini".

Specification 13: (Finding of not guilty).

Specification 14: In that Major Samuel Sansweet, \* \* \*, did, at or near Drew Field, Tampa, Florida, on or about 1 April 1944, borrow the sum of \$200.00 from Sergeant William Berkowitz, an enlisted man, then a member of the same command.

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

Specification: (Finding of not guilty).

ADDITIONAL CHARGE II: Violation of the 63rd Article of War.  
(Finding of not guilty).

Specification: (Finding of not guilty).

Accused pleaded guilty to Specifications 12 and 14 and not guilty to all other Specifications and the Charges. He was found not guilty of Specifications 1, 2, 3, 4, 7, 10 and 13 of Charge II, not guilty of Additional Charge I and its Specification and Additional Charge II and its Specification, guilty of Specification 2 of Charge I except the words "on divers occasions between 26 February 1944 and about 7 March 1944, inclusive" substituting therefor the words "on or about 2 March 1944", and guilty of all other Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the finding of guilty of Specification 1 of Charge I, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution pertaining to the Charges and Specifications under which there were approved findings of guilty was substantially as follows:

a. Specification 2, Charge I. Wrongfully soliciting caresses and attention:

On 26 February 1944, accused called on Mrs. Helen Ackerman, aged 19, who was living with her mother, to discuss the matter of court-martial proceedings pending against her husband, Private Russell Ackerman, 501st Training Regiment, for mishandling of the mail (R. 69, 78). During their discussion accused remarked how blue Mrs. Ackerman's eyes were and then proceeded to address her as "blue eyes". He invited her to meet him at a local hotel the following Monday when he expected to have further information about her husband's case. He suggested that at their next meeting she wear a blue dress to complement her eyes (R. 70).

Mrs. Ackerman met accused at the hotel, declined his invitation to have a drink and sat with him on a sofa in the lobby and discussed her husband's case. He told her that her husband might be sentenced to restriction to certain limits for 15 days. During their conversation accused invited her to his home, stating that his wife was visiting in New York, but she declined the invitation. Accused told her if she ever needed any assistance from him to contact him at his station (R. 70).

Sometime later Mrs. Ackerman called at accused's office to determine what had transpired with respect to her husband's case. Accused's superior officer, Colonel Van Ingen, was present in the office and accused invited Mrs. Ackerman to accompany him to his home so they might converse more privately. She accepted the invitation and they proceeded to accused's house where they seated themselves upon a sofa and began to discuss Ackerman's situation. Soon accused put his arm around her and attempted to kiss her. When she rejected his advances, accused inquired what difference a little kiss would make and attempted several times thereafter to kiss her, although she continued to protest his conduct, telling him that she loved her husband and would do nothing to hurt him. Each time she objected to his overtures, accused desisted temporarily. During their conversation, Mrs. Ackerman mentioned that she did not have sufficient gasoline to visit her husband whereupon accused gave her the last four gasoline coupons in his ration book. Mrs. Ackerman was "pretty sure" accused told her that she need not fear that her husband would be sent to the guardhouse inasmuch as he had told the court-martial authorities to give him 15 days' restriction to the post and reduce him to the grade of private. Mrs. Ackerman remained with accused in his home for about 30 minutes (R. 71, 72, 78).

Private Ackerman was eventually tried by summary court-martial and was sentenced to 15 days' restriction to the post and reduced from the grade of sergeant to private (R. 145).

b. Specification 5, Charge II. Having military personnel work and labor in and about accused's home:

About 9 a.m. one morning during December 1943, accused requested Anthony J. Cincotta, a law school graduate and then Personnel Sergeant-Major of accused's organization but at the time of trial a prisoner in the stockade awaiting approval or disapproval of his court-martial sentence, to contact a First Sergeant Reinfeld of the 1st Reporting Company and have him procure some enlisted men "who wanted to rake the lawn, and more or less beautify the surroundings" around accused's house. Three men were obtained and Cincotta drove them to accused's house about 9 or 9:30 one morning, telling them to prune the bushes and clean up the yard. They worked until 4:30 p.m. and returned the next day to complete the job (R. 106, 110, 131). Cincotta gave these three men a total of \$3 for lunch money during the two days and

paid each of them \$1 for his work for which Cincotta stated he was never reimbursed by accused (R. 111). The enlisted men of the 1st Reporting Company had no specific military duties to perform but were all being processed either for discharge or shipment overseas (R. 131). When the executive officer of the 1st Reporting Company heard of this incident about the middle of December 1943, he reported it to higher authority. Accused thereafter admitted so employing these enlisted men and was admonished for it by Colonel McNamee, the executive officer of the Aircraft Warning Unit Training Center. Subsequently accused informed the officer who reported the incident that he was lacking in loyalty to accused and that accused would not forget it (R. 131-133, 158).

c. Specification 6, Charge II. Wrongfully and unlawfully soliciting military personnel to work about accused's house:

On or about 30 December 1943, accused asked Sergeant Cincotta to procure an enlisted man to make some minor repairs on his oil burning furnace. The enlisted man who had previously made some minor adjustments on it was unavailable so accused suggested to Cincotta that one of "the utilities boys" might know how to remedy the trouble (R. 112). At Cincotta's direction, Private Anthony D. Bozzi called on Sergeant James E. Frye, who was in charge of the Utilities Shop, sometime around 9 a.m. and asked him to attend to the accused's furnace. In an emphatic manner, Sergeant Frye stated that because of the pressure of work he would be unable to attend to the matter until afternoon. It was around 1 p.m. that day when Sergeant Frye arrived at accused's house. Working in the Utilities Shop with Sergeant Frye were Sergeant Ivey L. Stroupe and Private First Class James E. Thompson (R. 90, 91, 134, 135). Apparently accused learned that Sergeant Frye did not hasten to repair accused's furnace as soon as the request for his services was made and he summoned all three of these men from the Utilities Shop to his office, and as Sergeant Frye expressed it, accused (R. 135):

"Told us that when he asked for a man he was in dire need of him and it was better for we men to lose two or three hours of our time than it was for him to lose thirty minutes of his time. He talked on a little bit and said that if we didn't change our attitude he would change our address and then he walked out."

Sergeant Frye had not mentioned his conversation with Bozzi to Sergeant Stroupe or Private Thompson because, after he heard that accused wished to see them, he discovered that Bozzi "had already talked to Sgt. Stroupe over at Headquarters that morning" (R. 135).

d. Specification 8, Charge II. Wrongfully procuring furloughs for two enlisted men to enable them to obtain automobile tires for accused:

Private Jack J. Henock, who was in confinement at the post guard-house at the time of accused's trial, having been found guilty of soliciting

bribes and attempted bribery, and Private Jack D. Bilello received furloughs to Brooklyn, New York, about 10 January 1944 (R. 52, 62, 79). Both men were members of accused's organization, 1st Training Regiment (R. 49, 79). Because of some variance in the testimony of the prosecution's witnesses on the matters covered by this Specification, it is advisable to summarize the testimony of each witness separately.

Henock testified that, although he had no conversation with accused before going on furlough, he had learned that accused was looking for automobile tires and it had come to his attention that tires could be obtained in New York (R. 52). Since furloughs were then authorized only for five days plus traveling time, Henock was not too anxious to have one until he was told he could request an extension. Cincotta prepared Henock's request for the furlough. Thereafter he, and Bilello went to New York on their furloughs where they called on Bilello's brother to see if he could obtain the tires. He did procure two prewar tires for them at a cost of \$40 each and the men brought them to their station upon return from their furloughs. The tires were shown to accused and when he inquired where such "cheap tires" had been obtained, Henock protested, stating that they were good tires. These tires were thereafter mounted on accused's automobile. While in New York Henock wired accused directly requesting an extension of time on his furlough and obtained it (R. 53, 54).

Bilello testified that when he was due for a furlough in January 1944, some question of obtaining tires arose (R. 79). Bilello obtained his furlough through regular channels, never discussed a furlough with accused, and, although he had no agreement with accused to obtain tires for him in New York, one of his purposes in going to Brooklyn, New York, was to obtain tires which Bilello understood were for accused (R. 79, 82-85). While in Brooklyn, Bilello obtained an extension of his furlough by sending a telegram directly to accused as he had been told to do (R. 80). He requested the extension because his mother was not feeling well and because he had not as yet been able to obtain the tires (R. 83, 84). Bilello finally "received" two Firestone De Luxe 600 x 16 tires in Brooklyn for which his mother and brother paid a total of \$80 (R. 80). He brought the tires to camp upon return from his furlough and they were exhibited to accused and then mounted on the two rear wheels of his automobile (R. 82). Bilello had not been paid for the tires and he knew of no payment that had been made to his mother or brother (R. 80).

Private Anthony D. Bozzi testified that when Henock and Bilello filed their requests for furlough, he took the requests directly to accused, their commanding officer, because Cincotta told him so to do, and accused approved them (R. 86, 87). Bozzi knew that accused examined the tires when the tires were brought to the camp (R. 88). He was also present when the tires were mounted on the rear wheels of accused's automobile which work Henock paid to have done at a Sears Roebuck establishment in town (R. 89).

Cincotta testified that in November 1943 accused informed him that he wished to obtain some tires for his automobile (R. 112). In December 1943, after a conversation with Henock, Cincotta told accused that an enlisted man named Bilello, a friend of Henock's would be able to obtain tires in New York through his brother (R. 114). Accused told Cincotta that if these two men could obtain tires for him, furloughs were to be arranged for them. During the first week of January accused had a conversation about tires with Cincotta, Henock and Bilello during which Bilello said his brother could obtain tires in New York (R. 115). Thereafter accused issued instructions that Henock and Bilello were to apply for furloughs through their organization commander, a Lieutenant Eaton of a Service Company. It was further arranged that they should send telegrams requesting an extension of their furloughs. About 17 or 18 January 1944 telegrams from them addressed to accused were received, accused initialed them and Cincotta then arranged with the proper clerk to have extension telegrams mailed in reply. When Bilello and Henock returned from furlough, they had two tires with them which were put on accused's automobile at his instruction (R. 116, 127, 128). Cincotta further testified that he had given Bozzi either \$3 or \$5 plus instructions "to see that those two tires were brought back from New York and put on Major Sansweet's car" (R. 117).

g. Specification 9, Charge II. Dishonorably failing to pay for two tires received from enlisted men:

Although Bilello's brother and mother contributed a total of \$80 to pay for the tires and Henock told Bilello's brother that Bilello would be paid for the tires, the latter never received any payment for them. So far as Bilello knew his brother and mother had not been reimbursed (R. 80, 82). Cincotta testified that, pursuant to a telephone conversation he had with accused on the night of 21 April 1944, he and accused met the following morning. This meeting occurred after the authorities had begun to investigate accused's relations and transactions with various enlisted men. Accused informed Cincotta that Bilello had made a statement and during their conversation accused said to Cincotta, "I thought you paid for the tires". When Cincotta informed him that he had not, accused then said, "Well, see if you can get word to Henock. Tell him that if anybody questions him that he paid \$50 for the tires" (R. 128, 129).

Sergeant Anthony Colini testified that in January 1944 accused loaned him \$70 when he was going on furlough. Colini gave Cincotta \$70 shortly after the next payday and asked him to return it to accused (R. 102, 103). Cincotta admitted that shortly after payday in January or February 1944 Sergeant Colini gave him \$70 to be delivered to accused to repay the loan. Cincotta stated, however, that he turned the \$70 over to accused and did not use any part of it to pay for the tires (R. 126, 127). On cross-examination Cincotta admitted that he signed a statement which was

dated 22 April 1944, in which he swore that the last time he saw accused was on 9 April 1944. In explaining the inconsistency between his testimony and his statement, accused testified that he made his statement between 9 and 15 April 1944, that his conversation with accused on 22 April 1944 occurred after the statement had been taken, and that he did not know how the statement came to be dated 25 April 1944 (R. 130).

f. Specification 11, Charge II. Wrongfully accepting the painting of his automobile as a gift from military subordinates:

Henock testified that early in 1944 he drove accused's automobile to the Elkes-Pontiac Company, apparently a dealer in the vicinity, to obtain an estimate on the cost of repainting it. He was informed that a synthetic repainting would cost \$65 (R. 55). Sometime in February 1944 Henock gave Cincotta \$50 toward the cost of repainting the automobile (R. 56).

Cincotta testified that in late December 1943 Henock drove accused's automobile to the Elkes-Pontiac Company to have it simonized but the company advised against it stating that it would not "take" considering the paint finish on the automobile. Henock then told accused, "I am going to get you a gift of a paint job". Henock later got estimates that a synthetic painting of the automobile would cost \$50 and that a lacquer painting of it would cost \$65. On 8 or 9 January 1944 accused told Cincotta his automobile would be available for painting the following week (R. 117). After the automobile had been repainted and was ready for delivery to accused, Cincotta discovered that Henock, who was to pay for the work, was on furlough. Cincotta told accused that fact and the latter then suggested that Cincotta pay for the painting and then obtain reimbursement from Henock upon his return. Cincotta used \$35 of his own funds and borrowed the balance from a Corporal Berkowitz in order to pay for the painting. He was given a receipt of \$65 by the Elkes-Pontiac Company which he turned over to accused in response to his request therefor. Cincotta was eventually reimbursed to the extent of \$50 by Henock but never did receive the balance of \$15 although he asked accused for it (R. 118). Cincotta denied that this balance of \$15 was paid to him from the \$70 repaid by Sergeant Colini to accused in January or February 1944 (R. 126, 127).

g. Specification 12, Charge II. Wrongfully accepting a gift of a cigarette lighter from enlisted men:

Although accused pleaded guilty to this Specification, there is such variance in the testimony of the prosecution's witnesses as to the details of the transaction that it will be hereinafter summarized as to each witness.

Sergeant Colini, who was under charges involving this cigarette lighter among other things, testified that about two days before he went

on furlough in February 1944, Henock gave him \$5 to purchase a cigarette lighter, saying that "Major Sansweet had given him \$5.00 for that lighter. The money was coming from his pocket and he was trying to get on the good side of the old man and money was no object" (R. 100). Colini bought a cigarette lighter which cost \$4.95 and had inscribed upon it the words "Torpedo Men, Henock and Colini". Henock had told him to have these words inscribed saying that it would "be a good joke. The old man will like it" (R. 98, 103). When he returned from furlough, Colini gave the lighter to an enlisted man from the Personnel Section and told him to give it to the accused (R. 98).

Henock testified that he did not participate in the gift of the lighter to accused and that all he knew was that Colini went home on furlough and sent the major a lighter as a gift (R. 56).

Cincotta testified that he saw the inscribed cigarette lighter in accused's possession and knew it was a present from Henock and Colini at Henock's expense (R. 118, 119). In the middle of February 1944, soon after Colini's return from furlough, Cincotta told accused he heard that he had received a lighter from Colini to which accused replied affirmatively. Cincotta observed accused throw the lighter in his desk drawer as he remarked, "those damn fools" (R. 119).

h. Specification 14, Charge II. Borrowing the sum of \$200 from an enlisted man:

Accused pleaded guilty to this offense and the evidence for the prosecution demonstrates that, on or about 1 April 1944, Sergeant William Berkowitz loaned accused \$200 which was repaid about 30 days thereafter. Accused's wife and Berkowitz's wife apparently were very good friends (R. 24, 26). Accused and Berkowitz were both members of the 501st Signal Aircraft Warning Regiment in September 1943, and there is no evidence to indicate that they were not members of the same organization on the date that loan was made (R. 18).

4. After his rights as a witness had been fully explained to him accused testified generally that he had served about 26½ years in the Army, having served overseas in the last war with the 4th Infantry Division with which he participated in five major engagements and as a result received awards of the Purple Heart and the Silver Star. Thereafter he spent ten years on duty with the Finance Department and in 1931 was assigned to the Signal Corps. He served as a staff noncommissioned officer between ten and twelve years before he was discharged in the grade of master sergeant to accept a commission in the Signal Corps. He was a past commander of Runnell Post, American Legion, Baltimore, Maryland (R. 218-220).

It was stipulated for the defense that if Major General George C. A. Scoane, Retired, Colonel C. A. Scoane, Retired, and Colonel Harry E. Storms were present they would testify that accused had served under their command, that his character and reputation for truth and veracity was good, that they would believe him under oath, and that, during the time he served under the first two officers, he performed his duties in a superior manner (R. 258, 259). In January 1944, accused received a letter of commendation from Brigadier General S. H. Sherrill for his extraordinary diligence and energy and for the efficient manner in which he processed over 4000 men through the 1st Training Regiment in a period of two months (Def. Ex. 6).

The defense introduced the following testimony, including the testimony of accused, under each of the offenses alleged.

a. Specification 2. Charge I.

Accused testified that it was a policy and practice in his regiment to investigate the family conditions of any enlisted man who was to be court-martialed and because of that he went to see Mrs. Ackerman at her mother's house after Ackerman's trouble arose. Worried over her husband's situation, she asked accused when he would know the disposition of her husband's case. During their conversation he arranged to meet her in the lobby of the Hillsboro Hotel the following Monday at 2 o'clock. The appointment was kept, they discussed the case briefly and accused told her if there was any way he could help her further she could call him at his office (R. 221). Several days later, after telephoning accused for an appointment, she called at his office to discuss further her husband's troubles. In order to converse more privately they drove to accused's house and seated themselves upon a sofa in the living room. Mrs. Ackerman was quite upset and insisted on knowing what was to happen to her husband. While trying to cheer her up accused admitted he might have put his hand on her shoulder but denied he made any attempt to solicit caresses inasmuch as he was very happily married. While discussing her husband's case she complained that she did not have enough gasoline coupons to permit her to see him every day, whereupon accused gave her two of his coupons (R. 222). He admitted that his wife was not at home when this incident took place but he stated that fact had not occurred to him inasmuch as he had talked at his home with the wives of other enlisted men who were in trouble (R. 248).

Harold Turney, a neighbor who lived next door to accused, was home on this afternoon and saw accused and Mrs. Ackerman enter accused's house. Mr. Turney was cutting grass and pruning bushes in his yard during Mrs. Ackerman's visit which lasted 15 or 20 minutes. He glanced into

accused's living room through the open venetian blinds on two occasions and only observed accused and Mrs. Ackerman chatting casually as they sat on the sofa (R. 211-215).

b. Specification 5, Charge II.

It was stipulated that if First Sergeant Howard M. Reinfeld, of the 1st Reporting Company, were in court he would testify that on or about 15 December 1943 he received a phone call from a corporal who asked if he could provide three men to work at accused's home. He provided the three men during duty hours who upon their return stated they had been paid. These men were part of a group of six or seven hundred who had no official duties at the time (R. 195).

The accused testified that at the time there was a minimum of 500 men in his organization who were either awaiting discharge or physical or dental rehabilitation approximately 200 of whom were always without any specific duty and had little or nothing to do. He had one of his clerks call the first sergeant of the 1st Reporting Company to inquire if three of the men would volunteer to work around his yard for which they would be paid. Later that day his wife told him that the men had worked around the house only a few hours, had not completed the job and were coming back the next day. She had paid them \$1 a piece (R. 226). The next night she told him they had finished the job and she had again paid them \$1 a piece (R. 227). Accused's wife testified that she paid each of the men \$1 for his work about the yard (R. 217). In justification of his conduct, accused testified that he was working long hours and many week ends clearing some 5000 or 6000 men through his organization who were being processed for discharge or reassignment. Consequently, he did not have an opportunity to attend to personal and domestic matters. He then got into the "custom" of asking certain clerks around him to do little things for him he didn't have time to do for himself (R. 224).

c. Specification 6, Charge II.

Accused testified that he was having considerable difficulty with his oil heater and one particular morning in December 1943 it failed completely to function. He asked Sergeant Bozzi, one of the clerks in his office, to see if there was any man in the organization who could start the heater. When Sergeant Bozzi told him the gist of the conversation he had with the men in the Utility Shop, accused became indignant and "had the three men brought up to my office and reprimanded" (R. 227). It was reported to accused that the men had told Sergeant Bozzi that they wouldn't leave their work at that time if Colonel Van Ingen himself had summoned them. Accused claimed he reprimanded them for that remark and not for their refusal to go to his house (R. 248).

d. Specification 8, Charge II.

Accused testified that sometime toward the end of 1943 he commenced having trouble with his tires. Cincotta, who was then accused's Sergeant-Major, told him he knew where he could obtain some new tires. When Cincotta told him they would cost \$50, accused told him to obtain them (R. 228). Shortly before 31 January 1944, Cincotta brought the tires to accused's office. Accused examined them, saw they were "very good" and asked Sergeant Bozzi to have them mounted on his auto (R. 229). Accused denied that he knew Henock or Bilello at that time or that he procured the issuance of furloughs for them (R. 229). He admitted that, although he didn't know Henock, he approved his request for an extension because the telegram was addressed to him and Sergeant-Major Holland had sent it to him for his approval (R. 246). He first met Henock around the early part of March 1944 when Cincotta said he had volunteered to go down and clean up accused's house (R. 255). Accused denied that there was any understanding prior to Henock's and Bilello's departure on furlough that they would be given an extension if they submitted a request to him (R. 249).

Second Lieutenant Charles C. Walker testified that he approved Bilello's request for an extension and that accused had no concern with it (R. 171). First Lieutenant Andrew L. Hellmuth testified that Henock's application for an extension of his furlough passed through his hands as assistant regimental adjutant, that it was processed as any such application would be processed, and that he received no instructions from the accused about it (R. 184). It was stipulated that if First Lieutenant Henry W. Eaton were present he would testify that on or about 9 January 1944 he approved Bilello's and Henock's applications for furloughs which were submitted through regular channels and approved in the regular course of business and that he issued the furloughs (R. 194).

e. Specification 9, Charge II.

Sometime in December 1943, accused testified that he was in the office of Kitchen #23 with Cincotta and Colini and the latter complained that he had a furlough effective 1 February but was without funds. Accused extracted \$70 from his wallet, loaned it to Colini, told Cincotta to obtain a receipt for it and told Colini to repay the \$70 to Cincotta. Accused testified that on the way back to battalion headquarters he told Cincotta to keep \$50 for the tires and return \$20 to accused when the loan of \$70 was repaid. Cincotta then stated that it cost \$45 to have accused's automobile painted although he had originally told accused it cost but \$25 (R. 228). Accused testified he then told Cincotta to keep the entire \$70 to pay for the tires and the balance due for the car painting (R. 228, 229). Accused stated that he first learned that the tires cost more than \$50 when Cincotta was tried by court-martial (R. 229).

f. Specification 11, Charge II.

Accused testified that in December 1943, Cincotta told him that he knew of an automobile painter in the vicinity who would paint accused's automobile for \$25. Accused told him to have it painted, and after the work had been completed and the automobile returned, accused gave Cincotta \$25 to pay for it (R. 228). A few days later, just after an inspection of Kitchen #23, Cincotta told accused that it actually cost \$45 to have the automobile painted. Accused further testified that he then told Cincotta to keep the \$70 when Colini repaid the loan accused made to him in that amount, applying \$50 to pay for the tires and the balance of \$20 to repay Cincotta for the additional amount due to repay him for the painting. It was not until Cincotta was tried by court-martial that accused learned that the painting had actually cost \$65 and that, therefore, he still owed somebody the balance of \$20. He denied that he accepted the painting of his automobile as a gift (R. 228, 229, 253).

g. Specification 12, Charge II.

Accused testified that one day while he was executive officer of the 1st Training Regiment, Cincotta handed him a cigarette lighter which had an inscription on it that accused did not understand. It appeared to be an inexpensive item which in normal times could be purchased for about 25 cents. Accused stated that eventually he saw no more of it after it lay on his desk for four or five days (R. 230). Had he considered it to be an expensive lighter he would have returned it (R. 240, 252). In answer to questions propounded by members of the court, accused testified that he met Henock in the early part of March 1944, when he volunteered to work about accused's house. Accused confessed his inability to explain why he received a gift of a lighter on 10 February 1944 from a man whose acquaintance he did not make until sometime thereafter (R. 255).

h. Specification 14, Charge II.

Accused testified that when he borrowed \$200 from Sergeant Berkowitz it never occurred to him that he was borrowing from a sergeant in his command. He and his wife were quite friendly with Sergeant and Mrs. Berkowitz and accused considered that he was borrowing from a friend (R. 231). The loan of \$200 was used to augment accused's bank account so he could make a down payment of \$1200 on a new car without cashing Government bonds to furnish the additional cash (R. 242). He repaid the loan within 30 days (R. 231).

5. The evidence and matters of law are herein discussed with respect to each offense with which accused was charged.

a. Specification 2, Charge I.

By appropriate exceptions and substitutions, the accused was found guilty of wrongfully soliciting caresses and attentions, on or about 2 March 1944, from the wife of an enlisted man in accused's command, in violation of Article of War 95. Conduct of an officer which is "morally unbecomting and unworthy" and disgraces or dishonors him personally as a gentleman and exhibits him as unworthy to remain an officer constitutes a violation of Article of War 95 (Winthrop's Military Law and Precedents, 2nd Ed., p. 711, 713). The evidence fails to establish that accused's conduct in privately seeking to embrace Mrs. Ackerman, desisting in his overtures each time she refused to consent thereto, was so disgraceful as to constitute a violation of that Article of War.

Mrs. Ackerman's testimony, however, does establish that accused, a married man, interested himself in the court-martial proceedings pending against her husband, a soldier in accused's command, and when she turned to him for advice and counsel in the matter he sought to utilize the occasion as an opportunity to indulge in personal familiarities with her. The testimony of accused's neighbor does not even controvert Mrs. Ackerman's inasmuch as he only briefly observed accused and Mrs. Ackerman as he glanced through the window on two occasions during her 20 or 30 minute visit. Accused's amorous behavior in a situation that required courteous and tactful conduct on his part could have no other effect than to bring discredit and disrepute upon the military service. Military discipline and the impartiality of our system of military justice demands that accused's conduct in his relations with Mrs. Ackerman be most impersonal. For him to behave as he did operated to the direct prejudice of both. The conclusion is inescapable that his conduct constituted a violation of Article of War 96. The evidence sustains so much of the findings of guilty of Charge I and Specification 2 thereof as involves a violation of Article of War 96.

b. Specification 5, Charge II.

The evidence demonstrates that accused had three enlisted men labor for two successive days about the yard of his house trimming bushes and mowing the lawn for which, in addition to lunch money, they were paid not more than \$1 a day. The employment of enlisted men by an officer for nonmilitary purposes directly operates to the prejudice of good order and military discipline (Winthrop's op. cit., p. 727; CM 257469, MacKay). The evidence sustains the finding of guilty of this Specification.

c. Specification 6, Charge II.

The evidence discloses that, at the direction of accused, Sergeant James E. Frye was requested to go to accused's house and make adjustments upon his oil burning furnace. Although accused later reprimanded Sergeant Frye,

Sergeant Ivey L. Stroupe and Private First Class James E. Thompson for failing promptly to do his bidding on this nonmilitary matter, there is no evidence in the record except for some scant hearsay testimony, that the two enlisted men last named had been solicited to do this work. For an officer to direct that an enlisted man be solicited to perform non-military work for the officer is as prejudicial to good order and military discipline as is the actual performance of the work. The evidence sustains so much of the finding of guilty of this Specification as involves accused's improper solicitation of the services of Sergeant James E. Frye only.

d. Specification 8, Charge II.

The essence of the offense charged in this Specification is that accused issued or procured the issuance of furloughs to two enlisted men, Henock and Bilello, for the purpose of having them obtain automobile tires for him. Henock and Bilello both received furloughs and instructions from some source to obtain automobile tires for accused while on their furloughs in New York. It is clear that they obtained black market tires and when they returned, delivered them to accused who had them mounted on the rear wheels of his automobile. Their requests for furloughs were taken directly to accused and approved by him. Cincotta testified that the furloughs were discussed and arranged at a conference attended by accused, Cincotta, Henock and Bilello, but the latter two men denied that they were present at any such conference. The fact that Cincotta and Henock had both been convicted by courts-martial for offenses arising either directly or indirectly from their association with accused gives some inkling of the reason for the variance in the testimony of these witnesses. Irrespective of this variance, the evidence does indicate that accused approved Henock's and Bilello's requests for furloughs during which they understood they were to procure tires for accused. The approval of accused, considering his position in the regiment, obviously was an important factor, if not the determining factor, in procuring the issuance of the furloughs. That the men may have been entitled to furloughs under existing policy would not constitute a defense to this Specification if in fact when accused approved them he intended that the two men should use some portion of their furloughs to obtain automobile tires for him. Authorized absence on furlough is a privilege granted to enlisted men under War Department policy based upon the proposition that brief periods of absence for the purpose of relaxation from military routine are beneficial to military personnel (par. 1b, c, AR 615-275, 2 Sep 1944). Furloughs are not intended as a device to assist an officer in obtaining property through enlisted personnel in his organization. If an officer procures the issuance of furloughs to certain personnel with the intent that they occupy themselves during a portion thereof in obtaining automobile tires for him from questionable sources, his conduct is contrary to good order and military discipline and, consequently, violative of Article of War 96. The evidence sustains the finding of guilty of this Specification.

e. Specification 9, Charge II.

The two tires obtained for accused cost \$80 and the individuals who paid for them did not receive reimbursement from accused. Accused contended that Cincotta informed him the tires cost \$50 and that he instructed Cincotta that, when Colini repaid a loan of \$70 accused made to him, Cincotta was to use \$50 thereof to pay for the tires. Cincotta denied that any such arrangement had been made and testified that when Colini paid him \$70 he promptly turned it over to accused. Thus it is a question of the credibility of accused and Cincotta. The court which had the opportunity to hear and observe both witnesses determined that credence was to be accorded Cincotta's testimony rather than accused's. It is difficult for us to understand why, if accused was to pay for the tires, Cincotta should tell him they cost \$50 rather than the correct figure of \$80. There is no logical basis to justify accused's story that he was told they cost but \$50. It is apparent that the court acted properly in rejecting accused's testimony. These tires were delivered to accused in February 1944 and no payment had been made for them by accused up to the date of trial, 24 July 1944. Failure of accused to settle this bill with the enlisted men involved over such a period of time constituted a violation of Article of War 96. The evidence sustains the finding of guilty of this Specification.

f. Specification 11, Charge II.

That accused's automobile was painted is not disputed. Henock testified that he paid \$50 of the job price of \$65 and Cincotta testified he contributed the balance of \$15 which accused never repaid to him. Accused testified that Cincotta first told him the painting cost was \$25, that he gave such amount to Cincotta to pay for it, that after he made the loan of \$70 to Colini he was then told by Cincotta that the painting cost \$45, and that he then told Cincotta that when the \$70 was repaid Cincotta was to apply \$50 in payment of the tires and \$20 in payment of the balance due on the painting. The testimony of Henock and Cincotta demonstrates that their funds paid the painting bill and the court apparently believed their testimony and not that of accused. If accused was to pay the painting bill himself what sensible reason existed for Cincotta first to tell him the cost was but \$25 and then later raise it to \$45 but never tell accused the correct figure of \$65? Accused's story is too illogical for belief and properly was so considered by the court. Accused's acceptance of this gift from enlisted men in his organization constituted a violation of Article of War 96 (CM 230829, Mayers, 18 B.R. 65). The evidence sustains the finding of guilty of this Specification.

g. Specification 12, Charge II.

The accused pleaded guilty to receiving the cigarette lighter as a gift from the two enlisted men, Henock and Colini, and there is nothing

in the record to demonstrate that this plea was improvidently entered. Rather, the evidence of both of prosecution and the defense establishes commission of the offense. Acceptance of this gift from enlisted men in accused's organization likewise constituted a violation of Article of War 96. The evidence sustains the finding of guilty of this Specification.

h. Specification 14, Charge II.

The accused pleaded guilty to this offense of borrowing \$200 from an enlisted man in accused's organization. Such conduct was clearly prejudicial to good order and military discipline (CM 221833, Turner, 13 B.R. 239, 1 Bull. JAG 106). The evidence sustains the finding of guilty of this Specification.

At the inception of the trial on 24 July 1944, defense counsel requested a continuance inasmuch as he believed he had not had ample time fully to prepare his case. Practically all of the specific reasons advanced to support the request for a continuance concerned charges of which accused was found not guilty. The request was denied by the court, the law member stating that if during the progress of the trial any lack of preparation by defense counsel appeared to be prejudicing rights of the accused, the court would recess to afford time for further preparation. On 26 July 1944, after the prosecution rested its case, defense counsel requested a continuance until 1 August 1944, further to prepare his case. The court granted a continuance until 29 July 1944. An examination of the record of trial does not reveal that accused was prejudiced by the rulings of the court. His defense was conducted in a thorough, workman-like manner. There is nothing in the record to indicate any specific instance in which accused's defense was prejudiced by failure to grant the full extent of the continuance requested by defense counsel.

Attached to the record of trial is a letter, dated 19 September 1944, from accused to the President to be transmitted through the Commanding General, Third Air Force, and a statement by defense counsel, dated 18 September 1944, addressed to accused and entitled "Errors in court martial trial". A substantial portion of the statement is devoted either to matters not now material in view of the action of the reviewing authority or to argumentative comments upon the credibility of witnesses and the weight of the evidence. In the material portion of the remainder of the statement, defense counsel contends that it was manifestly unfair to try accused upon 18 Specifications covering conduct which occurred over a period of six months, particularly when little foundation existed for nine of the Specifications of which accused was found not guilty. Apparently, the position of defense counsel is that there was an unnecessary accumulation of charges and a trial of accused for certain offenses of which he was so obviously innocent that they should never have been made the basis of Specifications.

We cannot agree with defense counsel on either proposition. In the first place, for military authority to accumulate or save up charges "through improper motives" is prohibited, but "when a good reason exists (e.g., when in the interest of discipline it is advisable to exhibit a continued course of conduct) a reasonable delay is permissible if the person concerned is not in arrest or confinement" (MCM, 1928, par. 26). Numerous of the Specifications against accused evidence a continued course of improper conduct in his relations with enlisted men in his organization. The seriousness of his behavior can be viewed in proper perspective only when his whole course of conduct is examined. Further, much of accused's conduct was unknown to his superiors since it involved unpublicized relations with enlisted men. Apparently higher authority did not become conversant with the full extent of accused's derelictions until certain of the enlisted men involved decided to reveal it. We find no improper accumulation of charges against accused.

Secondly, the record of trial does not support the contention that accused was harassed with Specifications of which he was clearly innocent. We have examined the evidence presented by the prosecution on the Specifications of which accused was acquitted and we find it quite sufficient to warrant the action of the appointing authority in referring the Specifications for trial.

6. The accused is 45 years of age. He graduated from high school, studied extension courses with LaSalle Extension Institute and studied accountancy at the University of California from 1924 to 1926. He also graduated from the Army Finance School. He served two years with the Coast Guard Service, was employed for eight months as assistant paymaster of a public utility and served in the Regular Army for over 26 years. Except for his service in the Coast Guard and the eight months spent in civilian employment, he served continuously as an enlisted man from 1917 until 1941 when he was discharged in the grade of master sergeant for the convenience of the Government and promptly thereafter commissioned a captain and assigned to duty with the Finance Department. In 1942 he was assigned to duty with the Signal Corps and on 13 November 1942 he was promoted to major.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and Specification 2 thereof as involves a violation of Article of War 96, legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Francis M. Jaffey, Judge Advocate.

William H. Gambrell, Judge Advocate.

Robert C. Brewster, Judge Advocate.

SPJGH  
CM 264936

1st Ind.

War Department, J.A.G.O.,

DEC 27 1944

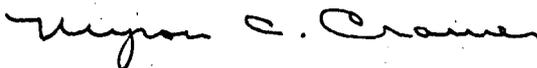
- To the Secretary of War.

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 Major Samuel Sansweet (O-198020), Signal Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and Specification 2 thereof as involves a violation of Article of War 96, legally sufficient to support all other findings of guilty 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 inclosed letter from Senator M. E. Tydings, requesting 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,  
Major General,  
The Judge Advocate General.

- 4 Incls.  
Incl 1-Record of trial.  
Incl 2-Dft ltr for sig S/W  
Incl 3-Ltr fr Sen Tydings.  
Incl 4-Form of action.

(Findings disapproved in part in accordance with recommendation of  
The Judge Advocate General. Sentence confirmed. G.C.M.O. 60,  
27 Jan 1945)



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

(375)

SPJGK  
CM 264961

9 NOV 1944

UNITED STATES )  
 )  
 v. )  
 )  
 Second Lieutenant VIRGIL )  
 H. VEDDA (O-717924), Air )  
 Corps. )

ARMY AIR FORCES  
EASTERN TECHNICAL TRAINING COMMAND

Trial by G.C.M., convened  
at Boca Raton Army Air  
Field, Florida, 20 Septem-  
ber 1944. Dismissal,  
total forfeitures and one  
year confinement.

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OPINION of the BOARD OF REVIEW  
LYON, HEPBURN and MOYSE, Judge Advocates.  
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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that Second Lieutenant Virgil H. Vedda, Air Corps, Section H, 3501st Army Air Forces Base Unit, did, at the Boca Raton Club, Boca Raton Army Air Field, Florida, on or about 18 August 1944, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

FIRST NATIONAL BANK                      63-483  
Palm Beach, Florida

Check NO. \_\_\_\_\_ August 18, 1944

Pay to the  
Order of Cash                                      \$ 20 00/000

Twenty - - - - - and no cts      Dollars

Albert J. Klyapp  
F/O A.C 0627121

(376)

which said check was a writing of a private nature, which might operate to the prejudice of another.

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

Specification: In that Second Lieutenant Virgil H. Vedda, Air Corps, Section H, 3501st Army Air Forces Base Unit, did, at the Boca Raton Field Officer's Mess, Boca Raton Army Air Field, Florida, on or about 30 August 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:

FIRST NATIONAL BANK  
Palm Beach, Florida

63-483

Check No. \_\_\_\_\_ August 18 19 44  
Pay to the  
Order of \_\_\_\_\_ Cash \$ 20 00/000  
Twenty -- --- --- --- --- and no cts Dollars

Albert J. Klyapp  
F/O A.C. 0627121

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Second Lieutenant Virgil H. Vedda, then well knew, falsely made and forged.

He pleaded not guilty to and was found guilty of the Charges and their respective Specifications. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for a period of one (1) year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused during the occurrence complained of was in the military service of the United States, a second lieutenant of the Air Corps, assigned to Section H, 3501st Army Air Forces Base Unit, Boca Raton Army Air Field, Boca Raton, Florida (R. 5). On 30 August 1944 the accused presented a check to Sergeant Nicholas Kovacs at the cashier's cage of the Officers' Mess of the Boca Raton Army Air Field and asked him to cash it (R. 6-7). The check was dated August 18, 1944, payable to "cash", in the sum of "\$20<sup>00</sup>/000", signed "Albert J. Klyapp F/O A.C. 0627121", drawn on

First National Bank, Palm Beach, Florida (Pros. Ex. 1). The sergeant asked the accused if he would endorse the check, to which the accused replied that he would. The sergeant however did not return the check to the accused for endorsement for the reason that he observed that the name of the maker of the check was "hardly distinguishable" and that the serial number could not be that of a Flight Officer as it had no "T" in it (R. 8). He stated that the check was also peculiar in that in designating no cents to be added to the 20 dollars three zeros appeared as the denominator of the fraction (R. 8). He thereupon requested the accused to accompany him to Colonel Jackson's office. He then left the accused with Colonel Jackson in the latter's office (R. 9).

It was stipulated that if Mr. H. V. Nye, Vice President of the First National Bank, Palm Beach, Florida, were present in court and sworn, he would testify that he examined the check (Pros. Ex. 1) and the records of the bank upon which it was drawn; and there is no account in the name of Albert J. Klyapp of record in the bank; and, if the check had been presented to the bank for payment, payment would have been refused (R.10).

On 2 September 1944 the accused, after he was fully advised of his rights, voluntarily signed a statement (Pros. Ex. 2) reading as follows:

"On the night of 18 August 1944, I was playing craps in the Pool Room of the Boca Raton Officers' Club. During the course of the game I ran short of cash because I lost Thirty-five or Forty Dollars. Because I wanted to continue to play I wrote a check for Twenty Dollars and used this check plus Five Dollars to make a bet. There are always blank checks available in the Pool Room where these games are played and I obtained a blank check on the First National Bank of Palm Beach and I made out this check to cash for Twenty Dollars. I dated the check 18 August 1944 and signed a fictitious name -- Albert J. Klyapp, Flight Officer, AC, 0627121. To the best of my knowledge, there is no such person as Albert J. Klyapp. I merely made the name up at the time I wrote the check. I won the pot in which I bet with this check so that I got the check back immediately and it never passed to any of the other players. When the game ended, I retained possession of the check. On the 21st or 22nd of August, I was sent to the Station Hospital where I remained until the 29th of August. Upon being released from the hospital, I was very short of money. I owed a bill at the hospital of Seven Dollars and I owed some officers quite a bit of money and I also needed money with which to eat. Still having the above described check in my possession, I decided

after deliberating about three (3) hours to attempt to cash it. I presented the check to Sergeant Kovacs in the Cashier's cage at the Boca Raton Club. I handed the check to Sgt. Kovacs saying, 'I would like to cash this check'. Sergeant Kovacs asked if the check was endorsed and I said, 'No'. Sgt. Kovacs then said that the check looked like one of those bad checks previously presented at the club. Sgt. Kovacs asked me to go to Colonel Jackson's office where Colonel Jackson and a Corporal from the Provost Marshal's office questioned me concerning the check and took a sample of my handwriting. I was then taken to the Provost Marshal's office where Capt. Hass after warning me of my rights questioned me again. At this time, I admitted to Captain Hass that I had written the above described check and had attempted to cash it at the Boca Raton Club."

The defense counsel objected to the admission in evidence of the statement on the ground that the confession was inadmissible until proof had been made, independent of the confession that the offense had been committed. In other words, until the corpus delicti had been established (R. 11). The objection was overruled (R. 13).

In a conversation on 30 August 1944 with Captain Albert H. Hass, Assistant Provost Marshal, investigating three other forged checks signed, in his opinion, by the same writer, although the makers thereof were all different, the accused, having been properly advised of his right to remain silent and that anything he might say might be used against him, admitted that he had written the check (Pros. Ex. 1) (R. 17). Captain Hass was also permitted to testify over objection that the three forged checks previously cashed had the same characteristics as the check (Pros. Ex. 1) that was presented by the accused to be cashed (R. 16-17).

Several specimens of the handwriting of the accused were obtained or were provided by the accused. In the opinion of two witnesses who testified as to their training and experience in examining specimens of handwriting, the check (Pros. Ex. 1) was written by the accused (R. 18, 22). The witnesses pointed out to the court the basis of their opinion in the similar characteristics of the compared writings (R. 19, 22).

4. The accused having been advised of his rights, elected to testify under oath (R. 23). He related that he was born 22 years ago in the United States but lived from 1928 to 1940 with his grandparents in Italy. He came back to this country in order to avoid being drafted into the Italian Army. He enlisted in the Air Corps of the United States Army thinking that to be the quickest way to get a commission (R. 23-24). He engaged in gambling at Boca Raton and 1cst. On 18 August 1944 he wrote out the check (Pros. Ex. 1),

using the fictitious name of Albert J. Klyapp, for the purpose of covering some losses in a gambling game (R. 26). He intended to cash the check when he presented it to Sergeant Kovacs in order to pay a hospital bill (R. 27).

5. The Specification of Charge I avers in substance that the accused forged the check appearing as Pros. Ex. 1. Forgery is defined in MCM (1928), par. 149j, page 175 as "the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice".

It was proved by the evidence for the prosecution and admitted by the accused in his voluntary statement and under oath in his testimony that he did, at the time and place specified, write the check in question in its entirety signing as the maker thereof a fictitious name, and that he did it with the intent of negotiating it and thereby to defraud. The fact that Albert J. Klyapp was a fictitious person is immaterial. The Manual for Courts-Martial, 1928, states: "Forgery may also be committed by signing a fictitious name" (MCM (1928) par. 149j, page 176). See also Wharton's Criminal Law, par. 867; 22 Am. Dec. 308.

Defense counsel objected to the admission in evidence of the accused's confession before proof of the corpus delicti. It is a general rule of law that the corpus delicti cannot be established by an unsupported confession. Without corroborating proof of the corpus delicti the confession of the accused is inadmissible in evidence (Wharton's Crim. Law, Vol. 1, par. 357). However, all that is required is some corroborating evidence.

"\* \* \* This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense".  
(MCM, 1928, par. 114, p. 115).

In the opinion of the Board of Review the prosecution did offer sufficient evidence to show the probable commission of the offense by (1) the check itself, (2) the discrepancy appearing on the face of the check concerning the irregular serial number of the maker indicating a forgery, and (3) the fact that no such person had an account with the bank upon which the check was drawn. In this manner the corpus delicti was sufficiently proved so as to make the confession, otherwise admissible, acceptable in evidence.

The forging of an instrument is punishable under the 93rd Article of War. Passing or uttering a forged instrument is not punishable under this Article but is punishable under the 96th Article of War (MCM, 1928, par. 149j, page 176). For that reason the accused is charged with the passing or

"uttering" of the forged check in Charge II and its Specification as a violation of Article of War 96.

Is the evidence of record legally sufficient to support the conviction of this charge and specification?

It was shown beyond any doubt and without contradiction that the accused attempted to cash the forged check at the time and place averred in the Specification of Charge II. He did so by handing it to the cashier of the Officers' Mess and asking him to cash it. The cashier refused to cash the check before it was endorsed by the accused, and, when the cashier discovered the peculiarities and discrepancies appearing on the face of the check, he did not cash it. Notwithstanding his inability to negotiate the check the accused may properly be found guilty of "uttering" it. The uttering of a forged instrument may consist of merely offering the instrument as genuine and it is immaterial that it is not accepted.

"Uttering has been held to be proved by \* \* \* leaving on a shop counter, when this has been preceded by the offer of the forged instrument in payment for goods, and the detection of its spuriousness by the shopkeeper", Wharton's Criminal Law, 12th Ed., par. 913.

It necessarily follows that the accused "uttered" the forged check when he handed it to the cashier and requested him to cash it. Accused knew at the time that the check was forged and of no value and the intent to defraud as averred in the specification may be implied from these circumstances, *idem* par. 910. The conviction of this Specification and Charge may therefore be legally sustained.

Over the objection of defense counsel one of the prosecution's witnesses was permitted to testify that there were three other checks which the Officers' Mess found to be worthless apparently written by the same person even though the signatures on each of the three were different, and that all of these checks had two distinctive characteristics: (1) The denominator of the fraction showing the cents consisted of three zeros, and (2) the "s" had a loop after it was closed (R. 15-16). The same witness pointed out the same characteristics in the check admitted by the accused to have been forged by him. The three checks alluded to were not in evidence before the court. The admissibility of such evidence is dubious and often depends upon the purpose of its introduction. As stated in Wharton's Criminal Evidence (11th Ed) Vol. 1, par. 349, page 513:

"In forgery cases, evidence of other forgeries is not admissible, and cannot be considered for the purpose of establishing the act of forging or uttering the instrument charged in the indictment, but, where the fact of the false making or uttering of a forged instrument has been shown, evidence of collateral forgeries or uttering of forged instruments

of like description is admissible as tending to show the intent with which the false making was done, or the guilty knowledge of the defendant in uttering the instrument named in the indictment".

It is not necessary, however, to determine the admissibility of this evidence for the reason that, even if erroneously admitted, it could not have injuriously affected the substantial rights of the accused. The remaining evidence, apart from that supplied by this witness, coupled with the accused's confession and his testimony clearly proves the commission of the offenses charged.

6. War Department records show the accused to be 22 years of age. Single. Educated and reared in Italy he returned to this country in 1940. He was graduated from Columbia University (Pre-Medical Course) in 1943, and speaks Italian and French. He entered the military service 27 March 1943, and was appointed Air Cadet 20 August 1943. Upon completion of training as a bombardier he was commissioned 2nd Lieutenant Air Corps, 30 March 1944.

7. The court was legally constituted and had jurisdiction over the accused and of 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 of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93 or Article of War 96.

Wm. C. Fox, Judge Advocate.

Charles Stephens, Judge Advocate.

William M. Magee, Judge Advocate.

(382)

1st Ind.

War Department, J.A.G.O.,

NOV 15 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 Virgil H. Vedda (O-717924), 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, that the forfeitures be remitted, that the sentence as thus modified be carried into execution and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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



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

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

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(Sentence confirmed but forfeitures remitted. G.C.M.O. 25, 10 Jan 1945)

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

(383)

SPJGQ  
CM 265038

25 NOV 1944

UNITED STATES )

XXIII CORPS

v. )

) Trial by G.C.M., convened  
) at Camp Hood, Texas, 15  
) September 1944. Dismissal,  
) total forfeitures, and con-  
) finement for one (1) year.

) Second Lieutenant AUBREY  
) L. WILLIAMS (O-1031040),  
) Cavalry. )

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OPINION of the BOARD OF REVIEW  
ANDREWS, FREDERICK and BIERER, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Aubrey L. Williams, 758th Light Tank Battalion, did, at or in the vicinity of Camp Hood, Texas, on or about 22 August 1944, feloniously buy and receive two automobile tubes, two automobile tires and two automobile wheels, value in excess of \$50.00, of the goods and chattels of Captain Donald L. Carman, 784th Tank Battalion, then lately before feloniously stolen, taken, and carried away; he the said Second Lieutenant Aubrey L. Williams, then well knowing the said goods and chattels to have been so feloniously stolen, taken and carried away.

He pleaded not guilty to and was found guilty of the Specification and the Charge. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed from (sic) the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for one (1) year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

(384)

3. The evidence for the prosecution, briefly summarized, is as follows:

On 22 August 1944 Captain Donald L. Carman, 784th Tank Battalion, stationed at Camp Hood, Texas, was the owner of a 1940 Plymouth Coupe (R. 6) which had been jacked up and was resting on supports which had been placed under each axle. The two wheels on the right side had been removed by the owner but the front and rear wheels on the left side were in place (R. 11, 12). Mounted upon each wheel was a tire and tube (R. 6). The wheels were green in color with yellow stripes and the one on the front had been balanced and had mounted upon the rim three balancing weights on the outside and four on the inside. The trade name and serial number appeared on each tire (R. 8, 9, 10).

Captain Carman had seen the car and wheels intact on 21 August 1944 but at 3:30 p.m. on 22 August he noticed that the two wheels had been removed from his car. He immediately reported the incident to the military police at Camp Hood and gave them the sizes, numbers and names of the tires (R. 7). Captain Carman had given no one any authority to remove the wheels (R. 11).

Meanwhile, James C. Prustt, a civilian residing in Killeen, Texas, while driving his car from Belton, Texas, discovered that it had a leaky radiator and he was obliged to stop at "the second bridge from Killeen, Texas" to get some water. When he had gone down the embankment into the culvert he noticed two automobile wheels with tires mounted thereon under the bridge (R. 12, 13). He thereupon took the wheels to his car and carried them to town where he turned them over to Chief of Police Fred Blair and Wilburn Douglas, Assistant Chief of Police (R. 14, 17, 18), telling them where he had found them (R. 15, 18, 19).

Assistant Chief Douglas and Officer Marshall Blair thereupon went to the culvert, taking the wheels with them, and replaced them where they had been found. After doing so they hid in the brush, waiting for whoever might come for the wheels (R. 19, 21, 51).

Some time between 9:15 and 9:30 o'clock p.m. a person, later discovered to be the accused, approached in a car from the direction of Killeen and driving as close as possible to the bridge after leaving the pavement, he parked the car, leaving the lights burning. He then went down the embankment and under the bridge where, after flashing a light, he picked up both wheels and started back toward the car. Just as he came from under the bridge, Assistant Chief Douglas halted him (R. 22-24). The officers then took possession of the tires and, returning to town, confined the accused to jail and reported the matter to the military police (R. 23).

Captain Gerald M. Bear, Assistant Provost Marshal, Camp Hood, Texas, received the report from the local police and went at once to the city jail (R. 26). There he examined the wheels and the tires checking the names and serial numbers with the information theretofore furnished to him by Captain Carman and found that they agreed (R. 27). He also had an interview with the accused who, after proper warning as to his rights, made a statement which was reduced to writing in the accused's identical language and after he had read it the accused signed it (R. 29; Government Exhibit C).

The pertinent part of the statement is as follows:

"22 Aug 44, at approximately 0930, my car, 1940 Ford sedan, Illinois License - 1944 - #1386030, Camp Hood Sticker, O-1810, was parked in the parking lot across from the 758th Tank Battalion Officer's barracks. I was out by the car looking at my tires and a Private from one of the Tank Battalions came up and asked me if I was having tire trouble. I told him I was not having tire trouble, but was having inner-tube trouble. He said, 'Lieutenant, I think I can get you two inner-tubes,' and said, 'It will cost you \$5.00.' I asked him where he got them and he replied, 'Well, you want the tubes, don't you, Sir?' He also stated that he could get rid of them easily enough if I didn't want them. I told him I would like to have them, and gave him \$5.00 in cash. He then told me that I could pick them up on the road from Killeen, Texas, to Belton, Texas, on Highway #190, underneath the second culvert east of Killeen. I do not know this soldier, nor know his name. He was about 6 feet tall, black hair, brown eyes, dark complexion, and weighed about 170 pounds. He wore a Tank patch, but I don't know whether the soldier was from the 758th Tank Battalion or not. I believe I would recognize him if I saw him again. He left me then after I asked him if he was sure that he wasn't kidding me. At approximately 2045, 22 Aug 44, I left the colored Officer's Club at 172nd and Brigade Avenue, Camp Hood, Texas, and drove directly to Killeen, Texas. I drove through Killeen, and went directly to the second culvert east of Killeen, and parked my car on the right side of the road. The soldier in Camp Hood had told me that the inner-tubes were hidden right under the right side of the culvert. I got out of my car and went under the culvert for the purpose of getting the two inner-tubes. I shined my flashlight under the culvert and found two tires (casings) and two inner-tubes, mounted on two wheels. The wheels were green with a light yellow or white stripe around the outside. I later examined the tires in the City Hall, Killeen, Texas, and found the following markings on them, 'Wards Riverside, 3207 V 335,' and 'Firestone, 600 x 16 - BB 291209.' I picked up the two wheels and tires and was dragging them out from underneath the culvert. As soon as I picked them up I was challenged by an officer of the Killeen Police Department

whom I later learned to be Mr. Wilburn Douglas, Assistant Chief of Police. There was another officer with him, Mr. Marshall Blair, and they had me pick the wheels up and bring them up to their Police car. I put them in the Police car and they brought me to the City Jail, Killeen, Texas. I was confined in jail and they notified the Military Police, Camp Hood, Texas."

The two wheels with mounted and inflated casings on each were admitted in evidence after they had been identified by the owner, Captain Carman (R. 9, 10), Mr. Pruett, (R. 15), Assistant Chief Douglas (R. 20, 21) and Captain Bear (R. 26, 27) (R. 10, 56, 57). It was conceded by the defense that each of the casings contained an inflated tube (R. 23) and it was stipulated and agreed that the two wheels, two tires and two tubes are of the value of over fifty dollars (R. 30).

4. The accused, having been informed of his rights, elected to be sworn as a witness.

He stated that he had been in the military service for four years, 2½ years of which were served as an enlisted man. He was commissioned on 12 November 1942 and then served in the 92nd Reconnaissance Troop at Fort Huachuca, Arizona, and the Flying School at Tuskegee, Alabama. Because of difficulty in depth perception he was returned to the Ground Forces and had been stationed with the 758th Tank Battalion since 25 July 1944 (R. 32).

He reiterated much of what he had said in his extra-judicial statement but elaborated somewhat upon his conversation with the soldier from whom he claimed to have bought the tubes, thus:

"A soldier came up, wearing a Tank Patch, but I could not say whether he was from the 758th Battalion or the 784th; but he said, 'Lieutenant, sir, are you having tire trouble' and I said, 'No, but I am having tube trouble; I purchased some synthetic tubes'; he said, 'Lieutenant, I tell you what, I can tell you where you can get two good tubes and I can sell them to you for five dollars'; I said, 'Where did you get them' and he said, 'If you don't want the tubes, I can sell them to someone else'; and I gave him five dollars and he told me I could find them under the second culvert out of Killeen."

When asked whether it did not "strike him as foolish to pay five dollars on that information" he replied:

"Well, I had been having plenty of trouble with

my tubes before, and I didn't particularly think about it; I just thought it was a chance to get some good tubes." (R. 34).

Later he testified, however, that "I knew if I was buying synthetic tubes for five dollars, I would be saving money, as two synthetic tubes, good ones, would cost nine or ten dollars for a pair" (R. 44, 45). When asked "How did it strike you when he told you that you would find them under a culvert", he answered:

"Well, I knew the five dollars was a chance to get some tubes, and I didn't think about it until that evening when I stopped to get them" (R. 34).

He claimed to have been surprised when he found two tires and wheels for he had bargained for only two tubes and in the bargaining no mention had been made of wheels and casings (R. 34, 35). He admitted that he had taken them out from under the culvert and had one wheel in each hand "ready to roll them out" when he was apprehended (R. 36).

He made personal investigation two days later to try to find the soldier who had sold him the tubes but he checked the whole 758th Battalion in vain. He also made a less thorough check of the 784th Battalion without success (R. 37).

On cross examination the accused admitted that he was not in the habit of buying merchandise without looking at it nor paying for it before receipt and that his action in this matter was an unusual thing for him to do (R. 39).

Although he was through with his work by 7:15 p.m. on the evening of 22 August 1944 he went to the officers' club and stayed there about an hour before starting toward the culvert which had been described to him (R. 41).

He stated that he had the wheels "on each side of (his) body, as though in a rolling position" but denied he had "raised them up" specifically stating "I did not pick them up" (R. 43). He did not think he was buying stolen property when he bought the tubes from the enlisted man but it "struck (his) mind" that they were stolen when he found the wheels (R. 44).

Assistant Chief Douglas, called by the defense, testified that as they were riding back to town the accused when asked ". . . couldn't you get tires without getting them this way", replied "Well, I didn't need them, I just bought them from a fellow at a saving."

On cross-examination he stated that the accused "got hold of the casings and pulled them out and then he picked them up and naturally he had to take a few steps to get out and then he was standing straight up and carrying them, one with each hand" (R. 46, 47).

Captain Frederick Coleman, Company "C", 758th Light Tank Battalion, the accused's Commanding Officer testified that the accused had come to the battalion on about 27 July 1944. His reputation is "good or excellent"; he would give him a rating of "excellent"; and he would very much like to have the accused go overseas with him (R. 47, 48).

Captain Henry T. Morenz, Commanding Officer of Company A, 758th Light Tank Battalion, had known the accused for two months. He testified that his reputation was "very good".

Major Lowery F. Bicknell, Commanding Officer, 758th Light Tank Battalion, who had known the accused since 27 July 1944, stated that his reputation was "very good" and that his efficiency was "excellent". He was the kind of an officer the witness would like to take into combat (R. 50).

5. The accused stands charged with buying and receiving stolen goods knowing that they were stolen, and the offense is alleged to have been committed at or near Camp Hood, Texas. The proof shows that while the buying took place within the Camp reservation the goods were actually received later on a public highway between the towns of Killeen and Belton, Texas.

It is evident from the Specification that the accused is charged under Article of War 96 with having committed an offense not capital which is not made punishable by any other Article of War and if the offense is such that its commission was a violation of public law as enforced by the civil power was properly laid thereunder (par. 152 (c), M.C.M., 1928).

Since the receiving and not the buying is the gist of the offense the acts complained of were not a violation of the provisions of the Federal statute making such conduct criminal (18 U.S.C. 467) because the property was not received within the military reservation. But, as will be seen, they did constitute a violation of the law of the State of Texas.

Article 1430, Penal Code of Texas (Revision of 1925) provides: "Whoever shall receive or conceal property which has been acquired by another in such a manner that the acquisition comes within the meaning of the term theft, knowing the same to have been so acquired, shall be punished in the same manner as though he had stolen the property" and this describes and fixes the punishment for the offense of receiving stolen property.

To constitute the offense it is essential (1) that the goods should have been stolen by some other person than the accused; (2) that the accused should have received the goods; (3) that, at the time of so doing, he knew that they had been stolen and (4) that in so doing he acted with criminal intent (53 C.J. 503).

There is nothing in the evidence from which the court could have reasonably inferred that the accused was the person who stole the automobile wheels and, under the facts, no attempt was made to charge him with larceny. Having been found in possession of recently stolen property it could have been inferred that the accused was the thief if he had not given an explanation which reasonably absolved him of the original taking. While the explanation of the possession was unusual it was no more incredible than to believe that, if he was the thief, the accused would have carried the goods such a distance and concealed them in such an artless manner and in such a peculiar place. That the wheels were stolen at the time alleged is clearly shown. Who stole them is of no consequence in the determination of the guilt of the accused so long as he was not shown to be the thief.

The goods, however, must when received, have been in the possession of another person than the owner. But, to constitute the offense, it is not necessary that they be received from the thief or from any particular person, it being immaterial from whom they were received (Anderson v. State, 20 S. (Fla.) 765; State v. Minnick, 214 P. (Kan.) 111). If all other elements are present the offense is established if it be shown that the property was received from anyone (Wertheimer v. State, 169 N.E. (2nd) 40).

That the stolen property was in the constructive possession of the vendor who sold the "tubes" to the accused is evident from the instructions and the precise description given by him to the accused at the time of the sale whereby the accused was enabled to find the goods later although they were concealed.

It was the apparent contention of the accused that he did not have possession of the stolen property long enough to permit him to determine the situation which confronted him when he discovered wheels and casings at a place where he expected to find only tubes, and he insisted that he had not taken the wheels into his possession. The evidence is clear, however, that he did go to the secretive spot where the wheels were hidden, intending to find the tubes he had purchased, and that he did take both wheels into his manual possession and was apprehended as he was about to carry them up the embankment to his car.

To constitute receiving, possession for a brief period only is sufficient, the duration of the possession being immaterial. Thus, mere possession of stolen goods, knowing them to have been stolen,

even if only for carting or storage temporarily or to hide or to assist thieves in disposing of them is receiving (State v. Krupin, 125 A. (N.J.) 97); and where one who, knowing, or having good reason to believe, that goods are stolen, receives them for a single moment, or permits their concealment in his house, either for the purpose of appropriating them to his own use or for the purpose of appropriating them to his own use or for the purpose of obtaining a reward, it was held to be a receiving of stolen goods (Leonardo v. Terr 1 N.W. 291).

As above stated, the gist or gravamen of the offense is the guilty knowledge that the goods were stolen and this must have existed at the time the goods were received.

This guilty knowledge, however, need not be actual or direct, and constructive knowledge through notice of facts and circumstances from which guilty knowledge may be inferred satisfies the requirements (Jordan v. State, 87 S. (Ala.) 434; People v. Tantenella, 180 N.W. (Mich.) 474). If the goods have actually been stolen, a belief on the part of the accused, induced by facts and circumstances accompanying the transaction sufficient to cause this belief, is the equivalent of actual knowledge and sufficient to sustain the conviction if all other elements of the offense have been shown (53 C.J. 510). So, actual knowledge of the theft of the property is not always essential to constitute the offense of receiving stolen property but circumstances surrounding the transaction may sufficiently impute knowledge to the buyer or put him on sufficient notice to require him to investigate the title which the party offering goods for sale may have in the goods he offers for sale (Arnivan v. State, 175 S.W. 2d., (Tex.) 598).

It is the determination of this guilty knowledge which presents conflicting hypotheses of such character and significance that the case may be said to turn upon one factor alone. When the accused, who had bought and expected to find only two tubes at the culvert, found two wheels equipped with tires and tubes, what was his reaction and what did he intend to do? Whatever may have been his intent at the time of purchase, the offense could not be complete until the taking, and the intent at the time of the taking is the essential element which must be established. He could not be convicted of receiving the tubes knowing them to have been stolen, even though he had intended to receive them at the time he bought them and believed them to have been stolen, if, in fact, he had changed his mind when he found the tubes at the culvert and before taking them into his possession. The principle applies equally to any change of mind which may have taken place, if, after turning the flashlight on what he thought would be tubes and found to be wheels, tires and tubes, the accused had a change of heart and mind, and thereafter and before taking the wheels into his possession no longer intended to appropriate to his own use any part of the property. Under the circumstances, it is quite possible that the accused, when confronted by unmistakable



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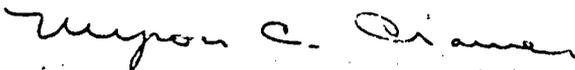
1st Ind  
NOV 27 1944

War Department, J.A.G.O., To the Commanding General,  
XXIII Corps, APO 103, Fort McPherson, Georgia.

1. In the case of Second Lieutenant Aubrey L. Williams (O-1031040), Cavalry, I concur in the foregoing opinion of the Board of Review holding the record of trial legally insufficient to support the finding of guilty and the sentence, and for the reasons stated I recommend that the finding 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 50 $\frac{1}{2}$ , and that under the further provisions of that Article and in accordance with the fourth note following the Article (MCM 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 orders 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 265038).



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.

SPJGH  
CM 265047

15 NOV 1944

UNITED STATES )

THIRD AIR FORCE

v. )

Trial by G.C.M., convened at  
Barksdale Field, Louisiana,  
18 September 1944. Dismissal.

Second Lieutenant GILBERT  
R. H. BROWNING (O-821450),  
Air Corps. )

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OPINION of the BOARD OF REVIEW  
TAPPY, MELNIKER and GAMBRELL, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Gilbert R. H. Browning, attached to Training Squadron "O", Key Field Replacement Training Unit (TR), Air Corps Unassigned, did, on or about 16 August 1944, at or near Northwood Country Club, Meridian, Mississippi, wrongfully and knowingly violate Section II, paragraph 16 a (1) (d), Army Air Forces Regulation 60-16, dated 6 March 1944, by flying a military airplane at an altitude of less than five hundred feet (500) above the ground.

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

3. On 16 August 1944, accused, a rated pilot, United States Army Air Forces, stationed at Key Field, Meridian, Mississippi, was ordered to fly a "local" mission in a P-40 Government airplane No. 6066. He was scheduled to take off at about 1300 hours and to return to the field within an hour (R. 4; Ex. C). He flew the "local" mission in a P-40 Government airplane as scheduled and returned to the field within the time prescribed in the order (R. 4; Ex. B). An extract copy of Army Air Forces Regulation No. 60-16, paragraph 16a (1) (d), which prohibits the operation of Army aircraft below the altitude of 500 feet above the ground except under certain specified conditions not present here, was admitted in evidence (R. 4) as Prosecution's Exhibit A.

Mrs. Josephine Edith Whitwell testified by deposition that she was at the swimming pool of the Northwood Country Club, Meridian, Mississippi, Sunday afternoon, 16 August 1944, and that between 1:30 and 2 o'clock that afternoon she observed an airplane flying low over the swimming pool. It appeared to be a single engine plane of medium size and flew at treetop level over the pool (Ex. D). Mrs. Myrtle B. Beattie testified by deposition that she was also at the Northwood Country Club, on the afternoon of 16 August 1944, and at about 1:30 that afternoon she saw an airplane approach at a low level and fly directly over the swimming pool of the club. There were some tall trees by the parking space near the pro shop, and the plane appeared to be just barely above these treetops. She did not observe any number on the plane and was unable to identify different types of airplanes (Ex. E).

Accused's commanding officer, Major Edwin P. Gardener, testified by deposition that accused and all other students assigned to his squadron for training were required to read the safety file, which included excerpts from AAF Regulation 60-16 and local flying regulations. In addition this witness had given lectures which accused had attended, confirming the policies on flying safety and appropriate punishments for violation of flying regulations. He rated accused's character and performance of duty as excellent, but thought he was not quite mature enough to realize fully the serious consequences of committing an act of low flying (Ex. F).

Major Wayne L. Fulton testified by deposition that he interviewed accused on 16 August 1944, following receipt of information that a plane had flown low over the Northwood Country Club, Meridian, Mississippi. After warning accused of his rights accused told Major Fulton that he was returning to Key Field from a puff target adjustment mission and that in passing over Northwood Country Club he decided to go down and have a look at it, which he did. He made one pass over the golf course, but did not believe he was lower than 250 feet from the ground at any time. He admitted to Major Fulton that he was familiar with the regulations prohibiting low

flying (Ex. G). Accused also made a statement to Major Andrew T. McMillin, the investigating officer, that prior to taking off at 1300 on 16 August 1944, he set the altimeter of his plane to read 300 feet, cleared the field and proceeded to perform his assigned mission of puff target adjustment. He completed the mission and was returning to the field at an altitude of 1500 feet when he observed the Northwood Country Club. Turning west he entered a shallow dive, passing over the club swimming pool at an altitude of approximately 250 feet above the ground (R. 5).

4. After having his rights explained, accused elected to make a sworn statement, which in substance was, that on 16 August 1944, he made an authorized flight from Key Field, Meridian, Mississippi, in the performance of a puff target adjustment mission. Upon completion of this mission and en route back to the field he flew low over the Northwood Country Club. He did not intend to violate AAF Regulation 60-16, but was prompted to fly low because he got an exalted feeling from it. Prior to this incident he had always observed flying regulations. As soon as he landed the plane he reported to Major Gardener, his commanding officer, and told him what he had done. Among other things accused stated, "I didn't want to hide anything for the truth is always better than a lie. \* \* \* Up until the time of this incident I had worked hard and had no black marked marks against my record. I realize that I jeopardized my whole flying career in that one brief moment and I am sorry. I assure you that it wouldn't happen again, if I could be given one more chance" (R. 7).

5. The evidence is clear and uncontradicted that accused on 16 August 1944, piloted a U. S. Army airplane over the swimming pool of the Northwood Country Club, Meridian, Mississippi, without authority and at an altitude of less than 500 feet above the ground in violation of paragraph 16a (1) (d), AAF Regulation No. 60-16, dated 6 March 1944, which prohibits the operation of military aircraft below an altitude of 500 feet above the ground, except under certain specified conditions not present in this case. Two eye witnesses, Mrs. Josephine Edith Whitwell and Mrs. Myrtle B. Beattie, were sitting near the swimming pool of the club at the time of the incident and observed an airplane flying low over the pool at treetop level. Accused was familiar with AAF Regulations prohibiting low flying, and freely admitted that he violated its provisions, at the time and place and in the manner alleged. The court's findings of guilty are fully sustained by the evidence.

6. All members of the court, the trial judge advocate and defense counsel joined in a request for clemency, which is attached to the record of trial. The clemency request is predicated upon the representations that accused has potential value to the military service, that his previous military service and character have been excellent and because of his youth. The specific clemency recommended is that the sentence of dismissal be suspended during accused's good behavior.

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7. Accused is single and about 19 years and six months of age. He is a high school graduate and was attending Purdue University at the time of his enlistment in the Air Corps as a flying cadet 13 April 1943. He was commissioned a second lieutenant, Army of the United States, and assigned to duty with the Air Corps, following his completion of the prescribed Flying Training Course, Craig Field, Selma, Alabama, 7 January 1944.

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

James W. Kelly, Judge Advocate.

Admiral, Judge Advocate.

William H. Hambrick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., **NOV 29 1944** - To the Secretary of War.

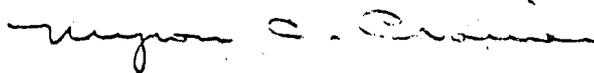
1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Gilbert R. H. Browning (O-821450), Air Corps.

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.

3. The accused on 16 August 1944 intentionally flew an Army airplane over the swimming pool of Northwood Country Club, Meridian, Mississippi, at an altitude of approximately 250 feet above the ground, contrary to Army Air Forces Regulations requiring such flight to be at an altitude of not less than 500 feet. He was sentenced to dismissal. There is attached to the record a Memorandum for The Judge Advocate General dated 16 October 1944, from Lieutenant General Barney M. Giles, Deputy Commander, Army Air Forces, in which General Giles recommends that the sentence be commuted to a forfeiture of accused's pay in the amount of \$60 per month for six months. I concur in the recommendation of General Giles and recommend that the sentence be confirmed but commuted to a forfeiture of pay in the amount of \$60 per month for six months.

4. Consideration has been given to requests for clemency contained in letters from the accused; Henry F. Schricker, Governor of Indiana; Senator Samuel D. Jackson and Captain Eugene G. Carrington, AAFPDC Port Liaison Officer, Fort Sam Houston, Texas.

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



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

8 Incls.

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|---|--|
| Incl 1 - Record of trial.               |  |
| Incl 2 - Memo fr Gen Giles 16 Oct 44.   | Incl 6 - Ltr fr Capt Carrington<br>20 Sept 44. |
| Incl 3 - Ltr fr accused.                |  |
| Incl 4 - Ltr fr Gov Schricker 7 Oct 44. | Incl 7 - Dft ltr for sig S/W.                  |
| Incl 5 - Ltr fr Sen Jackson 11 Oct 44.  | Incl 8 - Form of action.                       |

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(Sentence confirmed but commuted to forfeiture of \$60 per month for six months. G.C.M.O. 2, 5 Jan 1945)



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

(399)

SPJGK  
CM 265339

17 NOV 1944

UNITED STATES )

HEADQUARTERS I TROOP CARRIER COMMAND

v. )

Trial by G.C.M., convened at  
George Field, Lawrenceville,  
Illinois, 16 and 22 September  
1944. Dismissal and confine-  
ment for one (1) year.

Second Lieutenant JOHN B.  
MANNING (O-667738), Air  
Corps. )

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OPINION of the BOARD OF REVIEW  
LYON, HEPBURN and MOYSE, Judge Advocates.  
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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that Second Lieutenant John B. Manning, Section A, 805th Army Air Forces Base Unit, did, without proper leave, absent himself from his organization while en route from Grenada Army Air Field, Grenada, Mississippi, to Alliance Army Air Field, Alliance, Nebraska, from about 17 May 1944 to about 20 June 1944.

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

Specification 1: In that Second Lieutenant John B. Manning, \* \* \*, did, at Kansas City, Missouri, on or about the 15th day of June, 1944, with intent to defraud, wrongfully and unlawfully make and utter to Palace Clothing Co., a certain check in words and figures as follows, to wit:

Kansas City, June 15, 1944.    N-P  
Grenada Bank, Grenada, Miss.    18-1

PAY TO Palace Clothing Co. or order    \$19.24  
Nineteen and 24/100                    DOLLARS

805th Base Unit                            O-667738  
Army Air Base  
Alliance, Nebr. (Signed)    JOHN B. MANNING  
2nd Lt. A.C.

and by means thereof did fraudulently obtain from Palace Clothing Co., merchandise and U. S. currency of the value of \$19.24, the said Second Lieutenant John B. Manning then well knowing that he did not have and not intending that he should have, sufficient funds in the Grenada Bank, Grenada, Mississippi, for the payment of the said check.

Specification 2: Identical in form and substance as Specification 1 except that the amount is \$25.00 and the date of the offense and the check is June 14, 1944.

He pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specifications. He was found guilty of all Charges and Specifications. Evidence was introduced of one previous conviction by general court-martial on 10 December 1943 of a violation of the 96th Article of War for issuing "bad checks" for which the sentence, as approved, provided that he be reduced in rank to the foot of the officers of his grade and "remain there for a period of six months". In the instant case he was sentenced to be dismissed the service 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 showed that during the time the offenses were alleged to have been committed the accused was in the military service of the United States as a second lieutenant, a member of Section "A", 805th Army Air Forces Base Unit, Alliance, Nebraska, on detached service at Grenada, Mississippi (R. 7). On or about 2 May 1944 accused was relieved from detached service and ordered to return to his organization and, at his request, was granted seven days delay en route in addition to the three days travel time between stations (Pros. Exs. A, B and C). He "signed out" of Grenada, Mississippi, on 5 May 1944 (R. 8,9; Ex. D). He was entered on the morning report of his organization as "AWOL 5-19-44" (Pros. Ex. A). On 20 June 1944 he was apprehended in Kansas City, Missouri, and on 23 June 1944 he was returned to his base (R. 9; Pros. Ex. E).

By stipulation it was shown that if Mr. George Eddy, an employee of the Palace Clothing Company, 12th and Grand Avenue, Kansas City, Missouri, were present as a witness he would testify that on 14 June 1944 accused purchased from him certain merchandise at that establishment and in payment therefor and for cash turned over to accused, issued and delivered his check for \$25 drawn on The Grenada Bank, Grenada, Mississippi. On 15 June 1944 the accused made other purchases through Mr. Eddy, and in exchange therefor, wrote, signed, and delivered his check on the same bank for \$19.24. The difference between the sales price of purchase and the amount of the check was given to the accused in cash (Pros. Ex. G). It was further stipulated that if Mr. Aaron W. Hansen, Auditor of the Palace Clothing Company, were present he would testify that both checks were presented for payment to the drawee bank and were returned marked "not paid". The two checks, offered in

evidence in connection with the stipulation, bear the notation "account closed" (R. 10,11; Pros. Exs. F and G).

It was stipulated that if the vice-president of the Grenada Bank were called as a witness he would testify that the checks described above were presented to his bank for payment in due course in June 1944, and that payment was refused because the accused's account had been closed 27 May 1944 (R. 12-13). By stipulation a copy of the accused's account with that bank from 4 March 1944 to 27 May 1944 was admitted in evidence (R. 12,13; Pros. Ex. I). The account shows only two deposits made during that time, one of \$150 on 1 April, and the other of \$110 on 3 May. The accused's balance immediately prior to this last deposit was \$.83. The resulting balance of \$110.83 was reduced from time to time so that on 27 May 1944 there were no funds left in the account (Pros. Ex. I).

It was shown by stipulation that if Lieutenant J. C. McCormick, Assistant Provost Marshal, Kansas City, Missouri, were present in court he would testify that the accused was apprehended on 20 June 1944 in Kansas City, Missouri, at which time the accused stated that he was en route from Grenada Army Air Field to Alliance Air Base. An examination of his travel orders indicated that accused had been en route since 5 May 1944. Thereupon accused stated that he had become discouraged over some personal matters and had decided to "let his hair down and have a good time". Accused also stated to Lieutenant McCormick that he had issued worthless checks to different places of business in Kansas City in the total amount of \$235. At the same time he stated that he wanted to make the checks good. In furtherance of this desire on 21 June 1944 accused procured \$500 from his family and visited each place where he had given his bad checks and repaid them in full. The two checks made the basis of Charge II were not on the list of checks supplied by the accused to Lieutenant McCormick (R. 12).

On 4 September 1944 the accused, after being duly warned of his rights, voluntarily signed a written statement which was identified and received in evidence without objection. In this statement accused admitted that he was absent without leave from about 17 May until 20 June 1944, and that the two checks described in Specifications 1 and 2 of Charge II were his. He also stated that upon receipt of his back pay 3 September 1944 he immediately wired the Palace Clothing Company the full amount of the checks and received a receipt therefor (R. 14, Pros. Ex. J).

4. The accused having been advised concerning his rights to testify, to remain silent, or to submit an unsworn statement, elected to testify (R. 14). He stated that he was in the military service and that in compliance with orders he left Grenada, Mississippi, on 6 May 1944 en route to Alliance Army Air Field, Alliance, Nebraska. He went to his home in Texas for a week, then to Del Rio, Texas, then to Little Rock, Arkansas, and then to Kansas City, stopping at these named places (R. 15,16). Accused

stated that he asked for and received a delay of 7 days en route (R. 20). Assuming that he had 3 days of travel time between stations he stated that he should have arrived at his station about 20 May 1944. However, he did not arrive at his station until 24 June 1944, after having been apprehended by the Military Police in Kansas City, Missouri, 20 June 1944 (R. 20,21). He never closed his account with the Grenada Bank and the last deposit he made in that bank was \$110 on 2 May 1944. The copy of his account (Pros. Ex. I) supplied by the bank is correct (R. 23). He admitted that he wrote the two checks (Pros. Exs. F and G). At the time he did not have his check book and kept no record of his balance (R. 16-17). He also admitted that he paid off worthless checks totaling \$225 or \$230 that he had issued in Kansas City with \$300 he had obtained from home when he was apprehended in Kansas City. He would have paid these two checks if he had known of them at that time (R. 18). Later, on 15 July 1944, he redeemed nine more of his checks that had been returned. He did this when he was assured that he would not be "charged" with them. Again the two checks involved in the trial were not included (R. 18,19). When he received his pay on 3 September 1944, the first that he had received since 1 May 1944, he immediately redeemed the two checks (R. 19).

On cross-examination accused admitted that when he issued the two checks described in the specifications of Charge II he knew there was no balance to his credit in the bank and he made no deposits thereafter to provide for the checks (R. 23). In addition to drawing upon all of the funds in his account with the Grenada bank after his last deposit of \$110 on 2 May 1944, he issued checks during May and June 1944 totaling approximately \$425 (R. 25-26). This amount did not include the two checks given to the Palace Clothing Company. All checks have since been redeemed (R. 27). He admitted he had no authority to remain away from his organization from 17 May until 20 June 1944 (R. 28).

The accused stated that he was 21 years of age, married, the father of one child, and that his wife is an expectant mother at present (R. 30-31). He enlisted in the service 26 January 1942 and was accepted as an aviation cadet. He was commissioned second lieutenant 13 December 1942. He spent six months at a gunnery school, two months at a "B-26" school and from August 1943 until May 1944 he was stationed at Grenada (R. 31). While he was absent without leave he was drinking but was not drunk (R. 32). He claimed that he did not intend to defraud anyone of any money at any time (R. 33).

5. The evidence for the prosecution, the testimony of the accused, and his plea of guilty establish beyond any doubt that the accused without proper leave absented himself from his organization while en route from Grenada, Mississippi, to Alliance, Nebraska, from about 17 May 1944 to about 20 June 1944 as averred in the Specification of Charge I. The evidence so clearly supports the findings of guilty of this Charge and its Specification that no further comment or discussion is deemed necessary.

With reference to Charge II and its Specifications it was proved beyond all doubt and admitted by the accused that on the dates and at the place averred in the specifications he gave his two checks in exchange for cash and merchandise drawn on a bank in which he knew he did not have sufficient funds for their payment. He was forced to admit that, having issued checks totaling \$425 over and above his already exhausted deposit of \$110, there was no possibility of the bank paying the two checks that he gave to Palace Clothing Company that were the basis of this Charge. The only issue involved therefore is whether the accused made and issued the checks, which proved to be worthless, with intent to defraud and did thereby fraudulently obtain cash and merchandise in exchange for them. The fact that two and one-half months later accused redeemed the two checks is a circumstance for the consideration of the court upon the question of intent at the time the checks were issued, but restitution does not of itself absolve accused of responsibility. When consideration is given to all the evidence in the case (the most of which is undisputed) the depleted condition of accused's bank account at the time the two checks were negotiated, and the great number of other worthless checks issued by accused at about the same time, it is clear that the court was fully warranted in finding that the checks described in Specifications 1 and 2 of Charge II were made and uttered by accused with intent to defraud as alleged. Such an offense when committed by an officer constitutes a violation of Article of War 95 (CM 202601, 6 B.R. 171; CM 224286, 14 B.R. 97).

6. War Department records show the accused to be 22 years of age and married. His education consisted of seven years grammar school and two years of high school. Previous to entering the service he was employed as an architectural draftsman for about one and one-half years. He enlisted as an aviation cadet on 15 March 1942 and after completing his training as such was commissioned a second lieutenant, Air Corps, 13 December 1942. On 29 November 1943 he was convicted by a general court-martial of issuing with intent to defraud five checks drawn on a bank in which he had insufficient funds to make payment in violation of the 96th Article of War. As approved by the reviewing authority, the sentence for this offense provided that he be reduced in rank to the foot of the officers of his grade and "remain there for a period of six months".

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

Lucas E. Green , Judge Advocate.  
Earle H. Stetson , Judge Advocate.  
Thomas M. Mays , Judge Advocate.

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War Department, J.A.G.O.,

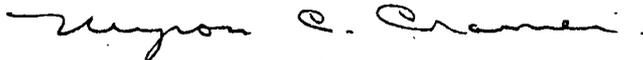
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- To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant John B. Manning (O-667738), 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. War Department records show that the accused is 21 years and 11 months of age. He is married and has one child and according to his testimony his wife was expecting another child in October of this year. I recommend that the sentence be confirmed and carried into execution and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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



Myron C. Cramer,  
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.

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(Sentence confirmed. G.C.M.O. 29, 13 Jan 1945)



