OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 43

1944

R
16
B63
v.43

Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume XLIII

including

CM 265399 to CM 267440

(1944)

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

Office of The Judge Advocate General

Washington : 1945

02578

CONTENTS OF VOLUME XLIII

CM No.	Accused	Date	Page
265399	McGary, Smith	24 Nov 1944	1
265441	York	17 Nov 1944	19
265445	Alexander	10 Nov 1944	31
265447	Hodge	21 Oct 1944	41
265459	Edmondson	1 Nov 1944	49
265538	Pamplin	25 Oct 1944	63
265676	Wolf, Zimmerman, Simpson	10 Nov 1944	67
265694	Welborn	24 Nov 1944	79
265695	Corey	8 Nov 1944	85
265699	Ferry	3 Nov 1944	91
265840	Brown	20 Oct 1944	97
265843	Davis	7 Dec 1944	101
265906	Hemingway	26 Oct 1944	111
265931	Sasser	9 Nov 1944	115
265939	Takahashi, Shimizu, B., Shimizu, M., Sakata, Matsuoka, Hiroo, Yagi, Yamashita, Ikata, Hasegawa, Kurahara	5 Dec 1944	121
265957	McNutt	20 Nov 1944	127
266137	Miller	26 Oct 1944	135
266154	Dearmin	25 Nov 1944	139
266173	Britton	8 Dec 1944	149
266201	Abrahamson	28 Nov 1944	161
266205	Rieder	26 Oct 1944	171
266206	Heselwood	14 Dec 1944	177
266219	Mills	4 Nov 1944	183
266244	Wassner	26 Dec 1944	189
266247	Cromwell	23 Nov 1944	203
266248	Hancock	14 Nov 1944	211
266302	Brown	2 Nov 1944	221
266441	Migan	1 Nov 1944	231
266442	Gilson	16 Nov 1944	235
266473	Sanson	25 Oct 1944	241
266484	Jones	25 Oct 1944	247
266515	Forpe	21 Nov 1944	251

CM No.	Accused	Date	Page
266642	Carey	8 Nov 1944	261
266655	Brown	27 Oct 1944	265
266660	Miguel	13 Nov 1944	269
266722	Benton	4 Nov 1944	277
266723	Jones	9 Nov 1944	283
266724	McDonald	9 Nov 1944	291
266734	Murphy, Wedge	14 Nov 1944	301
266820	Nestor	30 Nov 1944	305
266918	Freeman	3 Nov 1944	317
266930	Rankin	2 Nov 1944	323
267032	Edwards	11 Dec 1944	333
267160	Collier	14 Dec 1944	341
267246	Collender	1 Dec 1944	351
267247	Bewley	6 Dec 1944	359
267311	Driscoll	8 Nov 1944	365
267337	Harbison	13 Nov 1944	373
267342	Rose	15 Dec 1944	377
267382	Terry, Beal, Coleman	22 Dec 1944	381
267440	Sams	24 Nov 1944	393

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

SPJGQ
CM 265399

24 NOV 1944

UNITED STATES v. Private LEROY MCGARY (36989925) and Private William Smith, Jr., (42087326), both of 98th Battalion, 20th Group, 3860th Unit, Army Service Forces Training Center, Camp Claiborne, Louisiana.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Claiborne, Louisiana, 16 September 1944. As to McGary: Death by hanging. As to Smith: Acquittal.

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

1. The record of trial in the case of the soldier, Private Leroy McGary, 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, Private Leroy McGary, was tried upon the following Charges and Specifications:

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

Specification 1: In that Private Leroy McGary, Company E, 98th Battalion, 20th Group, 3860th Unit, Army Service Forces Training Center, Camp Claiborne, Louisiana, did, at Camp Claiborne, Louisiana, on or about 17 August 1944, voluntarily join in a mutiny which had been begun in Camp Claiborne, Louisiana, against the lawful military authority of Captain James R. Harper Jr., his superior officer, and did, with intent to override for the time being, in concert with sundry other members of said camp, refuse to disperse.

Specification 2: In that Private Leroy McGary, Company E, 98th Battalion, 20th Group, 3860th Unit, Army Service Forces Training Center, Camp Claiborne, Louisiana, did, at Camp Claiborne, Louisiana, on or about 17 August 1944, voluntarily join in a mutiny which had been begun in Camp Claiborne, Louisiana, against the lawful military authority of First Lieutenant Roland D. Campbell and Second Lieutenant Myron B. Godlware, his superior officers, and did, with intent to override for the time being, in concert with sundry other members of said camp, refuse to disperse.

CHARGE II: Violation of the 89th Article of War.

Specification: In that Private Leroy McGary, Company E, 98th Battalion, 20th Group, 3860th Unit, Army Service Forces Training Center, Camp Claiborne, Louisiana, and more than two other persons whose names are unknown, being in camp at Camp Claiborne, Louisiana, did, at Camp Claiborne, Louisiana, on or about 17 August 1944, commit a riot in that they, together with certain other persons to the number of about twenty, whose names are unknown, unlawfully and riotously and in a violent and tumultuous manner, assemble to disturb the peace of Camp Claiborne, Louisiana, and having so assembled, did, unlawfully and riotously assault Captain James R. Harper Jr. by pointing a bayonet at him to the terror and disturbance of the said Captain James R. Harper Jr.

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

Specification 1: In that Private Leroy McGary, Company E, 98th Battalion, 20th Group, 3860th Unit, Army Service Forces Training Center, Camp Claiborne, Louisiana, did, at Camp Claiborne, Louisiana, on or about 17 August 1944, lift up a weapon, to wit, a bayonet, against Captain James R. Harper Jr., his superior officer, who was then in the execution of his office.

Specification 2: In that Private Leroy McGary, Company E, 98th Battalion, 20th Group, 3860th Unit, Army Service Forces Training Center, Camp Claiborne, Louisiana, did, at Camp Claiborne, Louisiana, on or about 17 August 1944, lift up a weapon, to wit, a bayonet, against First Lieutenant Roland D. Campbell, his superior officer, who was then in the execution of his office.

The appointing authority directed a common trial of the accused and they were so tried without objection by either. Each was accorded the separate rights of challenge and each separately indicated satisfaction with the court as constituted and sworn. Each was separately arraigned and entered separate pleas. By separate finding Private William Smith, Jr., was acquitted of all Charges and Specifications upon which he was tried.

The accused, Private Leroy McGary, pleaded not guilty to and was found guilty of all Charges and Specifications relating to him. No evidence of previous conviction was introduced at the trial. He was sentenced to be hanged by the neck until dead. All of the members of the court present at the time the votes were taken concurred in each finding of guilt and in the sentence. 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, insofar as it relates to the accused Private Leroy McGary, briefly summarized, is as follows and the term "accused" is used to designate Private McGary only:

The accused was, at the time of the events hereinafter set forth, in the military service as a member of Company E, 98th Battalion, 20th Group, stationed at Camp Claiborne, Louisiana. (R. 10, 11).

At about 1:25 a.m. on 17 August 1944, Captain James R. Harper, Jr., 1355th Engineer Dump Truck Company, also stationed at Camp Claiborne, was awakened by Lieutenant Davis, officer of the day, and informed that the company had been alerted because of an armed mob roving the post (R. 12), and, together with Lieutenants Davis and Jackson, he proceeded to the orderly room of his organization to see about the rifles and to be sure the supply room was locked (R. 12, 25). The orderly room and the supply room were in one building, separated by a partition (R. 18).

As they came to the building Captain Harper saw two jeeps approaching and as the officers went into the orderly room approximately 4 or 5 men, armed with carbines and rifles, were observed entering the company area heard shouting "for everybody to get inside the barracks and turn off the lights, that they didn't want anybody out on the street" (R. 13, 17, 18). Corporal Thomas L. Robinson was in the orderly room in charge of quarters when the officers arrived (R. 18, 32). The light was then extinguished after which the orderly-supply room building was surrounded by a mob (R. 13, 25) and shortly thereafter the door on the side of the supply room which was locked and barred (R. 18) was broken open and about 20 or 25 men entered the supply room (R. 19, 25) and a light was turned on (R. 13). The officers in the orderly room observed what was going on in the supply room through a crack in the partition (R. 13, 18, 25), and saw the men open all the boxes, attempt to break open all the rifle racks (R. 13). One '03 rifle, about 4 bayonets and 24 flash-lights were taken away (R. 18).

The group then left the supply room going outside where there was discussion and speculation as to whether or not the officers were in the orderly room. The talk was "Let's go", whereupon they opened fire on the orderly room, shooting through it (R. 13, 19, 25, 33). The officers were lying on the floor of the orderly room (R. 13, 19) but Corporal Robinson sat in a corner (R.19). Altogether about 25 or 35 shots were fired, some of them missing the officers by a few feet (R. 19, 28). The corporal, however, was wounded in the shoulder and another bullet grazed his head (R. 19, 25, 28, 33). While the shooting was going on there was discussion about burning the orderly room down (R. 20, 33) and cries of "Kill the white mother-fuckers" (R. 91).

Finally, it was decided to go into the orderly room to investigate; but, as the men opened the door and saw Captain Harper lying on the floor, they jumped back and ordered those in the orderly room to come out with their hands up (R. 13, 25). Someone then turned on the lights outside the orderly room (R. 29, 36). Captain Harper thereupon went outside followed by the lieutenants and the corporal, each holding his hands in the air (R. 13, 14, 20, 26, 35). When they got outside they found a mob of approximately 40 or 50 men (R. 14, 27). Captain Harper said all of them were armed with rifles and some had bayonets affixed (R. 14). Lieutenant Jackson could not say that most of them were armed but "quite a few" were (R. 27).

As Captain Harper started walking toward the mob trying to quiet them, (for there was a shouting of conflicting orders among the members of the mob), the accused, armed with a rifle and bayonet, approached him, shoving him back and telling him "in a very gruff voice" to "move back, move back" (R. 26, 91). The captain then asked what the trouble was about and the accused answered that "four of their soldiers had been killed out in the bivouac area". Captain Harper tried to assure them that there was no basis for the rumor as he had confirmation from "higher headquarters" that no such thing had occurred. He gave them a direct order to go to their barracks, put up their rifles, go to bed and forget the matter and suggested that they investigate at their own headquarters to confirm what he was telling them (R. 14, 21). Lieutenant Davis told them the same things and, at times, the men were temporarily quieted. However, talking did little good and after a while the accused insisted that they go into the orderly room and ordered Captain Harper to accompany him, pointing the bayonet at the captain's stomach (R. 14, 15, 21). Meanwhile there was a great deal of "hollering" and cursing and some discussion about killing the officers. One man said that it was a good thing they were white officers and not white civilians or they would have been killed (R. 21, 22).

Captain Harper then returned to the orderly room still covered by the accused who said he was looking for ammunition and demanded that the safe be opened. "At the point of a gun and bayonet" the captain then

opened the safe (R. 26) and the contents were dumped on the floor. No ammunition was found although there was a clip in the safe which was overlooked. The accused insisted that the captain had ammunition and forced him to open all the files and disclose the contents (R. 15, 16). Finding no ammunition they went outside where the three officers were lined up with their hands in the air. There was a soldier standing in back of Lieutenant Jackson who kept a rifle pointed in his back and sometimes cocked it across the lieutenant's shoulder pointing it at Captain Harper and Lieutenant Davis (R. 26, 29, 30). As Lieutenant Jackson tried to shove the gun aside so it would not be pointing at the other officers he turned part way around. Thereupon the soldier ordered him to "turn back around", gave him a shove and he was then hit with the muzzle of an M. 31 rifle so that blood ran down the back of his head (R. 16, 26, 27, 31). Captain Harper, on seeing this, asked for permission to take Lieutenant Jackson to the dispensary whereupon the crowd marched the officers to the dispensary 300 yards away with their hands still held up in the air (R. 16, 27).

As soon as he had come out of the orderly room Corporal Robinson had gone, unmolested, to the dispensary, in company with Private Sammie L. Webb, a member of the same company, and they were there when the officers arrived. Eight stitches were taken to dress the corporal's wounded shoulder (R. 33, 34, 38). Lieutenant Davis then tried to make a telephone call and while he was doing so, one of the men standing in the doorway said that there was no need to call as "the MPs had been taken care of" (R. 58). An ambulance had been ordered and, shortly after the officers arrived at the dispensary it drove up. The mob then ordered the ambulance drivers to get out and hold up their hands while members of the mob "frisked" them (R. 16).

Private Webb recognized the accused as one of the crowd who "was just doing a lot of talking". When Corporal Robinson was brought out to be placed in the ambulance the accused said: "Put him in the damned jeep". When, later, the crowd was importuned to allow all of the injured to go to the hospital in the ambulance and consented, the accused told Webb not to hurt Robinson. Webb informed the accused that Captain Harper and Lieutenant Jackson were officers of his (Webb's) company and that no one would hurt Robinson whereupon the accused said "Well, kill all the sons-of-bitches" (R. 39). All of the members of the mob at the dispensary had "some kind of weapon" and the accused was armed with either a carbine or a rifle (R. 41, 69).

Meanwhile Captain George E. Knipe and First Lieutenant Roland D. Campbell, both of the 1360th Engineer Dump Truck Company, and Second Lieutenant Myron B. Goldware of the 1359th Engineer Dump Truck Company, having heard that there was "some sort of mob in the area" and noticing a group of men in the vicinity of the 5th Regiment Dispensary, went over

to see exactly what was happening. Lieutenant Campbell realized that under the 67th Article of War it is a crime against the government to fail to suppress a mutiny (R. 44, 55). As they drew near they saw two jeeps and, inasmuch as there were two jeeps missing from the motor pool, they thought they would get these and return them to the pool. It was decided that Captain Knipe should get one and Lieutenant Campbell the other. Accordingly, Captain Knipe went toward the one while Lieutenants Campbell and Goldware approached the other (R. 44, 68).

As Captain Knipe went to the front jeep the driver drove away but when ordered to stop he came back and drove around the side of the ambulance. Captain Harper, who was in the ambulance, called out saying: "Let's get in this ambulance; these fellows mean business" (R. 68, 70) for he feared that the mob would start shooting again (R. 17). The ambulance drivers had their hands in the air and one of the mob was pointing a gun at them through the window of the ambulance (R. 28, 68). Captain Knipe, who was carrying a carbine, got into the ambulance and then the man who was covering the drivers demanded his weapon. Captain Knipe removed the clip of ammunition and surrendered the gun but, upon further demand, gave up the ammunition also (R. 17, 69).

As Lieutenants Campbell and Goldware walked up to the second jeep the accused came up to them and demanded their guns telling them to hold their hands over their heads. As they were surrounded by "a ring of carbines" they obeyed (R. 44, 47), but only Lieutenant Campbell was armed (R. 47, 55). The accused then searched Lieutenant Campbell and demanded the clip of ammunition. When he refused to comply the accused poked a bayonet in his stomach (R. 45, 47). Both lieutenants gave the mob orders to disperse and pleaded with them to realize that they were engaged in mutiny but the orders and pleas had no effect whatever (R. 48, 55).

At this time Lieutenant Joseph R. Boydes, Director of the Security and Intelligence Division at Camp Claiborne, accompanied by two sergeants of the military police, drove to the area in question on a report that there had been sporadic shooting there. As they arrived at the dispensary and drew up behind the ambulance, the crowd surrounded them and ordered them to get out of the jeep, calling them "white mother-fuckers" and saying: "We are going to kill you". They thereupon got out of the jeep and raised their hands while they were disarmed after being "patted down" by members of the mob, and the "MP" brassards were torn from the arms of the sergeants. The accused, who acted as the leader of the mob, ordered the two sergeants and Lieutenants Campbell, Goldware and Boydes to line up in a column of twos with hands over the heads, which they did (R. 45, 55, 73, 81). One member of the mob who had a handkerchief over his face then shouted: "Kill'em, Kill 'em, Kill the white bastards". Lieutenant Boydes

asked the accused to let him say something and after the accused had quieted the mob Lieutenant Boydes told them they were MPs who had come down on the report that there had been trouble (R. 75). The police were then told they were "no good God-damned MPs and (they) didn't have any business down there" and the accused thereupon struck both sergeants, hitting one of them on the jaw with his doubled fist. At this point Lieutenant Campbell felt a glancing blow, aimed by a rifle butt, on the back of his neck and the next moment Lieutenant Goldware was struck and knocked to the ground unconscious (R. 45, 46, 55, 73). Lieutenant Boydes, thinking that Lieutenant Goldware had been killed by the severe blow, attempted to pick him up and called one of the sergeants to help him but the accused refused to allow him to do so (R. 73). Lieutenants Boydes and Campbell finally prevailed upon the accused to allow them to take Lieutenant Goldware into the dispensary (R. 46, 56), where he was placed on the emergency first-air table (R. 74). The officers were then held prisoners in the dispensary under three guards. One of the guards was persuaded to call up headquarters to verify the fact that no man had been killed in the bivouac area and when he received information to that effect he went outside, talked with the accused and then returned (R. 46).

After the officers had gone into the dispensary the crowd outside continued to abuse the police sergeants, ordering them first to take off their shoes and stockings and then their trousers. However, as they started to take off their trousers some one shouted "Let 'em put 'em back on" which they then allowed them to do. One of the sergeants was knocked down twice and kicked in the back. Finally someone said: "Take them out and kill them" and after some debate the mob decided to take the sergeants out to the bivouac area and kill them. They then started off, the sergeants in the first jeep followed by two jeeps in control of members of the mob. As they passed the officers' club one of the sergeants saw and recognized Captain Gormsen who was formerly Provost Marshal, and called to him. This alarmed the men in the cars which were following and they turned off while the sergeants proceeded to headquarters and reported what had happened (R. 82, 83).

At about 1:30 a.m., 17 August 1944, First Lieutenant Richard D. Turpisch, who was officer of the day for the 1328th Engineer Construction Battalion, was awakened by hearing "a good deal of shooting". He got up, dressed, and looked for his arms but found they had been taken. When he went outside he saw a mob of about 60 men in the vicinity of the 5th Regiment Dispensary gathered around one man who was talking in a loud voice. He approached the mob and ordered them to disperse - "to break it up, get out of there". As soon as his presence was made known, an enlisted man accosted him, pointed a gun at him and ordered him to put his hands up in the air. He was then surrounded and all of the men covered him with guns. The man who first came up ordered him to get into a truck near the

dispensary. Lieutenant Turpisch advised the men that they were committing mutiny and that they might be shot for it or "would have to stop it right now". As he took a step forward to disarm the enlisted man he was attacked by the others and beaten so severely that he suffered a concussion and a wound requiring four stitches. He did not recognize the accused as a member of this particular group (R. 65-67). He also was taken into the 5th Regiment Dispensary for treatment (R. 57, 79, 92).

All of the officers involved in the various episodes related above were, at the time, in uniform and wearing the insignia of their respective offices (R. 52, 56, 59, 67, 69, 75).

The accused, by his actions and on account of the evident influence over the others which he displayed, appeared to be the leader of the mob which broke into the supply room and which later disarmed and injured the officers and men at the 5th Regiment Dispensary (R. 22, 26, 39, 44, 45, 55, 56, 73).

The size of the mob involved in those incidents out of which the offenses with which the accused stands charged arose was variously estimated to be from 30 to 50 soldiers (R. 14, 27, 35, 49, 61, 69) and most of them were armed with either a rifle, or a carbine (R. 27, 41, 49, 61, 83).

At sometime not stated Captain Harper was on a train going to his home in Little Rock, Arkansas for the weekend. Just outside of Monroe, Louisiana he recognized the accused and a negro sailor walking through the car in which Captain Harper was a passenger. At the Captain's direction the military police on the train apprehended the accused and he was turned over to the military police at Selman Field, Louisiana (R. 22, 23).

4. The accused, having been informed of his rights, elected to be sworn as a witness and testified, substantially, as follows:

He detailed at length the circumstances under which, while his wife was critically ill, he debated with her his obligation to serve in the war. He was eventually inducted into service in June 1943. He felt that he had been forcibly separated from his wife but did his best notwithstanding. His company commander told him he had accomplished more in 2 weeks than some others in 6 months and encouraged him to keep on in the hope of better things. However, his wife's condition "tormented" him so that he "got excited" and "began to disremember things . . . because (his) mind was upon her." Finally he asked to be discharged or to be transferred to a post closer to his wife so he could be with her as often as possible. He was then sent to "Company 'E' of the 98th Battalion" and was there when "this trouble started".

According to his own words:

> "Well, the best thing I can say is that I am innocent. There are so many things against me that I know I cannot win. I got to go out the loser, but when I got over there the trouble started. I didn't want no part of it. I didn't have any part of it because I was thinking about my wife. Around September 24, I mean August 24, I was already to go home when this Captain Harper, he told the MPs to come and get me. The MP came and got me and he asked me, he said, do you remember seeing me? I said, no, sir, I don't remember seeing you. He scratched his chin and looked up at me. He said, officers, I suspects this man of mutiny. Arrest him. Well, I was in line to go home then, so I began to cry. I said, Captain, I don't understand. I said, my wife is dying at home; she needs me. I said, please let me go. I said, when I come back, you got anything against me, I will confront it just like a man, but you haven't got anything against me. They stopped me at Monroe, so he told the Lieutenant of the MPs that I was suspected of mutiny and on this other charge, so they held me. Here I am."

He was arrested and confined. While in confinement he had a dream that his wife had died and soon thereafter he was informed that she did die. He was refused permission to go to see her or to attend her funeral.

He maintained: "I am innocent and I don't care what happens to me. All I know is I am innocent, that's all" (R. 96-100).

On cross-examination when asked whether he was "down in the 1355th area the night in question" he said he "don't even know where the 1355th area is"; nor did he know the location of the 5th Regiment area (R. 100). He denied having had a rifle (R. 100, 101) or a bayonet (R. 102) on the night of 16/17 August 1944 but said he had a gas mask "because everybody was hollering out there to get our gas masks that they was dropping gas" although when he went through the company area no gas was found. He denied seeing Lieutenants Goldware and Jackson but claimed that he helped Lieutenant Engelbert recover guns and ammunition (R. 101). He stated that he was underneath his barracks with some other men but when he "called them as witnesses . . . they don't know whether I was under there or not", and he added "I can't prove a thing". (R. 102, 103). He did see jeeps that night but was afraid to come out from under the barracks because he "knew those fellows they was vicious" (R. 103). He also said he was playing cards in the barracks with another fellow just before going underneath but when asked for the name of the companion with whom he played cards he hesitated and replied: "Well, he is in the company". He claimed that he was on "furlough" when he was apprehended on the train and explained that the Red Cross sent him a telegram stating that his wife was becoming weaker and weaker and his presence was needed there (R. 104).

5. The accused was charged with committing a riot, joining in two mutinies and lifting up weapons against two officers. All of the offenses were committed on the same night within the limits of Camp Claiborne, Louisiana and within a period of no more than three hours. The occasions for the acts attributed to the accused arose out of a general state of excitement which existed on the night of 16/17 August 1944 because of rumors that some of the enlisted men in a bivouac area had been killed presumably by white civilians, and the offenses followed one another in a sequence of events which occurred while the accused, with others, moved from one place to another throughout the period of time indicated.

From a cursory view of the evidence it is apparent that some of the offenses were consummated contemporaneously so that, because of the peculiar, coincidental circumstances surrounding them, the charges and specifications might appear to be objectionable as duplications and unwarranted because unreasonable. Such, however, is not the case. The Specifications of Charge I (joining in mutinies) and the Specification of Charge II (committing a riot), when considered together, are not duplications, for the reason that joining in a mutiny and committing a riot are separate and distinct offenses. Proof of the facts constituting the offense alleged in the Specification of Charge II would not, in and of itself, prove the offenses of joining in either mutiny as set forth in the Specifications of Charge I. The converse is equally true. The offenses under each contain elements not embraced within the other as will be shown later. It was, consequently, not objectionable to charge the accused with committing a riot and with joining in a mutiny although both offenses arose out of the same transaction, and the accused is not placed in double jeopardy because of the findings of guilt on both accusations (CM ETO 895 (1944); Bull J.A.G. April 1944, p. 143).

Answer to the question whether the Specifications of Charge I constitute an unreasonable multiplication of charges against the accused depends upon the factual situation presented by the evidence. Whether the collective insubordination of a group against the authority of an officer is an incident of or apart from a related collective insubordination against another officer, at a different time and place and under other circumstances so as to constitute a distinct and separate offense, is a question of fact which the court may determine and their judgment in the matter will not be distrubed unless it is the result of an obvious abuse of discretion.

Proceeding to a determination of the legal sufficiency of the record of trial it will first be examined with regard to the offense of committing a riot which is less heinous than the others of which the accused was found guilty and was committed first in point of time.

A riot is defined in the Manual for Courts-Martial as a tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and who afterwards actually execute the same in a violent and turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful (par. 146c, MCM 1928).

The proof required is that the accused being with a certain command in quarters, camp, garrison, or on the march, committed acts of rioting as alleged (idem).

It is clear, from the evidence, that, whatever may have been the misguided notions of those who participated, a group of 4 or 5 armed men entered the area of the 1355th Engineer Dump Truck Company at Camp Claiborne, Louisiana in the early morning of 17 August 1944 and were soon joined by 40 or 50 others, most of whom were armed with rifles or carbines. This mob was bent upon the unlawful mission of procuring ammunition for their weapons. No one in authority had ordered them to do so nor consented thereto and the group was assembled together of their own authority and were engaged in an enterprise of a private nature. That they intended to give mutual assistance to one another against anyone who might oppose them is to be inferred from the fact that they were armed and from the behavior which followed. Their violent and tumultuous conduct in the period that followed during which they surrounded the company orderly room, forcibly broke into the supply room, broke open boxes and rifle racks, took away property which had been stored there, and then fired rifle shots through the orderly room wounding a corporal and imperilling his life and the lives of three officers who were in the room at the time, constituted a riot of the most aggravated and vicious type. That the mob was inclined toward even greater mischief is apparent from evidence of shouts urging that the building be burned down and that the occupants be killed. However, not one of the occupants of the orderly room who testified at the trial, was able to identify any of the rioters who were engaged in these particular acts. From what ensued it might reasonably be inferred that the accused was, up to this time, as he appears to have been later, not only present but an active participant. Since his presence at this time does not appear beyond reasonable doubt it becomes necessary to inquire further and examine the events which immediately followed.

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, with an insubordinate intent. This intent, which distinguishes mutiny is the intent to resist lawful authority in combination with others (par. 136,a, MCM,1928).

Winthrop defines the offense as consisting of an unlawful opposition or resistance to, or defiance of superior military authority, with a deliberate purpose to usurp, subvert, or override the same, or to eject with authority from office. The intent may be openly declared in words, or it may be implied from the act or acts done, as for example, from the actual subversion or suppression of the superior authority, from an assumption of the command which belongs to the superior, a taking up of arms and assuming a menacing attitude, and the like. But the fact of combination - that the opposition or resistance is the proceeding of a number of individuals acting together apparently with a common purpose - is, though not conclusive, the most significant, and most usual evidence of the existence of the intent in question (Winthrop's "Military Law and Precedents", 2d Edition (Rep. 1920) page 578, et seq.).

There can be no actual mutiny until there has been an overt act of insubordination joined in by two or more persons. Therefore no person can be found guilty of joining in a mutiny unless an overt act of mutiny is proved nor can a person join in a mutiny without joining in some overt act. Hence presence of the accused at the scene of the mutiny is a necessary element of the offenses charged (par. 136,b, MCM 1928).

Joining in a mutiny is the offense of one who takes part in a mutiny at any stage of its progress, whether he engages in actively executing its purpose, or, being present, stimulates and encourages those who do. The joining in a mutiny constitutes a conspiracy and the doctrines of the common law thus become applicable to the status - viz. that all the participators are principals and each is alike guilty of the offense; that the act or declaration of any one in pursuance of the common design is the act or declaration of every other; and that, the common design being established, all things done to promote it are admissible in evidence against each individual concerned (Winthrop, supra, page 583).

The proof required is (a) the occurrence of certain collective insubordination in a company, party, post, camp, detachment, or other command in the Army of the United States and (b) that the accused joined in such certain collective insubordination (par. 136,b, MCM 1928).

In all that had transpired in the events above-described (however violent the conduct of the mob may have been) there was no sign of collective insubordination which is the element which peculiarly distinguishes the offense of mutiny. Thus far there had been no interference by constituted authority with the plans of the mob and no one had intervened in an attempt to suppress the riotous disorder. However, when Captain Harper, Lieutenant Jackson and Lieutenant Davis (who was officer of the day) were ordered to come out of the orderly room with their hands up (although their presence there was not known to the rioters) the mob, of its own initiative, demonstrated an insubordination and an intent to resist lawful authority the moment the commissioned officers appeared in the open and the members of the mob

became aware of the fact that they were intimidating their superior officers by force of arms. From that time the mob, by their actions, demonstrated a wilful, intentional suppression and assumption of the superior authority. But the insubordination and misconduct did not stop there. Captain Harper courageously advanced toward the mob and began to question them. Upon discovering that they had evidently been inflamed by the rumor, he repeatedly assured them that it was without foundation and ordered them to return to their barracks. Lieutenant Jackson did likewise. Instead of obeying, the accused, while the other members of the mob stood by, forced Captain Harper, at the point of a bayonet, to return to the orderly room, open the company safe, and disclose the contents of all the official files. Upon their return to the group outside, and while the officers were still held defenseless by the mob, Lieutenant Jackson was violently struck on the head with a rifle and so badly injured that Captain Harper requested permission to take him to the dispensary, to which they were then marched in humiliation and disgrace, with their hands in the air, under the guarded surveillance of the armed mob.

Every essential element of mutiny was clearly established as to this offense and the accused assumed the role of direct leadership. He not only stimulated and encouraged the mutiny but aided and abetted the others by giving orders and was himself guilty of vicious, overt acts against the officers, whose orders he not only defied but whose authority he brazenly assumed after he had overpowered it. There is no reasonable doubt of his guilt under Specification 1 of Charge I.

Since the offenses of rioting and mutiny are separate and distinct they may be committed at the same time under circumstances which arise out of one transaction. There is therefore no error in the finding of guilt on the Specification and Charge II. The riotous conduct which was first evidenced in the violent siege of the orderly room did not subside but grew in intensity until it became aggravated by the additional factor of insubordination to superior authority but insofar as the offenses are concerned there was no merger of a lesser into the greater. The doctrine that when the accused is found guilty of two or more offenses constituting different aspects of the same act or omission the court should impose punishment only with reference to the act or omission in its most important aspect is of little consequence in this case inasmuch as the sentence of death which was imposed is authorized for the conviction of the offense of mutiny alone.

As soon as the officers and the accompanying men had arrived at the dispensary which was about 300 yards away, Lieutenant Jackson was taken inside by the other officers and while he was being treated, the third series of disorders took place. When an ambulance which had been ordered for the wounded sergeant and Lieutenant Jackson arrived, the mob compelled the driver and the attendant to get out and hold up their hands while they were being searched. Meanwhile Captain Knipe and Lieutenants

Campbell and Goldware approached the scene, were disarmed and made to hold their hands up while surrounded by "a ring of carbines". Both of the officers pleaded with the mob to realize that they were engaged in mutiny but their efforts had no effect whatever. They then gave orders to disperse but were not obeyed. While this was happening the accused demanded a clip of ammunition from Lieutenant Campbell and when it was refused he poked a bayonet in the officer's stomach. At this point Lieutenant Boydes, Director of the Security and Intelligence Division drove up accompanied by two sergeants of the military police. They were compelled to get out of the car and were disarmed while members of the mob called them opprobrious names and shouted that they were going to kill them. Thereupon the accused ordered the officers and the sergeants to line up in a column of "2s" again with hands over their heads while the crowd shouted "Kill them, Kill them, Kill the white bastards". The accused then hit both sergeants, hitting one of them on the jaw with his doubled fist and soon thereafter Lieutenant Campbell felt a glancing blow on his neck and Lieutenant Goldware was knocked to the ground unconscious. Meanwhile Lieutenant Turpisch, officer of the day for an adjoining organization, approached and attempted to reason with the crowd, telling them they were committing mutiny, and ordered them to break up and get out but he was set upon and beaten so that he also required treatment for a wound at the dispensary.

During all of this shocking disorder and insubordinate and criminal misconduct the accused was present and he again took a major part in some if not all of the insulting and violent acts perpetrated by the mob against their superior officers who were striving to overcome the turbulent and vicious attitude of the mob and reduce it to order and discipline.

It would be unnecessarily repetitious to review the evidence any further. Sufficient has been patently shown to demonstrate conclusively that, in this instance, the accused was not only present in a shockingly mutinous body of armed men when violent assaults were made upon superior officers and police authorities who were in the execution of their office, but, by his overt acts, contributed materially toward further arousing and inflaming the spirit of the mob to an even increasing degree of insubordination.

A careful examination of the evidence leads to the sensible conclusion that the accused participated in two mutinies, aiding and abetting in both when he was not assuming direct leadership. The evidence does not show that the mob at the dispensary was composed of the same men who constituted the mob at the orderly room and although it might be assumed, with reason, that a part of the men who formed the latter group proceeded together to the dispensary, there is no impelling reason why the misbehavior at the latter place should be deemed a continuation of the misconduct at the former. The mission of the mob at the orderly room was clearly to get ammunition. It was for this purpose that they surrounded

the orderly room, broke into the place where supplies were stored and later forced the captain to open the safe and empty the files. Having completed this project they moved on to the dispensary. That this was no part of their originally concerted plan is certain. They went there merely because the officers requested permission to take the wounded there for treatment. Surely there was no hope of finding ammunition there. This was an entirely new venture - a turn of events not contemplated. How many men who were in the original crowd at the orderly room went to the dispensary is not shown. For all the record discloses most of the men may have dispersed when first ordered to their barracks. Assuredly some did accompany the officers and that a large and unruly mob did gather at the dispensary is unquestioned. However, Captain Harper and Lieutenants Jackson and Davis had gone into the dispensary and left the crowd to its own resources. What transpired thereafter was an entirely new and separate show of insubordination against entirely different officers who were strangers to the preceding events. There had been sufficient time elapsing to allow the fury of the mob to subside, at least partially, and here, for the first time the men were told of the enormity of the offense they were committing and of the penalty which they might incur. Yet the men continued in their heedless disregard of authority and one violent act followed another. Under all the circumstances it is apparent that there were two separate and distinct series of mutinous acts and there is no error in either the laying of the offenses in two separate specifications nor in the findings of guilt thereon. It follows that the record is legally sufficient to support the finding of guilt under Specification 2 of Charge I.

It is a grievous offense for any person in the military service to assault, on any pretense whatsoever, any superior officer who is in the execution of his office (A.W. 64).

The phrase "on any pretense whatsoever" is not to be understood as excluding as a defense the fact that the assault was committed in legitimate self-defense or in the discharge of some duty.

By "superior officer" is meant not only the commanding officer of the accused, but any other commissioned officer of rank superior to that of the accused. That the accused did not know the officer to be his superior is available as a defense.

The phrase in the Specifications "did lift up a weapon" covers any simple assault committed in the manner stated. The raising or brandishing of such a weapon minaciously in the presence of a superior officer and at him is the sort of act contemplated. The raising in a threatening manner of a firearm (whether or not loaded) would be within the description, "lifts up" as used in Article of War 64.

(16)

An officer is "in the execution of his office" when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or military usage. It may be taken in general that using violence against any superior officer by a person subject to military law, over whom it is at the time the duty of that superior officer to maintain discipline, would be violence against him in the execution of his office (par. 134a, M.C.M. 1928).

The proof required is (a) that the accused lifted up a weapon against a certain officer as alleged; (b) that such officer was the accused's superior officer at the time; and (c) that such superior officer was in the execution of his office at the time (par. 134a, supra).

The facts shown in support of the Specifications of Charge III have been too clearly established by the evidence to require discussion. In the melee at both the orderly room and the dispensary, the accused sought forcibly to compel obedience to his orders by officers known by him to be his superiors at a time when they were trying to suppress mutiny as they were obliged to do under Article of War 67. In each instance he menaced them by thrusting a fixed bayonet at their stomachs. Each act was a deliberate and outrageous assault upon the superiors under circumstances which indicated a present ability as well as intention to do great bodily harm or to cause death. There is therefore no reasonable doubt of the guilt of the accused under the Specification of Charge III.

The common trial of the accused and Private Smith having been directed by the reviewing authority and no objection having been made by the accused and it appearing that the individual rights of the accused were safeguarded throughout the trial there was no legal impropriety in such procedure (sec. 395 (33) Dig. Ops. JAG 1912-40; CM NATO 1070, Bull. JAG January 1944, p. 11).

6. The Charge Sheet discloses that the accused was inducted on 23 June 1944 and has had no prior service. He is 24 years of age.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. A sentence of death is authorized upon conviction of a violation of Article of War 64 or of Article of War 66.

(on leave), Judge Advocate.

Herbert R. Frederick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ - CM 265399 1st Ind

Hq ASF, JAGO, Washington 25, D. C. FEB 8 - 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 Private Leroy McGary (36989925), Company E, 98th Battalion, 20th Group, 3860th Unit, Army Service Forces Training Center, Camp Claiborne, Louisiana.

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. Although the offenses committed by the accused were very serious, I do not recommend that the maximum penalty of death be confirmed. In my opinion, confinement for forty years constitutes adequate punishment. Accordingly, I recommend that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for forty years, and that the sentence as thus commuted be carried into execution. I further recommend that the United States Penitentiary, Atlanta, Georgia, be designated as the place of confinement.

3. Consideration has been given to the following letters, attached to the record of trial, requesting clemency in behalf of the accused: Letters from Miss A. Murphy, Mrs. Alberta Saunders and Mrs. Mary McGary of Chicago, Illinois, addressed to the President, dated 5 October, 7 November and 4 November 1944 respectively; letter and inclosed petition from the Reverend T. V. Smith and the Reverend E. C. Curtis of the Eighth District Baptist Association, Alexandria, Louisiana, to the Commanding General at Camp Claiborne, Louisiana, dated 13 October 1944; letter from Mrs. Alberta Saunders, sister of the accused, to Brigadier General Louis F. Gueroy at Camp Claiborne, Louisiana, dated 9 October 1944; letter from the accused, addressed to the President, dated 28 December 1944; copy of letter from Mr. and Mrs. A. C. Smith, San Antonio, Texas, addressed to Mrs. Eleanor Roosevelt, dated 25 January 1945.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

10 Incls
1 - Record of trial
2 - Dft ltr for sig S/W
3 - Form of action
4 - Ltr fr Miss A. Murphy to President dated 5 Oct. 44
5 - Ltr fr Mrs. Alberta Saunders to President dated 7 Nov. 44
6 - Ltr fr Mrs. Mary McGary to President dated 4 Nov. 44
7 - Ltr fr Rev. T. V. Smith and Rev. E. C. Curtis to CG, Camp Claiborne, La., dated 13 Oct. 44
8 - Ltr fr Mrs. Alberta Saunders to Brig. Gen. Louis F. Gueroy, Camp Claiborne, La., dated 9 Oct. 44
9 - Ltr fr accused to President dated 28 Dec. 44
10 - Cy of ltr fr Mr. and Mrs. A. C. Smith to Mrs. Eleanor Roosevelt dated 25 Jan. 45

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures, and confinement for forty years. G.C.M.O. 145, 16 Apr 1945)

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

SPJGQ
CM 265441

17 NOV 1944

UNITED STATES v. Private EDWARD H. YORK (36343856), 71st Ferrying Squadron, 559th Army Air Forces Base Unit (20th Ferrying Group).	FERRYING DIVISION AIR TRANSPORT COMMAND Trial by G.C.M., convened at Nashville, Tennessee, 4, 14, 15 and 16 August 1944. Death.

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

---

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Edward H. York, 71st Ferrying Squadron, 559th AAF Base Unit, (20th Ferrying Group), did, at Nashville, Tennessee, on or about 8 July 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant Kenneth L. Jacobs, 4471st SCU M.P. Detachment, Nashville, Tennessee, a human being, by stabbing him with a knife.

He pleaded not guilty to and was found guilty of the Specification and the Charge. Evidence of three previous convictions was introduced, two by summary and one by special court-martial and all for absences without leave for eight, seven and four days respectively, in violation of the 61st Article of War (Pros. Ex. 2). He was sentenced "to be hanged by the neck until dead". Three-fourths of the members present concurred in the findings of guilty of the Specification and the Charge, and all of the members present at the time the vote was taken concurred in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the Prosecution: The evidence is substantially as follows: On the night of 8 July 1944 at Nashville, Tennessee, Sergeant Norman J. Van Dane and Sergeant Kenneth L. Jacobs, the deceased, were on patrol duty as military policemen, as members of the 4471st Service Command Unit, Military Police Detachment. Their tour of duty began at 6:00 p.m. and ran until 2:00 a.m. They were good friends (R. 34) and worked from Headquarters, using a three-quarter-ton carryall. Van Dane was the driver and Jacobs the Sergeant of the Guard (R. 12-13). At about 9:00 p.m. a call was received by the desk sergeant and they were instructed to go to Red Dardy's to get a soldier who had been arrested by civilian police (R. 13). The carryall vehicle had a long back seat, the middle seat was missing, but there was a jump seat next to the driver's seat in front (R. 14). Jacobs and Van Dane left in the carryall, taking with them Private Clinton D. Combs and another soldier. These men had been brought to Headquarters earlier in connection with the arrest of a third soldier (R. 39). They were released without charges, and were being given a ride to town (R. 14). A stop was made near the Tulane Hotel and Combs and his companion got out, but Combs made some remark to Jacobs, which Jacobs evidently resented and Combs was ordered to get back in the vehicle, which he did (R. 16, 40). Van Dane, Jacobs and Combs proceeded in the vehicle to Red Dardy's Tavern, where the vehicle was parked approximately twenty yards north of the place. Combs remained in the carryall, as directly, while the other two went inside (R. 15, 41). After 3 or 4 minutes Combs saw the two MP's returning with a man between them (R. 41). On entering the Tavern operated by Dardy, Van Dane observed a crowd in front, and, inside saw accused and his wife sitting in the second booth, and Sergeant McCann, a member of the Nashville City Police, standing nearby. The Tavern has ten booths, five on each side, with counter and kitchen to the rear. Sergeant McCann indicated that the accused was under arrest and that he wished to prefer charges. Van Dane said to the accused, "Private York, come with us" (R. 16), and told the accused that he was under arrest (R. 17). The accused made no effort to move. Van Dane took him by the arm and pulled him out of the booth (R. 17). Accused resisted and Jacobs came to Van Dane's assistance. Accused lunged forward and shoved Jacobs across the aisle. In the scuffle, Jacobs seized the accused by the hair (R. 27). Both military policemen then took accused to the carryall (R. 17). Accused was led out rapidly, offered some resistance and was pulled part of the way (R. 27-28). He was placed in the carryall, went to the rear, and sat beside Private Combs (R. 18). Before being placed in the vehicle accused was searched by Jacobs (R. 17). Combs observed that accused had stumbled and fallen on the floor of the carryall and testified that he helped him to the rear seat where Combs was seated (R. 42). Van Dane denied this (R. 28-29). This placed accused in the right-hand corner of the vehicle (R. 28, 42). Jacobs went back into the tavern (R. 28). On returning, he sat on the jump seat facing the accused, who appeared to have

been drinking, but was not drunk, according to Van Dane (R. 26). Combs spoke to accused after he got into the carryall about Combs not liking "MP's" and accused nodded his head and said "Yes" or "Unhuh" (R. 56). There was nothing unusual about his face, but it was apparent to the witness (Combs) that accused had been drinking quite a bit--"he looked pretty tight" (R. 57).

The vehicle with the two military policemen and the two prisoners, Combs and accused, left Dardy's and proceeded to Third Avenue and down to Broad Street, turning right on Broad Street. There had been no conversation up to that point between Jacobs and Van Dane (R. 18). Somewhere near the intersection of 2nd and Broad Streets or 3rd and Broad Streets (R. 19, 43), the vehicle slowed up slightly (R. 44, 63) and the accused made a lunge toward Sergeant Jacobs (R. 19, 44). About this time Van Dane felt accused against him and noticed his head almost against the dash and his right hand against Sergeant Jacobs' throat. Accused was leaning over across Jacobs' legs (R. 19). Van Dane grabbed accused's right wrist and flipped him over on his back (R. 19, 29). Van Dane in the struggle felt a knife scrape him. He pinned accused's right arm with his left knee. Van Dane received a cut on the right hand and testified that the accused attempted to strike him in the throat (R. 19, 30). He observed Jacobs strike accused with a night stick. Jacobs grabbed his own throat, which was all bloody. When Van Dane grabbed accused's wrist, blood "shot out" over Van Dane (R. 19). Private Combs observed accused make the lunge forward and heard Van Dane mention a knife. He went forward, observing accused lying on Jacobs' left side, and saw him roll over on his back (R. 44). Combs saw accused being struck by Van Dane, and heard a spurting sound. Combs pulled accused to the rear of the vehicle, holding his right wrist down, and in taking hold of accused's left wrist felt a sharp thing cut his thumb. Accused put his left hand in the air where it was grabbed by Combs and forced over the edge of the window, and the knife seemed to go out of the open window of the vehicle. Combs heard the sound of an object striking the outside of the car (R. 45). Combs held accused on the floor, telling him to lie still or he would kick him, accused replying that he didn't care (R. 46).

Sergeant Van Dane, observing that Sergeant Jacobs was badly injured, started driving rapidly for the Nashville General Hospital. Combs had an arm lock on accused and continued to hold him on the floor, cursing him for having used a knife (R. 20, 46). On arriving at the hospital, Van Dane and an attendant carried Jacobs into the operating room (R. 20,46). Jacobs was weak and could only move slowly (R. 20). Returning to the carryall, Van Dane, seeing accused on top of Combs, who was holding him down, grabbed a two by four and hit accused in the head. The blow stunned accused and he relaxed (R. 20, 21, 46). Van Dane and Combs dragged and pushed the accused into the hospital (R. 21, 46). Van Dane struck the accused a number of blows with his fist, until the accused fell (R. 21).

Sergeant Jacobs, with his throat cut, was on a tilted table in the emergency room of the hospital (R. 76). He was given emergency aid by Dr. William H. Yeider and others (R. 77). The doctor was at the hospital working on another emergency case when Jacobs was brought in by Van Dane (R. 79). Observing Jacobs' injury and realizing he was severely wounded, Dr. Yeider, with the assistance of several other doctors, attempted to check bleeding vessels, administered pure oxygen, and attempted to inject heart stimulants. Jacobs gasped once or twice and was quiet. Efforts at resuscitation were continued for 25 minutes, to no avail. Jacobs was officially pronounced dead at 9:40 (R. 79, 80, 81). Death was due to loss of blood resulting from the wound in his neck. There was "a very deep incision which extended to the posterior pharynx, next to the larynx and carried back to a point about midway between the base of the neck and the tip of the shoulder." The wound was approximately three inches deep and tapered from the skin to that depth (R. 80). The wound was inflicted by a sharp instrument (R. 87). One suffering injuries of this type and nature would get into the condition in which deceased was observed to be at the hospital, in approximately ten minutes after the infliction of the wound (R. 81).

Dr. Yeider then examined the accused, who had been dragged into the emergency room. He had superficial wounds and abrasions on his face. His breath was alcoholic. Accused repeatedly said, "I am sick", and appeared bewildered (R. 82, 83, 84). After the examination the accused walked out of the room, two military policemen having him in custody. The witness (Dr. Yeider) would not express an opinion as to whether accused was intoxicated (R. 89).

George G. Buchanan, a member of the Nashville Police Department for twenty years and Homicide Officer for the past five years, was at the hospital that night. He saw Jacobs rushed into the emergency room and watched the doctors attempting to save his life. He took charge of a pistol and belt, which had evidently belonged to Jacobs. He also saw another soldier brought in and laid on the floor (R. 90-91). On learning what had occurred, he took a flashlight and searched the truck, attempting to find the knife. He did not find it in the truck, which was bloody. Buchanan in his car retraced the route he was told the carryall had taken. On Broad Street, twenty-five feet from First Avenue he found a soldier's cap and nearby a military police stick. Making a second trip over the route, he found a knife, open and bloody, in the street near the Tennessee Central depot. He placed it in an envelope. These articles were later delivered by Buchanan to Major Suthers and Lieutenant McGee at the stockade at Centennial Park (R. 92). The night stick also was bloody (R. 97, 99). The knife was identified at the trial by the officer who found it, and was introduced in evidence (R. 95; Pros. Ex. G-1). It had recently been sharpened, and there

was a fresh chip out of the bone handle (R. 94). Buchanan saw accused at the Centennial Park Police Headquarters standing before the desk and being "booked". He appeared to stand erect and was not swaying. The depot where the knife was found in the street was on First Avenue about three hundred fifty feet from Broad Street (R. 93).

4. Evidence for the defense. Accused went on Saturday afternoon about 5:30 to 67 Carroll Street, Nashville, where his wife had an apartment on the second floor (R. 111). Mr. Lusk, who lived downstairs, had obtained a pint of whiskey for Mrs. York and took it to their apartment. Accused took a "B.C." headache powder and then joined Lusk and Mrs. York in some drinks (R. 102). Before taking the drinks accused ate some sandwiches, which his wife prepared and drank some buttermilk (R. 101). The three remained in the apartment for about 20 minutes and during this time accused took three drinks containing about six jiggers or ounces of whiskey in the aggregate (R. 103, 175). Lusk departed, accused and his wife remaining in their apartment. They dressed and went to Red Dardy's place about 7:00 p.m. (R. 103, 114). Here they joined Willie Carter, his wife and Jackie Pruitt in a booth. Accused was given a drink of whiskey, about two jiggers, and later, after opening another pint, someone in the group, poured accused a second drink (R. 103). A number of witnesses including the wife of accused testified as to the subsequent happenings at the tavern on this occasion. There are many minor discrepancies regarding the details, but in the main, the witnesses seem to agree. Most of the witnesses knew accused and his wife and were friendly with them. The second pint of whiskey was consumed by the group. The accused had two more drinks, and later drank some beer (R. 104). According to the witness Pruitt, accused, with Carter and witness, drank "very strongly" (R. 129). Around 8:30 the group left the booth and went outside (R. 131). Most of them got into Pruitt's car, which was parked outside (R. 135). There was a discussion as to where, and with whom, the various members of the party would go. Pruitt, Carter, and his wife left, and accused and his wife returned to the tavern (R. 117, 136). At this time accused appeared normal to his wife, although he wasn't walking "any too good" (R. 117). Accused, according to Pruitt, had been talking loudly and staggering a bit (R. 131). On returning to the tavern accused and his wife sat in a booth and had some beer with Lewis Daugherty (R. 118). One Brummett joined the group, and shortly thereafter engaged in a fight with accused. In the fight accused was thrown or fell to the floor and was struck several blows in the face by Brummett, who also took accused's head and struck or bumped it against the floor. The accused sustained a very severe beating (R. 107, 142, 164, 184). Previous to this fight two deputy sheriffs had entered the place, and when "JABO" (Lewis Daugherty) called accused's attention to their presence, he said he didn't care about the law, that the "MP's" were supposed to attend to him (R. 106). According to Daugherty accused was in a belligerent mood and was getting drunk, and the witness left and went home (R. 151). Following the fight with Brummett, the

accused was "out in every way" -- "laying like a corpse" (R. 142); "laying there and not moving * * * didn't seem to be breathing" (R. 107); he appeared to be dazed (R. 186). There was evidence that Brummett also struck Mrs. York (R. 107, 185). According to some of the witnesses the two deputy sheriffs were present during this fight, but made no effort to interfere or quell the disturbance (R. 107).

At this point Sergeant McCann of the Nashville Police Department arrived in answer to a call. Most of the people were outside at this time except some of the employees, the accused and his wife (R. 177). McCann called the military police, who arrived in a few minutes, wearing armbands (R. 37, 124). McCann pointed out the accused, saying "Here he is, a drunk soldier. Take him out." Sergeant McCann had restrained the accused, placing his hands on his shoulders, keeping him in the booth, until the military police arrived. In the opinion of this witness (McCann) the accused was drunk and staggering (R. 177-178). Accused used profanity toward Sergeant McCann (R. 179). Military Policemen Van Dane and Jacobs removed York from the tavern, pulling him out, the accused's feet dragging (R. 179). According to McCann, there was no mistreatment of York and no more force was used than was necessary to remove him (R. 180). There was testimony of others present that one of the military policemen grabbed accused by the hair (R. 109, 166).

From the Nashville General Hospital the accused was taken to military police headquarters at Centennial Park (R. 219, 220).

Later that evening, shortly after 11:00 p.m., accused received medical treatment at Thayer General Hospital (R. 192, 193). Certain wounds were cleaned and sutures made in his lips. No anesthetic was used and York made no exclamation of pain when the needle was used (R. 194). Private First Class Bernstein, Medical Detachment at Thayer General Hospital, drew five cubic centimeters of blood from accused's arm. The witness Bernstein, a graduate of the school for laboratory technicians at Riley General Hospital, ran a blood test the next day to determine the alcoholic content (R. 195). The specimen was placed in a flask and kept overnight in a refrigerator (R. 194, 198). The flask had a rubber stopper (R. 204). According to Captain Robert M. Melampy, Sanitary Corps, the reduction in alcoholic content, of samples stoppered and stored in a refrigerator from twenty-four to thirty-six hours, is negligible (R. 207). The test showed 3.0 milligrams of alcohol per cubic centimeter of blood (R. 196; Def. Ex. 1). The reading was checked by Captain Melampy, a graduate chemist in charge of the Bio-Chemistry Section of the Hospital Laboratory (R. 200). Captain Melampy obtained the same result -- "3.0 milligrams of ethyl alcohol per cubic centimeter of blood" (R.205). According to the witness the result of tests conducted on the "average drunk" shows between 2.0 and 3.5 milligrams of ethyl alcohol per cubic centimeter of blood (R. 205). Further, in his

opinion, "every person showing an alcoholic content between 2. and 3.5 is drunk" — that is "They would all show some behavior characteristic of the effects of alcohol" (R. 207).

The accused while at the Nashville General Hospital was bloody around the face, mouth and nose, had two or three teeth knocked out and seemed "pretty much in a daze" (R. 211). On leaving the hospital, accused "was staggering and couldn't walk by his own power" (R. 212).

Accused's wife testified that she had known him for five years, and that they were married on 8 December 1943 (R.100, 125). She had drunk with him before and had seen him drunk often. Usually on week-ends they went out together and accused would get drunk. When drinking whiskey accused gets wild and is easily offended. Her husband, on this night, drank more than he usually does and "this time it seemed as though he didn't know just what he was doing or what was going on" (R. 125).

The accused did not testify but offered as unsworn statements three statements made on investigation of the charges, all signed by accused and verified under oath. The statements were accepted by the court as the unsworn statement of the accused (R. 216, 217; Def. Ex. 3). The accused admitted in the statement that he was at Red Dardy's that night on a week-end pass, and that he drank some whiskey, and asserted that he remembered nothing that occurred from the time he ordered some more whiskey at the tavern until he was at the county jail. He had no recollection of the events alleged in the Specification. He further stated that he owned and had a knife with him when he went home that night, which he identified because of a chip out of the handle. On being shown Prosecution's Exhibit G-1, accused stated that it looked like the knife he had with him that night except that the notch (chip) was bigger. He recalled having put the knife in his pocket when he changed clothes at his barracks on Saturday, 8 July (Def. Ex. 3).

5. The prosecution, in rebuttal, offered evidence substantially as follows: Accused while being conducted from Nashville General Hospital to Military Police Headquarters at Centennial Park walked about twenty yards "under his own power" (R. 219). On being placed in the vehicle, he was ordered by the guard to lie on the floor and to put his hands over his head, and complied with the order (R. 219). At Headquarters, accused stood unaided for several minutes, raised his arms while being searched, and answered questions directed to him by the desk sergeant (R. 223, 224).

Major Castanares, Medical Corps, a surgeon and experienced practitioner, testified regarding the accuracy of a blood test in reflecting the actual drunkenness of the individual (R. 231). Differences in individuals,

the development of a tolerance to alcohol, the taking of food by the individual, before or during the drinking, all affect the state of intoxication (R. 231, 232, 233).

> "* * * a man who is an habitual alcoholic or a man who drinks quite frequently, it will take much more liquor to cause him to become drunk than it will a man or woman who doesn't drink * * *" (R. 234)

6. The evidence is undisputed that the deceased, Sergeant Jacobs, while riding in an Army vehicle on the night of 8 July 1944, in Nashville, Tennessee, received a severe injury in his neck and throat and that as a direct result of the shock and loss of blood resulting from this injury, Sergeant Jacobs died within the ensuing fifteen or twenty minutes. Riding in the vehicle at the time with Jacobs were three other enlisted men: the driver, Sergeant Van Dane, a friend of Jacobs and on duty with him, and two prisoners, Private Combs, in custody for an alleged minor offense, and accused, then under arrest for disorderly conduct. The accused had been drinking and fighting and was in a belligerent mood immediately before the arrest. The two prisoners were seated in the rear, accused on the right. Jacobs, the deceased, was seated next to the driver but facing the rear. No light was burning inside the carryall. Suddenly the accused lunged toward Jacobs and a brief struggle between them occurred in the front of the vehicle. Van Dane felt accused against him and observed that Jacobs was injured. Van Dane joined the struggle with accused, grabbing his right wrist. He felt a knife scrape him. Combs came forward and pulled accused to the rear of the vehicle. Van Dane saw that Jacobs was badly hurt and saw him grab his throat, attempting to check the flow of blood. When Combs pulled York to the rear, Van Dane started to drive rapidly to the hospital. Combs, in holding the wrist of accused, felt a sharp instrument cut his thumb. The car window was open and Combs held accused's wrist, beating it against the glass. At this point Combs heard an object strike the outside of the car. Later, following a search in this vicinity, an open, bloody knife was found in the street. This knife was identified as admittedly similar to one in the possession of the accused some hours before. Although no one saw the accused with the knife or saw him strike the deceased, the circumstances admit of no reasonable doubt that York, the accused, inflicted the fatal blow.

An element of murder is malice aforethought (MCM, 1928, par.148a). Malice may be implied, when (as in this case), there is the intentional use of a deadly weapon (Clark and Marshall, Crimes, 4th Ed., p. 292). There is no evidence in the record that the accused acted at that time in self

defense. No adequate provocation existed to excuse the assault, assuming that accused acted in the heat of anger. The defense was based on the contention that accused was so drunk at the time that he did not know what he was doing, and could not have had the necessary intent.

It is a general rule of law that voluntary drunkenness is not an excuse for crime committed while in that condition, but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense (MCM, 1928, par. 126a). The evidence discloses that the accused had consumed a considerable number of alcoholic drinks during a period of approximately three hours before the fatal occurrence. A number of defense witnesses testified that he was drunk. A blood test, made from a sample drawn from the accused two hours after the occurrence, disclosed the presence of a considerable amount of alcohol. This fact is not controlling as to drunkenness, but a circumstance to be considered along with the other evidence. The evidence shows that accused, age 33, had been drinking liquor for at least the past five years and had been drunk many times during that period. It was shown that a man may develop a tolerance for alcohol, thereby lessening its effect.

There was also evidence that accused, while unsteady on his feet at times, walked to the vehicle and afterwards walked from the hospital to another car. He then complied with orders to lie down and place his hands over his head. Shortly afterward, he walked from the car into military police headquarters, where he stood unaided at the desk, answered questions, and supplied information regarding his military status. No attack was made by accused on Combs, his fellow prisoner in the car. The accused evidently had the necessary mental and physical capacity to withdraw his knife and open the blade. He then, in partial darkness, made a sudden attack on deceased, inflicting in a split second a fatal blow in a most vital spot. As indicated, there was conflict in the testimony of the witnesses as to the degree of drunkenness of the accused, which conflict the trial court, with the opportunity to hear and observe the witnesses, resolved against the accused. The findings are entitled to their due weight here (CM 243674, Bever, 28 B.R. 43). The evidence sustains the conclusion that the accused was not so intoxicated as to be unable to entertain the necessary specific intent.

The testimony permits an inference that the attack upon Sergeant Jacobs was in furtherance of an effort and intent to resist and escape from the restraint imposed by the military police. The men were wearing arm bands when they arrived at the tavern and took accused into custody. Accused had shortly before indicated that the civil authorities could not handle him, but the military police could. Among the states of mind amounting to malice aforethought as set forth in paragraph 148a, Manual

for Courts-Martial is:

> "An intent to oppose force to an officer or other person lawfully engaged in the duty of arresting, keeping in custody, or imprisoning any person, provided the offender has notice that the person killed is such officer or other person so employed" (CM 222443, Lieberher, 13 BR 283; CM NATO 1070 (1943), Bull. JAG, Jan. 1944, p. 11).

The record supports the findings that the accused, with malice aforethought, willfully, feloniously, unlawfully and with premeditation killed Sergeant Jacobs as specified. This was murder as denounced by Article of War 92.

7. The admission of the testimony of Major Castanares, over the objection of the defense counsel, was proper. The witness, a graduate of a reputable medical college with subsequent internship and the practice of medicine, was qualified as an expert to give his opinion on the effects of alcohol on the human body. It was not necessary that he be a toxicologist. The competency or qualification of an expert is a matter for determination by the court, and its decision thereon will not be reversed unless it be shown that there was an abuse of judicial discretion (Jones on Evidence, 4th Edition, 369; Underhill's Criminal Evidence, 4th Edition, 236). No reason appears to suppose that the testimony of this witness was particularly persuasive upon the court, or bore any vital relation to the findings. The record would have been as sufficient without it.

8. The Charge Sheet shows that the accused is 33 years of age and that he was inducted into the military service on 1 June 1942. His record shows no prior service. He is married.

9. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence either of death or of life imprisonment is mandatory upon conviction of a violation of Article of War 92.

Fletcher R. Andrews, Judge Advocate.

Herbert R. Federer, Judge Advocate.

[illegible], Judge Advocate.

1st Ind.

War Department, J.A.G.O. DEC 21 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 Edward H. York (36343856), 71st Ferrying Squadron, 559th Army Air Forces Base Unit (20th Ferrying Group).

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. In view of the uncontroverted testimony that the accused not only was intoxicated, but had very recently suffered a severe beating in a fight with a civilian, receiving violent blows upon the head which had rendered him unconscious, I recommend that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, that the sentence as thus commuted be carried into execution, and that the United States Penitentiary, Atlanta, Georgia, be designated as the place of confinement.

3. Consideration has been given to a letter by the Defense Counsel and Assistant Defense Counsel, attached to the record, recommending clemency. Consideration has also been given to a letter from the wife of the accused, addressed to The Adjutant General, dated 8 November 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 suitable to carry into execution the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

4 Incls.
1 - Record of trial
2 - Dft. ltr. for sig. S/W
3 - Form of action
4 - Ltr to The Adjutant General fr wife of accused dated 8 Nov. 1944

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures, and confinement for life. G.C.M.O. 70, 2 Feb 1945)

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

SPJGN
CM 265445

10 NOV 1944

UNITED STATES	THE INFANTRY SCHOOL
v.	Trial by G.C.M., convened at Fort Benning, Georgia, 15 September 1944. Dishonorable discharge, total forfeitures and confinement for three (3) years.
Second Lieutenant CLARENCE E. ALEXANDER (0-1823202), Infantry.	

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 Charges and Specifications:

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

Specification: In that Second Lieutenant Clarence E. Alexander, Officers' Special Basic Course No. 29, 28th Company, Third Student Training Regiment, The Infantry School, did, at Columbus, Georgia, on or about 13 August 1944 by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Private R. H. Shumway, Lawson Field, Fort Benning, Georgia, one billfold, value about $1.00, and about $62.00, lawful money of the United States, the property of the said Private R. H. Shumway.

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

Specification: In that Second Lieutenant Clarence E. Alexander, Officers' Special Basic Course No. 29, 28th Company, Third Student Training Regiment, The Infantry School, Fort Benning, Georgia, was, at Columbus, Georgia, on or about 13 August 1944 in a public place, to wit, The Elks' Club, disorderly while in uniform.

The accused pleaded not guilty to, and was found guilty of, both Charges and the Specifications thereunder. He was sentenced "to be dishonorably discharged the service", to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence but reduced the period of confinement to three years and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that Private R. H. Shumway, an artful card sharper, was "playing dice" about 1 August 1944 in the toilet at the Greyhound Bus Station in Columbus, Georgia. The accused entered the room and joined the game. This was the first meeting of the two men (R. 19, 27). During the ensuing two weeks they were in frequent contact with one another (R. 19). By 6 August 1944 the accused felt that their friendship was on a sufficiently firm foundation to warrant his asking for a loan of $100. Shumway refused to advance the money. The accused immediately attempted to borrow the more modest sum of $75, but the answer was again in the negative (R. 42).

On the night of 13 August 1944 they went to the Elks Club in Columbus together (R. 7). The purpose of their visit was to start a blackjack game with marked cards, to entice others to participate, and to split the winnings "fifty-fifty" (R. 7-8, 28-29, 43). As the first step toward the accomplishment of this fraudulent plot, Shumway purchased a deck of playing cards at the Club and with his pocket knife carved code signs intelligible only to himself on all "the high ones" (R. 29-30, 43-44). To fortify themselves for their mission he and the accused consumed a quart of whiskey and several additional drinks. Although Shumway did away with a pint himself, he was only slightly intoxicated (R. 44). Seating himself at a table, he began dealing to the accused (R. 8, 29-30). There were about forty members and guests in the Club, and within fifteen or twenty minutes the two conspirators were joined by several other gamblers, including First Lieutenant Horace H. Stevens (R. 8, 15, 30, 54-55, 57). The accused remained in the game and continued wagering (R. 30).

As was inevitable, Shumway was the only consistent winner. Stevens, who was the hardest hit, lost eighty-five dollars of which he paid twenty-five dollars by check. This instrument was promptly cashed at the bar by Shumway and the proceeds deposited in his leather wallet (R. 8-9, 31-33; Pros. Ex. 1). Although not beaten "every hand", the accused apparently also contributed to Shumway's ill-gotten gains (R. 30-33).

The game ended at approximately 9:00 p.m. (R. 9, 51). The accused was not given his split of his "partners" net cash winnings of thirty to thirty-five dollars (R. 31, 33). Instead, Shumway withdrew to a corner of the main floor of the club for a private game of blackjack with Lieutenant Stevens who "wanted to play some more * * * to get even" (R. 9, 31). After struggling futilely for two hours against the prearranged verdict of the marked cards, Lieutenant Stevens saw his debt

gradually mount from sixty to two hundred dollars (R. 9, 34). During that period the accused did not intrude or interfere but he walked by and "came up several times" (R. 34-35). In desperation Lieutenant Stevens began "betting one hundred dollars a lick" (R. 34). Suddenly, moved by a well-founded suspicion, he charged his opponent with "dealing off the bottom" (R. 10, 36). The accusation was "immediately denied" (R. 36).

At this point the accused without any previous warning approached with his fist "pulled up" and aimed a blow at Shumway. Reacting instinctively, Shumway "ducked" but not quickly enough. Struck on and behind his left ear, he suffered a cut three-fourths of an inch long and was briefly stunned. He "felt an arm and hand go over [his] back trying to get [his] billfold * * *. Finally it was removed from [his] pocket" despite some resistance on his part. Recovering partially from his dazed condition, he rose to a half sitting, half standing position, reached out, and hit the accused on the nose, causing it to bleed (R. 9, 11, 36-39, 41, 49, 52). A short "scuffle" ensued which was terminated by the intervention of First Sergeant Floyd Durst and Mr. F. B. Miller, the Custodian of the Club (R. 41, 46, 52). Catching Shumway by the arm, Miller inquired, "What did you hit the lieutenant for?" The reply was "He [the accused] has got my purse" (R. 12, 47, 52). This assertion was categorically denied by the accused. He not only proclaimed his innocence but insisted that he be searched to prove that the wallet was not in his possession. Durst went through his pockets and found a purse but it was not the one in issue (R. 12, 39, 47, 52-53). Unconvinced, Shumway stated, "He has my purse. Please get it for me. He has all the money I have. Please get it" (R. 52-53).

In response to this plea Durst undertook a second search and located a "hump" near the middle of the accused's back between his belt and his body (R. 13-41, 48, 53). Upon making the discovery Durst said, "If you have Private Shumway's wallet, give it back to him". Still obstinate, the accused replied, "I don't have the wallet" (R. 48). Having confirmed Durst's finding by personally feeling the "hump", Miller left the room momentarily to call the military police (R. 53). Shumway again asked for the return of his property, and this time the accused said, "All right, go ahead and get it" (R. 48). Reaching over to the "hump", Shumway retrieved his wallet. He was able to identify it positively because he had written his name on it and because of a broken zipper and a torn seam (R. 16-17, 50; Pros. Ex. 1). Upon looking inside, he found that the contents consisting of approximately sixty-two dollars "had not been disturbed" (R. 13-15, 48-49). When the military police arrived, the accused remarked to him that, "If you keep quiet about us, everything will be all right * * *" (R. 40). Completely appeased and "very happy", Shumway said to those present "I have got my money. He gave it to me. Just drop it" (R. 49-50, 53-54). Upon Miller's insistence, however, he related the events of the evening and expressed his willingness to sign a statement against the accused (R. 54).

4. The accused, after having been apprised of his rights relative to testifying or remaining silent, took the stand on his own behalf. The only other witness called for the defense was First Lieutenant Horace H. Stevens. Since he was intensely concentrating on his cards at the time, he did not see the accused remove the wallet or strike Shumway behind the ear (R. 58, 60-62). Lieutenant Stevens' best recollection was that the "fracas" did not begin until after Shumway's "announcement * * * that his purse was missing" (R. 59, 62).

The existence of the agreement to split gambling profits was confirmed by the accused in his own testimony but he insisted that his sole motive was to unmask a sharper and to ensure his conviction (R. 68, 82, 84-85, 89, 93-94, 97, 99). At the first meeting in the latrine of the Greyhound Bus Company the accused had detected Shumway in the act of switching dice and, upon the conclusion of the game and after the withdrawal of the other players, had charged him with cheating. The conversation which followed was summarized by the accused as follows:

> "He said, 'Well, I think you are a pretty shrewd person, Lieutenant.' He said, 'Here, I am going to give you your eleven dollars back.' He gave me my money back, the eleven dollars. He said, 'How would you like to make some good money?' I thought, well what kind of deal is this? I thought I would listen to what he had to say. He said, 'You and I could shoot crap, play cards, and split the profits.' Well, I remembered reading an article a long time ago in a newspaper or magazine. I don't remember where I read it, but it went on to say — this article — that thousands of dollars are lost in the army by innocent enlisted men and officers by crooked card sharks, dice sharks, etcetera . . . That ran through my mind when Private Shumway made the proposition to me. I told him I would go along with him, figuring I could find out — get enough evidence on him, see what it was going to build into and see how much he was actually taking from the army" (R. 68).

The accused had seen Shumway on three or four occasions thereafter. On one of these Shumway had demonstrated his method for marking cards. "He said he could take a deck, and when the seal on the deck is unbroken, the player must take the deck * * * and loosen the glue and slide the cards out of the side of the deck. Then you can mark the cards and glue the side of the carton back on again * * *. He took a razor blade and he showed * * * how to mark the deck. The high cards, he would sort of dust the edges, just enough to sort of dust the mere finish off the edges of the cards" (R. 69-70).

Prior to the night of 13 August 1944 the accused witnessed at least four gambling games in which Shumway either shifted dice or employed marked cards. Although there was ample and convincing evidence each

time that Shumway was cheating, the accused did not attempt to expose him (R. 69-73, 93-94, 97, 103). On one occasion a colored waiter who was participating and who parted with $3.50 in short order charged Shumway with "using crooked dice". The accused immediately refunded the loss to prevent a disturbance and to avoid " a very embarrassing situation".. He "had one operation in mind; that was the final expose" (R. 73, 93-94, 103).

His own losses were always returned by Shumway but they never split any of the profits despite their agreement (R. 71-72, 83, 86-89, 94-95). Shumway put the winnings "Down in his jeans" and usually claimed that he had lost money (R. 72, 89, 95). The accused was in debt and had a few checks outstanding for which he was not certain that there were sufficient covering funds, but his "intentions" in trying to borrow $100 from Shumway "were to find out how much he had available" (R. 83-85). If the accused ever "needed money very badly", he could always obtain it from his "folks" (R. 92).

On the night of 13 August 1944 he had brought to the Elks Club a fifth of whiskey with only "three fingers in it" and a full half pint. The fifth was checked at the door and the half pint was carried inside in his pocket. He did not use this last supply of liquor in the course of the evening but did have a few drinks with Shumway at the bar (R. 75-76).

One of the employees of the Club supplied them with a deck of cards which Shumway promptly proceeded to mark with his pocket knife (R. 77, 103). During the game which commenced shortly thereafter the accused "contributed * * * definitely twenty dollars, maybe a dollar less or a dollar more" (R. 78). Play was terminated at the request of a club employee because the betting was "too heavy" (R. 78). When Lieutenant Stevens and Shumway withdrew for their private game of blackjack, "they did not want [the accused] around." He tried to persuade Lieutenant Stevens to stop playing and said "Why don't you guys cut it out? Why don't you get straightened out here?" They ignored him. Despite their obvious wish to be alone and their resentment at his interference, he went over to their table about "three or four times" (R. 79-80). On these excursions he could hear Shumway say, "Well, that is three hundred you owe me" or "That is two hundred you owe me" (R.79).

Not anticipating any resistance, the accused "reached down over [Shumway's] back", pulled out his billfold, and said, "I am going to relieve you of this and get this straightened out right now" (R. 80-81, 87-88, 95). The first blow was struck by Shumway; not until then "did the fracas" begin (R. 81).

In explaining his conduct the accused stated that:

"I intended to straighten out the whole deal; in other words I wasn't going to make him, but I was going to see it done myself; take the purse out, give Lieutenant Stevens back the amount of money he had lost, take out what I had lost, and explain to Lieutenant Stevens how he had been cheated" (R. 96, 103-104).

Although he had planned to expose Shumway, the reason he had not done so after the fight commenced was that:

"Everybody was standing around. If I had taken that purse back out of my pocket at that point, everybody would have seen it and said, 'He is a thief'" (R. 81, 100).

He had finally become "disgusted with the whole thing" and had said to Shumway, "If you keep quiet, nothing will happen" (R. 81). In the accused's own words,

"I wanted to expose him myself * * * I could not afford to be caught cooperating with him in such a scheme, because if I would be found, which I was found at it, it would appear that I was just as guilty as he was. That is the reason I did not want to expose him. I wanted to expose him myself. That was my mission from the start." (R. 89-90).

* * * * *

"I was bleeding profusely, and Mr. Miller and the first sergeant were all around there - [An explanation] could cause more damage than do good. After all, who would believe me in something like that at a place like that?" (R. 100-102).

No part of the $20.00 invested by the accused in the game at the Club or the $3.50 previously given by him to the colored waiter was ever repaid by Shumway (R. 82).

5. The Specification of Charge I alleges that the accused did "on or about 13 August 1944 by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Private R. H. Shumway * * *, one billfold, value about $1.00, and about $62.00, lawful money of the United States, the property of the said Private R. H. Shumway". This offense was laid under Article of War 93.

Having entered into a conspiracy to cheat other gamblers and having enjoyed some little success during the twelve days after the commencement of their acquaintance, the accused and Shumway on the night of 13 August 1944 went to the Elks Club in Columbus, Georgia, in

search of additional victims. The place was well chosen for the nefarious purpose contemplated and within short order a game was in progress. Since the high cards had all been marked beforehand, at least twenty-five dollars, exclusive of the accused's losses, gravitated into Shumway's hands. The amount contributed by the accused was estimated by him to be some twenty dollars but Shumway inferentially fixed the amount at not to exceed five dollars. Although in their past transactions the accused had always had his losses reimbursed at the conclusion of their gambling forays, the practice was not followed in this instance. Instead Shumway began a private game with Lieutenant Stevens. After rudely intruding three or four times, the accused suddenly forcibly removed the wallet from Shumway's rear pocket. Whether the accused prefaced this act by delivering a blow with his fist is immaterial, for the taking of the billfold was firmly resisted by Shumway. In overcoming this opposition the accused was guilty of that measure of violence which is an essential element of robbery.

Obviously his intention was not merely to expose his confederate or to compel him to disgorge his gains, for had that been the accused's purpose he would have availed himself of the several opportunities which had previously presented themselves. What better occasion could he have planned than that afforded by the complaint of the negro waiter or, on the very night of the incident here involved, at the termination of the first blackjack game? The failure to act in either instance lends substance to the inference that the accused was all too ready to profit by Shumway's fraud.

It has been subtly argued by the defense that the accused at the time of the assault could not have entertained the intent to steal essential to proof of robbery, because he was merely seeking to recapture his own gambling losses. Although the legal principle contended for has been recognized in numerous jurisdictions, it has no application to the facts here under consideration: See People v. Rosen, 78 P. (2d) 727 (Cal. 1938), 116 ALR 991 and Temple v. State, 215 S.W. 965 (ct. of Crim. App. Tex., 1919). Whatever monies of the accused may have found their way into Shumway's possession were not "lost" at gambling, but were paid out as "capital" in a fraudulent enterprise, in pursuance of a prior agreement, for the purpose of inducing "suckers" to participate in the game. Most important of all, the accused did not limit his forcible seizure to his own advances but also removed a wallet and other monies belonging to Shumway. Even under the rule contended for by the defense this circumstance alone would have necessitated an exception warranting conviction for robbery: Gant v. State, 115 Ga. 205, 41 S.E. 698 (1902). When, however, the forcible recapture not only involves the property of others but is followed by vigorous denials of the taking, the animo furandi requisite to a conviction for robbery has been irrefutably established. All of the technical aspects of the offense have been proved beyond a reasonable doubt.

6. The Specification of Charge II alleges that the accused was "on or about 13 August 1944 in a public place, to wit, The Elks' Club, disorderly while in uniform". This was set forth as a violation of Article of War 96.

With an attendance at the time of about forty individuals, both military and civilian, including "a few ladies", the Elks' Club on the night of 13 August 1944 was unquestionably a public place (R. 55). In engaging in what has been variously described as a "scuffle" or "fracas" and particularly, if the testimony for the prosecution is accepted at face value, in delivering the first blow, the accused committed a breach of the peace which was per se disorderly. The evidence amply supports the Specification of Charge II.

7. While the sentence to "dishonorable discharge" imposed in this case is inappropriate for a commissioned officer, it is not illegal nor does it prejudice the substantial rights of the accused. It is the legal equivalent of dismissal and will be given the same construction and effect: III Bull. JAG, July 1944, p. 281, sec. 402 (7).

8. The accused, who is divorced and the father of one child, is about 26 years old. He attended high school in Piper City, Illinois, for four years and the University of Illinois for two years. Between March 1940 and July 1942 he was employed as a radio announcer, continuity writer, labor foreman, hoisting and portable engineer, and trench machine operator. After enlisted service from 17 July 1942 to 14 April 1943, he was commissioned a second lieutenant on 15 April 1943. He has been on active duty as an officer since this last date. Prior to the incidents narrated in paragraph 3 above he received punishment under Article of War 104 on six different occasions.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93 or Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Robert J. Connor, Judge Advocate.

Gabriel H. Gaecke, Judge Advocate.

SPJGN
CM 265445

(39)

1st Ind.

War Department, J.A.G.O., JAN 2 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 Clarence E. Alexander (0-1823202), 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 originally recommended that the sentence as approved by the reviewing authority be confirmed and ordered executed, but on 26 December 1944, after this case had been forwarded to the office of the President for final action, Major General Fred L. Walker, the reviewing authority, executed an amended action in which he recommended that the execution of the sentence imposed be suspended. In an accompanying letter of even date Major General Fred L. Walker stated that he was of the belief that some "credence" should be given to the testimony of the accused and that the accused possessed "salvage value". In pursuance to Major General Walker's recommendation I recalled the case from the office of the President and I now recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted and that the execution of the sentence as thus modified be suspended during good behavior.

3. Consideration has been given to a brief submitted by Dexter W. Scurlock, individual defense counsel, and to a letter dated 7 November 1944, from the Honorable Scott W. Lucas, member of the United States Senate, and to a letter dated 20 November 1944 from Governor Dwight H. Green of Illinois.

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

Myron C. Cramer

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

6 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of action.
Incl 4 - Brief submitted by defense counsel.
Incl 5 - Ltr. fr. Hon. Lucas.
Incl 6 - Ltr. fr. Gov. Green w/incl.

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. As thus modified, execution suspended. G.C.M.O. 79, 21 Mar 1945)

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

SPJGQ
CM 265447

21 OCT 1944

UNITED STATES	)	106TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Atterbury, Indiana, 30 September 1944. Dishonorable discharge and confinement for ten (10) years. Disciplinary Barracks.
Private JOHN R. HODGE (36656798), Company B, 423d Infantry.	)	

- - - - - - - - - - -

HOLDING by the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

- - - - - - - - - - -

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private John R. Hodge, Company B, 423rd Infantry, did, at Camp Atterbury, Indiana, on or about 0001 28 August 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: Shipment to Fort George G. Meade, Maryland, for overseas replacement, and did remain absent in desertion until he came under military control at Camp Grant, Illinois on or about 17 September 1944.

He pleaded not guilty to and was found guilty of the Specification and the Charge. Evidence of three previous convictions for absences without leave in violation of the 61st Article of War 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 twenty years. The reviewing authority approved the sentence, reduced the period of confinement to ten years, designated The United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

(42)

3. The evidence for the prosecution is as follows:

On 25 August 1944 the accused was transferred from his then organization to Army Ground Forces Replacement Depot #1, Fort George G. Meade, Maryland, by orders of which the following extract copy was introduced in evidence (R. 7; Ex. F):

R E S T R I C T E D

HEADQUARTERS 106TH INFANTRY DIVISION
Camp Atterbury, Indiana

SPECIAL ORDERS) 25 August 1944
NO. 203)

E-X-T-R-A-C-T

* * *

2. Following EM (MOS-745; Inf - Rifle Trained) units indicated trfd in gr to AGF Repl Depot #1 Ft Geo G Meade Md so as to arrive on or before 29 Aug 44:

* * *

423d Inf
PVT'S

	NAME	ASN	AGCT GROUP	MCO	COMPANY
254.	Hodge, John R.	36 656 798	IV	590	B

* * *

TTG TDN 501-31 P 433-02, 03, 07 A 212/50425 and 501-15 P 432-02, 03 A 212/50425. Auth: AGF TWX GNACR 5056.

* * *

By command of Major General JONES:

WILLIAM C. BAKER JR
Col GSC
CofS

OFFICIAL:

/s/ F. I. AGULE
/t/ F. I. Agule
Lt Col AGD
Adj Gen

DISTRIBUTION: "X"

R E S T R I C T E D

These orders were, inferentially, based upon the receipt by the organization of a telegram from Headquarters, Second Army, directing the transfer of six hundred fifty enlisted men to the mentioned Replacement Depot to arrive on or before 29 August 1944, and five hundred on or before 3 September 1944. The telegram stated that these men were replacements, and would comply with directives "P.O.R.", concerning Preparation for Individual Overseas Replacement. It directed citation of such telegram, AGF TWX GNACR 5056, as authority for such transfer orders (R. 7; Ex. E).

On the day the orders were issued for his transfer, 25 August 1944, the accused was called to the orderly room of his company, and there First Sergeant Bierds (R. 11) showed him the orders and pointed out to him that his name appeared thereon, as he had not been present when the orders were read to the other men. There, also, First Lieutenant Collette read to him the 28th Article of War (R. 11, 12-13). The men named on the order were notified that they had been alerted and would leave within a short period of time to report to Fort Meade, Maryland (R. 13).

The court took judicial notice that Fort George G. Meade, Maryland, is an Army Ground Forces Replacement Depot (R. 13-14).

Lieutenant Collette did not tell the accused that he was going overseas, but did tell him that he was alerted, restricted to the area, and would leave in a short time or on a moment's notice (R. 14). First Sergeant Bierds refused him a pass to go home and see his wife, saying "You know if you got a pass, you wouldn't return. Why don't you just go down and call her up?" The accused said, "Maybe you're right, Sergeant." (R. 11).

The accused signed a statement in writing to the Investigating Officer, wherein he admitted being brought into the orderly room and hearing the orders read transferring him to Fort George G. Meade. He left the orderly room and telephoned his wife from the "PX". Her mother answered, saying that his wife was sick in bed with the "flu", and that he should come home right away. He went home the next Saturday afternoon (26 August, the next day), intending to return Sunday evening, but his wife remained sick in bed and he "could just not help" himself. He "just stayed". After his wife got up she still felt bad all the next week. Accused was "picked up" by a policeman who came to his house on being notified by a neighbor that he was there on "Saturday afternoon". Accused wants to go overseas and prove that he "ain't yellow". He has a brother overseas who has been captured. He does not want a general court-martial; his wife and baby need his allotments. His wife can't work because she is pregnant. He wants to start soldiering again (R. 10; Ex. G).

The company morning report shows the accused from duty to AWOL 28 August 1944 (R. 6; Ex. C). The guardhouse morning report, Camp Grant, Illinois, shows him confined 17 September 1944 (R. 6; Ex. D).

4. The defense introduced no evidence. The accused remained silent, after explanation of his rights by defense counsel (R. 14).

5. The requirements of proof of intent to shirk important service, as well as those applicable to its concomitant intent, to avoid hazardous duty, to bring a case within the definitive Article of War 28 in a prosecution under the punitive Article of War 58, have been the subject of discussion in a long line of decisions by the Board of Review.

The standard was set in time of peace by the decision in CM 151672, Lytle, Dig. Op. JAG 1912-40, sec. 385, page 193, defining "important service", within the purview of Article of War 28, as including "all actual service designed to protect or promote, in a manner direct and immediate, the national or public interest or welfare", but not including "preparatory" service which constitutes merely a part of a series of acts or course of conduct designed, as preparation and training, to perfect the personnel of the Army when called upon "to render efficiently that actual, direct, immediate service to the national or public interest or welfare which is the ultimate object of maintaining an Army".

This standard of direct relation to actual service such as "embarkation for foreign duty, possible contact with the enemy, or other functions of the Army" recognized as "important service", distinguished from preparatory movements or transfers, not so recognized, remains generally applicable in time of war (CM 224805, Conlon, 10 October 1942, 14 BR 191), wherein "important service" was recognized as a relative term, to be applied comparatively in time of war as well as in time of peace, and transfer to a cadre to entrain for undisclosed immediate duties, which, so far as the accused had reason to know, were routine training, not directly preparatory to departure overseas, was held not to constitute such important service, though the assignment was to an amphibian command. So also CM 225128, Southern, 14 BR 229; CM 225422, Barrett, 14 BR 267; CM 225405, Lineberger, 14 BR 255.

In the instant case, the telegram (admitted without objection) directing the transfer of a certain number of enlisted men to the Replacement Depot stated that the purpose of the transfer was to provide overseas replacements, and was regarded in the forwarding command as distinguishing the case from CM 262416, Morel, decided 7 September 1944, where transfer to a Replacement Depot was held not to constitute important service within the purview of Article of War 28, there being no showing that the accused was destined to embark on overseas service or that he was on a shipping list at a port of embarkation. The telegram was not shown to the accused, nor its import disclosed to him. Even so, proof that the accused has been selected as a replacement for overseas duty and is in the process of preparation therefor falls short of the established requirements as a basis for any inference of intent on his part to shirk the duty of embarkation for overseas service.

To sustain that inference, the evidence must establish that the accused knew or had reason to know that his embarkation for overseas duty was imminent and that his absence would result in avoiding such embarkation. (CM 262347, Moore, 13 September 1944; CM 230826, McGrath, 18 BR 53; CM 227459, Wicklund, 15 BR 299; CM 226374, Collins.)

The proof must show that the accused was about to depart for overseas duty and that he absented himself with the specific intent to avoid that service. (CM 231163, Sinclair, 18 BR 153, 2 Bull. JAG 139; CM 225512, Henning, 14 BR 281; CM 228401, Webster, 16 BR 167; CM 224765, Butler, 14 BR 179.)

The transfer of the accused must be directly related to embarkation for foreign duty, or other important service. (CM 262347, Moore, supra.)

Proof that Article of War 28 was explained to the accused and that he was told that it was in effect as to his organization is insufficient. The proof must show that he expected his early embarkation for overseas service. (CM 253070, Moran).

The fact that the accused's organization knew of its contemplated early departure does not establish an inference that the accused knew it. (CM 231163, Sinclair and CM 230826, McGrath, supra.)

That the accused's organization was in a staging area, given a Task Force number and later actually embarked for foreign service is insufficient to prove that the accused knew of its immediately, impending departure. (CM 225512, Henning; CM 226374, Collins; CM 224765, Butler and CM 227459, Wicklund, supra.) Transfer to a staging area is no basis for such inference. (CM 262347, Moore, supra.)

Reference to some cases that have applied Article of War 28 to transfers involving important service, and found the evidence sufficient, will serve to illustrate the requirements.

In CM 228619, Hammock, 16 BR 275, the accused had helped to load the ship for embarkation, had been sleeping and eating on shipboard, and absented himself only one hour before final roll call. This was held sufficient to sustain conviction, although the hour of sailing and destination had not been revealed.

In CM 227845, Sapp, 15 BR 379, and CM 228400, McElroy, 16 BR 161, the accused were members of a landing team, equipped for combat, and had practiced landing operations. They were ordered to entrain from Fort Bragg, North Carolina for a port of embarkation. They absented themselves 12 October. The organization entrained 14 October and embarked from the port for foreign service 15 October. The character and extent of activity within the organization and the fact that the accused knew it was "going someplace" were held sufficient to apprise them of its imminent departure for overseas duty. In CM 228401, Webster, 16 BR 167, the accused, a member of the same landing team, overstayed a pass from a week earlier, not knowing departure was imminent, and the evidence was held insufficient to sustain his conviction.

In CM 262836, Parmelee, decided 3 October 1944, the accused absented himself from Replacement Depot No. 1, Fort George G. Meade, Maryland, after notice of transfer to a port of embarkation, and of his place on a particular shipping list to overseas destination, after particularly diligent but unsuccessful efforts to have himself declared physically unfit, which efforts he continued during his absence. A substitute embarked in his place. The circumstances were held sufficient to sustain the inference of intent to avoid embarkation.

In NATO 1566, Donohue, the accused absented himself without leave while alerted for shipment to an undisclosed destination from a replacement depot in North Africa. He had been told the sailing list he was on. The organization sailed for Italy in his absence. His conviction was upheld, as he knew embarkation was imminent.

In CM ETO 2473, Cantwell, the accused absented himself without leave while his company was bivouacked in a combat staging area, after notice to the accused of preparation for imminent departure on a hazardous mission. His unit had drawn combat equipment and was loading combat trucks and stowing them on invasion vessels. This was held sufficient, distinguishing CM ETO 2432, Durie, where the accused knew that he was "taking a chance", having notice that his unit was under orders for invasion, and of the probable consequences of unauthorized absence at that time, but not of the imminence of departure, as evidenced by his leaving his belongings with another soldier of his unit and returning in accordance with his declared intention and before his organization in fact left its station.

In CM A-1142, Evers, the accused, who was with his organization on arrival in a foreign theater of operations, stowed away on the vessel from which he had debarked, attempting to return to the United States. He was discovered and confined eight days later. In the absence of evidence of proximity of the enemy or of an alert to move to a forward area, his offense was held to be absence without leave only, on the proposition that mere unauthorized absence, even within a theater of operations in a foreign country, does not, without other proof, establish prima facie an intent to shirk important service. As an extreme example, the authority of the case as a precedent is open to some question, but it illustrates the point under discussion. The opposite result was reached in CM 228022, Marquez, 16 BR 41, where the accused was on the transport, without authority, for five days before it sailed from Unalaska and the area was under enemy attack.

In the instant case, the proof is lacking that the accused was under orders for imminent embarkation, his transfer to a Replacement Depot being merely a preparatory step, or that his absence would or did avoid embarkation, or that the accused had knowledge of any such facts if assumed. It cannot be inferred that the accused knew certain facts when the existence of the facts has not been established. (CM 262347, Moore, supra.)

Where desertion with the intent to shirk important service or avoid hazardous duty is charged, the accused cannot legally be convicted of desertion with intent not to return. (CM 262416, Morel; CM 224765, Butler, supra, and other cases.)

The evidence clearly justifies conviction of the lesser included offense of absence without leave.

6. The charge sheet data, accepted at the trial, disclose that the accused is twenty years of age, was inducted 5 April 1943, and has had no prior service. The evidence is that he is married and has one or more children. The Staff Judge Advocate's Review shows, from his qualification card, that he had seven years grammar school education and worked for one and a half years as a laborer. His Army General Classification Test score was 63, placing him in Group IV. His commanding officer certified his character as poor, his service, unsatisfactory.

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 the 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 came under military control at the time and place alleged, in violation of Article of War 61, and legally sufficient to support the sentence.

Fletcher R. Andrews, Judge Advocate.

Herbert A. Frederick, Judge Advocate.

[illegible], Judge Advocate.

1st Ind.

War Department, J.A.G.O., 24 OCT 1944 - To the Commanding General, 106th Infantry Division, Camp Atterbury, Indiana.

1. In the case of Private John R. Hodge, 36656798, Company B, 423d Infantry, I concur in the foregoing holding by the Board of Review and for the reasons therein stated 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 50½, you will have authority to order the execution of the sentence.

2. In view of the policy announced in letter dated 5 March 1943 (AG 250.4 (2-12-43)), from The Adjutant General to all officers exercising general court-martial jurisdiction within the continental limits of the United States, "Subject: Uniformity of sentences adjudged by general courts-martial", it is recommended that the confinement be reduced to a period not in excess of five years.

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

(CM 265447).

Myron C. Cramer

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

1 Incl.
Record of trial.

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

SPJGQ
CM 265459

1 NOV 1944

UNITED STATES v. Captain HANSEL E. EDMONDSON (0-310203), Medical Corps.	SIXTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Sheridan, Illinois, 21 August 1944. Dismissal.

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

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

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

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

Specification: In that Captain Hansel E. Edmondson, Medical Corps, 726th Military Police Battalion, Fort Custer, Michigan, was, at Fort Custer, Michigan, on or about 25 July 1944, found drunk while on duty as Medical Surgeon of the 726th Military Police Battalion.

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

Specification: In that Captain Hansel E. Edmondson, Medical Corps, 726th Military Police Battalion, Fort Custer, Michigan, having received a lawful order from Lieutenant Colonel Frederick W. Staples Commanding Officer 726th Military Police Battalion, to report to his office at the Battalion Headquarters, the said Lieutenant Colonel Frederick W. Staples being in the execution of his office, did, at Fort Custer, Michigan on or about 25 July 1944, fail to obey the same.

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

Specification: In that Captain Hansel E. Edmondson, Medical Corps, 726th Military Police Battalion, Fort Custer, Michigan, was, at Riverside Park, Saint Joseph, Michigan, on or about 2 July 1944, drunk and disorderly in camp, to wit, the 726th Military Police Battalion bivouac area, at or near Saint Joseph, Michigan.

He pleaded not guilty to all Charges and Specifications. He was found guilty of all Specifications and of Charge I and Charge II and not guilty of Charge III but guilty of a violation of the 96th Article of War. No evidence of previous conviction was introduced at the trial. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, recommended that the execution of the sentence be suspended during good behavior and forwarded the record for action under Article of War 48.

3. The evidence, briefly summarized, is as follows:

Charge III and the Specification:

For the prosecution:

On 1 and 2 July 1944, the accused was Medical Officer of the 726th Military Police Battalion, stationed at Fort Custer, Michigan, but in bivouac on these days at Riverview Park, Saint Joseph, Michigan (R. 58, 59, 65, 72). July 2nd was a Sunday and all of the military personnel were more or less at ease (R. 59). It had been arranged between Captain Morris Stelzer, the dental officer (R. 69), and the accused, that one would be on duty one night, the other on the next night (R. 42) and Captain Stelzer was accordingly acting as officer in charge of the Aid Station on the morning of 2 July and the accused was authorized to leave the bivouac area on the night of 1-2 July and was not actually required to perform any specific duty on the morning of 2 July as there was no sick-call (R. 42, 67).

At about 7 or 8 o'clock in the morning of 2 July Captain Stelzer saw the accused coming from the bivouac area toward the Medical Department vehicles where he later leaned against the tail-piece of a weapons carrier and urinated (R. 65). Daylight had come and "the entire Battalion was probably up" (R. 70). The accused remained in that position and did not seem able to start or make his way back. Captain Stelzer thereupon sent two aid men to assist him. The accused was quite unsteady in his walk and after observing him leaning against the truck Captain Stelzer was of the opinion that he was suffering from a "bad hangover" and was still under the influence of liquor to some extent (R. 64-66). The

latrine was about 130 yards from the trucks (R. 66). During this episode Captain Stelzer was within 20 or 25 yards of the accused (R. 67). In his opinion the accused was in no condition to take care of any medical duties that might have required his attention (R. 68, 70).

At about 9 or 9:30 o'clock a.m. Captain Martin E. Francis, Executive Officer of the battalion, was called to the bivouac area of the Medical Department and there saw an officer, fully clothed, sprawled in his tent in a very undignified manner as though he had "stumbled in" (R. 33, 34). Upon examination he discovered that it was the accused. He awakened him and, after observing his florid or flushed face, the disheveled condition of his clothing, his inability to stand up, his incoherent speech and the odor of alcohol on his breath, he concluded that the accused was intoxicated or drunk (R. 35, 36, 44).

For the defense:

Corporal Arthur Bickers and T/5 Paul J. Bunch were both members of the Medical Detachment of the 726th Military Police Battalion, and as such, served under the accused. At the suggestion of Captain Stelzer they went to the assistance of the accused on the morning of 2 July 1944 when he was leaning up against a truck (R. 80, 88). Bickers arrived at the truck first and saw in the accused "reactions of a man when he had been urinating" (R. 81). The accused talked in a normal manner and Bickers did not think he was intoxicated (R. 80, 82). Bunch saw the accused leaning against the truck (R. 88) and guessed "he had been drinking some . . . supposed he had" (R. 91). The accused "wasn't too steady" on his feet though Bunch was in a hurry and did not pay very close attention (R. 92). Both Bickers and Bunch saw the accused go to his tent unattended (R. 83, 88).

T/4 Anthony P. Cumbo and Staff Sergeant John J. Morris, both of Headquarters Detachment, 726th Military Police Battalion, saw and spoke with the accused between 8:30 and 11 a.m. on 2 July 1944 at the Battalion Command Post and to each of them the accused appeared sober and acted normal (R. 71-74; 75-78).

Charges I and II and the Specifications:

For the prosecution:

On 25 July 1944 the accused was on duty as Medical Officer of the 726th Military Police Battalion, then stationed at Fort Custer, Michigan. His hours on that day were from 7 a.m. to 4 p.m. and his place of duty was the infirmary building (R. 8, 59).

At approximately 10 o'clock a.m. Master Sergeant Densil L. Stephenson, Supply Sergeant, Post Medical Supply at Fort Custer, was sent to investigate a complaint from the accused to the effect that his supplies

were inadequate. The sergeant made a call on the accused at his office (R. 32) and a conversation ensued in which the accused was emphatic about wanting supplies but did not state what he wanted. Discussing the accused's order for supplies the sergeant asked about each item, why he wanted them, explaining that some requests were inadequate and some inconsistent with needs. After explaining that acetone, which had been requested, was a restricted item, the accused stated he wanted it for the purpose of washing windows. During the conversation the accused crossed the room in an unsteady manner. He thereupon opened the medicine cabinet, took out a bottle of terpin hydrate and handed it to the sergeant saying: "Have a drink. Have a snort". The sergeant refused whereupon the accused opened the bottle, put it to his mouth and took a drink of the contents (R. 27, 28, 30). Elixir of Terpin Hydrate is a cough medicine which contains 40% of 90% alcohol and the proper dosage for medicinal purposes is a teaspoonfull every 3 or 4 hours (R. 22-24). The accused's speech was thick and slurred and he had difficulty picking up matches and lighting a cigarette when he already had one lit (R. 28). As the sergeant got up to leave, the accused got up, once more crossed the room and, taking the bottle, offered the sergeant a second drink which he again refused. In his opinion the accused was intoxicated (R. 29).

At about noon on 25 July 1944 Lieutenant Colonel Frederick W. Staples, Commanding Officer of the 726th Military Police Battalion, telephoned to his adjutant, First Lieutenant Philip E. Pugsley and directed him to call the accused and have him come to the Colonel's office (R. 60). The office was about seventy-five yards from the dispensary (R. 63, 64). The adjutant thereupon called the accused, advised him who was speaking, and told him the Colonel would like to see him. The Colonel waited about 12 or 15 minutes and when the accused failed to appear he called the adjutant again and directed him to call the accused and ask whether he was coming to the Colonel's office. When the adjutant called him a second time the accused said: "I'll be right over" (R. 57, 60; Pros. Ex. 2). After receiving this report from the adjutant the colonel waited a short time and then sent Lieutenant Pugsley to the infirmary to find out why the accused had not come over as directed (R. 60). The adjutant thereupon went to the dispensary where he found the accused sitting in a chair with his shirt buttoned but with his tie off and the collar crumpled. His face was quite red and he had a "sleepy, starey look in his eyes". In the opinion of Lieutenant Pugsley the accused was drunk. To the adjutant's suggestion that he had better come right away as he should know better than to keep the colonel waiting, the accused repeated: "I'll be right over" several times, whereupon Lieutenant Pugsley reported to Colonel Staples (Pros. Ex. 2).

Colonel Staples then directed him, Major Noal A. Leary, Battalion Training Coordinator, and Captain Francis, the Executive, to take the accused to the hospital for a blood alcohol test (R. 61).

According to Major Leary, when they arrived at the dispensary between 2 and 2:30 p.m. where the accused was on duty as battalion surgeon (R. 9, 11) Captain Francis told the accused to get ready to go to the hospital. At first the accused refused to go but when enlisted men were sent for and arrived he consented to leave (R. 9) but said he was going to see the colonel (R. 10, 11). He was unsteady on his feet in leaving the car and after arriving at the hospital he seemed to lose his balance and fell back in a chair (R. 10). It seemed to the witness "that Captain Edmondson was not in condition to perform his duties as medical officer due to the fact that he was very unsteady on his feet . . . whether from intoxicating liquor or some drug he had taken" the witness did not know (R. 9, 11). He did not get close enough to the accused to detect any unusual odor on his breath (R. 10, 11).

Lieutenant Pugsley stated that the accused did not go to the car at once when Captain Francis asked him to do so but asked to sit down and wait a while. Upon his refusal when again directed to go to the car, Captain Francis left and came back with two enlisted men, who were then ordered to take the accused to the car, whereupon the accused got up and went voluntarily and unassisted but weaved considerably in walking down the steps and had trouble standing on his feet and, although he had control of his mental faculties he did not have "good control" of his physical faculties (Pros. Ex. 2).

Captain Francis testified that when they arrived at the dispensary they could not find the accused until several enlisted men pointed to a room in the corner of the building. Upon opening the door to this room he discovered the accused slouched over in a chair. His glasses were off, his hair was mussed, he wore no tie and his face was more florid than usual. When the witness told him they were ordered by the colonel (R. 44) to take the accused to the hospital for a blood test he said "no, he was not going with (him), he was not going any place, he was going to sit right there" and wanted witness to sit there and talk it over with him. Witness again ordered him to go with him to the hospital and accused again refused. Upon orders from Colonel Staples witness then got two military policemen for the purpose of forcibly taking the accused, if necessary. When he had taken the police to the dispensary and the accused refused for a third time to accompany him, he ordered the police to take the accused to the car, whereupon the accused finally decided to go and went without assistance (R. 37, 38). His walk was unsteady and he leaned against the wall, bounced against the door and on the outside witness assisted him with one hand while going down the steps. When he reached the car the accused was unable to get in without lurching against the car (R. 37-39). In the opinion of Captain Francis the accused was "intoxicated" (R. 40) and "definitely too drunk to perform his duties or any kind of duty" (R. 44).

At the hospital Captain Joseph R. Eder, Medical "Service", was receiving officer on 25 July 1944 and saw and examined the accused at about 1 p.m. on that day (R. 12, 13). As they brought the accused in he saw that he was staggering and unsteady and he had to be assisted before he sat down, as he was unable to do so himself (R. 13). When witness requested the accused to come into the examination room he was slightly belligerent though he voluntarily submitted to the test. Witness gave him a thorough neurological and physical examination and found that he revealed blurred vision, marked tremors of the extremities and was more or less incoherent and of a gay mood (R. 14). There was a thickening and a slurring of his speech, and his gait was rather unsteady. It was several minutes before he was able to sit down by himself (R. 15, 16).

Captain Leo J. Flax, Medical Corps, attending surgeon at the Station Hospital, Fort Custer, saw the accused at about 1 p.m. on 25 July 1944 in the receiving office of the hospital. When he entered the office he saw the accused sitting with his feet crossed and up on the desk, his collar unbuttoned and his tie off. His clothing was in a "somewhat unneat condition". His gait was unsteady, he was somewhat uncoordinated and he spoke in a somewhat slurred and indistinct speech. He had a tremor of the hands and when the witness spoke with him the accused "appeared to be somewhat euphoric and belligerent" in his attitude at the moment. In his opinion the accused was intoxicated (R. 20). On cross examination witness stated that the accused admitted he had been drinking the night before and had taken approximately 1½ ounces of elixir of terpin hydrate that morning. However, in witness' opinion that amount of elixir was not sufficient to cause the amount of intoxication (R. 23) and before one could drink enough to become intoxicated one would become ill or nauseated (R. 24).

A blood-alcohol test was then made from a specimen of the accused's blood (R. 47, 49). The analysis revealed an alcohol content of 3.44 milligrams per cubic centimeter of blood (R. 49, 51, 52; Pros. Ex. 1).

Major Joseph M. Loone (Pros. Ex. 1 shows the name "Looney") Medical Corps, Chief of the Laboratory Service at the Station Hospital, stated that he made the final reading on the analytical test of the accused's blood specimen (R. 50, 51). He testified that such a content indicated that the individual from whom the blood was taken was intoxicated (R. 52). He was also of the opinion that 1½ ounces of elixir of terpin hydrate taken over the course of several hours would not lead to any such alcoholic content in the blood (R. 53, 55). Witness further stated that some persons will be intoxicated with a content of 1.5 milligrams of alcohol in their blood; others may not become intoxicated with as much as 2 milligrams; but, with a content of 3.44 milligrams some would be

unconscious. Without knowing the individual he could say certainly that any person with the latter content would be intoxicated (R. 56).

For the defense:

First Lieutenant Anthony Watkins, 726th Military Police Battalion, lived in the same barracks with the accused. On the afternoon and evening of 24 July 1944 from about 4:30 to 9:30 o'clock he and the accused drank rum and coca-cola, each consuming about half of the contents of a bottle known as a "fifth". At about 9:20 p.m. the accused went to bed and witness went to his own quarters and went to bed. At that time the accused was having no difficulty in walking nor with his speech (R. 106, 107). Witness stated he had never seen the accused drunk on duty nor under the influence of liquor (R. 108), although on cross examination he admitted he had never seen the accused on duty (R. 109) and further stated that he and the accused had also had some beer at the Officers' Lounge at about 7:30 p.m. on the same evening (R. 110).

First Lieutenant George E. Painter, 726th Military Police Battalion, went to the Battalion Dispensary at about 9 a.m. on 25 July 1944 for the purpose of obtaining some cough medicine and to have a small pox vaccination checked. He conversed with the accused at that time and he appeared absolutely normal. The accused checked the vaccination and gave witness a bottle of medicine telling him there was codeine in it and when witness took a drink of it the accused told him he took a little too much, jokingly suggesting that the drug might affect him because of its alcoholic content (R. 101, 102). He then said he had a cold and took a drink of the cough syrup from a gallon bottle out of which he had poured the medicine for witness (R. 102, 104).

At about noon on 25 July 1944 T/5 Warren A. Peterson, Medical Detachment, 726th Military Police Battalion, went to see the accused about a pass. He found the accused in the sick room of the dispensary (R. 94). Before he had time to ask for the pass the Battalion Adjutant came in and told the accused to report to the colonel - to which the accused replied that he would be right over. Before he had a chance to go over, the adjutant appeared again with the executive officer and a major. When the accused was told that they were taking him to the hospital he said: "No I can't go. I have to report to the colonel". Thereupon the executive went out and returned with two military policemen and the accused then decided to go. Witness followed them to the steps and then looked out of the window and saw the accused get into a staff car by himself (R. 95, 97). Upon examination by the court witness stated that when he arrived at the dispensary the accused was sitting down, was not attending to any sick persons nor busy in any other way (R. 98) and he made no effort to get up and leave at any time (R. 99).

The accused, having been advised of his rights, testified, substantially, as follows:

He was graduated from Tulane Medical University in 1929 and after hospital service of one year became a reserve officer and practiced medicine on active duty as such with the Civilian Conservation Corps for a period of seven years before going into active service with the army (R. 130, 131).

On the afternoon of 1 July 1944, (Saturday) while his battalion was bivouacked at Riverside Park, Saint Joseph, Michigan (R. 112) he took a group of men of his detachment to Playland Park at "the beach" where he drank a few bottles of beer (R. 113). After dark he took the men back to camp but returned to town (R. 138, 139) where he remained drinking beer and ale until 6 a.m. 2 July 1944, when he returned to the bivouac (R. 123, 138, 139). No sick call was held on Sundays (R. 112, 113). He went to bed in a pup-tent but left his clothes on for protection against mosquitos (R. 114, 115, 137). He did not visit a latrine before doing so (R. 138) and at about 7 a.m. had a strong desire to urinate. He got up and, fearful that he could not reach the latrine which was about 150 or 200 yards away, he stepped behind a truck near at hand in the detachment area and urinated there, returning afterwards to his tent (R. 114, 115, 126, 139). Neither officers nor enlisted men were permitted to use that place for such purposes (R. 137).

At about 8:30 he was awakened by Captain Francis and had a conversation with him. The accused then went back to bed but brooded over the interview with the executive officer and got up with the intention of seeking the adjutant to make a complaint about Captain Francis' attitude toward him. He was unsuccessful in his search at headquarters and again returned to his tent and went to sleep (R. 113, 114). He recalled seeing Corporal Bunch and speaking with T/4 Cumbo shortly after 7 a.m. but neither assisted him in any way (R. 115). He remembered leaning up against the truck as testified by Captain Stelzer but could not explain why Captain Stelzer sent two enlisted men to his assistance at the time (R. 134). After going back to bed subsequent to his search for the adjutant, he slept until noon when he arose and went on duty (R. 136-137).

On the night of 24 July 1944 the accused and Lieutenant Watkins together drank a bottle of rum (R. 115, 116). At about 7:30 they had gone to the officers' lounge where the accused also had a couple bottles of beer after which they returned to quarters and the accused retired some time after 9:30 p.m. (R. 116). He arose the next morning (25 July) in time to report for duty at 7 a.m. When he had finished sick call

at 8 a.m. he went to the refreshment stand and had a cup of coffee. At 9 a.m. Lieutenant Painter came to the dispensary and the accused, having heard his testimony at the trial, "cannot vary any at all because it is as near the truth" as he remembers (R. 117, 128, 129). He admitted taking a drink of elixir of terpin hydrate at that time and another at about 10:30 a.m. (R. 118) but, although he recalled Sergeant Stephenson's visit, he did not remember taking a drink from a bottle of terpin hydrate in his presence (R. 127). At about 10:30 a.m. (R. 118) he went into the surgeon's office, crawled up on an examining table and went to sleep for a period of approximately 1 hour and 15 minutes. When he awoke he sat down in a chair until an attendant called him to the telephone where he received word from Lieutenant Pugsley that the colonel wanted to see him and the accused replied: "All right" (R. 119). He returned to the chair, not feeling very well, and again sat down for a period of 10 minutes when Lieutenant Pugsley appeared and told him the Colonel wanted to see him at Battalion Headquarters. The accused replied "Yes, (he) would go" and Lieutenant Pugsley left. Corporal Peterson then arrived followed by Lieutenant Pugsley, Captain Francis and Major Leary (R. 120). Captain Francis pulled him by the arm and said: "Come on, let's go to the hospital" but the accused replied "No, wait a minute. I have to go and see the colonel". This put Captain Francis into "a huff", he and the accused having been "antagonistic, a little bit, toward each other", and Captain Francis thereupon went out and returned with a couple of military police. The accused then accompanied them, unassisted, to the car (R. 121). They then proceeded to the hospital where he submitted to a blood test and returned afterward to his barracks with instruction to remain there until the next morning. The accused had "no alcoholic beverage in the sense of a drink" after 9:30 p.m. on 24 July 1944 and felt he was normal on the morning of 25 July although he "could tell (he) had something the night before all right" (R. 118, 122).

Upon cross-examination the accused admitted telling the investigating officer that he had made the statement that he "might be" under the influence of intoxicants "on the morning of 2 July but" was not on duty (R. 125); and he had also stated that on the night of 24 July 1944 he had "plenty of beer and ale to drink" (R. 124).

He remembered receiving the order to go to see the colonel but failed to obey because he "felt that (he) was a little too drowsy" (R. 118, 129). He stated that he did not have more than 1½ ounces of terpin hydrate on the morning of 25 July but, when shown the report of analysis of his blood on that morning, he expressed the opinion that an alcoholic content of 3.44 milligrams "would have a rather intoxicating effect" - that a person with such content would be intoxicated, but not drunk (R. 131, 132).

5. In the light of all the evidence adduced in support of the Specification and Charge III the action of the court in finding the accused guilty of the Specification as a violation of Article of War 96 was fully warranted. It is alleged, and the proof shows, that the accused was both drunk and disorderly in the bivouac of his organization at the time and place alleged. Another medical officer on duty at the time of the offense saw the accused staggering or weaving from his tent at about 7 or 8 a.m. on the morning specified and saw him urinate against a detachment truck in the medical area. His conduct was such that, in the observer's opinion, the accused was under the influence of liquor to some extent and required assistance, for which purpose two enlisted men were directed to go to the accused's aid. Both of these men, who served in the medical detachment under the accused, stated that the accused appeared normal to them, required no assistance and received none. Later in the morning the attention of the battalion executive was attracted to the grotesque and disorderly appearance of the accused as he lay in his pup-tent and upon arousing him he discovered that the accused was unable to stand steady or speak coherently and his breath had an alcoholic smell. He was of the opinion that the accused was drunk. Again two enlisted men testified that they saw the accused shortly thereafter and that he appeared normal.

In the light of this conflict in evidence it is only necessary to consider other facts and circumstances in evidence in order to resolve the doubt. The accused admitted that he had gone to town on the preceding afternoon and, except for a trip back to the bivouac to return enlisted men in his custody, remained there drinking beer and ale until about 6 a.m. on the morning in question. When, shortly thereafter, the accused was seen staggering from his tent and urinating openly in a place where such an act is forbidden it may reasonably be inferred that he was drunk. As battalion surgeon and medical officer the accused was responsible for the sanitation and hygiene of the camp and his violation of a basic rule of military hygiene and sanitation to which all officers and enlisted men are subject is a fact which, together with the evidence of his actual physical condition, strongly tends to prove that he was drunk at the time. The accused admitted the urination and could not justify it save on the purported ground of necessity. If there was such urgent necessity, the medical station was only a short distance away and the use of some container obtainable there was indicated. Day had come and most of the camp personnel was up and about. All these things the accused knew. He was fully aware of his misconduct for he said he "hid (himself) as best (he) could". He had not seen fit to utilize the latrine when he returned just an hour previous from spending the whole night in town where he had been drinking "plenty of beer and ale" by his own testimony although he ought to have known

that such beverages have an invariable tendency to promote frequent urination. It is apparent that the act was one of convenience and not of necessity. Under these facts the accused's conduct was a disorder without justification. But neither the drunkenness nor the disorderly conduct, while undoubtedly to the prejudice of good order and military discipline, were of such a reprehensible character and nature as to constitute a violation of Article of War 95.

In the Specification of Charge I it is alleged that the accused was drunk while on duty as Battalion Surgeon on 25 July 1944 and the failure to obey the lawful order of Lieutenant Colonel Staples as alleged in the Specification of Charge II arose at the same time out of the same circumstances and is supported by much of the same testimony.

It was shown that on the evening of 24 July 1944 the accused drank half of a bottle of rum and several bottles of beer. Although he retired at 9:30 p.m. and arose at 7 a.m. on the next day and entered upon his duties, there is ample evidence of such intoxication on the morning of 25 July as to unfit him for the performance thereof. A supply sergeant who had business to transact with him at 10 a.m. said his speech was thick and slurred and he was unable to pick up and light matches or his cigarette. The accused offered the sergeant a "snort" of elixir terpin hydrate which has an alcoholic content of 40% of 90% alcohol and when it was refused, the accused took a drink from the dispensary stock-bottle. He later offered the sergeant another drink of the elixir and was still standing by the bottle when the sergeant left. The accused admitted that he had taken a second drink of the compound but intimated that he did so because he was suffering from a cold. One does not ordinarily refer to medicinal doses as "snorts" and it is a fair inference that the accused was resorting to the elixir as an alcoholic stimulant and not as medicine. What followed bears out this assumption. The battalion commander sent word to the accused through the adjutant that he wanted to see the accused at headquarters. This order was twice telephoned to the accused and once delivered in person by the adjutant. The accused admitted that he had received the orders, comprehended them and indicated that he was about to obey. Instead of doing so, however, he remained indolently sitting about in a chair, too drowsy to respond to the order. He never did comply with it. Eventually the colonel found it necessary to direct his adjutant, the executive and Major Leary to take the accused to the hospital for a blood test. When they attempted to do so he was antagonistic and refused to go until threatened with forcible removal by military police. The three officers who took him to the hospital and one of the medical officers who examined the accused were each of the opinion that the accused was either intoxicated or drunk. Major Leary stated that the accused was not in condition to perform his duties as medical officer, and Captain Francis said he was too

drunk to perform his duties or any duties. Each testified regarding the physical manifestations upon which they based their opinions. Another medical officer who made a thorough neurological and physical examination of the accused at the hospital, although he expressed no opinion as to the sobriety of the accused, testified in detail as to his blurred vision, tremors, incoherence and unsteady gait. Therefore, notwithstanding the contrary testimony of Lieutenant Painter who, although the accused took a drink of terpin hydrate out of the dispensary bottle in his presence, thought the accused was absolutely normal, and T/5 Peterson, who saw the accused accompany the other officers to the staff car unassisted, the proof of the accused's intoxication is conclusive.

Whether the drunkenness was caused by liquor or drugs is immaterial, except that the use of drugs as a medicine may, under certain circumstances, be a defense. Such circumstances are not shown in this case.

Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of Article of War 85 (par. 145, MCM 1928).

The state of drunkenness contemplated by the Article of War may be said to be one which incapacitates the officer, 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 but not properly. In any such case he is in general to be held "drunk" in the sense of the article equally as if he were totally incapacitated; a due, proper, and full execution being what is required of him, and the offense is complete where, by becoming intoxicated, he has rendered himself either more or less incompetent for the same. (Winthrop's Military Law and Precedents, 2d Ed. (Reprint) p. 612). The accused was admittedly on duty at the time and place where he was found in the intoxicated condition disclosed by the evidence and these are the elements the combination of which constitute a violation of the Article.

Little need be added with regard to the finding of guilt as to Charge II and its Specification. The accused received a lawful order from his superior officer. He acknowledged receipt of it and promised to obey it for he knew he was obliged to do so. The headquarters where he was asked to report was only 75 yards from the dispensary where the accused was drowsily sitting with no specific duty to perform at the time. His failure to obey is patent and his attempt to avoid responsibility for his omission by showing his offer to obey the order

after it had been repeated three times and had been countermanded by another order directing that the accused be taken to the hospital, cannot excuse him nor in any way justify the offense.

6. Records of the War Department disclose that the accused was born in Braxton, Mississippi, is 40 years of age, married and has one child. After graduation from high school in 1923 he attended and was graduated from the University of Mississippi with a B.S. degree in 1927 and received the degree of M.D. from Tulane University in 1929. He was commissioned a first lieutenant, Med.-Reserve on 22 June 1933 and served with the Civilian Conservation Corps from 13 October 1933 until 31 August 1939 when he reverted to an inactive status. On 3 August 1937 he had been promoted to Captain, Medical Corps Reserve. On 18 December 1940 he was ordered to active duty for a period of one year. He performed temporary duty at Fort Bragg, North Carolina, for a period of time not shown and thereafter entered upon active duty at Camp Claiborne, Louisiana. On 10 October 1941 his tour of active duty training was extended to 18 December 1942. (There is no entry of any kind in this officer's AG 201 file subsequent to 20 October 1941).

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 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 85 in time of war and is authorized upon conviction of a violation of Article of War 96.

Fletcher R. Anderson, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Hansel E. Edmondson (0-310203), Medical Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. In view of the recommendation of the reviewing authority, I recommend that the sentence be confirmed but that the execution thereof be suspended during good behavior.

3. Inclosed are a draft of a letter for your signature, transmitting the record 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

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 4, 5 Jan 1945)

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

SPJGH
CM 265538

25 OCT 1944
THIRD AIR FORCE

UNITED STATES v. First Lieutenant HARRY S. PAMPLIN, Jr. (0-862528), Air Corps.	Trial by G.C.M., convened at Lake Charles Army Air Field, Lake Charles, Louisiana, 28 September 1944. Dismissal.

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

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

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

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

Specification: In that First Lieutenant Harry Spencer Pamplin, Jr., Squadron P, Lake Charles Replacement Training Unit (Medium Bombardment), did, at Lake Charles Army Air Field, Lake Charles, Louisiana, on or about 31 July 1944, feloniously take, steal, and carry away sixty dollars ($60.00) in currency, lawful money of the United States, the property of Captain Julian R. Campbell.

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

3. In support of the Specification and the Charge, the prosecution presented evidence to show that during the early afternoon of 31 July 1944, Captain Julian R. Campbell of Squadron P, Lake Charles Army Air Field, had received his Army pay of $115.50 in cash, eleven of the bills being of $10 denomination. He placed the money in his billfold which he carried on his person until about 6 p.m. that day when he removed his clothing in his room

in the officers' quarters preparatory to taking a shower bath. Accused entered Captain Campbell's room twice while the latter was preparing to bathe. When Captain Campbell thereafter returned from the bathroom he observed that his billfold protruded from the pocket of his trousers which were lying on his bed. An immediate examination of the contents of the wallet revealed that six bills, each of $10 denomination, were missing therefrom (R. 6, 7). During the time Captain Campbell was bathing there were other individuals in the barracks besides him and accused but they were "down the hall aways" (R. 11).

A month later, on the morning of 1 September 1944, between 7 and 7:30 a.m., accused entered Captain Campbell's room as the latter was arising and engaged in a short conversation after which accused departed. Captain Campbell then removed the money from his billfold and secreted it in his footlocker, placed the billfold in a pocket of his trousers, and folded his trousers in a particular manner and laid them upon his bed. He then visited the washroom but returned to his room within less than a minute, and as he entered he noticed a dim figure therein which proved to be accused. After a brief silence accused asked Captain Campbell to come to the window to observe a rat (R. 8, 9). Accused thereafter left the room, Captain Campbell examined his trousers and his billfold and saw that both had been molested (R. 10).

About 15 or 20 minutes after this incident, Captain Campbell approached accused and asked him why he had been in his (Captain Campbell's) room tampering with his clothes. He informed accused that $60 had been taken from his wallet the previous month and that he wished to recover it. Accused then offered to give Captain Campbell that amount of money. Without threatening accused or exercising any of the prerogatives attaching to his rank, Captain Campbell stated he would not accept the money unless accused admitted he had taken it from him (R. 10). Accused admitted he had taken the money the previous month and he then gave Captain Campbell $60 (R. 11, 12). Several times during their conversation accused requested the captain not to report the matter to their superior officer, a Major Ford, as accused expected to be transferred from the organization and did not want anything to interfere with it. Accused was in fact scheduled to take a physical examination preparatory to admission to gunnery school (R. 12). Captain Campbell then had breakfast with accused, told him their recent discussion "would probably be the last" of the matter but denied he shook hands and said "Let's forget it" (R. 12).

4. Through his counsel accused made an unsworn statement reciting that he had applied for admission to gunnery school with a view to eventual shipment overseas, that his wife was pregnant and suffered from a kidney disorder, and that he was due to go on leave on 21 September 1944. Accused paid $60 to Captain Campbell believing that, if he did not do so, the latter would prefer charges and thus upset accused's plans to attend gunnery school and to visit his wife. He gave this money to Captain Campbell hoping that "nothing more would come of the matter" (R. 14).

5. There is no evidence that accused's confession to Captain Campbell was involuntarily made because induced through force or by hope of benefit or fear of punishment inspired by Captain Campbell (MCM, 1928, par. 114a). It was after accused had confessed that Captain Campbell breakfasted with him and indicated that probably no more would be heard of the matter. Captain Campbell's statement that he would not accept $60 from accused unless he admitted he had originally stolen the money constituted no compulsion or persuasion, moral or otherwise. It was only natural for the captain to refuse such a tender unless he was sure he was receiving the money from the guilty person. Accused had perfect freedom to deny that he had taken the money. Even if accused feared that failure to pay the money might adversely affect his future plans, that fear was self-kindled and was not "inspired by" Captain Campbell (MCM, 1928, par. 114a). It is quite apparent that accused confessed because he realized he was under definite suspicion and hoped that by returning the money there would be an end to the matter. It is our opinion that accused's confession was freely and voluntarily made.

The evidence is clear that accused had the opportunity to commit the larceny charged and that, after he realized he was under suspicion, he voluntarily confessed his crime. The evidence sustains the findings of guilty of the Charge and Specification.

6. Accused is a high school graduate and is about 25 years of age. He served as an enlisted man from 4 September 1941 until 9 March 1943. He was appointed an aviation cadet on 12 March 1943 and on 3 June 1943 he was commissioned a second lieutenant after completing the Armament Course at the Air Force Technical School, Yale University. On 28 July 1944, he was promoted to first lieutenant. In civilian life he was employed by the Hercules Powder Company, Radford, Virginia, at first to classify and file fingerprints and later as a time-checker.

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

Thomas N. Taffey, Judge Advocate

Aaron Linder, Judge Advocate

William H. Dembrees, Judge Advocate

SPJGH
CM 265538

1st Ind.

War Department, J.A.G.O., OCT 31 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 Harry S. Pamplin, Jr. (0-862528), 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. Accused was found guilty of stealing the sum of $60 from the room of a brother officer in the officers' quarters at Lake Charles Army Air Field. There is no greater disturbing element to routine living conditions at an Army installation than a "barracks thief". Such thieving by an officer is both dishonorable and intolerable. I recommend that the sentence, although inadequate, be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 23, 10 Jan 1945)

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

SPJGK
CM 265676

10 NOV 1944

UNITED STATES v. Second Lieutenant DONALD E. WOLF (O-778326), Second Lieutenant RICHARD L. ZIMMERMAN (O-778336), and Second Lieutenant EVERETT F. SIMPSON (O-778278), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Merced Army Air Field, Merced, California, 13 September 1944. Dismissal.

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

---

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

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

CHARGE: Violation of the 95th Article of War.

<u>Second Lieutenant Donald E. Wolf.</u>

Specification 1: In that Second Lieutenant Donald E. Wolf, A.C., Section H, 3031st Army Air Forces Base Unit, Mather Field, California, did, at Mather Field, California, on or about 8 July 1944, with intent to deceive First Lieutenant Seymour Kempner, A.C., officially state to the said First Lieutenant Seymour Kempner, A.C., in substance, that the minimum altitude flown by the TB-25 aircraft in which he was riding on 2 July 1944 was 10,000 feet except on take-off and landing, which statement was known by the said Second Lieutenant Donald E. Wolf, A.C., to be untrue, in that said aircraft made a let-down over the city of Sacramento to an altitude of less than 1,000 feet approximately five minutes after take-off.

Specification 2: In that Second Lieutenant Donald E. Wolf, * * *, did, at Mather Field, California, on or about 8 July 1944, with intent to deceive First Lieutenant Seymour Kempner, A.C., officially state to the said First Lieutenant Seymour Kempner, A.C., that Second Lieutenant Richard L. Zimmerman, A.C., was at the controls of a TB-25 aircraft on 2 July 1944, from the time of its take-off for a period of about two hours and 35 minutes, which statement was made by the said Second Lieutenant Donald E. Wolf as true when he did not know it to be true.

Specification 3: (Finding of not guilty).

Second Lieutenant Richard L. Zimmerman.

Specification 1: In that Second Lieutenant Richard L. Zimmerman, Section H, 3031st AAF Base Unit, Mather Field, California, did, at Mather Field, California, on or about 8 July 1944, with intent to deceive First Lieutenant Seymour Kempner, officially state to the said First Lieutenant Seymour Kempner in substance that he, the said Lieutenant Zimmerman, was on 2 July 1944 at the controls of a TB-25 aircraft upon its take off from Mather Field at about 2130 and for 2 hours and 35 minutes thereafter, which said statement was known by the said Second Lieutenant Richard L. Zimmerman to be untrue in that Second Lieutenant James S. Bates was at the controls of said aircraft upon its take off and for approximately 5 minutes thereafter.

Specification 2: In that Second Lieutenant Richard L. Zimmerman, * * *, did, at Mather Field, California, on or about 8 July 1944, with intent to deceive First Lieutenant Seymour Kempner, A.C., officially state to the said First Lieutenant Seymour Kempner in substance that the minimum altitude of flight during the first 2 hours and 35 minutes after take off of a TB-25 aircraft on 2 July 1944 at about 2130 was 9,000 feet except for takeoff, which said statement was known by the said Second Lieutenant Richard L. Zimmerman to be untrue in that said aircraft was operated at an altitude of less than 1,000 feet over Sacramento, California, approximately 5 minutes after the takeoff was completed.

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

Second Lieutenant Everett F. Simpson.

Specification 1: In that 2nd Lt. Everett F. Simpson, AC, Section H, 3031st AAF Base Unit, Mather Field, California, did, at Mather Field, California, on or about 7 July 1944, in an affidavit, make under oath a statement in substance that on or about 4 July 1944 he, the said 2nd Lt. Everett F. Simpson, took off at Mather Field by instruments in a TB-25 airplane and piloted said plane by instruments for 2 hours and 30 minutes, which statement he did not then believe to be true.

Specification 2: In that 2nd Lt. Everett F. Simpson, * * *, did, at Mather Field, California, on or about 7 July 1944

in an affidavit, make under oath a statement in substance that at no time did the TB-25 in which he was riding on 4 July 1944 go below an altitude of 9000 feet above the terrain except during takeoff from and landing at Mather Field, which statement he did not believe to be true.

Each accused consented to be tried in a common trial with the others (R. 13). Each pleaded not guilty to the Charge and the respective Specifications. Each was found guilty of the Charge. Lieutenant Donald E. Wolf was found not guilty of Specification 3 but guilty of Specifications 1 and 2 of the Charge. Lieutenant R. L. Zimmerman was found not guilty of Specifications 3 and 4, but guilty of Specifications 1 and 2 of the Charge. Lieutenant E. F. Simpson was found guilty of both Specifications of the Charge. No evidence was introduced of any previous convictions as to any of the accused. Each was sentenced to be dismissed the service. The reviewing authority approved the sentence of each and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution in support of the Charge and of those Specifications of which the accused were found guilty may be summarized as follows:

On 7 July 1944 the Commanding Officer at Mather Field, California, instructed First Lieutenant Seymour Kempner, Legal Officer and Trial Judge Advocate of the general and special courts-martial at Mather Field to investigate the alleged violations of flying regulations of Second Lieutenant James S. Bates, which were alleged to have occurred on the 2nd, 3rd and 4th of July. Lieutenant Kempner thereupon requested all of the officer students whom Lieutenant Bates was instructing on those dates to come to his, Lieutenant Kempner's, office. The three accused officers were the only officer students of Lieutenant Bates on those dates and therefore reported to Lieutenant Kempner at his office (R. 14). Lieutenant Simpson reported during the morning of 7 July; Lieutenants Wolf and Zimmerman reported separately during the morning of 8 July. Lieutenant Kempner told each one individually that he had been directed to investigate the alleged violations of flying regulations of Lieutenant Bates; that he had information that Lieutenant Bates had committed such violations; and that he wanted each one of the accused to tell him the truth. He impressed upon each the seriousness of perjury (R. 15) and that "if they did lie and it was subsequently proven that they had lied, that they might well be dismissed from the service, and might even suffer confinement in addition to that" (R. 16).

Each accused signed a separate stipulation which was admitted in evidence, without objection, for consideration by the court only to the extent that it concerned the accused by whom it was signed (R. 16, Pros. Ex.A; R. 19, Pros. Ex. B; R.23, Pros. Ex. 6). Each accused in the stipulation

signed by him agreed that he individually had appeared before Lieutenant Kempner at Mather Field, California, on the date set forth above, and in connection with an official investigation being conducted by Lieutenant Kempner as trial judge advocate, made official statements to that officer, which were reduced to writing by a stenographer and accurately transcribed for accused's signature. There is attached to each of the stipulations a copy of the statement made by the particular accused who entered into the stipulation. It was further agreed in the stipulation that Lieutenants Wolf's and Zimmerman's appearance before Lieutenant Kempner was late on the morning of 8 July 1944; that neither one signed his statement; that Lieutenant Simpson's appearance was on the 7th of July 1944; and that he returned on the same day and signed and swore to the truth of his statement.

According to the stipulations all three of the accused voluntarily returned to Lieutenant Kempner's office on the afternoon of 8 July 1944 and stated that their previous statements were untrue and that they wished to change them. A second statement was thereupon prepared at the dictation of each of the accused and signed and sworn to by each. Copies of both the first statement and of the second statement of each accused are attached to the respective stipulations entered into by the accused as exhibits thereto.

In the first statement made by the accused Lieutenant Wolf to Lieutenant Kempner, which was transcribed but never signed by Lieutenant Wolf, he stated that on 2 July 1944, at about 2130, he took off on a cross-country flight with Lieutenant Bates, his instructor, and another officer student; that the other officer student was at the controls of the plane for the first two hours and 35 minutes, after which the accused took over the controls and remained thereat until landing at Mather Field at 0245 that night; that from the time of the take-off he could feel a steady climb; that no "buzzing" took place during the flight and the minimum altitude flown was 10,000 feet except on take-off and landing.

In the second statement made by the accused Lieutenant Wolf in the form of an affidavit signed and sworn to by him on 8 July 1944, he stated that on 2 July 1944 at 2130 he took off on a cross-country flight with Lieutenant Bates, his instructor, and another officer student; that he was in the navigator's compartment and did not know who was at the controls on the take-off; that after reaching an altitude of about 800 to 1000 feet the ship went toward the northeast corner of Sacramento and came down to an altitude of about 400 feet above the terrain and was then brought up to an altitude of over 5000 feet.

In the first statement made by the accused Lieutenant Zimmerman to Lieutenant Kempner, which was transcribed but never signed by the accused, he stated in substance that he went on a cross-country flight with his instructor, Lieutenant Bates, and another officer student on 2 July

1944, at which time he, the accused, was at the controls during the take-off, at about 2130, and remained thereat for the first two hours and 35 minutes; that at no time during that period did the plane engage in any "buzzing", and the minimum altitude flown was 9,000 feet except at the take-off and landing.

In the second statement made by Lieutenant Zimmerman in the form of an affidavit signed and sworn to by him before Lieutenant Kempner as trial judge advocate at Mather Field on 8 July 1944, he stated that he, another student officer, and his instructor Lieutenant Bates took off on a cross-country flight on 2 July 1944 at 2130. When they reached an altitude of about 1100 feet, they leveled off and flew to the easterly outskirts of Sacramento; they then dropped to an altitude of about 550 feet above the terrain and then climbed to the specified altitude of the flight plan in the neighborhood of 4,000 feet. The instructor was at the controls of the ship on the take-off and during the time of the "buzzing" which occurred about three or four minutes after take-off. The "buzzing" took place over the residential district of Sacramento near the easterly outskirts.

In the first affidavit which was executed and sworn to by the accused Lieutenant Simpson on 7 July 1944, it is stated in substance that he and another officer student (Lt. Zimmerman) and Lieutenant Bates, their instructor, took off on a cross-country flight from Mather Field on 4 July 1944 at about the hour of 2035, returning from the flight to Mather Field that night at 0140; that the accused Lieutenant Simpson took the plane off at Mather Field by instrument and piloted the plane by instrument for two hours and 30 minutes, which took them as far as Bakersfield, at which time Lieutenant Zimmerman took over the controls for the next two hours and 35 minutes; that their instructor took over the controls on the turns and on these turns at Sacramento their altitude was 10,000 feet above mean sea level on the first turn and on the second turn over the municipal airport at Sacramento they were at an altitude of between 9,000 and 10,000 feet; that at no time during that flight did their plane go below an altitude of 9,000 feet except during take-off and landing.

In the second statement signed and sworn to by the accused Lieutenant Simpson on 8 July 1944 before Lieutenant Kempner as trial judge advocate at Mather Field, he stated that he (Lieutenant Simpson) together with another student officer and their instructor Lieutenant Bates, took off on a cross-country flight on 4 July 1944 at about the hour of 2035 and returned to Mather Field that night at the hour of 0140. Lieutenant Bates, the instructor, was at the controls on take-off, which was made by contact. After reaching an altitude of 600 feet, they leveled off and turned toward the City of Sacramento and then dropped to an altitude of 500 feet at a point about two miles east of Sacramento. When they were about a mile from the city, Lieutenant Bates, who was still piloting the plane, pointed to a green-roofed house and then started to dive toward that

house when they were about three blocks from it. The ship was brought down from an altitude of 500 feet to about 150 feet above the terrain, passing directly over the house from the southeast to the northwest. Lieutenant Bates then brought the ship up to an altitude of about 3500 feet. The "buzzing" over the house in Sacramento took place about five minutes after the take-off.

The three accused and other witnesses appeared before a general court-martial in the trial of Lieutenant Bates held 1 August 1944 and as a result Lieutenant Bates was found guilty of violating flying regulations on the 2nd, 3rd and 4th of July 1944 by flying over the City of Sacramento at altitudes of from 150 to 500 feet (R. 16-17).

4. Lieutenant Kempner was recalled as a witness by the defense and testified in substance that Lieutenants Wolf and Zimmerman returned to change their statements within 3 or 4 hours after making the original statements (R. 37); and that Lieutenant Simpson signed his first statement about 1 p.m. on 7 July and retracted it at 4:30 p.m. on 8 July 1944 (R. 39). All three accused returned together on 8 July 1944. Lieutenant Kempner was expecting only Lieutenants Wolf and Zimmerman to return to sign their unsigned statements (R. 41). After telling Lieutenant Kempner that they wished to make other statements because their first statements were untrue they requested that their first statements be returned to them. Lieutenant Kempner told them that he had no authority to return them but, after the second statements had been prepared for their signatures, he telephoned the commanding officer, Colonel Pyle, in their presence and explained the situation. He was instructed by Colonel Pyle to destroy the first statements and accordingly destroyed them in the presence of the accused. The three accused thereupon signed the new statements (R. 42-43,53,54). The copies of the original statements attached to the stipulations (Pros. Exs. A,B,C) were prepared from the stenographer's notes which were not destroyed (R. 43). The accused were not told at the time that their first statement would "not be held against them" (R. 55).

The three accused officers having been advised of their rights elected to submit to the court unsworn statements (R. 58-59, Def. Exs. 1, 2,3).

Lieutenant Wolf set forth in his statement in substance that he admired and respected his superior officer and instructor Lieutenant Bates and acting upon an impulse to protect him and as a result of his ethics of school days not "to tattle" he denied that Lieutenant Bates had flown the plane at low altitudes while he was with him on the dates in question. He returned voluntarily about a half an hour later and retracted the false statement as a result of more deliberation and discussion with the other officers involved about their duty as officers.

Lieutenant Zimmerman set forth in his unsworn statement that he had made the false statement to protect Lieutenant Bates because of friendly relationship existing between them. He later realized that there was sufficient evidence apart from his possible testimony to prove the charges against Lieutenant Bates, and appreciating the seriousness of committing perjury and his duty as an officer, he retracted his false statement and made the correct statement.

Lieutenant Simpson set forth in his unsworn statement in substance that he "lied" for Lieutenant Bates because he liked, respected and admired Lieutenant Bates; that their relationship was more of friendship than one of student and instructor; and that he did it because he believed anyone else would have done the same under the same circumstances. He believed there was an unwritten code among pilots "of trusting the fellow you fly with and sticking with him * * * for some day you may fly with him in combat". He did not believe that he would have made the first statement had he been given time to deliberate, but Lieutenant Kempner insisted that he make a statement "then and there". The statement was typed by a corporal and signed by accused all within the space of 20 minutes. He returned the next afternoon to correct his false statement and assumed when it was destroyed in his presence that he would "never hear of" it again. Lieutenant Kempner at the time stated as he tore up the statements after talking to Colonel Pyle that the Colonel was willing to forget about it this time, but in the future Colonel Pyle expected the truth the first time. He did not think to ask about the destruction of the secretary's notes.

5. All of the members of the court, immediately after imposing the sentence, recommended that the sentence as to each be commuted because of (1) the youth and inexperience of the accused, (2) the fact that each made a bona fide effort to retract the false statements given, (3) the apparent tacit understanding that no action would be taken against them when their false written statements were destroyed in their presence, (4) the fact that justice was not impeded, (5) the fact that their act was induced by a sense of loyalty to their instructor and did not show culpable criminal intent, and (6) the fact that the court was precluded from exercising any discretion in fixing the sentence, based on the extenuating circumstances, because the findings of guilty of the specifications "brought under the 95th Article of War" made it mandatory for it automatically to impose the sentence of dismissal.

In his final speech to the court the trial judge advocate stated that in accordance with military law it was necessary that the court impose a sentence of dismissal "because the 95th Article of War says that that is the finding that you must make if you conclude that they are guilty; and I submit that there is no other conclusion that you can come to". He quoted Winthrop to the effect that the court cannot properly evade its responsibilities as to the sentence by finding the accused guilty of a violation of the 96th Article of War and assessing a lighter punishment.

"* * * It [the court] must find according to the testimony and attach the statutory sentence, those members who consider this too severe joining, if desired, in a recommendation for commutation." (R. 88)

6. All three of the accused officers have been convicted under two specifications of having made, with intent to deceive, a false official statement to Lieutenant Kempner, which was either known by the accused to be untrue or which was made as true when the accused did not know it to be true, in violation of Article of War 95.

The evidence for the prosecution showed beyond any doubt, and it was admitted by each of the accused, that they did on the date and at the place alleged in the specifications each make an official statement; that the statement contained untrue or false declarations; and that they each knowingly made the false statements with the intent to deceive. This was admitted by all of the accused in their stipulations entered in evidence and also in their unsworn statements submitted to the court. Each statement was false in two particulars as averred in the respective specifications. Lieutenant Wolf stated that the minimum altitude of the plane in which he was riding on 2 July 1944 was 10,000 feet and that from the time of its "take-off" until 2 hours and 35 minutes thereafter Lieutenant Zimmerman was at the controls. This was false. Lieutenant Zimmerman corroborated these purported facts in his false statement. Lieutenant Simpson stated that on 4 July 1944 he was at the controls of the plane in which he was riding when it took off and continued at the controls of the plane for over two hours thereafter and that it did not go below an altitude of 9,000 feet above ground except during take-off and landing. This was false. All three of the accused admit that these statements were false in the particulars set forth and gave as their reasons for making them their desire to protect their friend, fellow officer, fellow pilot, and instructor, Lieutenant Bates.

Such reasons, of course, do not constitute a defense to the charges, but operate only in mitigation of the offenses.

Defense counsel urgently contended that the retraction of the false statements within the time and under the circumstances shown by the evidence was a complete defense. Retraction of false statements or false testimony has been held to exculpate the one who made the false statement or gave the false testimony from the charge where the false answer was occasioned by a reasonable misunderstanding of the question (CM 231119, 18 B.R. 139). Where, however, the initially given false statement was admittedly deliberate and willful a subsequent retraction is no defense (CM NATO 154; CM 231445, 18 B.R. 197. U. S. v. Norris, 300 U.S. 564, 81 L. Ed. 808). There is authority to the contrary (CM 220746, 48 C.J. 830), but the rule stated above has been definitely adopted by The Judge Advocate General.

In view of the foregoing, it necessarily follows that the evidence of record was legally sufficient to support the findings of guilty of the specifications under discussion.

The only question that remains is whether under the circumstances the accused have violated the 95th Article of War. An officer may be prosecuted for making a false official statement under either Article of War 95 (CM 239665, 25 B.R. 221; CM 238103, 24 B.R. 167) or Article of War 96 (CM 240259, 26 B.R. 7; CM 239984, 25 B.R. 301). It does not always follow that if he has made a false official statement he has violated the 95th Article of War. The determination of whether the 95th or 96th Article of War has been violated depends upon the facts of each case to be decided by the court that conducts the trial and not by the one who prefers the charge.

If the charge is brought under Article of War 95 but cannot be sustained under that Article of War the court may find the accused guilty of a violation of the 96th Article of War and not guilty of the 95th Article of War (CM 231445, 18 B.R. 214, Winthrop's Military Law and Precedents, 1920, p. 384).

It is clear from the record that the court was of the opinion that it did not have the authority to find the accused guilty of a violation of the 96th Article of War instead of the 95th Article of War because the charges were instituted under the 95th Article of War. The entire personnel of the court so stated in its recommendation of commutation of the sentence. Such an opinion was erroneous and was probably induced by the statements made by the trial judge advocate, summarized in paragraph 5 above.

The conduct contemplated by the 95th Article of War of an officer, acting in an official capacity, is behavior which, in dishonoring or otherwise disgracing him as an officer, compromises his character and standing as a gentleman. Winthrop, Military Law and Precedents, 1920, page 711:

> "The conduct had in view by the Article may not consist in conduct unbecoming an <u>officer</u> only, or in conduct unbecoming a <u>gentleman</u> only, but must in every case be unbecoming the accused in <u>both</u> these characters at once. * * * there may be acts which, in the estimate of a court-martial, may be unbecoming to an accused party in the one capacity without being necessarily unbecoming to him in another * * * the conduct here denounced * * * need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrespect upon the military profession which he represents."

In the instant case three student officers of immature years were unexpectedly called upon by a superior officer to bear witness against, to

"tattle upon", one of their friends, a fellow officer, and their instructor. Instinctively, as a result of their civilian training and sense of loyalty to the individual, they endeavored to protect him. They were unexpectedly thrust into an embarrassing position by being called upon to provide evidence harmful to one of their own group of friends. They could not, without committing the serious offense of willful disobedience, refuse to talk or to make a statement. While we cannot condone their failure to tell the truth, we are not convinced that their conduct under the circumstances was so disgraceful or dishonorable as seriously to compromise their characters or standing as gentlemen. For that reason the finding of guilty of a violation of Article of War 95 should not be sustained. Their conduct was, however, clearly prejudicial to good order and military discipline and constituted a violation of Article of War 96.

7. War Department records provide the following information concerning the accused:

Second Lieutenant Donald E. Wolf: 24-1/2 years of age. Native born. Single. High school graduate. He enlisted in the service as an aviation cadet on 23 September 1942, and was called to active duty 30 March 1943. Upon completion of his training as a pilot he was commissioned a second lieutenant, Air Corps, at Luke Field, Arizona, 23 May 1944. He was employed as a spot welder by the Douglas Aircraft Company for two years prior to entering the service.

Second Lieutenant Richard L. Zimmerman: 20-1/2 years of age. Native born. Single. High school graduate. Attended University of Idaho 3/4 of one year, majoring in engineering. Served in Reserve Officers' Training Corps at University of Idaho from September 1942 to February 1943. He was called to active service in March 1943 as an aviation cadet, and upon successfully completing his training as a pilot was commissioned a second lieutenant, Air Corps, 23 May 1944, at Luke Field, Arizona.

Second Lieutenant Everett F. Simpson: 20 years of age. Native born. Single. High school graduate. He enlisted as an air cadet 18 February 1943, and upon successfully completing his training as pilot was commissioned a second lieutenant, Air Corps, 23 May 1944, at Luke Field, Arizona.

8. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted herein 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 specifications of the charge as involves a finding of guilty thereof in violation of Article of War 96, and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Lucius E. Zoll, Judge Advocate.

Earle Stetson, Judge Advocate.

Herman Mayer, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 1 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Donald E. Wolf (O-778326), Second Lieutenant Richard L. Zimmerman (O-778336), and Second Lieutenant Everett F. Simpson (O-778278), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specifications of the Charge as involves a finding of guilty thereof in violation of Article of War 96, and the sentence, and to warrant confirmation of the sentence. These officers were charged with violating the 95th Article of War by making false official statements in connection with an investigation of alleged violations of flying regulations by their fellow officer and instructor. Shortly after making these false statements and after consultation and further consideration, they retracted their former statements and made true statements as to the facts in the case. The making of a false official statement by an officer is a serious offense, but under all the circumstances in this case, and in view of the unanimous recommendation for clemency on the part of the court it is believed that the ends of justice would be served by confirming the sentence in the case of each accused and commuting it to a reprimand and forfeiture of $25 of pay per month for a period of three months, and I so recommend.

3. In the case of the accused Second Lieutenant Richard L. Zimmerman consideration has been given to a letter from United States Senator John Thomas of Idaho and to a letter from Mr. Arthur P. Zimmerman, father of Lieutenant Zimmerman, to Brigadier General William R. Arnold, Chief of Chaplains. Both letters 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.

5 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. ltr. for sig. S/W.
Incl 3 - Ltr. fr. Sen. John Thomas
Incl 4 - Ltr. fr. Mr. Arthur P. Zimmerman.
Incl 5 - Form of action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence in case of each officer confirmed, but commuted to reprimand and forfeiture of $25 per month for three months. G.C.M.O. 24, 10 Jan 1945)

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

SPJGH
CM 265694

24 NOV 1944

UNITED STATES v. Private WOODROW WELBORN (34844902), 895th Quartermaster Troop Transport Company.	THE INFANTRY SCHOOL Trial by G.C.M., convened at Fort Benning, Georgia, 22 September 1944. Dishonorable discharge and death by hanging.

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

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

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Woodrow Welborn, 895th Quartermaster Troop Transport Company, did, at Fort Benning, Georgia, on or about 13 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Charlie E. Kemp, a human being, by striking him on the body with a sharp instrument.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction for an absence without leave was introduced. He was sentenced to dishonorable discharge, total forfeitures and to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced competent evidence to show that Vera Kemp, wife of the deceased, a colored soldier named Charlie E. Kemp, visited her husband at Fort Benning, Georgia, on Sunday, 13 August 1944. They spent the latter part of the afternoon at a Post Exchange consuming soft drinks

and after supper they visited Service Club No. 5, a colored service club, where they remained until approximately 9 p.m. (R. 7-8,14,21). About 7 p.m. that evening accused who was a member of deceased's organization had been observed staggering and swearing outside this service club (R. 27).

About 9 or 9:30 p.m., deceased, his wife and Corporal Kermit J. Ballett left the service club and went to a bus stop located in the vicinity. The night was dark and no moon was visible. They and several colored soldiers sat on a bench near the bus stop for a short while until a taxicab approached. Corporal Ballett stepped to the taxi to determine the charge for transporting Mrs. Kemp to town (R. 8,15,19,21,28). Just about that time accused approached the bench and with a vile epithet greeted a soldier who was seated there. Private Russell L. Hunt who was also seated on the bench noticed that accused was carrying a knife with a blade five or six inches long in his right hand. Deceased advised accused that his wife was present and asked him to show some respect for her to which accused replied that he didn't "give a damn for the lady" (R. 8,9,16,27-29). Deceased and his wife then started to walk toward the taxicab, the headlights of which cast their beam just to the right of the bench on which they had been seated. Deceased had his hand on his wife's shoulder and as they walked away he remarked that "some soldiers try to run the Army". Immediately thereafter a soldier, whom Mrs. Kemp and Corporal Ballett could not identify but who was identified by Private Hunt as accused, stepped in back of deceased and struck him in the neck. Deceased cried, "I'm cut", staggered a few steps and fell to the ground with blood pouring from a wound in the left side of his neck (R. 9-11,16,18,28-31,33).

After this assault accused turned and ran down hill toward a nearby woods. Private Hunt observed that as accused fled his gait was "kind of a dragging run-not quite steady" (R. 30,36). Hunt had seen accused at the service club about 7 p.m. that night and was of the opinion that he was drunk at that time. At the time of the assault, however, Hunt was of the opinion that accused was sober; although accused then talked like a man "that's been drunk", his speech was coherent and understandable (R. 35-37).

This assault occurred sometime around 9:15 or 9:30 p.m. Shortly before 10 p.m. an ambulance arrived at the scene and took deceased, Mrs. Kemp and Corporal Ballett to the station hospital (R. 11, 12,16,17,38). About 10 p.m. deceased was treated at the hospital for shock and received blood plasma injection. However, he died at approximately 11:15 p.m. (R. 40). Medical examination revealed that deceased had a stab wound in his neck which extended to a depth of three inches. One of the main arteries in the neck had been severed causing a massive internal hemorrhage and compression on the heart which in turn caused the death of deceased (R. 23,25,41).

4. The defense introduced evidence to prove that between 3 and 4 p.m. on 13 August 1944, accused and Privates Roosevelt L. White and James Celestine met in the Post Exchange near their organization's area

where White purchased a pint bottle of rubbing alcohol. Several bottles of Coca-Cola were purchased by the trio and the alcohol was mixed with it (R. 50,52,53,58,60,67). Celestine did not drink any of this mixture, White drank about one Coca-Cola bottle of it and accused consumed most of it. Only a small portion of the alcohol was not consumed (R. 53,54,63,68).

About 6:30 or 7 p.m., accused and his two companions obtained a ride in a truck from the Post Exchange to the Service Club, a distance of about two miles. When they arrived at the club accused stumbled as he clambered from the truck because, according to Celestine, he was drunk (R. 50,55,59,61,62). About 7 p.m., shortly after the group arrived at the Service Club, Celestine and another soldier supported accused who was staggering about, lead him from the Service Club and then laid him on the ground where he remained for about 15 minutes (R. 51,55,62,64). Accused did not join Celestine or White in drinking beer at the club (R. 57, 61,62). Sometime after 7 p.m., accused staggered up to Technician Fifth Grade Lee R. Black and several other enlisted men saying, "Why the hell don't you fellows get drunk and be somebody". Black was of the opinion that accused was drunk (R. 74,75,77).

White had not seen a knife in accused's possession while they were together on this day (R. 51). Accused and deceased lived in the same barracks and Celestine had never known them to have an argument (R. 66).

About 10 p.m. this Sunday evening, after deceased had been assaulted, accused entered the recreation room of his organization. Private Ulysses Maldin, a friend of accused, observed him stagger in and fall to the floor. He arose from the floor, started toward the officers' quarters and, when someone asked where he was going, he altered his course and proceeded to his own barracks. Maldin was of the opinion that accused was drunk (R. 78-81).

After accused's rights as a witness had been fully explained to him he elected to take the stand and testify under oath. Before being sworn accused stated that he had completed four grades of public schooling and could read and write. Accused thereafter testified that on Sunday afternoon, 13 August 1944, he consumed two Coca-Cola bottles of the mixture of Coca-Cola and rubbing alcohol while at the Post Exchange with White and Celestine. After visiting his barracks to obtain a package of cigarettes, accused climbed aboard the truck bound for the Service Club (R. 85,97). Accused remembered seeing deceased's wife at the Post Exchange that afternoon where she asked him how he could drink such alcohol, but remembered nothing after he boarded the truck for the club until reveille the next morning (R. 87,88,94). He was then sick to his stomach. After he ate breakfast, he went to the motor pool and still feeling ill he slept in a truck the entire day till 6 p.m. (R. 89,90).

Accused further testified that he had no knife on 13 August 1944 and had possessed none since the previous January (R. 85,90). His organization had been at Fort Benning for about a month and he testified that he had never been to the Service Club and did not know where it was (R. 91). He stated he never had any disagreement with deceased (R. 86).

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 defense 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). It is quite apparent from the evidence that the doctrine of self-defense has no application here.

Malice aforethought does not mean hatred or personal ill will or even an actual intent to take life. Its existence 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, assuming accused was capable of forming a specific intent, is established in this case by accused's use of a knife in a manner which was likely to result in death or grievous bodily harm.

Voluntary drunkenness is no excuse for crime but it may be considered in determining whether accused possessed the mental capacity to entertain the requisite specific intent (MCM, 1928, par. 126a). Accused claimed that he had no recollection of the events that occurred on this fatal day after he boarded the truck at 7 p.m. to go to the service club. All of the witnesses who saw him at the club around 7 p.m.agree that he was then intoxicated. However, over two hours later Private Hunt observed accused when he knifed deceased and when he fled from the scene and Hunt was of the opinion he was not drunk; accused could talk coherently, walk and could wield a knife with fatal effect. After committing the assault, accused fled from the scene. Such conduct clearly indicates accused's consciousness of guilt. Flight is consistent with and a result of a conscious appreciation of the evilness of an act perpetrated immediately prior thereto. Furthermore, within three quarters of an hour after the slaying accused was in his company area approximately two miles away from the Service Club. There is no evidence he covered this distance other than under his own power of locomotion. If this was his first visit to the Service Club, as he contended, he must have had some conscious appreciation of his surroundings to be able to wend his way back to his organization, and in a comparatively short time.

At most accused may have been sufficiently under the influence of the liquor he had consumed so that when he assaulted deceased his emotions may have been inflamed and his judgment affected. His offensive language in the presence of deceased's wife indicated he was in a nasty, quarrelsome mood. However, it was not established by the evidence that he was then so devoid of reason or understanding that he did not know what he was doing when he knifed the deceased; that he was so drunk he was unable consciously to intend to stab deceased with the open knife he had in his hand. The evidence sustains the findings of guilty of the Charge and Specification.

6. The accused is 25 years of age. He was inducted into the military service on 27 September 1943 at Fort Jackson, South Carolina.

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of 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.

Thomas N. Taffy, Judge Advocate.

[illegible], Judge Advocate.

William H. Trumbull, Judge Advocate.

SPJGH
CM 265694

1st Ind.

War Department, J.A.G.O., DEC 24 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 Private Woodrow Welborn (34844902), 895th Quartermaster Troop Transport Company.

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. On the afternoon of 13 August 1944, accused, a colored soldier, consumed about two glasses of a mixture of Coca-Cola and rubbing alcohol. He was thoroughly intoxicated around 7 p.m. that evening. Shortly after 9 p.m. he approached a bus stop near a colored service club and used vile language in the presence of deceased, also a colored soldier, and deceased's wife. Deceased expressed his disgust with accused's behavior as he walked to a taxicab with his wife whereupon accused fatally stabbed him in the neck with a knife. Accused stands convicted of an unprovoked cold-blooded murder of another soldier. 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 it meet with approval.

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 161, 7 May 1945)

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

SPJGK
CM 265695

8 NOV 1944

UNITED STATES v. Private EDWARD A. COREY, JR. (37075106), Section N, 327th Army Air Forces Base Unit, (RTU HB).	THIRD AIR FORCE Trial by G.C.M., convened at Drew Field, Tampa, Florida, 16 August 1944. Dishonorable discharge (suspended), total forfeitures, confinement for one (1) year. Rehabilitation Center.

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and the sentence. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Edward A. Corey, Jr., Section "S", 302nd AAF Base Unit (SW), did, at Hunter Field, Savannah, Georgia, on or about 22 May 1944, with the intention of avoiding hazardous duty wrongfully pretend to First Lieutenant Miles W. Lewis that he, the said Private Edward A. Corey, Jr., was not trained or qualified as a Radio Operator Gunner, MOS 757, then well knowing that said pretenses were false.

Specification 2: In that Private Edward A. Corey, Jr., Section "S", 302nd AAF Base Unit (SW), did, at Hunter Field, Savannah, Georgia, on or about 22 May 1944, with intent to deceive First Lieutenant Miles W. Lewis, officially state to the said First Lieutenant Lewis that he had never been trained for or performed the duties of a 757, Radio Operator Mechanic Gunner, which statement was known by the said Private Edward A. Corey, Jr., to be untrue.

He pleaded not guilty to and was found guilty of the Charge and its Specifications. No evidence was introduced of any previous conviction. 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 one year. The reviewing authority approved the sentence, ordered it executed, but suspended that portion thereof adjudging dishonorable discharge until his release from confinement and designated a detention and rehabilitation center as the place of confinement. The proceedings were published in G.C.M.O. 709, Headquarters Third Air Force, Tampa, Florida, 2 October 1944.

3. The evidence for the prosecution (pertinent to the conclusion hereinafter reached) shows that the accused in March 1944 was in the military service as a member of Section "O" of 327th AAFBU, stationed at Drew Field, Florida. During that month he was reclassified from military occupational specification (MOS) 755 to (MOS) 757 - in other words, from a radio operator mechanic to a radio operator gunner (R. 9; Pros. Ex. F). On 18 May 1944 he was transferred in the latter grade to Hunter Field, Georgia, for assignment as a replacement in a combat crew (R. 51; Pros. Ex. D).

Shortly before leaving Drew Field accused told another soldier that he would not go overseas; that he was not a gunner; and that he might be back in a week or two (R. 40).

Shortly after his arrival at Hunter Field the accused informed Major Ward F. Robinson the commanding officer of the combat crews at that field that he felt that he was not qualified as a gunner (R. 69). As a result a written statement was prepared by the accused, with the aid of the Classification Officer and a stenographer. The statement was prepared in the office of Lieutenant Miles W. Lewis at Hunter Field. In the statement the accused averred that he had "never been trained for or performed the duties of a 757, radio operator mechanic gunner" (R. 6; Pros. Ex. A). Lieutenant Lewis, did not read the statement and without any knowledge of its contents, had the accused sign and swear to the document and affixed his jurat thereto as Summary Court Officer (R. 7, 8; Pros. Ex. A). The accused did not make the statement to or before Lieutenant Lewis. He merely swore to the truthfulness of the written document before Lieutenant Lewis as a Summary Court Officer (R. 8).

4. The accused elected to remain silent, but included in the evidence presented on his behalf was the following stipulation:

> "It is stipulated by and between the accused, defense counsel, and the prosecution, that were Lieutenant John T. Purnell, Classification Officer, Hunter Field, Savannah, Georgia,

present, he would testify under oath that Staff Sergeant Edward A. Corey arrived at Hunter Field, Georgia, about the middle of May as an individual replacement for a Staff Sergeant Tercorian. Upon his arrival there, there was made a sworn statement by said Staff Sergeant Edward A. Corey, which has been introduced as Exhibit 'A', that Staff Sergeant Corey appeared before a classification board which consisted of four officers, to wit: Lieutenant John D. Dazuin, Lieutenant John T. Purnell, and Major Royal F. Cowen, the fourth being unknown at the present, who examined his Form 20 and interrogated the accused and as a result of such interrogations and examination of the records of the accused he was reclassified from a 757 to a 756, and reported to the Third Air Force that the man had been overclassified, and that the Third Air Force sent a teletype message to the Base Commander at Hunter Field, Georgia, ordering a replacement 757 to be taken from the base at Hunter Field and to return Staff Sergeant Corey to Drew Field" (R. 68, 69).

6. Specification 1 of the Charge alleges that the accused did "wrongfully pretend to" Lieutenant Lewis that he was not trained or qualified as a Radio Operator Gunner, MOS 757.

Specification 2 of the Charge alleges that the accused "with intent to deceive" Lieutenant Lewis officially stated "to" him (Lieutenant Lewis) that he had never been trained for or performed the duties of "a Radio Operator Mechanic Gunner, MOS 757."

It is observed that not only is the accused charged with making a false pretense and a statement but also that he made them to and with the intention of deceiving Lieutenant Lewis.

Assuming but not deciding that the statements contained in the paper writing signed and sworn to by accused were false, the record is wholly lacking in any proof that the statements were made to or with the intention of deceiving Lieutenant Lewis as alleged in the charge and specifications. The evidence merely shows that accused signed and swore to the statements in the presence of Lieutenant Lewis in his (Lt. Lewis's) capacity as summary court officer. The evidence affirmatively shows that the accused made no statement to Lieutenant Lewis other than that he (accused) had read the document and that he had sworn to its truthfulness, and that Lieutenant Lewis, without any knowledge of the contents of the document affixed his jurat thereto as summary court officer. Is this evidence legally sufficient to support the findings of guilty of the charge and specification alleging that accused made false statements to Lieutenant Lewis for the purpose of deceiving Lieutenant Lewis? Our answer is, "No".

In CM 239502, 25 BR 189 an officer was similarly charged with making a false official report with intent to deceive another officer. The Board of Review held:

"the proof of mere execution of the statement does not fulfill the requirements of the proof of the commission of the offense alleged. The offense charged is that the accused with intent to deceive Major Clark, did on or about 10 June 1943, make a false official report to Major Clark which the accused knew to be untrue. To make a false official report encompasses not only the execution thereof, but also its delivery; because without delivery the full act is not consummated and, certainly, without delivery thereof no intent to deceive could arise. The evidence, therefore, does not beyond a reasonable doubt, establish the delivery of the statement by the accused or his authority and, failing in that essential, it ipso facto fails to establish that the intent to deceive existed which is equally fatal to the guilty findings."

In the case of Reass v. United States, 99 Federal (2) 752, it was held by the court in a prosecution based upon violation of a statute imposing criminal responsibility on anyone who makes any statement knowing it to be false, for the purpose of influencing in any way the action of a Federal Home Loan Bank upon any application for loan, "that the mere assembling of the material and its arrangement in a written composition containing the misrepresentations of fact can have no effect, and it is only when they are communicated to the lending bank that the crime takes place".

It necessarily follows that as the prosecution has failed to show any pretense made to Lieutenant Lewis or any intent to deceive Lieutenant Lewis the finding of guilty of the Charge and its Specifications cannot be sustained.

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.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK
CM 265695

1st Ind.

War Department, J.A.G.O., NOV 10 1944 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private Edward A. Corey, Jr. (37075106), Section N, 327th Army Air Forces Base Unit (RTU HB), Drew Field, Tampa, Florida.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that the findings and sentence be vacated and that all rights, privileges, and property of which accused has been deprived by virtue of said sentence be restored.

3. Inclosed is a form of action carrying into effect the recommendation above made.

Myron C. Cramer

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

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

(Findings and sentence vacated by order of the Under Secretary of War. G.C.M.O. 640, 2 Dec 1944)

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

SPJGH
CM 265699

8 NOV 1944

UNITED STATES v. Private ARTHUR F. FERRY (35884618), Company B, 205th Infantry Training Battalion.	INFANTRY REPLACEMENT TRAINING CENTER CAMP BLANDING, FLORIDA Trial by G.C.M., convened at Camp Blanding, Florida, 14 September and 2 October 1944. Dishonorable discharge and confinement for thirty-one (31) years. Penitentiary.

REVIEW by the BOARD OF REVIEW
TAPPY, MELNIKER and GAMBRELL, Judge Advocates

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

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

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

Specification: In that Private Arthur F. Ferry, Company "B", 205th Infantry Training Battalion, did, at Camp Blanding, Florida, on or about 9 July 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Lexington, Kentucky on or about 6 August 1944.

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

Specification: In that Private Arthur F. Ferry, * * *, did, at or near Versailles, Kentucky, on or about 6 August 1944, feloniously take, steal and carry away a motor vehicle, value of more than fifty dollars ($50.00), property of C. E. Blake. (At conclusion of trial, court permitted prosecution to amend Specification by deleting date "6 August 1944" and substituting therefor the date "19 July 1944" (R. 22)).

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

Specification: In that Private Arthur F. Ferry, * * *, having been duly placed in confinement in Stockade #1, Camp Blanding, Florida, on or about 16 August 1944, did, at Camp Blanding, Florida, on or about 1 September 1944, attempt to escape from such confinement.

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

Specification: In that Private Arthur F. Ferry, * * *, (Prisoner, Stockade #1), in conjunction with Private Carmelo F. Mazze, Prisoner, Stockade #1, Camp Blanding, Florida, and Private Robert W. O'Gara, Prisoner, Stockade #1, Camp Blanding, Florida, did, at Camp Blanding, Florida, on or about 1 September 1944, with intent to commit a felony, viz. murder, commit an assault upon Private Harold D. Castner, Surplus Detachment, Section 1, Station Complement, Camp Blanding, Florida, by wilfully, feloniously, and with malice aforethought, striking the said Private Harold D. Castner, on the face, head and body with his fists and with a rake handle.

He pleaded guilty, by appropriate exceptions and substitutions, to the lesser included offense of absence without leave under the Specification of Charge I, not guilty to Charge I but guilty of a violation of Article of War 61, and not guilty to all other Charges and Specifications. He was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement for life. The reviewing authority approved the sentence, reduced the period of confinement to 31 years, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. In support of the Specification of Charge I, the prosecution introduced competent evidence to prove that a short time prior to 6 July 1944 accused had struck another enlisted man and had received extra fatigue duty because of his misconduct. On or about 6 July 1944, apparently provoked by the fatigue duty to which he had been detailed, he stated that if they didn't stop giving him "this crap around here" he was going "to take off" (R. 10, 11). Sometime during the week prior to 9 July 1944, accused was also heard to comment that he would "just as soon be in the pen as in the Army" (R. 13, 14). On 9 July 1944, accused absented himself without leave from Camp Blanding, Florida (R. 8; Pros. Ex. A). It was stipulated by the accused, defense counsel and the prosecution that he was apprehended by military police at Lexington,

Kentucky, on or about 6 August 1944 (Pros. Ex. B). He was returned to Camp Blanding under armed guard and en route he informed the enlisted man guarding him that he had been dressed in civilian clothes when apprehended and that he had absented himself because he thought he was getting a "raw deal" (R. 12).

In support of the Specification of Charge II, the prosecution introduced competent evidence to prove that on 19 July 1944 a 1934 Ford tudor sedan automobile, owned by Mr. Carlos E. Blake of Versailles, Kentucky, was stolen while parked on a street in Lexington, Kentucky. In Mr. Blake's opinion the automobile was worth about $150 (Pros. Ex. C).

On 19 July 1944, an individual named Arthur Ferry represented himself to be the owner of Mr. Blake's automobile and sold it to an Ernest A. Chrisman of Danville, Kentucky, a used car dealer, for $130, of which $65 was paid in cash when the sale was negotiated. The seller agreed to effect a conveyance of title to the automobile on the following day, but he failed to do so. Examining the interior of the automobile, Mr. Chrisman found documents containing Mr. Blake's name and address. He contacted Mr. Blake and on or about 1 August 1944 he returned the automobile to him (Pros. Exs. C, D).

A carbon copy of a receipt which bore the signature "Arthur Ferry" and acknowledged the signer's receipt of $65 as part payment for the automobile was admitted in evidence after accused, defense counsel and the prosecution had stipulated that it was a carbon copy of the original receipt and that the signature "Arthur Ferry" was likewise a carbon copy "of the original signature made by the accused, Arthur F. Ferry, at the time of signing the original receipt" (R. 15, 16; Pros. Exs. E, F).

In support of the Specifications of Additional Charges I and II, the prosecution introduced competent evidence to prove that accused was confined in Stockade No. 1, Camp Blanding, Florida, on 16 August 1944 (Pros. Ex. G). Around 9 a.m. on 1 September 1944, accused and two other stockade prisoners, O'Gara and Mazze, were on a work detail raking leaves in the vicinity of one of the post laundries (R. 16, 17; Pros. Ex. H). Private Harold D. Castner, the guard in charge of this detail, was suddenly assailed by these three prisoners. One of them held Castner while accused struck him on the left side of the head with his fists and the third prisoner hit him on the right side of the head with a rake (Pros. Ex. H). Castner fell to the ground and the prisoners took flight (R. 17). Accused dashed around the corner of the boiler room and came upon another guard, Private John L. Lentz, who brought a loaded rifle to port arms as he ordered accused to halt. Accused obeyed the command and was taken into custody (R. 18).

Castner was promptly removed to the regional hospital and was examined about 9:35 a.m. that morning. He was found to be suffering from a compound comminuted fracture on the right side of his skull with depressed fragmentation, severe concussions and a mild hemorrhage of the right ear. These injuries were of such a serious nature that Castner might well have expired from them, and for several days it appeared likely that his death would eventuate (R. 21). He recovered sufficiently, however, to warrant his removal to the Lawson General Hospital in Atlanta, Georgia, on 20 September 1944 (R. 20; Pros. Ex. H).

4. The accused elected to remain silent after his rights as a witness had been explained to him and the defense rested without offering any evidence.

5. The evidence introduced under Charge I and its Specification fully establishes that accused absented himself from his station at Camp Blanding, Florida, on 9 July 1944, having but a few days prior made remarks indicating he was thoroughly dissatisfied with the Army. About a month later he was apprehended at Lexington, Kentucky, dressed in civilian clothes From these facts the court was amply warranted in concluding that accused absented himself with intent to desert the service (MCM, 1928, par. 130a). The evidence sustains the finding of guilty of the Specification of Charge I.

The evidence introduced under Charge II and its Specification shows that a Ford automobile owned by Mr. Carlos E. Blake was stolen in Lexington, Kentucky, on 19 July 1944, and was sold the same day for $130 to a used car dealer in Danville, Kentucky, by a person who identified himself as Arthur Ferry. That the seller of the automobile was accused is established by the stipulation, signed by accused, wherein he admitted that he signed a receipt acknowledging payment to him of the $65 cash down payment made by the used car dealer who purchased the automobile. It was only after the sale had been negotiated that the dealer discovered he had acquired stolen property. It is well settled that unexplained possession of recently stolen property shortly after the theft thereof is sufficient to support a conviction of larceny (Dig. Op. JAG, 1912-40, sec. 451 (37); 2 Bull. JAG 189). Accused was in possession of the automobile on the day it was stolen and he promptly negotiated sale of it to an unsuspecting used car dealer. That he was fully aware he was possessed of a stolen automobile is demonstrated by the fact that he failed to perfect all documents of sale and also refrained from collecting the balance of $65 due on the transaction.

Although the owner of the automobile estimated it to be worth $150, it was not established that he was qualified to testify as to market values of secondhand automobiles. The market value of the property stolen is the yardstick for determining the authorized punishment to be imposed for larceny under the Table of Maximum Punishments (2 Bull. JAG 13). However, the selling price of $130 agreed upon by accused and the used car dealer is competent

evidence as to market value and such evidence establishes that the value of the property stolen exceeds $50, thus placing accused's offense in the maximum punishment bracket under the Table of Maximum Punishments (MCM, 1928, par. 104c).

No error prejudicial to the substantial rights of the accused was committed when the court permitted the prosecution to amend the Specification of Charge II by changing the date of theft from 6 August 1944 to 19 July 1944. Prior to trial accused had signed a stipulation admitting receipt of $65 in part payment for this automobile when he sold it on 19 July 1944. This stipulation demonstrates that accused was fully advised of the offense with which he was charged, and it is quite apparent he was not under any misapprehension with respect thereto. Under such circumstances it was proper to permit the amendment to be made (MCM, 1928, par. 73). The evidence sustains the finding of guilty of the Specification of Charge II.

The evidence introduced under the Specification of Additional Charge I clearly shows that after accused had been confined to the post stockade, he and two other prisoners assaulted their guard while they were on work detail and then fled. Accused was promptly apprehended by an armed guard but a short distance from the scene of the assault. It is obvious that a concerted attempt to escape confinement was made by accused and two fellow prisoners. The evidence sustains the finding of guilty of the Specification of Additional Charge I.

The evidence introduced under the Specification of Additional Charge II establishes that, while attempting to escape confinement, accused and his two companions viciously assaulted their guard. Accused beat him with his fists on the left side of the head and one of his companions struck him with a rake on the right side. The guard's skull was fractured on the right side indicating that his severe injuries probably resulted from the blows delivered by the rake. However, accused aided and abetted in the commission of this assault and is chargeable as a principal for any offenses arising either from his own acts or from those of his co-participants (3 Bull. JAG 284). If the guard had expired as a result of this assault accused would have been guilty of murder. Malice aforethought would have been established by the proof of accused's intent forcibly to oppose the guard lawfully charged with keeping him and his companions in custody (MCM, 1928, par. 148a). Similarly, the intent to murder, which is an essential element of the offense with which accused is charged, was established by proof that accused assisted in viciously assaulting and causing grievous bodily injury to the guard lawfully engaged in keeping him in custody. The evidence sustains the finding of guilty of the Specification of Additional Charge II.

6. The accused is 24 years of age. He was inducted into the military service on 12 April 1944.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. Larceny of property of the value of $50 or more and assault with intent to murder are offenses of a civil nature, both of which are punishable by penitentiary confinement for more than one year under Sections 22-2201 and 22-591, respectively, of the District of Columbia Code and, since that is so, under the provisions of Article of War 42 accused's entire sentence of confinement may be executed in a penitentiary.

Thomas N. Taffe, Judge Advocate.

[illegible], Judge Advocate.

William H. Gambrell, Judge Advocate.

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

SPJGK
CM 265840

20 OCT 1944

UNITED STATES v. Private First Class LUCIOUS BROWN (42004079), Headquarters Detachment, USAFIL.	HEADQUARTERS USAFIL Trial by G.C.M., convened at Roberts Field, Liberia, 25 September 1944. Dishonorable discharge (suspended), total forfeitures and confinement for two (2) years. Rehabilitation Center.

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

---

1. The record of trial in the case of the soldier named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and the sentence. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Pfc Lucious Brown, did, at Roberts Field, Liberia on or about the 13th September 1944, with intent to do him bodily harm, commit an assault upon S-Sgt Julian Baltimore (Mess Sgt), by cutting him in the shoulder, with a dangerous weapon, to wit a dagger (Native).

The accused pleaded not guilty to and was found guilty of the Charge and the Specification. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion of the sentence involving dishonorable discharge, and designated a detention and rehabilitation center as the place of confinement. The proceedings were published in General Court-Martial Orders Number 51, Headquarters, USAFIL, Roberts Field, Liberia, 2 October 1944.

3. The record of trial shows that Captain William J. Yamber, Coast Artillery Corps, who signed and swore to the Charge and Specification,

participated in the trial as a member of the court. The Trial Judge Advocate stated in open court that Captain Yamber was the accuser. Notwithstanding the fact that no challenge was made by either the prosecution or the defense, Captain Yamber is clearly ineligible under Article of War 8 and paragraph 4a (page 2), Manual for Courts-Martial, 1928. The proceedings and sentence are therefore null and void as having been had and adjudged by an illegally constituted court (Sec. 365 (7), Dig. Op. JAG 1912-40; CM 216028, Nix; CM 220 693, Dye; CM 232797, Coombs; B.R. No. 19, p. 211).

The proceedings are also invalid in that it appears upon the face of the record that three officers, First Lieutenants Albert W. Bishop, Merle B. Reynoldson, and Charles W. Valencourt were present and sat as members of the court without having been detailed thereon. The court was originally appointed by paragraph 7, Special Orders No. 124, Headquarters USAFIL, dated 13 July 1944. This order does not detail either Lieutenant Bishop or Lieutenant Reynoldson as members of the court and they are not so detailed by any amending order. The original order does detail Lieutenant Valencourt as the trial judge advocate, but by paragraph 3, Special Orders No. 141, dated 10 August 1944, Lieutenant Valencourt was relieved as trial judge advocate and by paragraph 4 of the same order First Lieutenant Edward L. Lewis was appointed as the trial judge advocate of the court appointed by paragraph 7, Special Orders No. 124. Thus it appears that First Lieutenants Bishop, Reynoldson and Valencourt participated as members of the court in the trial of this case without any authority whatever.

The Board of Review has repeatedly held that where an officer who was not detailed thereon sat as a member of the court the proceedings were thereby invalidated (CM 131672, Carradi, Dig. Op. JAG 1912-30, sec. 1351; CM 152563, Stone; CM 218157, Beadle; CM 218158, Stewart; CM 218159, Thornal, B.R. No. 11, p. 391; CM 238607, Mashburn, B.R. No. 24, p. 307).

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.

Judge Advocate.

Judge Advocate.

Judge Advocate.

1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724, 10 U.S.C. 1522), is the record of trial in the case of Private First Class Lucious Brown (42004079), Headquarters Detachment, USAFIL.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that the findings and sentence be vacated, and that all rights, privileges, and property of which accused has been deprived by virtue of said sentence be restored.

3. Inclosed is a form of action carrying into effect the recommendation above made.

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

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

(Findings and sentence vacated by order of the Under Secretary of War. G.C.M.O. 608, 8 Nov 1944)

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

(101)

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

SPJGQ
CM 265843

7 DEC 1944

UNITED STATES v. Technician Fifth Grade PHILLIP DAVIS (34906440), 1364th Engineer Dump Truck Company.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Claiborne, Louisiana, 26 September 1944. Dishonorable discharge and confinement for life. United States Penitentiary, Leavenworth, Kansas.

REVIEW by the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

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

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

CHARGE: Violation of Article of War 66.

Specification: In that Technician Fifth Grade Phillip Davis, 1364th Engineer Dump Truck Company, did, at Camp Claiborne, Louisiana, on or about 17 August 1944, voluntarily join in a mutiny which had been begun in Camp Claiborne, Louisiana, against the lawful military authority of Second Lieutenants Joseph R. Boydes and Myron B. Goldware, his superior officers, and did, with intent to subvert such authority for the time being in concert with sundry other members of said Camp Claiborne assembled in said Camp Claiborne, forcibly confine the said Lieutenants in a room.

He pleaded not guilty to and was found guilty of the Specification and the Charge. 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 for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

- 3. The evidence for the prosecution, briefly summarized, is as follows:

On the night of 16 August 1944, the enlisted personnel of various areas in Camp Claiborne, Louisisna, had become disturbed and excited because of a rumor that some enlisted men had been killed in the bivouac area of one of the camp units (R. 33,34,49). There had been a number of disturbances in the 5th Regiment area that night and several officers had been engaged in investigating and attempting to quell the disorders (R. 6,32,33,48,51).

Early in the morning of 17 August First Lieutenant Roland D. Campbell, 1360th Engineer Dump Truck Company, who was duty officer at the time, and Second Lieutenant Myron B. Goldware, 1359th Engineer Dump Truck Company, noticed a disturbance in the vicinity of the 5th Regiment Dispensary and determined to investigate it. Lieutenant Campbell was armed with a carbine but Lieutenant Goldware was unarmed. As soon as they arrived at the dispensary they were surrounded by a mob of between 50 and 75 soldiers, most of whom were armed with rifles and bayonets and one of whom had a "tommy-gun" (R. 7,13,23,51; Pros. Ex. A).

These soldiers ordered the officers to hold their hands in the air and they then disarmed Lieutenant Campbell. Both officers attempted to reason with the crowd and both gave orders for the men to disperse and go back to their huts, without avail (R. 6,8,9,15).

Shortly thereafter Second Lieutenant Joseph R. Boydes, Director of Security and Intelligence, Camp Claiborne, who had been ordered to investigate sporadic shooting which had been reported (R. 23,33), arrived in a jeep accompanied by two sergeants of military police who were wearing MP brassards (R. 6,21,35). As soon as they appeared the mob made them raise their hands, get out of the jeep and they were then disarmed (R. 6, 7,21,23; Pros. Ex. A), ordered to line up, with Lieutenants Campbell and Goldware, in a column of twos, with hands over heads (R. 7,23) and were told they were going to be killed (R. 23).

This episode was observed from a distance by First Lieutenant Vickers B. Watts, Adjutant of the 1st Battalion of the 5th Regiment. At about 2 a.m. he had been ordered by the senior officer of the 5th Regiment area present at the time, to approach the dispensary as closely as possible, observe what was taking place and report to him. When he reached a point about 70 or 80 feet from the dispensary he watched the proceedings from a secluded spot. He saw a group of about 40 or 50 men, most of whom were armed with carbines, surrounding Lieutenant Boydes who had his hands in the air and was addressing them. He also recognized Lieutenants Campbell and Goldware (R. 48,50) for "it was pretty light close to the dispensary" (R. 13) and the lights of a car were shining (R. 49). He heard Lieutenant Boydes assure the men on his "word of honor as an officer" that

the report about men being killed in the bivouac area was untrue but he was "booed down" and someone in the crowd said "Let's kill the sons-of-bitches". Finally Lieutenant Boydes quieted them sufficiently so that he could be heard and said: "What you are doing is mutiny; return to your areas at once!" but was again "shouted down" (R. 22,24,25,49). The mob was so unruly that Lieutenant Goldware was in fear of bodily harm (R. 8).

The mob then became abusive, directing most of their attacks toward the MP sergeants. The leader of the mob struck down both of them with his fists and there were cries of "kill the bastards" (R. 7,21,24). Lieutenant Goldware then saw the accused in the mob to his right and shortly thereafter was struck on the back of the head with what he thought was a rifle butt - and was knocked to the ground momentarily unconscious (R. 7, 9,21;Pros. Ex. A). Lieutenants Boydes and Campbell went to his assistance and at this time Lieutenant Boydes saw the accused in the mob as they were about to take Lieutenant Goldware into the dispensary. Someone then shouted "Better send a guard in with them" (R. 25,28,32) and the accused was "assigned" to act as guard (R. 21,24). He was armed with a rifle and bayonet and accompanied the officers into the dispensary (R. 10,25,39; Pros. Ex. A). As they were going into the dispensary Lieutenant Goldware recovered his senses and thereafter observed what transpired (R. 14,16,84,85).

Two other "guards", beside the accused, were also present in the dispensary and although the accused was the only one armed at first,one of the others had later procured arms (R. 10,29,34,35,40,43; Pros. Ex. A). The accused toyed with his bayonet, sticking it into the wall occasionally and looking at the officers and at one time flourished it at them saying: "(they) better not get the hell out of the dispensary because he was (their) guard" (R. 10,26,27,39). Private First Class Doyle E. Sappington who was in charge of quarters at the dispensary said the accused acted "kind of nasty" (R. 44) and he saw him "kind of" stick the bayonet against Lieutenant Boydes' stomach (R. 39) telling him to stay in the dispensary (R. 39,41). Lieutenant Goldware told the accused he was making a mistake and getting into trouble but he answered: "No, we are not making a mistake; we are not getting into any trouble" (R. 10).

Lieutenant Boydes tried to leave the dispensary saying he wanted to go outside to see if his sergeants were all right but the accused "flourished" his bayonet about 3 or 4 feet away and told him: "Keep your ass in the dispensary" and forced him to remain. The lieutenant then asked the accused to go out and reason with the mob because he did not want the sergeants to be hurt but the accused just snickered and laughed telling him he did not believe what Lieutenant Boydes had told him about the rumor and that he (the accused) could not do anything if he went outside (R. 16,26). He was then ordered to make a telephone call to headquarters in order to confirm what Lieutenant Boydes had told him but he refused to do so for 10 or 15 minutes and there was a flurry of shots outside during this period (R. 16,26,30,33,34,39,40). When he did make the call the accused told the other two enlisted men who, meanwhile, had said nothing and were merely sullen in their demeanor, to watch the officers

while he was telephoning (R. 29,40; Pros. Ex. A). After making the call the accused did go outside and again cautioned the other two to guard the officers while he was gone (R. 35; Pros. Ex. A). When he returned he said he had been unable to do anything with the mob (R. 31). When told that the mob should "bust up and go home" since no one had been killed, the accused said: "There is something going on and I'm staying with them" or words to that effect (Pros. Ex. A).

Meanwhile Lieutenant Watts had reported what he had observed to the senior officer of the area and been directed to return forfurther investigation. When he did so he saw the MP sergeants standing in the road while members of the mob gave commands of "about face" and "forward march" whereupon the sergeants stepped off with the mob following them, some crowding into jeeps behind them (R. 49). This he reported at once and upon his return a second time he observed members of the mob still milling around but they then got into five vehicles and drove away leaving a few stragglers who immediately disappeared (R. 50).

While this was transpiring Lieutenant Turpisch, who had also been injured, was brought into the dispensary (R. 16,18,19,40). He was suffering with a severe head injury consisting of a gash on his chin (R. 40, 86).

During a period of about two hours Lieutenants Campbell and Boydes and Private First Class Sappington considered themselves prisoners (R. 35,44; Pros. Ex. A). In the opinion of Lieutenant Boydes any attempt on the part of the officers to leave the dispensary would have resulted in bloodshed (R. 35) and the private stated that he "wouldn't have attempted to take off, not for a minute" because he "wouldn't have thought (he) would have got very far" because of a "slug in (his) back, probably" as "they was flying all around" on the outside (R. 44,45).

Sometime between 2 and 4 a.m. (R. 31,74) the shooting and "hollering" outside subsided and the guards left. Lieutenant Boydes thereupon called headquarters and then went outside (R. 31,39,41). Shortly thereafter everyone left the dispensary except Private First Class Sappington, who remained on duty (R. 46). The accused, however, returned later with a companion and asked Sappington whether there had been any MPs in the dispensary and whether anyone had been shot in the last thirty minutes. Sappington replied that there had been no one there since the accused had been there a while previous with the officers. The accused then looked at Sappington and said: "You don't remember me being here, do you? . . . You never seen me before?" Sappington "knew what he was driving at right away" and replied: "No, I don't know you from anyone else" upon which the accused's companion suggested, in case anything came up "to make damn sure (he) didn't remember" them (R. 74-77).

Both Lieutenants Goldware and Boydes were in uniform and wearing the insignia of their respective offices on the occasions in question (R. 23,24).

4. The accused, having been informed of his rights, elected to be sworn as a witness and testified, substantially, as follows:

He finished the 7th grade of public schooling and was inducted into service on 5 November 1943.

In the early evening of 16 August 1944 he was at Service Club #2 until about 9 or 10 p.m. when he helped a friend to carry a trunk to the bus station remaining with him until the bus came. From the station he went to Reception Center #2 and joined in a dice game for about two hours (R. 55) although he could not remember the name of anyone with whom he played (R. 58). He then left, in company with another soldier and proceeded to return to his company. The soldier turned off shortly and he was alone when he got to the 5th Regiment Dispensary. Here a "crowd just came out in the street from nowhere (R. 55,56). They were armed (R. 57) but he recognized no one whom he knew (R. 58). He was asked where he was going and when he told them he was going to his company they said: "You one of those scared mother-fuckers, too; you better damn sight wake up". He replied: "Wake up to what? . . . No one never did anything to me and I don't even know what you all are talking about." Just then a jeep drove up with an officer in it and "some of the boys" said "let that man come over here and help carry this man into the dispensary." (R. 56). One of the men who was armed with a gun and bayonet told him to "pick up this man and carry him into the dispensary" and he did so "with a gun pointed on him" (R. 57,58,61). He thought the man he carried was an enlisted man (R. 61). He was not armed either with a gun or bayonet but he did see two enlisted men, one of whom did have a gun and bayonet (R. 58,59,60,67) and the officers when he entered the dispensary (R. 56,58). One of the officers asked him to make a phone call to find out what had happened out in the 1327th bivouac area. He did so and learned that nothing had happened and that "it was a lot of rumor". The officer then told him to tell the crowd outside what he had learned over the phone and he thereupon reported to them what he had heard. They answered that "the man on the phone don't know no more about it than they did" and the accused told this to the officers inside. The officers then explained to him that there were two MP sergeants outside who were from West Claiborne and "didn't bother anybody or nothing" and directed him to go out and tell that to the mob. He did so and apparently the crowd listened to him and took the sergeants away in a jeep (R. 56,60). He reported this to the officers in the dispensary and was then asked to go out again and see if he could "get those boys to settle down and go back to their barracks". He went out again and spoke to the crowd, as follows: "There is no sense in what you-all are doing; don't none of you know what you are doing, why you are out here; you just go about what you were, and wait till you see something before you do anything regarding it". They listened to him "a ways" and some went off but the biggest part stayed but quieted down. He told the officers that they would not listen to him and he then left the dispensary and went to his company (R. 56,57).

On cross-examination he was asked why he did not leave the dispensary after carrying the officer in and he explained that he did not "want to go back out there in the crowd, get stopped again before (he) got to (his) area" (R. 61) and "because (he) was talking to the Lieutenants in the dispensary" (R. 62). He denied that Lieutenant Campbell had told him to go home and that he had told Lieutenant Boydes to stay in the dispensary (R. 62, 63), stated that he left before the officers and denied coming back later and talking with Sappington (R. 63).

The following statement, made by the accused to the investigating officer, was admitted in evidence:

> "I, T/5 Phillip Davis, was returning to my company area on the 17 Aug. 1944 when I passed the regimental dispensary and saw a crowd around the outside. Some soldier who was armed asked me where I was going. When I replied that I was going to my barracks he said 'So you're one of those scared mother fuckers too.' He then instructed me to help carry a soldier into the dispensary who had been hurt. I did this and while I was on the inside I talked to the officers in there and they told me to call a colonel at ASFTC headquarters and ask him what had happened at the 1327th Engr. G.S. Regt. bivouac area. I did this and he told me that nothing had happened. I told this to the officers and they then told me to go outside and tell the rest of the men what the colonel had told me. I did this but no one paid any attention to me. I was not armed with any type of weapon at any time." (R. 64; Def. Ex. 1).

Private Sammie Williams, 1364th Engineer Dump Truck Company, testified that the accused had helped him to carry a trunk to the bus station on the night of 16 August 1944 and stayed with him until about 11:15 or 11:30 p.m. (R. 68).

Corporal Norman Jones, of the same organization, stated that he had seen the accused in the company area, standing by his quarters, between 11 and 12 p.m. on 16 August 1944 (R. 70). The accused was not armed (R. 71). When he asked him where he was going the accused replied: "Nowhere" and started toward the latrine. The corporal then informed him that "the Lieutenant wanted all the men to go into the barracks". He did not know whether the accused then went into his quarters (R. 70).

First Lieutenant Jerome M. Keiser, commanding officer of the 1364th Engineer Dump Truck Company, and the accuser in this case, testified that the accused had been a member of his organization since 5 April 1944. He had never been court martialed nor punished under the 104th Article of War, had never shown disrespect, his record of service was good and he had been recommended for promotion to technician, fifth grade (R. 73,74).

5. Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority (par. 136a, MCM, 1928). It has been defined as consisting in an unlawful opposition or resistance to, or defiance of superior military authority, with a deliberate purpose to usurp, subvert, or override the same, or to eject with authority from office. (Winthrop "Military Law and Precedents", 2d Edition (Rep. 1920) p. 578).

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. This intent may be declared in words or, as in all other cases, it may be inferred from acts done or from the surrounding circumstances. (MCM, 1928, supra).

For example, it may be inferred from the actual subversion or suppression of the superior authority, from an assumption of the command which belongs to the superior, a taking up of arms and assuming a menacing attitude, and the like, or it may be gathered from a variety of circumstances no one of which perhaps would of itself alone have justified the inference. But the fact of combination - that the opposition or resistance is the proceeding of a number of individuals acting together, apparently with a common purpose - is, though not conclusive, the most significant, and most usual evidence of the existence of the intent in question. (Winthrop, supra, pp. 580,581).

Since there can be no actual mutiny until there has been an overt act of insubordination joined in by two or more persons, no person can be found guilty of joining in a mutiny unless an overt act of mutiny is proved. Hence, the presence of the accused at the scene of the mutiny is necessary to convict him of joining therein (par. 136b, MCM, 1928).

Joining in a mutiny is the offense of one who takes part in a mutiny at any stage of its progress, whether he engages in actively executing its purpose or, being present stimulates or encourages those who do. The joining in a mutiny constitutes a conspiracy and the doctrines of the common law thus become applicable to the status, viz. that all the participants are principals and each is alike guilty of the offense; that the act or declaration of one in pursuance of the common design is the act or declaration of every other and that, the common design being established, all things done to promote it are admissible in evidence against each individual concerned. (Winthrop, supra, p. 583).

The proof required to support the charge is (a) the occurrence of certain collective insubordination in a company, party, post, camp, detachment, or other command in the Army of the United States; and (b) that the accused joined in such certain collective insubordination (par. 136b, MCM, 1928).

A lengthy restatement of the evidence which has hereinbefore been set out in substantial detail is not deemed essential nor would it serve any useful purpose.

It is nowhere denied in the record of trial that there was an outrageously disorderly mob of soldiers congregated in the vicinity of the 5th Regiment Dispensary in Camp Claiborne, Louisiana, in the early morning of 17 August 1944. Most of these men were armed and were in a tumultuously violent mood because of rumors that some enlisted men had been killed in the bivouac area of one of the units. The only logical inference to be drawn from the conduct of this massed upheaval of soldiers who were subject to the orderly discipline required in a camp is that they were unlawfully bent upon reprisal.

Consequently when they were apprised of their wrongdoing by officers who sought to assure them that the rumors were unfounded and who, in a lawful effort to restore order and discipline, commanded them to disperse and go to their quarters their concerted disobedience to the commands constituted mutiny. Nothing more was required to complete the offense.

However, as the evidence discloses, the riotous and insubordinate fury of the mob increased instead of abating until, by one violent act after another, the members of the mob had resorted to the most astounding proof of their determination to subvert and override the authority of their superiors while brooking no interference with their plans.

Thus, three commissioned officers, all of whom exerted every effort short of violent means to assert their authority, were publicly insulted, humiliated and ignominiously treated. They were made to stand defenseless with their hands in the air while those who were armed were disarmed. Cries of "kill the bastards" and "kill the sons-of-bitches" as well as the firing of rifles and carbines evidenced an intention to do great bodily harm which was presently carried into effect when two of the lieutenants were seriously injured and two military police sergeants were assaulted and knocked down. No clearer case of complete subversion and usurpation of lawful authority by force of arms could well be made.

Although the presence of the accused at the time these acts transpired was definitely established by eye witnesses, his guilt of the offense does not rest on that alone. However passive his participation may have been previously, when he was "appointed" a guard over the officers who went into the dispensary after Lieutenant Goldware had been knocked down and injured, his overt actions thereafter are conclusive of his guilt.

He not only guarded the officers against escape but threatened one of them menacingly with a bayonet when he tried to leave the building. For a period of two hours he held his superior officers as prisoners and not only defied their exhortations to obey their orders but prevented them from exercising their responsible duty to suppress the mutiny which was then in violent progress outside.

If there were any doubt about the accused's guilty knowledge of the enormity of his offense it is resolved by the proof of his actions when the mutiny had subsided and all had gone to their quarters. It was then that he and a companion returned to the place where he had forcibly detained the officers and, by innuendo, threatened an enlisted man, who had witnessed the affair, with harm in case he sought later to identify the accused as having been present on the occasion.

6. The Charge Sheet discloses that the accused is 19 years of age, was inducted at Fort Benning, Georgia on 6 November 1943 and has had no prior service.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. A sentence of confinement for life 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 mutiny.

Fletcher R. Andrews, Judge Advocate.

Herbert R. Fredericks, Judge Advocate.

[illegible], Judge Advocate.

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

SPJGN
CM 265906

26 OCT 1944

UNITED STATES	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 1.
v.	Trial by G.C.M., convened at Fort George G. Meade, Maryland, 29 September 1944. Dismissal.
Captain HARVEY W. HEMINGWAY (0-325333), Field Artillery.	

- - - - - - - - - - -

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 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 94th Article of War.

Specification: In that Captain Harvey W. Hemingway, Headquarters Detachment, 5th Replacement Regiment (FA & TD), did, at Fort George G. Meade, Maryland, on or about 22 August 1944, knowingly and willfully apply to his own use and benefit one recapped automobile tire of the value of about $6.00, property of the United States furnished and intended for the military service thereof.

Specification 2: In that Captain Harvey W. Hemingway, Headquarters Detachment, 5th Replacement Regiment (FA & TD), did, at Fort George G. Meade, Maryland, on or about 27 August 1944, knowingly and willfully apply to his own use and benefit one recapped automobile tire of the value of about $6.00, property of the United States furnished and intended for the military service thereof.

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

3. The evidence for the prosecution shows that the accused, who during all material times in consideration was Motor Transportation Officer for the 5th Regiment, Army Ground Forces Replacement Depot No. 1, Fort George G. Meade, Maryland, directed Technician Fifth Grade Rueben B. Cohen, parts man for the regimental motor pool, on 21 and again on 25 August 1944 to exchange a used 600 x 16 commercial tire, which were in the motor pool, for newly recapped government tires of the same size (R. 16). The transaction was recorded on the usual "Property Turn-In Slip", one of which was signed by the accused personally and the other by him through the agency of Cohen (R. 16; Pros. Exs. A, B). Cohen effected the exchange through Mr. Paul Z. Camp, "principal tire inspector of the maintenance", supply division of Fort Meade, who signed the two slips and delivered the two newly recapped government tires to Cohen who in turn delivered them to the 5th Regiment Motor Pool (R. Id, 6-7, 17). The two slips and the two newly recapped tires were identified and admitted into evidence (R. Id. 7-9, 16, 19-20). The value of the two tires was established as alleged (R. 8). Cohen on previous occasions at the accused's direction had turned in at least four other tires and three tubes, not of government issue, without receiving exchanges therefor (R. 17-18).

Thereafter Lieutenant Colonel John C. Abbott, the regimental motor maintenance officer, in checking the turn-in slips discovered the transaction and decided to investigate it since there were no vehicles in the regiment using such type of tires (R. 22-23). He located the two newly recapped tires upon the accused's automobile from whence they were removed in the presence of the accused who did not protest their removal (R. 19, 21-22). The accused's successor as Motor Transportation Officer for the Regiment had also been present and had taken the numbers of the two tires and he and Lieutenant Colonel Abbott identified the two tires offered in evidence as the ones which had been removed from the accused's automobile (R. 19-20, 23-25).

The Depot Inspector on 18 September 1944 had a conversation with the accused who, after explanation of his right to speak or remain silent, admitted the exchange of his two personally owned tires for the two newly recapped government tires which he pointed out as they were then still on his car. The accused absolved Corporal Cohen of any fault and stated that he had personally installed the two tires on his car, one on 22 August 1944 and the other on 27 August 1944. The Depot Inspector further identified the two tires admitted into evidence and testified that the accused explained the transaction by stating that he had turned in other tires without exchanges and therefore saw nothing wrong in exchanging his own slightly worn tires for newly recapped government tires (R. 26-28).

4. The evidence for the defense was presented by the testimony of the accused who, after explanation of his rights as a witness, elected to testify (R. 29). On several prior occasions he had been able to secure about nine tires and tubes from friends who had been able to procure new ones. These tires and tubes he had turned in to the government

without drawing exchanges (R. 30, 31). Having donated such rubber, in which he asserted a proprietary interest, to the government above and beyond the call of duty, he contended that its greater value should permit him to draw the two newly recapped tires (R. 31). He had directed Corporal Cohen to make the two exchanges and saw nothing wrong with the transaction (R. 31, 32).

5. Specifications 1 and 2, respectively allege that the accused on or about both 22 and 27 August 1944 at Fort Meade, Maryland, knowingly and willfully applied to his own use and benefit a recapped automobile tire of the value of about $6.00 each, property of the United States furnished and intended for the military service thereof. Such alleged offenses are condemned by Article of War 94 (M.C.M., 1928, par. 150i).

The prosecution's evidence conclusively establishes the accused's commission of the two alleged offenses. The accused personally directed a subordinate, an enlisted man, to exchange two of the accused's worn tires for two newly recapped government tires which he personally installed upon his own automobile. Furthermore, he made a record of the exchange. His acts, therefore, were knowingly and willfully done. The use of the two tires upon his own personal car clearly shows that they were applied to the accused's own use and benefit. The entire transaction was traced and the tires were identified as being government property furnished and intended for the military service beyond peradventure. The peculation he admitted both to the Depot Inspector and in his sworn testimony and his attempted explanation asserts no lawful defense whatsoever and sounds weakly even in mitigation. The evidence, therefore, beyond a reasonable doubt establishes his guilt of the two offenses as alleged and amply supports the findings of guilty of the Charge and its two Specifications.

6. The accused is about 32 years old. The War Department records show that he is single and that for almost seven years prior to entrance upon active duty he was employed by a large oil company as a lubrication engineer. He graduated from preparatory school in 1931 and from Yale University in 1935 when he was commissioned because of R.O.T.C. training as a second lieutenant in the Officers Reserve Corps in which he was promoted to first lieutenant on 15 September 1938. His reserve commission was terminated on 10 June 1940 because of his failure, without fault on his part, to answer official communications. He was appointed a second lieutenant on 7 April 1942 and entered upon active duty on 1 May 1942. He was promoted to first lieutenant on 5 October 1942 and to captain on 5 August 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and its Specifications and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 94.

Abner E. Lipscomb, Judge Advocate.

Robert J. Glennon, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

(114)

SPJGN
CM 265906

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Harvey W. Hemingway (O-325333), Field Artillery.

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

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

Myron C. Cramer

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

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

(Sentence confirmed but commuted to reprimand. G.C.M.O. 678, 29 Dec 1944)

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

SPJGQ
CM 265931

9 NOV 1944

UNITED STATES	)	FOURTH AIR FORCE
v.	)	Trial by G.C.M., convened at Tonopah Army Air Field, Tonopah, Nevada, 20 September 1944. Dismissal.
First Lieutenant LESLIE J. SASSER (0-1583617), Ordnance Department.	)	

- - - - - - - - - - -

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

- - - - - - - - - - -

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

2. The accused was tried upon the Charges and Specifications set forth below. On the Charge and Specification he was tried jointly with Second Lieutenant Joan G. Polesky, Women's Army Corps, who was acquitted thereof.

CHARGE: Violation of the 94th Article of War.

Specification: In that First Lieutenant Leslie J. Sasser, Ordnance, Squadron A, 422nd Army Air Force Base Unit and Second Lieutenant Joan G. Polesky, Women's Army Corps, Squadron W, 422nd Army Air Force Base Unit, acting jointly and in pursuance of a common intent, did, at Tonopah Army Air Field, Tonopah, Nevada, on or about 10 August 1944, knowingly and willfully misappropriate one (1) Ford V-8 engine assembly of the value in excess of One Hundred Dollars ($100.00), property of the United States, furnished and intended for the military service thereof.

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

Specification: In that First Lieutenant Leslie J. Sasser, Ordnance, Squadron A, 422nd Army Air Force Base Unit, did, at Tonopah Army Air Field, Tonopah, Nevada, on or about 26 July 1944, knowingly and willfully misappropriate one (1) 600 x 16 Pharis tire, serial number 8124573-C, of the value in excess of Five Dollars ($5.00), property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to the Specification and the Charge, guilty to the Specification and the Additional Charge, and was found guilty of both Specifications and both Charges, except the language of the Specification of the Charge which alleged joint action and common intent with Lieutenant Polesky. No evidence of previous convictions was introduced. He was sentenced "to be fined Five Hundred Dollars ($500.00) and to be dismissed from the service". 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. Competent evidence introduced by the prosecution established the following state of facts.

The Charge and Specification.

The accused was the officer in charge of the Third Echelon Motor Shop at the Tonopah Army Air Field, Tonopah, Nevada (R. 20, 21). On or about 7 August 1944, Corporal Puls, Automotive Supply Clerk (R. 15), tallied into the stock records two new Ford V-8 motors, just received. One of these was withdrawn from stock for the stated purpose of being used in a truck or staff car (R. 16). Later Corporal Puls saw a used Ford V-8 motor in the crate that had held one of the new motors. Technical Sergeant Ermand R. Boni, shop foreman (R. 19), at the accused's direction, on or about 8 August 1944, assembled a new V-8 engine, that had arrived the day before, and put it back in the crate. Accused said he wanted it for a staff car (R. 20). About 10 August 1944, Private Gasquoine (R. 18), on verbal orders of the accused, moved one of the new motors to the parts room and placed there a jack, an oil pan, a drop pan and some solvent (R. 18). The next day the accused ordered him to steam-clean an old Ford V-8 engine in the parts room, to be shipped out. He did so, and put the old motor in a crate (R. 19). Staff Sergeant Virgilio Boni, assistant shop foreman (R. 20), saw Ermand Boni and a civilian assistant assembling the new motor. The two new Ford V-8 motors, which had arrived from Ogden Arsenal, were the only V-8 engines in stock. The witness, at the accused's direction, caused the new assembled motor to be taken to the supply room (R. 21). Later, the witness, at the order of accused, had Private Gasquoine clean a used V-8 engine that was hanging on a crane in the shop. The engine was then crated and put in the supply room (R. 22). There was no order in the shop at that time for the replacement of an old Ford V-8 motor with a new one (R. 22, 24).

Corporal Bufkin and Private Van Kirk, mechanics, at about 9:30 and again at about 10:30 or 11:00 o'clock on the night of 10 August 1944, saw the accused and Lieutenant Polesky, in fatigue clothing, a little greasy, come from the vicinity of the parts room to get "cokes" in another part of the shop (R. 25-28).

A new Ford V-8 motor was found installed in the accused's private car, which was siezed by orders of the Provost Marshal (R. 8), and which looked to Corporal Puls (R. 17) like the new motor that was received in the parts shop (R. 9; Ex. 1 for identification). Exhibit 2

for identification (R. 10), an old Ford V-8 motor in a crate, looked to Master Sergeant Whipperman like one he had siezed on order of the Provost Marshal from the Third Echelon repair shop (R. 10-11), and to Corporal Smith, Parts Clerk, like one that was in that shop about 10 August 1944 (R. 12). The engine in accused's car looked to Corporal Smith like the kind furnished for the military service, also like other kinds (R. 29).

The two new Ford V-8 engines referred to were received on a War Department shipping ticket from Ogden Arsenal (R. 13; Ex. 1).

The accused, in a sworn statement in writing to the Investigating Officer, Lieutenant Carrico, duly qualified (R. 29-30; Ex. 2), confessed removing the old engine from his own Ford car and replacing it with a new Government owned Ford V-8 engine at the time and place specified, with the help of Lieutenant Polesky in the mechanical work preceding and following the actual exchange of motors, the substitution being effected in her absence and without her knowledge. Value of the engine in excess of $100 was stipulated (R. 25).

The Additional Charge and Specification.

Lieutenant Burns, Assistant Base Legal Officer, in the course of investigation of the Charge against the accused, discovered Pharis automobile tire number 8124573-C mounted on the accused's car (R. 32), with the serial number inside, and removed and siezed it (R. 33). (R. 32; Ex. 7). Value in excess of $5 was stipulated (R. 34). The accused, in a sworn statement in writing, duly qualified (R.33,34; Ex. 8), confessed that he had replaced a flat tire on his own car with a Government Issue tire.

4. The accused, after due explanation of his rights (R. 35), testified in accordance with the prosecution's evidence and his confession, and further testified to exonerate Lieutenant Polesky, that the actual substitution of motors was made in her absence and without her knowledge, and that she was left in the belief that the work being done was merely the cleaning and overhauling of the accused's motor (R. 36-39). Lieutenant Polesky testified to the same effect (R. 40-42). The defense introduced no other evidence.

5. The accused, with leave of court, changed his plea to the Charge and Specification from guilty to not guilty solely to avoid any possible inference that he was asserting Lieutenant Polesky's guilt under the joint charge (R. 7-8). He pleaded guilty to the Additional Charge and Specification, which supplies certain elements of identification of the Government tire otherwise left uncertain.

The evidence shows the deliberate and planned misappropriation of Government property in the case of each of the items involved, with utter disregard for the restraints of law and common honesty. The moral turpitude displayed is aggravated in both cases by the base misuse of the accused's position of responsibility, and further, in the case of the engine, by his use of his ill-merited authority to procure enlisted

men, unknowingly as he thought, to assist and conceal his thievery.

The evidence amply supports the findings and sentence.

6. War Department records disclose that the accused is 29 years old and married. He completed 10 grades of public schooling. In civil life he has been employed as a railroad car repairman and carpenter. He served in enlisted status in the 141st Field Artillery, National Guard of the United States, from 7 October 1934 to 15 August 1942, being inducted into the federal service 13 January 1941. He was commissioned 13 November 1942, through the Quartermaster Officer Candidate School, Camp Lee, Virginia, and ordered to active duty as a second lieutenant, Ordnance Department, Army of the United States. He was promoted to the grade of first lieutenant 24 August 1943. His commissioned service appears to have been as a motor maintenance officer entirely.

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.

Fletcher R. Andrews, Judge Advocate.

Herbert R. Fredrick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ
CM 265931

1st Ind.

War Department, J.A.G.O., NOV 17 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 Leslie J. Sasser (0-1583617), Ordnance Department.

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

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

Myron C. Cramer

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

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

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 11, 5 Jan 1945)

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

SPJGK
CM 265939

5 DEC 1944

UNITED STATES v. Privates KIYOSHI TAKAHASHI (39084747), BILL T. SHIMIZU (39385573), MINORU F. SHIMIZU (39086392), SAM M. SAKATA (39086380), EIJI MATSUOKA (39015478), SHOGO HIROO (39381319), TOM T. YAGI (39089929), TAKUMI T. YAMASHITA (39169300), and Privates First Class HITOSHI IKATA (39303209), and HISAYA HASEGAWA (39015185), and Corporal JOHNNY T. KURAHARA (39086311), all of Company D, Military Police Battalion, Army Ground Forces Replacement Depot No. 1.	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 1 Trial by G.C.M., convened at Fort George G. Meade, Maryland, 28 and 29 September, 1944. EACH: Dishonorable discharge and confinement for fifteen (15) years. YAMASHITA: Disciplinary Barracks. ALL OTHERS: Penitentiary.

HOLDING by the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates.

---

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

2. The accused, Takumi T. Yamashita, consented to common trial with the other ten accused. He was tried upon the following Charges and Specifications:

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

Specification: In that Private Takumi T. Yamashita, then of Company D, 12th Replacement Battalion, 3rd Replacement Regiment (Inf), now of Company D, Military Police Battalion, having received a lawful command from First Lieutenant Louis L. Langevin, his superior officer, to fall out for formation under arms, did, at Fort George G. Meade, Maryland, on or about 7 September, 1944, willfully disobey the same.

CHARGE II: Violation of the 66th Article of War. (Finding of not guilty.)

Specification: (Finding of not guilty.).

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

CHARGE: Violation of the 66th Article of War.

Specification: In that Private Tom T. Yagi, Private Kiyoshi Takahashi, Private Bill T. Shimizu, Private Minoru F. Shimizu, Private Sam M. Sakata, Private Eiji Matsuoka, Private Shogo Hiroo, Private First Class Hitoshi Ikata, Corporal Johnny T. Kurahara, and Private First Class Hisaya Hasegawa, all then of Company D, 12th Replacement Battalion, 3rd Replacement Regiment (Inf), now of Company D, Military Police Battalion, did, at Fort George G. Meade, Maryland, on or about 7 September 1944, excite and cause a mutiny in Compnay D, 12th Replacement Battalion, 3rd Replacement Regiment (Inf), by collectively and concertedly disregarding and defying the lawful orders of 1st Lieutenant Louis L. Langevin, the commanding officer thereof, to assemble for a night problem, or participate in training with intent to usurp, subvert, and override for the time being lawful military authority.

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

Specification: (Finding of not guilty).

4. Each accused pleaded not guilty to all Charges and Specifications. Accused Yamashita was found guilty of Charge I and its Specification and not guilty of Charge II and its Specification. Accused Hiroo was found not guilty of the Additional Charge and its Specification and guilty of the Charge and its Specification, except the words "excite and cause", substituting the words "voluntarily join in", and except the words "assemble for a night problem or". Each of the other accused was found not guilty of the Additional Charge and its Specification and guilty of the Charge and its Specification, except the words "excite and cause", substituting therefor the words "voluntarily join in" and excepting the words "or participate" substituting therefor the words "and participate". No evidence of any previous conviction except of accused Minoru F. Shimizu was introduced. As to him evidence was introduced showing a previous conviction by special court-martial on 17 August 1944 of willful disobedience of a lawful order of a noncommissioned officer on 13 August 1944, in violation of Article of War 65, for which he was sentenced to forfeit $14 of his pay per month for four months. Each accused 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 fifteen years. The

reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement for accused Yamashita and the United States Penitentiary, Lewisburg, Pennsylvania, for the other accused, and forwarded the record of trial for action under Article of War 50½.

5. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty with respect to accused Yamashita. With respect to the other ten accused, the sole question presented is a legal one, and, therefore, there is no necessity for a discussion of the evidence.

6. As analyzed in the 1921 Manual for Courts-Martial (p. 359), Article of War 66 defines five offenses relating to mutiny:

I. Attempting to create a mutiny.
II. Beginning a mutiny.
III. Joining in a mutiny.
IV. Exciting a mutiny.
V. Causing a mutiny.

In the present case the accused, other than Yamashita, were found not guilty of causing and exciting a mutiny, but by substitution, apparently on the theory that it was a lesser included offense, were found guilty of voluntarily joining in a mutiny, an entirely different offense from that with which they were charged and not necessarily included in that charged.

In Winthrop's Military Law and Precedents (Second Edition) the following enlightening discussion appears (pp. 582, 583):

"'Who begins, excites, causes, or joins in, any mutiny' &c. Samuel distinguishes in general terms the two classes of persons contemplated by the Articles as those who lead and those who follow. And the simplest view to take of the words quoted is to treat begin, excite and cause as different names for the same thing, to wit, the offense of the officer or soldier who originates or is instrumental in originating a mutiny, and join in as referring especially to the offense of one who participates in a mutiny when once inaugurated.

"Strictly, however, - though the terms are not necessarily so closely construed - the beginning of a mutiny would embrace only cases in which the offender himself personally takes the initiative in the overt act or proceeding of opposition or resistance; while exciting or causing of a mutiny would include instances in which the offender takes no personal part in the riotous demonstration, but confines himself to the stimulating of others to the resistance, &c., actually resorted to. Thus a mutiny may be excited and caused by an inflammatory harangue addressed to the soldiers by one having influence or authority

over them, as - especially-by an officer or non-commissioned officer; by his using, in their presence, defiant language, or behaving otherwise defiantly, toward a common superior; by his openly setting at naught the orders of the commander or issuing orders counter to his; by his falsely representing to his inferiors that they are being or about to be oppressed by a superior, &c.

"Joining in a mutiny is the offense of one who takes part in a mutiny at any stage of its progress, whether he engages in actively executing its purposes, or, being present, stimulates and encourages those who do. * * *

* * *

"The Charge. The form sometimes given to the charge-'Mutiny' or 'Mutiny in violation of the 22d Article of War', is loose and inaccurate; no such specific offense as 'mutiny' being designated in the Article. The charge should be either-'Beginning a mutiny', 'Exciting a mutiny', 'Causing a mutiny', 'Joining in a mutiny' or simply 'Violation of the Twenty-Second Article of War.' Or the two forms may be combined, as 'Joining in a mutiny, in violation of the Twenty-Second Article of War'. The specification should set forth the facts relied upon as constituting the offense with an allegation of the proper intent. * * *".

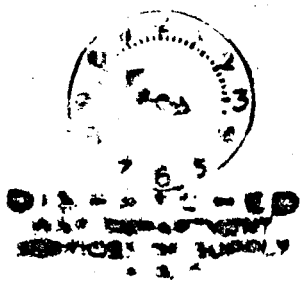
The wide variance between the terms "excite and cause" and "join in" is well illustrated by the older view, expressed by Hough (1825) that a superior who induces a mutiny in his own command by arbitrary treatment of his inferiors, or by failing to exercise proper discipline, or other misconduct, is chargeable with the offense of causing or exciting a mutiny (p. 70). This distinction is emphasized in the 1917, 1921 and 1928 Manuals for Courts-Martial in the discussion of the 66th Article of War (pp. 213-214, 1917 Manual; pp. 359-361,1921 Manual; and pp. 150-152, 1928 Manual). In order to establish the commission of any offense under the Article (except where the charge is attempting to create a mutiny), it is necessary that an overt act of mutiny be proved. For a person to be guilty of "beginning or joining in" a mutiny his presence at the scene of the mutiny is necessary (Sec. 136b, MCM, 1928). On the other hand, this principle is laid down in Section 136c (idem):

"* * * But a person may excite or cause a mutiny without taking personal part in, or being present at, the demonstrations of mutiny which result from his activities".

It is apparent, therefore, since it was not necessary in order to establish the present charge of exciting and causing a mutiny to prove that the accused actually "joined in" the mutiny, the offense of voluntarily joining in the mutiny, of which accused were found guilty by substitution, was not a lesser included offense, "necessarily included in that charged" as required by Section 78b, Manual for Courts-Martial, 1928.

7. For the reasons stated, the Board of Review holds as to accused Yamashita that the record is legally sufficient to support the findings of guilty of Charge I and its Specification and the sentence; and as to the other ten accused that the record is legally insufficient to support the findings of guilty of the Charge and its Specification with substitutions and the sentences.

DEC 18 '44 AM



Judge Advocate.

Judge Advocate.

Judge Advocate.

1st Ind.

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

18 DEC 1944

TO: Commanding General,
Army Ground Forces Replacement Depot No. 1,
Fort George G. Meade, Maryland.

1. In the foregoing case of Privates Kiyoshi Takahashi (39084747), Bill T. Shimizu (39385573), Minoru F. Shimizu (39086392), Sam M. Sakata (39086380), Eiji Matsuoka (39015478), Shogo Hiroo (39381319), Tom T. Yagi (39089929) and Takumi T. Yamashita (39169300), and Privates First Class Hitoshi Ikata (39303209) and Hisaya Hasegawa (39015185), and Corporal Johnny T. Kurahara (39086311), all of Company D, Military Police Battalion, Army Ground Forces Replacement Depot No. 1, Fort George G. Meade, Maryland, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as to the accused Private Takumi T. Yamashita, and legally insufficient to support the findings and sentence as to the remaining accused, which holding is hereby approved. Under the provisions of Article of War 50½ you now have the authority to order the execution of the sentence as to the accused Private Takumi T. Yamashita.

2. As to the other accused, under the provisions of Article of War 50½, the record of trial is transmitted for vacation of the sentence as to each in accordance with the foregoing holding, and for such other action as you may deem proper.

3. Under all the circumstances in this case, it is suggested that consideration be given to reducing the period of confinement as to the accused Yamashita, and that the execution of his sentence be deferred until final disposition has been made in the case of the other accused.

4. 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 265939).

Myron C. Cramer

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

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

SPJGH
CM 265957

20 NOV 1944

UNITED STATES v. Private HAROLD J. McNUTT (14055455), Company B, 539th Amphibian Tractor Battalion.	1ST HEADQUARTERS AND HEADQUARTERS DETACHMENT SPECIAL TROOPS Trial by G.C.M., convened at Fort Ord, California, 4 October 1944. Dishonorable discharge, total forfeitures and confinement for five (5) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
TAPPY, MELNIKER and GAMBRELL, Judge Advocates

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

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

CHARGE: Violation of the 86th Article of War.

Specification: In that Private Harold J. McNutt, Company B, 539th Amphibian Tractor Battalion, being on guard and posted as a sentinel, at Fort Ord, California, on or about 0045 22 September 1944, was found sleeping upon his post.

He pleaded not guilty to and was found guilty of the Charge and the Specification. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for five (5) years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the prosecution.

On the night of 21-22 September 1944 the accused, a member of Company B, 539th Amphibian Tractor Battalion, stationed at Fort Ord, California, was on guard duty (R. 8, 12). He was duly posted as a sentinel on post No. 8 and was on the shift which commenced at 11 p.m. (R. 8, 13). Within a few minutes after midnight the officer of the day made a tour of the guard and on his first trip was unable to find the sentinel on post No. 8. He thereupon made two more trips around the area of post No. 8 and, still being unable to find the sentinel, he returned to the guardhouse and instructed the sergeant of the guard to make a search for that sentinel (R. 13).

The sergeant of the guard, Staff Sergeant Ralph L. Burkhart, commenced his search for the accused at about 12:30 a.m. He drove around the post once in a peep and, being unable to find the accused, he got out of the peep and started looking in the latrines (R. 8). In the second latrine he entered he found the accused sitting "on the commode", holding a "Yank magazine" in "his right hand". The accused was wearing a helmet liner and his head was bowed forward so that the sergeant standing in front of him could not see his eyes (R. 8, 9). The sergeant further testified as follows (R. 9):

"Q Was he awake or asleep?
A I couldn't see his eyes, sir. I was about fifteen feet from him, sir.
Q Was he awake or asleep, do you know?
A He didn't move when I opened the door, sir. He was asleep."

The sergeant did not speak to the accused. When asked why he did not speak to him he said, "I wanted the O.D. to catch him, sir" (R. 9). Upon discovering the accused, the sergeant withdrew from the latrine, closed the door and told the peep driver to go to the guardhouse and bring the officer of the day and a relief sentry. Five minutes later the sergeant entered the latrine again and observed that the accused was still sitting in the same position. He withdrew again and waited outside of the latrine for the arrival of the officer of the day. While he was waiting the accused "came walking out" (R. 10). The sergeant asked him what he had been doing in the latrine and the accused stated that he had gone in to relieve himself. The sergeant said to him that he knew that that was not true "because I seen him setting on the bowl there asleep". On examination by the court, the sergeant testified that when he saw the accused sitting on the commode the latter's trousers were up and buttoned (R. 10, 11). When the officer of the day arrived with the relief sentinel, the sergeant

reported to him that "he found Private McNutt sleeping in the latrine". The officer of the day thereupon relieved the accused from guard duty and placed him under arrest (R. 13). The latrine in which the accused was found is within post No. 8 (R. 13).

4. Evidence for the defense:

Private First Class Daniel L. Perillo, a witness for the defense, testified that he was peep driver for Sergeant Burkhart on the night of 21-22 September 1944. At about 12:25 a.m. he stopped the peep near "the latrine of Company C of the 742nd Battalion" and Burkhart got out of the peep and went in the latrine. Burkhart then came out of the latrine and instructed Perillo to drive to the guardhouse and bring the officer of the day and a relief sentinel, which he did. Approximately ten minutes elapsed between the time Burkhart got out of the peep and the time Perillo returned from the guardhouse with the officer of the day and the relief sentinel (R. 16-18).

Sergeant Burkhart was recalled, this time as a witness for the defense. He identified three photographs of the interior of the latrine in which the accused was found, which photographs were introduced into evidence, without objection, as Defense's Exhibits A, B and C, respectively. The prosecution stipulated that they "depict the latrine in question in this case" (R. 19-20).

Burkhart specifically testified that Defense's Exhibit C, showing a man sitting on a stool and holding a magazine or paper in his right hand, represented the exact position in which the accused was sitting when Burkhart discovered him in the latrine. His testimony as to this appears on page 20 of the record as follows:

> "Q Showing you Defense's Exhibit C, sergeant, showing a man sitting on a stool, upon which you said the accused was sitting, does that represent a view of the accused as seen on the night of the 21st of September?
> (Witness examines photograph.)
> A Yes, sir, that is the position he was setting in, sir.
> DEFENSE COUNSEL: No further questions.
> CROSS-EXAMINATION
> Questions by prosecution:
> Q Is that the same exact position the accused was in (referring to Defense's Exhibit C)?
> A Yes, sir, that is the same exact position."

In view of the fact that the man shown in Defense's Exhibit C is firmly holding the magazine or paper in a horizontal position rather than holding

it limply in a vertical position, Burkhart was questioned in detail respecting the angle at which the Yank magazine was held by the accused. His testimony on this point appears on pages 20 and 21 of the record and is as follows:

> "Q Now, showing you on Defense's Exhibit C, the corporal holding a magazine or newspaper in his hand, was the magazine at that angle, or was it up and down?
> A It was hanging on the side of his legs like this right here, like that position there, sir (indicating on Defense's Exhibit C)."
>
> * * *
>
> "Q This picture shows the back of -- it shows the magazine being held up only by his hand. It is not resting on his knees or any other part of the body, is that the way you found him?
> A Yes, sir.
> Q Held in just one hand?
> A Yes, sir, in one hand."

Burkhart was asked whether the door to the latrine made any noise when he opened it, to which he replied, "Well, some of them squeak whenever you open it, and I pulled it back shut and went back up and opened it again" (R. 21). Subsequently, upon being recalled as a witness for the court, Burkhart explained that to enter the latrine from the street it is necessary to pass through the front door of the barracks, which is a double door, and then to enter the latrine through an inside connecting door. There is no other door to the latrine. The latrine door was closed when Burkhart entered the barracks. It was necessary for him to turn the knob on the latrine door to open it. He was asked: "Did it rattle?" to which he replied, "It made a little squeaking noise, sir"; and, upon further questioning, he stated, "It didn't make much noise, no, sir" (R. 30, 31).

Technician Fifth Grade Raymond W. Jackson, a witness for the defense, testified that he posed for Defense's Exhibit C and that he is the soldier shown in that photograph. When the photograph was taken he had his eyes open and was reading an advertisement on the paper which he held in his hand (R. 22).

The accused, after having his rights as a witness explained to him by the court, elected to be sworn and to testify in his own behalf. On the night of 21-22 September 1944 he went on post as a sentinel at 11 p.m. At approximately 11:55 p.m. he went to the latrine to relieve himself. He took with him a copy of Yank magazine and while in the latrine began reading in the magazine the Soldiers' Bill of Rights. He arose to go, buttoned up his clothes and put back on his belt. Then noticing

that he had not finished the article he was reading he sat back down and finished it. Defense's Exhibit C is an accurate representation of the position he was sitting in while reading the magazine. While sitting there he heard several men enter the building, laughing and talking. He heard one go upstairs and another go to his bed in the lower part of the barracks. He did not see any of the men who came in the building. Nor did he see or hear Burkhart. He is positive that the latrine door was not closed. It was standing open. When he finished reading the article he placed his carbine on his shoulder and walked out, meeting Burkhart on the street in front of the barracks. The total length of time he was in the latrine was between 8 and 15 minutes. No one spoke to him in the latrine. He walked out of his own free will, and without being prompted by anyone. Burkhart told him that the officer of the day was coming. At about this time the officer of the day arrived and relieved the accused as sentinel. The time was then 12:05 a.m. (R. 23-25). On cross-examination the accused admitted that when he walked out of the latrine Burkhart accused him of having been asleep in the latrine, to which he made no reply; and that he did not call the corporal of the guard before going to the latrine (R. 27-28). Further, on cross-examination, the accused testified as follows (R. 28):

> "Q Do you recall what you read in the G.I. Bill of Rights in Yank that night?
>
> A Well, it said if a person, something about being interested in buying a farm, you could borrow money to buy a farm and pay back so much, and if you wanted to go to school, they would give you so much, and if you were married --
>
> Q You haven't read that since, have you?
>
> A I haven't had a chance. I haven't had a copy of it."

5. The accused is charged with having been "found sleeping upon his post", in violation of Article of War 86. It is undisputed that he was duly posted as a sentinel and that, at the time alleged, he was found sitting in a latrine within the area of his post. Also, it is not denied that he neglected to obtain permission from the corporal of the guard or other proper authority to leave his post before entering the latrine. The accused does, however, vigorously deny that he was found sleeping upon his post. His conviction of that offense must stand or fall depending upon the sufficiency of the evidence relating to that particular issue. Evidence tending to establish that the accused was guilty of infractions of other duties as a sentinel, such as quitting his post without being properly relieved, regardless of how strong such evidence may be, may not be used to support the accused's conviction here if the evidence on the issue on which he was tried is otherwise insufficient. Nor did the conduct of the accused in entering the latrine without first obtaining proper authorization so to do involve the commission of a lesser included offense of the offense of which he was convicted.

The sole question requiring consideration here is whether the competent and legal evidence of record is such that the court could properly make a finding therefrom that the accused was guilty of the offense alleged. Except with respect to the ultimate issue as to whether the accused was or was not asleep in the latrine, the evidence is contradictory on only one important point, namely, whether the latrine door was open or closed. Sergeant Burkhart testified emphatically that it was closed and that in order to open the door it was necessary to turn the doorknob. The accused, on the other hand testified equally emphatically that the latrine door was not closed but was standing open. Burkhart testified that he opened the latrine door twice, at an interval of five minutes, that he saw the accused on each occasion, that the accused remained motionless on each occasion and that the accused was in exactly the same position the second time as the first. The accused does not assert that he was not motionless or that he changed his posture during a short period before his exit from the latrine, but he does assert that he was not asleep and that he was reading the magazine which he held in his hand. Burkhart was unable to see whether the accused's eyes were open. This is understandable, since it is apparent from an examination of Defense's Exhibit C that the helmet liner worn by the accused obstructed a view of his eyes from a distance of even two paces in front of him.

Burkhart's testimony as to the amount of noise made by the latrine door when he opened it is vague and weak. When asked how much noise was made, he at one point said, "Well, some of them squeak", and at another point, "It made a little squeaking noise, sir", and again "It didn't make much noise, no, sir". He had previously testified, "I wanted the O.D. to catch him, sir". The amount of noise that may reasonably be inferred from this testimony might very well have failed to attract the attention of the accused if he was reading and concentrating. Also, it is notable that Burkhart does not claim that he spoke to the accused or that he walked over to him and shook him.

Where the prosecution's case completely breaks down, however, is on the assertion that the accused, while asleep, was holding a copy of Yank magazine, in one hand, in a horizontal position, as shown in Defense's Exhibit C. The prosecution's only eyewitness was very definite that Defense's Exhibit C shows the exact position in which the magazine was held. The soldier who posed for this photograph testified that he was reading the magazine at the time the photograph was taken. The photograph itself (Defense's Exhibit C) clearly shows that the magazine was being held in a readable position. The fact that the magazine was held in one hand in the position represented refutes the conclusion that the accused was asleep.

While it is not the function of the Board of Review, in a case of this type, to weigh evidence, judge of the credibility of witnesses or determine controverted questions of fact, it is, nevertheless, well settled that the Board of Review is under the duty of safeguarding the basic principle of criminal law that in order to have a legal conviction the evidence of record must be legally sufficient to support the finding of guilty (CM 253683, Filipow). We have in the present case a finding of guilty which is necessarily based upon an inference of fact unsupported by legally sufficient evidence. As was stated by the Board of Review in CM 212505, Tipton (10 BR 237, 244):

> "The Board of Review, in scrutinizing proof and the bases of inferences does not weigh evidence or usurp the functions of courts and reviewing authorities in determining controverted questions of fact. In its capacity of an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty (A.W. 50½). If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for that inference (CM 150828, Robles; CM 150100, Bruch; CM 150298, Johnson; CM 151502, Gage; CM 152797, Viens; CM 154854, Wilson; CM 156009, Green; CM 206522, Young; CM 207591, Nash, et al.)."

The Board of Review has on numerous occasions quoted with approval the following extract from the opinion in Buntain v. State, 15 Tex. App. 490:

> "We must look alone to the evidence as we find it in the record, and applying it to the measure of the law, ascertain whether or not it fills the measure. It will not do to sustain convictions based upon suspicions * **. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens." (CM 207591, Nash, 8 BR 359, 363; CM 253683, Filipow).

6. For the reasons indicated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Thomas N. Tally, Judge Advocate.

Carl Rhude, Judge Advocate.

William H. Gambrell, Judge Advocate.

SPJGH
CM 265957

1st Ind.

War Department, ASF, J.A.G.O., NOV 21 1944

TO: Commanding General, 1st Headquarters and Headquarters Detachment, Special Troops, Fort Ord, California.

1. In the case of Private Harold J. McNutt (14055455), Company B, 539th Amphibian Tractor Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. I concur in the holding by the Board of Review and, for the reasons therein stated, recommend that the findings of guilty and the sentence be vacated.

2. Under the provisions of Article of War 50½, the record of trial is transmitted for vacation of the sentence in accordance with the foregoing holding and for a rehearing or such other action as you may deem proper.

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

(CM 265957).

Myron C. Cramer

1 Incl.
Record of trial.

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

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

SPJGK
CM 266137

26 OCT 1944

UNITED STATES	)	FOURTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Geiger Field, Washington, 23 September 1944. Dishonorable discharge, total forfeitures and confinement for three (3) years. Disciplinary Barracks, Fort Leavenworth, Kansas.
Private GRANT A. MILLER (36445035), Company B, 1901st Engineer Aviation Battalion, Geiger Field, Spokane, Washington.	)	

HOLDING by the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates.

---

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

2. As finally approved by the reviewing authority the accused was found guilty of the following charges and specifications:

CHARGE: Violation of the 96th Article of War.

Specification 2: In that Private Grant A. Miller, Company "B", 1901st Engineer Aviation Battalion, did, at Medical Lake, Washington, on or about 16 July 1944, wrongfully and unlawfully impersonate an officer of the Army of the United States by publicly wearing the uniform and insignia of the rank of Captain.

Specification 3: In that Private Grant A. Miller, * * *, did, at Medical Lake, Washington, on or about 8 July 1944, wrongfully and unlawfully impersonate a non-commissioned officer of the Army of the United States by publicly wearing the uniform and insignia of the grade of Sergeant.

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

Specification: In that Private Grant A. Miller, * * *, having been duly placed in confinement in Base Guardhouse, Army Air Base, Geiger Field, Washington on or about 29 July 1944, did, at Base Guardhouse, Army Air Base, Geiger Field, Washington, on or about 0300 hours 8 September 1944, escape from said confinement before he was set at liberty by proper authority.

He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for three years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence clearly supports the findings of guilty of the Specifications as approved by the reviewing authority. The only question requiring consideration is the legality of the sentence.

The conviction of the Additional Charge and its Specification alleging escape from confinement is legally sufficient to support a maximum sentence of confinement for one year (M.C.M., 1928, par. 104c, p. 98).

It will be noted that the specifications of the Charge do not allege, and the evidence does not show, that accused falsely impersonated an officer and thereby fraudulently demanded, claimed or obtained something of value - an offense in violation of Title 18, Section 76, United States Code, and punishable by imprisonment for a term of three years (CM 120050). The accused is merely charged with the wrongful and unlawful impersonation of a captain and sergeant of the Army of the United States by wearing the uniform and insignia of those grades, in violation of Article of War 96. This offense is not listed in the Table of Maximum Punishments, nor is it included in or closely related to any other offense there listed.

The Manual for Courts-Martial, 1928, states in pertinent part:

> "Offenses not thus provided for remain punishable as authorized by statute or by the custom of the service" (par. 104c, MCM, 1928).

The Board of Review has held in a case involving a similar offense to the one here considered:

> "The federal statute most nearly applicable (18 U.S.C. 76a and b) prescribes a punishment not exceeding a fine of $250 and confinement for six months for the unauthorized manufacture, sale or possession of any badge, identification card, or other insignia prescribed by the head of any department of the United States for use by any officer or subordinate thereof. The term 'insignia' includes 'chevrons' or other distinctive devices worn on the uniform to show rank (TM 20-205). Based on the mentioned statute, Army Regulations provide that the unauthorized wearing of any insignia prescribed by the War Department is prohibited, and that any person violating this provision is subject to punishment not exceeding a fine of $250 and confinement for six months (par. 12, AR 600-90, 24 February 1944).

The same provision was in effect at the date of the offense committed by accused. Authorized War Department regulations have the force of law (Standard Oil Co. v. U.S., 316 U.S. 481). Such regulations have the force of law within their proper scope, not beyond it; they are law to the Army and those whom they concern, and so far are binding and conclusive (par. 1a (1), AR 1-15, 12 December 1927)." (CM 251348, Gaston.)

The Board of Review is therefore of the opinion that the maximum confinement imposable in this case is six months for each offense of impersonation, or one year for the two offenses, and one year for the offense of escape from confinement in violation of Article of War 69, making a total maximum authorized confinement imposable of two years.

4. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty as approved by the reviewing authority 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 a period of two years.

, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

1st Ind.

War Department, J.A.G.O.

TO: Commanding General,
Fourth Air Force,
San Francisco, California.

1. In the case of Private Grant A. Miller (36445035), Company B, 1901st Engineer Aviation Battalion, Geiger Field, Spokane, Washington, attention is invited to the foregoing holding of the Board of Review that the record of trial is 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 two years, which holding is hereby approved. Upon reduction of the term of confinement to two years, you will have authority to order the execution of the sentence.

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

(CM 266137).

Myron C. Cramer

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

1 Incl.
Record of trial.

OCT 30 1944

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

SPJGH
CM 266154

25 NOV 1944

UNITED STATES	)	66th INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Rucker, Alabama, 15 and 16 September 1944. Dismissal, total forfeitures and confinement for five (5) years.
	)	
Second Lieutenant PAUL F. DEARMIN (0-1289010), Infantry.	)	

OPINION of the BOARD OF REVIEW
TAPPY, MELNIKER and GAMBRELL, 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 94th Article of War.

Specification 1: In that Second Lieutenant Paul F. Dearmin, 262d Infantry, Camp Rucker, Alabama, did, at Fort Benning, Georgia, on or about 30 November 1942, present for approval and payment, a claim against the United States, by presenting to Colonel J. H. McFall, Finance Department, Finance Officer, Fort Benning, Georgia, an officer of the United States duly authorized to approve, allow and pay such claims, a duly executed "Pay and Allowance Account," War Department Form Number 336a, dated 30 November 1942, in which a claim in the amount of $40.50 was asserted as subsistence and rental allowance for a dependent lawful wife, which claim for such rental and subsistence allowance was false and fraudulent, in that the said Second Lieutenant Dearmin represented therein that he was then, and had been since 16 November 1942, lawfully married to Florence Dearmin, when in fact he was not so married, and which claim was then known by the said Second Lieutenant Dearmin to be false and fraudulent.

Specification 2: In that Second Lieutenant Paul F. Dearmin, 262d Infantry, Camp Rucker, Alabama, did, at Fort Benning, Georgia, on or about 28 December 1942, present for approval and payment, a claim against the United States, by presenting to Colonel J. H. McFall, Finance Department, Finance

Officer, Fort Benning, Georgia, an officer of the United States duly authorized to approve, allow and pay such claims, a duly executed "Pay and Allowance Account," War Department Form Number 336a, dated 26 December 1942, in which a claim in the amount of $70.20 was asserted as subsistence and rental allowance for a lawful dependent wife, which claim for such rental and subsistence allowance was false and fraudulent in that the said Second Lieutenant Dearmin represented therein that he was then, and had been since 1 December 1942, lawfully married to Florence Dearmin, when in fact he was not so married, and which claim was then known by the said Second Lieutenant Dearmin to be false and fraudulent.

Specifications 3-6: (Findings of not guilty).

Specification 7: In that Second Lieutenant Paul F. Dearmin, 262d Infantry, Camp Rucker, Alabama, did, at Fort Bragg, North Carolina, on or about 23 March 1943, present for approval and payment, a claim against the United States, by presenting to Major M. B. Hale, Finance Department, Finance Officer, Washington, D. C., an officer of the United States authorized to approve, allow and pay such claims, a duly executed "Voucher For Per Diem and/or Reimbursement of Expenses Incident to Official Travel," War Department Standard Form Number 1012, dated 3 March 1943, in which a claim in the amount of $95.45 was asserted for commercial transportation cost for a dependent lawful wife for travel between 18 December 1942 and 22 December 1942, which claim was false and fraudulent, in that the said Second Lieutenant Dearmin represented therein that he was then, and had been since 18 December 1942, lawfully married to Florence Dearmin, when in fact he was not so married, and which claim was then known by the said Second Lieutenant Dearmin to be false and fraudulent.

The accused pleaded not guilty to all Specifications and the Charge. He was found not guilty of Specifications 3, 4, 5 and 6; guilty of Specifications 1, 2 and 7, and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for five years. The reviewing authority approved the findings and sentence and forwarded the record of trial for action under the 48th Article of War. He recommended that the President approve only so much of the sentence as provides for dismissal from the service.

3. The evidence introduced by the prosecution by stipulation to prove the commission of the offenses as to which there were findings of guilty was in substance as follows:

Accused, stationed at Camp Rucker, Alabama, on 30 November 1942 presented for approval and payment to the Finance Officer at Fort Benning, Georgia, a pay and allowance account signed by him, on W.D. Form No. 336a for rental allowance of $30 and subsistence allowance of $21 for the period from 16 to 30 November 1942, stating that his lawful wife was Mrs. Florence Dearmin (Pros. Exs. 1, 2).

On 28 December 1942 he presented for approval and payment a similar account to the same Finance Officer for rental allowance of $52 and subsistence allowance of $36.40 for the period from 1 to 26 December 1942 stating that his lawful wife was Mrs. Florence Dearmin (Pros. Exs. 1, 3).

On 22 March 1943 he presented for approval and payment to the Finance Officer at Fort Bragg, North Carolina, a voucher on W.D. Form No. 1012a for $95.45 for the cost of transporting his wife from Bremerton, Washington, to Columbus, Georgia, which occurred on 18-20 December inclusive 1942, certifying that his lawful wife was Florence W. Dearmin (Pros. Exs. 1, 8).

The accused and Florence Dearmin, nee Winston, the wife for whom the rent and maintenance allowances above referred to were claimed, were married on 21 April 1943 by Reverend Frederick J. Higgins, a priest of the Roman Catholic Church, at Fayetteville, North Carolina (Pros. Exs. 9, 10).

It was further stipulated that if Florence W. Dearmin, the wife of accused, was present in court and sworn as a witness she would voluntarily testify, with the consent of accused, to the following facts appearing in letters she wrote to the Commanding Officer, Camp Blanding, Florida, and to The Adjutant General; that accused drew $100 per month ration and quarters allowance as a married man claiming her as his wife, from November 1942 to May 1943; that he also drew transportation from either Seattle, Washington or Billings, Montana, to Columbus, Georgia, and from Columbus, Georgia, to Fayetteville, North Carolina, for her transportation claiming her as his wife and dependent during December 1942; that she and accused were married on 21 April 1943; that accused was not previously married and that she was not aware of the foregoing facts until after her marriage (R. 11; Pros. Exs. 1-par. III, 11, 12).

On 7 June 1944 accused signed and swore to an affidavit in which he stated that he sent the lady referred to above the money to travel from Billings, Montana, to Fort Benning, Georgia, and later at Fort Bragg,

North Carolina, submitted a voucher for her travel allowance; that they were married in Fayetteville, North Carolina, on 21 April 1943 and that it was his intention to repay the Government the amount he received for her before they were married; that he recently received divorce papers from his wife's lawyer requesting his consent to a divorce and that his wife threatened that unless he consented to the divorce she would inform the Government that accused had received allowances for her prior to their marriage (R. 12; Pros. Exs. 1, 13).

4. After being warned of his rights accused testified under oath that he was 31 years of age, born in Colorado Springs, Colorado, had three years of high school and three years of college training and in civil life had been a forest ranger for about eight years. He enlisted on 29 August 1940, attended Infantry Officer Candidate School, and was commissioned a second lieutenant on 18 July 1942. Upon receiving his commission he was assigned to Fort William Henry Harrison. While stationed there, about the second week in September 1942, he met Florence Winston. Thereafter they spent every week end together. About the first Friday or Saturday in October 1942, they agreed to be married by a priest as soon as possible. She had a job which she would lose if she were married so they agreed to delay the wedding but live together during week ends, in the meantime keeping their relationship secret from everybody except their most intimate friends (R. 19). This arrangement was carried out by accused obtaining a room each week end at a hotel in Helena, Montana, for which he alone registered as a guest. She would come there and stay overnight with him not registering as a guest and bringing no baggage. This continued until about 18 November 1942 when accused was transferred to Fort Benning, Georgia. During the time they were spending week ends together at the hotel in Helena he introduced her to some of their mutual friends as his wife. Before leaving Fort William Henry Harrison he arranged to have her join him at Fort Benning. While at Fort Benning and before Florence joined him there, accused testified that he wrote her that since she wasn't working any longer in Montana and was soon to leave there and join him and "since we were man and wife to ourselves" he could see "no reason any longer to withhold any knowledge of it to anybody" and that he was going to file claim "for her support and rations" (R. 16-22, 32-34).

Florence joined accused in Columbus, Georgia, on 22 December 1942 when he engaged a room at the Cardinal Hotel and registered as "Lt. P. F. Dearmin and wife". They occupied this room until 31 December 1942. He introduced her there generally as his wife to fellow officers and tradespeople (R. 23). He had purchased and they each wore a wedding ring. On 23 December 1942 they obtained a marriage license in Phenix City, Alabama, but it was never used, because when they went to a Catholic priest in Columbus, Georgia, to be married it was learned that Florence had been married before and divorced. This enforced a delay as it was necessary to get a dispensation for the marriage from the church authorities. The dispensation was finally obtained and they were married by Father Higgins

in St. Patrick's Church, Fayetteville, North Carolina, on 21 April 1943. In the interval they had lived together as man and wife, openly, and she was introduced to the neighbors and officers as Mrs. Dearmin. They rented a house; purchased furniture and an automobile, all in the name of Mrs. Florence Dearmin. In January a joint bank account was opened in the First Citizens Bank of Fayetteville in the name of Lieutenant and Mrs. Paul F. Dearmin and an allotment of $150 a month was made to the bank for deposit in their account (R. 23-34).

Accused was transferred to Camp Croft, South Carolina, in May, broke his elbow and was hospitalized there to 10 August 1943 when he was sent to Moore General Hospital at Swanahoa, North Carolina, where he remained about three months. When he was discharged he went back to Camp Croft for a few days, then to Camp Blanding, Florida. The last part of September, Mrs. Dearmin got word that her mother was very ill, so he got a 30-day emergency sick leave and drove his wife to Billings, Montana, to enable her to be with her mother, and he returned to Camp Blanding. She wrote a few letters and then stopped writing. He only saw her twice after that. She commenced suit for divorce against him and sent him the papers asking his consent which he refused to sign (R. 35-39). In May 1944, she wrote to his Commanding Officer and The Adjutant General that the accused had improperly obtained maintenance and quarters allowances for her (R. 44; Pros. Exs. 11, 12). When he went out to see her in Pasco, Washington, in June 1944, she wrote out and gave him a statement under oath of the circumstances relating to the presentation of the vouchers (R. 45, 74; Def. Ex. D). She there stated that while accused was stationed at Fort William Henry Harrison they decided to become married; that accused was a staunch Catholic and they wished to be married in the Catholic Church; that she was a divorcee and they could not be so married until the church granted permission; that they consulted a Catholic priest in Billings, Montana, who asked them not to be married civilly or by an ordained minister of another church as such action might retard chances of getting the desired permission; that the delay was burdensome so they decided to live together as man and wife although they were both fairly well known in and around Helena, Montana, which made them "somewhat hesitant to openly declare our common-law relationship of man and wife" (Def. Ex. D).

The accused denied any intent to defraud the Government and maintained that the vouchers were presented in good faith and in an honest belief that the relationship existing between himself and Florence Winston was such as to entitle him to present the vouchers upon which the charges are predicated, on the assumption that she was his common-law wife. He stated on cross-examination that during the time he and his wife were spending week ends together at the Placer Hotel in Helena, he was living at the officers' quarters at Fort William Henry Harrison and she was living with her parents at Billings and that he never went there and never met her parents until after their marriage in April 1943;

that in corresponding with Florence he addressed her as Miss Florence Winston; that up to the time he left Fort William Henry Harrison on 18 November he had introduced Florence as his wife to only four persons; prior to 22 December 1942 he addressed letters to her as Miss Florence Winston; she would have lost her job if it were known that she was married and that such knowledge would have been detrimental to "her character"; that he purchased two wedding rings just before he left Montana but until she came down to Fort Benning, neither wore them; that he changed the beneficiary of his Government insurance policy from his mother to his wife in January 1943; that he was ready and willing to repay any money he received for rental and maintenance allowances to which he was not entitled. Accused admitted that when this situation was being investigated he informed a Lieutenant Colonel Barry of the Inspector General's Department that he had drawn the travel allowance for Florence "before she was my wife". He also informed Colonel Barry that except for the December voucher he realized that the rest of the vouchers "were false and so did my wife". Accused admitted that prior to the investigation he "didn't think about" whether or not common-law marriages were recognized in Montana (R. 45-68).

It was stipulated that if Major E. B. Nelson, Commanding Officer, 3rd Battalion, 263d Infantry, and Lieutenant Colonel Clarence M. Olsen were present in court and sworn they would testify that accused was diligent, conscientious and capable in the performance of his duties which the former rated as at least very satisfactory and the latter as excellent; that the reputation of accused for honesty and integrity and as a law abiding citizen was good (R. 76-77).

5. The conviction of accused for violating the 94th Article of War by presenting false claims for rental, maintenance and travel allowances for an alleged wife presents the following questions for consideration: (1) were the claims false and (2) did the accused know or have reason to believe they were false at the time he presented them? The presentation of a claim, concededly false, cannot be made the basis of a conviction of this offense if the accused honestly believed it to be well founded.

> "The claim must be made or caused to be made with knowledge of its fictitious or dishonest character. This does not include claims, however groundless they may be, that are honestly believed by the maker to be valid, nor claims that are merely made negligently or without ordinary prudence, but it does include claims made by a person who has the belief of the false character of the claim that the ordinarily prudent man would have entertained under the circumstances" (MCM, 1928, par. 150a).

The accused contends (1) that the claims were not false because Florence Winston was his common-law wife commencing about 1 October 1942 and (2) that he did not believe them to be false as he honestly believed and considered Florence to be his common-law wife when he presented the claims in question.

A common-law marriage, that is marriage by consent and open living together as man and wife, is valid if recognized as such by the law of the place where the parties "habitually live" together as man and wife (Beale, Conflict of Laws, Vol. 2, p. 675). In September, October and November 1942, the parties habitually lived in Montana, if in fact they habitually lived any place, and the matter of whether or not a common-law marriage existed is to be determined by the laws of that state (35 Am. Jur. 284).

Some American text writers state expressly that cohabitation, including sexual intercourse, is not necessary to the validity of a common-law marriage (2 Kent's Commentaries, pp. 86, 87, 2 Greenleaf, Evidence, p. 460, 1 Scribner, Dower, p. 60, Schouler, Husband and Wife, sec. 31). In many states where the courts take the view that the marriage relationship is purely contractual, no proof of cohabitation and reputation is required, it being held that only evidence of the existence of the contract is necessary and that proof of cohabitation and reputation was only evidentiary of such a contract.

On the other hand the courts of some states have held that proof of cohabitation and reputation was necessary to establish a common-law marriage inasmuch as marriage is a status as well as a contractual relationship. The State of Montana recognizes common-law marriages as valid and its law is well established that cohabitation is an essential element to the existence of such a marriage (O'Malley v. O'Malley, 46 M. 549, 129 P. 501). For a common-law marriage to be valid in Montana, consent of the parties thereto must be followed by "mutual and public assumption of the marital relation" and clandestine cohabitation has been held insufficient to constitute the requisite assumption (In re Huston's Estate 48 M. 524, 139 P. 458; Franklin v. Franklin, 40 M. 348, 106 P. 353; Rev. Code, Chap. 4, sec. 5695). Furthermore, the parties must contemplate a present assumption of the relationship as distinguished from a future union (State v. Newman, 66 M. 180, 213 P. 805).

That the relationship of accused and Florence prior to 22 December 1942 was clandestine and not a "public assumption of the marital relation" is conclusively evidenced by the following facts, viz:

(a) Accused and Florence both admitted that while in Montana they agreed to keep their relationship secret and in fact revealed it to not more than four friends. He also admitted that sometime after 18 November 1942, the date he was transferred to Fort Benning, Georgia, he wrote Florence that he saw no need "any longer to withhold any knowledge" of their relationship from anybody.

(b) Florence only lived week ends with accused in a hotel in Montana, continued to work under her maiden name without informing her employer of any change in her status, continued to live with her

parents in Billings, Montana, whom accused did not meet until after a formal marriage ceremony had been performed in April 1943, and she received mail from accused addressed to "Miss Florence Winston".

(c) Accused and Florence did not wear wedding rings until after they commenced to live together in Georgia around January 1943 and accused did not change the beneficiary on his insurance policy from his mother to his wife until January 1943.

(d) Prior to the investigation of the instant charges accused had given no thought to the matter of whether or not common-law marriages were recognized in Montana.

To quote the language of the O'Malley case, supra, 129 P. 501, 503, it can only be concluded that "the evidence is far short of establishing that consistent and public course of conduct toward each other as husband and wife, that 'treatment of each other in the usual way with married people', that cohabitation which we hold to be necessary to constitute a mutual and public assumption of the marital relation" and, consequently, insufficient to establish the existence of a common-law marriage.

Having determined that no common-law marriage existed prior to 22 December 1942, it must next be determined whether or not accused believed a valid common-law marriage had been contracted prior to that date and thus whether or not he believed the alleged claims to be false when he presented them. Each of these claims was falsely made by accused if, when he made each of them, he had "the belief of the false character of the claim that the ordinarily prudent man would have entertained under the circumstances" (MCM, 1928, par. 150a).

Florence did not know accused had made the instant claims for subsistence and rental allowance as a married man until after their marriage on 21 April 1943 and in her letters to the Commanding Officer at Camp Blanding, Florida, and to The Adjutant General she made no mention of any belief by her and accused that a valid common-law marriage existed prior to January 1943. In the statement accused gave an investigating officer on 7 June 1944, he made no suggestion that he considered that a valid common-law marriage existed prior to January 1943. He did admit, however, that his wife had threatened that unless he consented to her divorce "she would inform the government that I had received allowances for her prior to our marriage". Such a statement is at odds with accused's present contention that, during the latter part of 1942 he believed a valid marriage, albeit a common-law one, bound him and Florence together. Finally, he admitted to the investigating officer that he had drawn the travel allowance for Florence

"before she was my wife", that, except for one voucher, he realized all the rest "were false and so did my wife", and that prior to the investigation he "didn't think about" whether or not common-law marriages were valid in Montana. From all this evidence, it is quite apparent that accused's defense, that he believed a valid common-law marriage existed, was concocted by him long after the events had occurred. The evidence not only fails to sustain accused's contention but, indeed, it suffices to establish the contrary. The conclusion is inescapable that accused had no thought of common-law marriage when he presented these claims and, accordingly, that he knew of their falsity when he presented them. The evidence sustains the findings of guilty of the Charge and Specifications.

6. The records of the War Department show that the accused was born in Colorado Springs, Colorado, and is 31 years of age. He attended Creighton University for three years but did not graduate. He was a shoe salesman in 1933-34; a "ditch-rider" in a water supply system, 1935; in the CCC in 1936-37. The record fails to show the occupation of the accused from 1937 to the time of his enlistment. He enlisted in the Medical Department on 29 August 1940 and was commissioned a second lieutenant of Infantry, Army of the United States, on 18 July 1942 upon graduation from the Infantry Officer Candidate School at Fort Benning, Georgia.

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 and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 94th Article of War.

Thomas N. Tappy, Judge Advocate.

[illegible], Judge Advocate.

William H. Gambrell, Judge Advocate.

1st Ind.

War Department, J.A.G.C., DEC 1 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 Paul F. Dearmin (0-1289010), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused was found guilty of presenting three false claims against the United States, one in the amount of $40.50 for additional rental and subsistence allowances claimed by accused because of an alleged dependent wife, another in the amount of $70.20 for similar rental and subsistence allowances, and the third for $95.45 to reimburse accused for transportation of the alleged dependent wife. Accused in fact was not legally married to the woman whom he alleged to be his lawful wife although he was living with her, nor was he lawfully entitled to the additional rental and subsistence allowances claimed, or to reimbursement from the Government for her transportation. Accused's fraudulent conduct clearly demonstrates his moral unfitness to remain an officer. Although the reviewing authority approved the sentence to dismissal, total forfeitures and confinement for five years, he recommended that the President approve only so much of the sentence as provides for dismissal. I concur with the reviewing authority and I recommend that the sentence be confirmed but that the forfeitures and confinement be remitted and that the sentence as thus modified be carried into execution.

3. 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. ltr. for sig. S/W.
Incl.3-Form of Action.

(Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 47, 27 Jan 1945)

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

SPJGQ
CM 266173

8 DEC 1944

UNITED STATES v. Private MELVIN BRITTON (37627607), Company "C", 1327th Engineer General Service Regiment.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Claiborne, Louisiana, 27 September 1944. Dishonorable discharge and confinement for life. Penitentiary.

- - - - - - - - - -

REVIEW by the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates.

- - - - - - - - - -

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

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

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

Specification: In that Private Melvin Britton, Company C, 1327th Engineer General Service Regiment, having received a lawful command from Captain LEWIS T. MICHENER, his superior officer to "Come over here", did, at Camp Claiborne, Louisiana, on or about 16 August 1944, willfully disobey the same.

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

Specification: In that Private Melvin Britton, Company C, 1327th Engineer General Service Regiment, did, at Camp Claiborne, Louisiana, on or about 16 August 1944, voluntarily join in a mutiny which had been begun in the regimental area of the 1327th Engineer General Service Regiment against the lawful military authority of Captain Lewis T. Michener, his Commanding Officer, and did, with intent to override for the time being, in concert with sundry other members of said Company C, 1327th Engineer General Service Regiment assembled in the regimental area, refuse to disperse.

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 term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution, briefly summarized, is as follows:

The accused was, on 16 August 1944, in the military service as a member of Company "C", 1327th Engineer General Service Regiment, Camp Claiborne, Louisiana (R. 18).

Shortly after 10 o'clock p.m. on that date, Captain Lewis T. Michener, commanding officer of the accused's company, went down to his company's area and, finding confusion there, ordered the company into formation in the company street. He then advised them, in answer to their request to be told something about a rumor regarding injury to some of their men in the bivouac area, that there was nothing they could do about it and he gave them an order to stay in the company area, return to their huts and remain quiet and orderly until he returned in about half an hour to tell them exactly what was going on (R. 18, 19, 21). The men requested him to check one of the rear areas in Company "C" to find out whether any civilian was back there with a shotgun. Accordingly, he went to regimental headquarters, from which, accompanied by the officer of the day, he went to the rear areas and found no civilian there (R. 19, 21). As he was returning to his company area he heard a crowd of men coming down through the area from regimental headquarters. They were "sounding off" about "get your rifles, get your gas masks". Captain Michener stood there waiting to see what would happen and as they passed he plainly recognized the accused and heard him say: "Come on C Company; get your rifles, let's go". Thereupon, he called to the accused, who was only 15 feet away, saying, "Britton, come here", but, although he was quite sure the accused could have heard him, "the accused kept right on going" (R. 19, 22) and failed to obey the order (R. 24). There was no one between the Captain and the accused at the time (R. 22), nor was there any other man in Company "C" by the name of "Britton" (R. 25). Captain Michener took the accused to be the leader of the mob because he was out in front and giving commands. The Captain then watched the men as they went in and out of the barracks, apparently taking rifles out of the racks "regardless of whose rifles they might be" (R. 20). The accused, however, was not armed when Captain

Michener saw him and gave him the order (R. 25). An inspection later disclosed that six rifle racks had been broken open (R. 21), and 27 rifles were missing (R. 24), although some rifles were still left in the racks (R. 21). By this time about 25 per cent of the members of Company "C" had left their company area and joined the mob. The rest were in the company orderly room, some of them quite afraid (R. 23). Captain Michener was wearing the insignia of his rank on this occasion (R. 26).

Sometime around 10 o'clock on the same evening, Second Lieutenant Charles B. Fischer, the officer of the day, had gone to headquarters of the 1327th Engineer General Service Regiment after receiving a report regarding someone being hurt in the bivouac area (R. 11). As he entered the front door the rumor was repeated to him and he then went outside to find out what he could about the matter. As he came out he saw a group of about 12 men, some of whom were armed, coming from the direction of the company areas. He stopped them and told them to return. They hesitated but, at about this time, a larger group of from 50 to 100 men came toward regimental headquarters from the company areas. They were followed by more (R. 12). There were seven companies in the regiment and Lieutenant Fischer had found disturbances and excited groups in every company that night (R. 14). The approaching men were armed with rifles, bayonets and ammunition and carried steel helmets and gas masks (R. 12). Lieutenant Fischer was in uniform and wore the insignia of his rank (R. 14).

At about the same time Captain Leroy A. Newell, 1327th Engineer General Service Regiment, had just returned to regimental headquarters after reporting to Colonel Ristedt's hut. The officers of the regiment had been alerted because of a rumor to the effect that four men had been killed in the bivouac area. As he approached headquarters a crowd of about 50 enlisted men had gathered there calling for ammunition, saying "they wanted to settle the score with the farmers around the bivouac area that had killed their friends and comrades" (R. 7). The number steadily increased until there were about 100 men in the crowd, some of whom were armed (R. 8). The Captain tried to explain to them that a mob could accomplish nothing and stated they could not have any ammunition. At this time he heard Sergeant Price say "what a good thing a mob had been in the French Revolution" (R. 7), and although Captain Newell was trying to reason with the men, the only one to whom they listened was Sergeant Price (R. 9). Captain Newell told them to "stand by" until more could be learned about the situation and ordered them to go back to their areas (R. 6, 7, 8). He offered to do anything possible, even to going out to the bivouac area to protect the men there and find out all he could (R. 7). However, the men still demanded ammunition and the Captain refused to allow them to have any (R. 6, 7). The mob then started into regimental headquarters. Captain Newell cut in ahead

of them and went at once to the storage room of the Engineer officers' section and stood in the door to the room where the ammunition was stored. He kept insisting that they could not have ammunition and stated that he would stay in the doorway until somebody moved him out of it. Shortly thereafter he heard a noise and opened the back door, whereupon he saw that someone had jumped into the room and thrown out three cases of ammunition, one of which was opened. Some men then took belts and carried them away. He threw the unopened cases back into the room and thereupon the crowd marched off toward the headquarters and service company in the direction of the motor pool (R. 7). Captain Newell was in uniform and was wearing the insignia of his rank and he and the other officers present tried to exercise their authority as officers in standing between the mob and what the mob sought to accomplish, but, notwithstanding their efforts, the crowd nevertheless broke into the ammunition room (R. 10). He did not, however, see the accused in the crowd that night (R. 8).

Meanwhile, the commotion had aroused other officers, who came out, and Colonel Ristedt "took over". There were several groups, on and off, all very much excited and telling different stories about the men who were supposed to have been wounded in the bivouac area. Everything was in disorder (R. 12) and mostly all of the men were in a high state of excitement (R. 15). There were many comments to the effect that there were wounded men out in the bivouac area and the members of the mob wanted to know what was going to be done about it. They claimed a white posse had been coming into the area shooting at them and that they were not safe in their own barracks (R. 13). Some said, "We are not safe to sleep in our own beds", and some one asked, "What is going to be done to protect us?" (R. 17). One of the leaders, Sergeant Conway Price, advocated going out to the bivouac area and killing anybody they could find there (R. 13). Some armed civilian posses had been seen "about four or five miles outside the west gate, towards the bivouac area" (R. 15). Lieutenant Fischer assured them that the Colonel had gone out to the area and when he returned he would report and let them know exactly what had happened, but they were not satisfied with that and one group "gave (him) one hour to produce some sort of results" (R. 17). The Lieutenant gave them orders at different times. He ordered the first group which he had seen to return to their barracks, and later on, as the mob grew in size, he ordered different groups to go to their barracks and put their guns away, and he advised them that they could get more things done if they proceeded in an orderly manner. However, no one obeyed and they stood their ground insisting that they would not go until something was done about the matter (R. 13, 14).

As soon as Colonel Ernest J. Ristedt, the commanding officer of the 1327th Engineer General Service Regiment, had heard the rumor about disturbances in the bivouac area he proceeded to the area and

after checking it found the rumor baseless (R. 30). When he then returned to his regimental area he found a crowd of several hundred men, many of whom had rifles (R. 31) and some of whom had bayonets and ammunition (R. 30), congregated in the road near the motor pool. They stopped the Colonel's car and he addressed them and told them he had been out to the bivouac area, had checked all the company areas and found no difficulty or disturbance whatever; that the men out there were perfectly all right and there was no need for them to go out. It was the intention of the crowd, however, to go out to the bivouac area and determine for themselves the truth of the report as well as to bring the men who were out at the bivouac back to camp because they feared for their safety. The Colonel then ordered them to go back to their barracks and put away their rifles and arms. In order to make it more impressive he then climbed upon the fender of a car and repeated the order. The mob protested, however, and said they wanted to go out and see for themselves and bring the men back (R. 30, 31). They had already lined up the trucks from the motor pool and were ready to move out (R. 30). Colonel Ristedt had placed his car across the road to block the exit from the motor pool, but the crowd shoved it from the road into a ditch and the trucks proceeded to the bivouac area despite the orders (R. 31, 32).

The Colonel, having lost control of the mob and fearing damage to the vehicles, accompanied them (R. 32, 34). When they arrived at the bivouac area all the company areas were visited and the men were satisfied that nothing had taken place and came back to camp. There had been no disturbances or acts of violence on the way out or back nor was there any further disturbance after they returned; nor had any violence been offered any officer or noncommissioned officer in the Colonel's presence (R. 34). Colonel Ristedt could not say whether or not the accused was in the crowd at the motor pool (R. 33).

Mr. Maurice R. Bullock, Agent, Security and Intelligence Corps, Office of the Provost Marshal, Shreveport, Louisiana, was called upon to assist in investigating alleged mutinies and other disturbances which had occurred at Camp Claiborne on 16 and 17 August 1944. In this capacity, at a time not stated, he had an interview with the accused who, after being properly warned of his rights under the 24th Article of War, and acknowledging that he understood them, made a statement which was transcribed and later signed by the accused on 2 September 1944. This statement was admitted in evidence, without objection (R. 28, 29; Prox. Ex. A). In substance the accused stated therein that he had been in the Army for 10 months and was a member of Company "C", 1327th Engineer General Service Regiment. He was in his hut on the night of 16 August 1944 when someone came in and yelled: "Fall out, four men have been killed out in the bivouac area." He went outside with other men of the company and saw Captain Michener talking to the men. There was no particular trouble "except

that everybody wanted to find out about the four negro soldiers being killed." Captain Michener told them to go back to their huts and keep order and quiet. "He would find out what it was all about and would see that the men were protected." After the Captain stopped talking the accused started back to his hut and then heard Captain Michener "hollering 'Britton'". Since he was the only "Britton" in the company he "figured" the Captain was calling him, but, as he was near to his hut "he just went in, figuring that if he really wanted to talk to me he would call me again." Sometime later someone yelled: "Get your rifle and gas mask", and the accused took his rifle and went with the crowd to the motor pool, knowing that no officer or noncommissioned officer had ordered the men to go there. Although he had no ammunition or bayonet, he "meant to use (his) rifle as a club in case anybody tried to attack (him)." When he got to the motor pool the trucks and jeeps were all lined up and he climbed into one of them. The truck proceeded, in convoy with others, to the bivouac area. They found nothing wrong in the area and came right back to camp, after which the accused went to bed (Pros. Ex. A).

4. The accused, having been informed of his rights, elected to remain silent and the defense offered no testimony (R. 34).

5. The Specifications of the Charges allege, and the accused was found guilty of, willful disobedience of the lawful command of a superior officer and joining in a mutiny. The first question that arises is whether there has been an unreasonable multiplication of charges arising out of what was, substantially, the same transaction. It has been held in a case similarly involving disobedience of a superior's order and joinder in mutiny that, when the offenses arose out of the same transaction, it should not be made the basis for a multiplication of charges (CM 249636, III Bull. JAG 234 (June 1944)). A careful review of the evidence leads to the conclusion that the charges in this case cannot be said to constitute an unreasonable duplication, although the two offenses may have arisen out of a series of related events which, together might be deemed a generally riotous condition pervading Camp Claiborne, Louisiana, on the night of 16/17 August 1944.

Rumors to the effect that negro soldiers had been killed by white civilians in an adjacent bivouac area were prevalent throughout the camp during the evening and had caused natural curiosity and excitement among the soldiers in camp. Certain men, however, arrogated to themselves leadership over the others in what was palpably a mistaken and unlawful purpose to go, in force, to the bivouac area and settle an imaginary score with suspected enemies, and as such leaders, they incited the disorganized and fitful mob to mutiny. Undoubtedly, there were many separate groups which, by distinct insubordinations, were guilty of separate mutinies and it would be difficult to ally the accused with any specific one, except for the statement which he made to an agent of the Intelligence and Security Corps operating from the Office of the Provost Marshal at Shreveport, Louisiana.

When this statement is analyzed in connection with the oral testimony of the officers at the trial, the picture is sufficiently complete to establish the essential elements of both offenses charged and, as will be seen, neither offense is necessarily concomitant with the other.

The record is replete with detailed evidence touching a number of disorderly events, some of which occurred simultaneously at different places within the camp and others of which constituted a series of events which followed one another as the spirit of mob violence waxed and waned in various groups of troops throughout the night. Much of the testimony is not directly relevant to the Charges upon which the accused was tried for the reason that neither he, nor others with whom he must have acted in concerted insubordination in order to find him guilty, are conclusively shown to have been present on the occasions to which such testimony relates. However improper it would ordinarily have been to admit such testimony or to allow it to stand upon failure of the prosecution to show any direct connection between the accused and the events to which it related, it cannot be said that any substantial right of the accused was violated thereby in this case.

Mutiny constitutes a conspiracy, and since common law rules are applicable to the status, the rules of evidence, though in no wise altered in their application, permit a wide latitude and a reasonable liberality in establishing the acts and statements of the coconspirators, all of whom are principals. The conduct of the accused on the night in question, as established by his own admission and testimony independent thereof, justified an inquiry into the numerous phases of the insubordinate conduct of various groups on the night of 16 August 1944, and, although it was not positively shown that the accused was present at all times and places to which some of the testimony refers, the close relation of each of the events to the other in time and place and the positive identification of the accused with some of them makes such testimony relevant and material in the establishment, by inference, of his intent and purpose under the charges upon which he was tried.

It first appears that Captain Michener, who was the commanding officer of the accused's company, sought to restrain the unrest and disorder among the men of his command at about 10:00 p.m. by addressing them while in company formation, during which he appealed to them to abide his investigation of the alleged rumors and ordered them to go to their huts and remain there until he returned to report to them. The accused admits that he heard this order and says he complied with it.

Captain Michener then went to regimental headquarters and from there, in company with the officer of the day, inspected areas in rear of the companies, after which he returned to his company area.

On the way back he encountered an unruly and boisterous group, among which was the accused. As soon as he recognized him the Captain ordered the accused to come to him. This the accused also admits and he further bears out the officer's testimony of disobedience by his statement that he nevertheless proceeded to his hut, figuring that if the Captain really wanted to talk to him he would call him again. Since the accused had been theretofore ordered to remain in quarters until the Captain's return, this second refusal to obey was clearly indicative of insubordination. However, since mutiny requires a concert of two or more insubordinate soldiers, and there is no showing that any of the accused's companions at this particular moment had been in the group that heard the Captain's prior orders, it cannot be said to have been a mutinous group at the time, even though the accused was shouting "get your rifles, get your gas masks." It is, therefore, clearly apparent that the charge of willful disobedience of the lawful order of a superior did not arise out of the mutinous acts charged as another offense, based upon later insubordinate conduct. Under the circumstances, the disobedience of the accused was a willful and flagrant act properly charged and as to which there is no reasonable doubt of guilt. The order given to the accused was a lawful order given by a commissioned officer, known by the accused to be his superior, acting in the execution of his office; and it was willfully disobeyed.

Since this offense occurred prior in time to the actual concerted insubordination of certain members of Company C, including the accused, which is made the basis of the mutiny charge, there has been no unreasonable multiplication of charges arising out of what is substantially the same transaction. In any event, the accused cannot be deemed to have been prejudiced thereby inasmuch as the sentence imposed is sustained by conviction upon either of the charges of which the accused was found guilty.

Mutiny, as stated, imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority (par. 136a, M.C.M. 1928). It has been defined as consisting in an unlawful opposition or resistance to, or defiance of superior military authority, with a deliberate purpose to usurp, subvert, or override the same, or to eject with authority from office (Winthrop "Military Law and Precedents", 2d Edition (Rep. 1920) p. 578).

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. This

intent may be declared in words or, as in all other cases, it may be inferred from acts done or from the surrounding circumstances (M.C.M. 1928, supra). For example, it may be inferred from the actual subversion or suppression of the superior authority, from an assumption of the command which belongs to the superior, a taking up of arms and assuming a menacing attitude, and the like; or it may be gathered from a variety of circumstances no one of which, perhaps, would of itself alone have justified the inference. But the fact of combination - that the opposition or resistance is the proceeding of a number of individuals acting together apparently with a common purpose - is, though not conclusive, the most significant and most usual evidence of the existence of the intent in question (Winthrop, supra, pp. 580, 581).

Since there can be no actual mutiny until there has been an overt act of insubordination joined in by two or more persons, no person can be found guilty of joining in a mutiny unless an overt act of mutiny is proved. Hence, the presence of the accused at the scene of mutiny is necessary to convict him of joining therein (par. 136b, M.C.M. 1928). Joining in a mutiny is the offense of one who takes part in a mutiny at any stage of its progress, whether he engages in actively executing its purpose, or, being present, stimulates and encourages those who do. The joining in a mutiny constitutes a conspiracy and the doctrines of the common law thus become applicable to the status, viz: that all the participators are principals and each is alike guilty of the offense; that the act or declaration of one in pursuance of the common design is the act or declaration of every other; and that, the common design being established, all things done to promote it are admissible in evidence against each individual concerned (Winthrop supra, p. 583).

There is much evidence in the record regarding mutinous activities of a mob at regimental headquarters, although none of the witnesses present on that occasion identified the accused as among the crowd. Captain Michener testified that as he was returning to his company area after inspecting rear areas, the group, in which he recognized the accused, was coming from the direction of regimental headquarters. However, in his statement the accused said nothing about being there and there is no positive and compelling proof that he was. But, even though the circumstances justify a reasonable inference that he was with the mutinous group at headquarters, such proof would not support the charge of concerted insubordination against Captain Michener as hereinbefore stated.

However, it is plainly evident that, as the accused proceeded on his way in defiance of the Captain's order, he harbored a mutinous intent which he overtly disclosed by shouting "Come on C Company; get your rifles, let's go!" in an effort to incite others to join

him; and in this he was successful. Captain Michener took the accused to be the leader because he was out in front and was giving commands. Thereafter, about 25 per cent of the men of Company C, all of whom had been theretofore ordered to remain in the company area and preserve order and discipline, seized rifles and left the area, the accused among them.

At this moment the offense laid to the accused under Charge II was complete and no further proof of his guilt thereof was required.

While further comment is unnecessary, it is appropriate. The evidence shows that the regimental commander found it necessary to use his influence in reasoning with a mob of violent and armed men who had congregated at the motor pool by the time he had returned from personal investigation of the situation at the bivouac area. Notwithstanding his earnest protestations that the rumors were unfounded and his repeated commands that the crowd disperse, go to their barracks and put away their arms, he was defiantly disobeyed. Although the Colonel had placed his automobile across the road to block egress from the pool, the men pushed it aside into a ditch and, taking government vehicles that had been already arranged in convoy formation, nevertheless went to the bivouac area. The accused in his statement admitted taking his rifle, with intent to use it "as a club in case anyone attacked (him)", and going to the motor pool. There he found "cars and trucks and jeeps all lined up." He admitted getting into a car and going to the bivouac area. The conclusion is inescapable that he was present at the time the Colonel was addressing the crowd and later ordered them to disperse. His presence then, under arms, and his participation in the insubordinate overriding of the highest military authority of the regiment by going to the bivouac area constitute additional and conclusive proof of his continuous and mutinous activities with the intent to override, not only the lawful authority of Captain Michener, but any and all other lawful, military authority which sought to oppose him.

The Colonel testified that there had been no violent acts on the way out to or on the return from the bivouac area or afterward. As heretofore stated, the concerted insubordination which constitutes mutiny need not be active or violent. Mere persistent refusal to obey orders with an insubordinate intent is sufficient. A fortiori overt acts in concerted willful disobedience of direct orders, with insubordinate intent, are mutiny. Clearly, the act of shoving the Colonel's car from the road into a ditch was a display of violence, and the taking up of arms under the circumstances was violence within the meaning to be attributed to the word in such cases, even though such arms were not used in a menacing manner.

The accused's written statement, whether deemed a confession in part, or merely admissions against interest, was properly admissible in evidence, inasmuch as he had been fully warned of his rights before making it and since the corpus delicti of both offenses charged had been established by independent proof.

It is noted that the specific act of insubordination alleged in the Specification is a refusal to disperse, whereas the proof shows that the initial insubordination against the lawful authority of Captain Michener consisted in a concerted disobedience of the order not to leave the company area, followed by later mutinous acts in continuous defiance of lawful authority. Although "refuse to disperse" is an inapt and unartful choice of language to express the disobedience of the orders not to leave the company area, it is not so widely different in meaning and effect as to have misled the accused. Moreover, the gravamen of the offense charged is (1) that there was a mutiny at the time and place specified against lawful military authority and (2) that the accused joined in it. The allegations of the Specification are complete in this respect. That portion of the Specification which sets forth the means and method pursued by the accused in "joining in the mutiny" is merely descriptive (C.M. 125432 (1919), Dig. Op. JAG 1912-1940, sec. 424; C.M. ETO 895 (1944) Bull. JAG April 1944, p. 144).

6. The Charge Sheet shows the accused to be 20 years of age. He was inducted on 30 October 1943 and has had no prior service.

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. The sentence imposed is authorized upon conviction of a violation of either Article of War 64 or Article of War 66. Confinement in a penitentiary is authorized by Article of War 42 for the offense of mutiny.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

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

SPJGK
CM 266201

28 NOV 1944

UNITED STATES v. Second Lieutenant CARL H. ABRAHAMSON (O-715423), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Majors Field, Greenville, Texas, 2 October 1944. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Carl H. Abrahamson, Air Corps, did, at Greenville, Texas, on or about 14 September 1944, disobey paragraph 1 a 1, Section V, Post Flying Regulations, Army Air Forces Pilot School (Basic), Majors Field, Texas, issued by the Commanding Officer of said field in the execution of his office reading as follows:

"1. LOCAL RESTRICTED AREAS:

a. No flying will be engaged in:

1. Over Greenville, Revelon or Mineral Heights at any altitude"

by flying a military aircraft over Greenville, Texas, and when not necessary to the performance of his mission.

Specification 2: (Finding of not guilty).

Specification 3: In that Second Lieutenant Carl H. Abrahamson, Air Corps, did, at or near Greenville, Texas, on or about 2 September 1944, wrongfully fly a military aircraft closer than 500 feet, to another aircraft in flight, in violation of paragraph 1b, Army Air Forces Regulation No. 60-16A.

He pleaded not guilty to all Specifications and the Charge; was found not guilty of Specification 2, and guilty of the remaining Specifications and the Charge. No evidence of any previous conviction was introduced. Accused was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. For the prosecution.

At all times pertinent to the issues involved, as well as at the time of trial, accused was in the military service, a flight instructor, stationed at Majors Field, Greenville, Texas (R. 5,10,12,17,29).

Specification 1 (flying over restricted area): Paragraph 1a, 1, Section V, Majors Field Post Flying Regulations, which was identified by Major Burnham W. Cowdery, Deputy for Training and Operations, and which he testified was in full force and effect on 14 September 1944, was introduced in evidence without objection and an extract copy thereof substituted in the record (R. 18; Ex. 3). These regulations are, in pertinent part, as follows:

"SECTION V

RESTRICTED AREAS

1. LOCAL RESTRICTED AREAS:

a. No flying will be engaged in:

1. Over Greenville, Revelon or Mineral Heights at any altitude."

The accused and Aviation Cadet Orville G. Miller flew together in a plane bearing Majors Field Number 84F between the hours 2120 (9:20 p.m.) and 2210 (10:10 p.m.) on 14 September 1944 (R. 5,8,10; Ex. 1).

Miller testified that he and accused took off from "South Sulphur" at approximately 2120 on the aforementioned date, headed southwest, and, at about 9:30 p.m., passed over the north west corner of Greenville, Texas, while flying at an altitude of approximately 2000 feet (R. 5,6).

He estimated that they passed inside the northwest corner of the city by about one-fourth mile (R. 6,9,50), or about two city blocks, but denied that they went near the center of the city (R. 50). The accused was flying the plane at the time (R. 6). He began a turning climb away from the city at about the time they crossed its corner, and cut the throttle of the plane back and forth approximately three times as he did so (R. 6). Miller was making his first night flight (R. 6). He knew that it was a violation of post flying regulations to fly over the City of Greenville, Texas (R. 6), but stated that it was permissible to fly over towns and houses outside the restricted areas at altitudes of not lower than 500 feet (R. 7). The witness marked on a map of the City of Greenville, stipulated to be a correct map of that city (R. 36; Def. Ex. A), what he judged to be their line of flight at the time in question. This line passes over the northwest corner of an area included within the city limits of the City of Greenville (R. 49; Def. Ex. A).

A signed, pre-trial statement, voluntarily made by accused to Major Cowdery on 15 September 1944, after the latter had warned him of his rights, was introduced in evidence without objection (R. 19-20; Ex. 4). In it, accused admitted that he had flown over the northwest section of the City of Greenville between 9:30 and 10:00 o'clock the previous night and that while doing so and while climbing, at an altitude of approximately 2400 or 2500 feet, he had raced the motor of his plane approximately three times. He stated that his reason for doing this was, "I knew my wife was down below there on Henry Street. There was no other special reason except climbing". He mentioned the matter to his wife after he got home and she stated that she had heard the plane. Accused admitted that he had read the post flying regulations and that he knew he was not supposed to fly over the City of Greenville, but maintained that he only flew over the edge of the city and not over the main part thereof. He admitted that the part over which he flew was a fairly thickly populated section.

Major Cowdery testified that the flight accused was engaged on at the time in question was a routine student training mission and that it was not necessary in the performance of that mission for accused to fly over the City of Greenville (R. 19).

<u>Specification 3</u> (flying within 500 feet of another plane in flight): Maurice M. Kay, pilot for American Airlines, testified that on 2 September 1944 he made a regularly scheduled trip from Nashville, Tennessee, to Fort Worth, Texas, on one of American Airlines commercial passenger planes (R. 21-22). He stated that this plane passed Greenville, Texas, traveling in a westerly direction, at approximately 11:10 a.m. and that when it was approximately five miles west of Greenville, he heard the roar of an airplane motor, looked out the right window and saw an Army training plane, the number of which was 53F (R. 21-22). He estimated that this Army plane was a distance of about 25 to 50 feet to the right and 10 feet in front of the right wing tip of the commercial plane when he saw

it (R. 22,23,24). He expressed the opinion that the Army plane had just recovered from a dive because it was "in steep climb" as the airliner passed it (R. 23). He expressed the further opinion that the Army plane came from the rear of the airliner because he had not seen it until he saw it climbing after his attention had been attracted by the roar of its motor (R. 24). He estimated that the Army plane was within his view for about ten seconds (R. 23) and testified that it was near enough that he could see into its cockpits, its two occupants, and the straps on their parachutes (R. 24). Kay testified that he saw only the one maneuver by the Army plane and did not see it again after the airliner passed it (R. 24). According to his further testimony, the airliner was, at the time, on the "airways" (R. 22), in level flight, above and well clear of existing clouds (R. 24), flying at an altitude of 5500 feet and at an air speed of 178 miles per hour (R. 22,24). It had been given clearance by Air Transport Command, Fort Worth, Texas, to descend from its previous cruising altitude of 6,000 feet (R. 22,23). There were 24 people aboard it - its three crew members and 21 passengers (R. 22). Kay was riding in the co-pilot's seat on the right side of the airliner (R. 23). He had only one ear covered with his earphones (R. 24). The co-pilot occupied the pilot's seat and was flying the ship (R. 23).

Kay testified that he had been flying for seventeen years, had flown approximately 14,500 hours, and had flown numerous different types of aircraft, but that he was not an Army-trained pilot and had never engaged in formation flying (R. 22,23,25).

According to the testimony of both Kay and the co-pilot, Robert J. Bininger, the airliner was powered by two 1100-horsepower motors (R. 23, 27). The pilot's cabin had soundproofing in it but was not soundproof (R. 23,27). Persons inside it could converse easily, but the ship's own motors could be heard (R. 23,27).

Bininger's testimony was in harmony with and in substance the same as that of Kay as regards the flight of the airliner and the time he saw the Army plane. He testified that he saw the Army plane pull up in front of the airliner's right wing, a distance of 25 to 50 feet away (R. 26). Asked to describe the exact maneuver he saw the Army plane engaged in, he replied:

> "The only maneuver I can tell I saw was the airplane pulling up from underneath of our airplane immediately in front of our right wing and then disappeared. I didn't see it again" (R. 26).

Bininger confessed his inability to say whether his attention was first attracted by the noise of the Army plane or by sight of the plane itself; "it happened in a split second" (R. 26). He said the Army plane "was climbing at a very steep angle" when he first saw it (R. 27).

It was stipulated that if O. T. Ridley, Superintendent of Flight Operations, Southern, American Airlines, Incorporated, Meacham Field, Fort Worth, Texas, were present in court and testifying under oath, he would testify that he was aboard the airliner at the time in question; that when it was "approximately at Greenville, Texas" he heard the noise of an airplane motor which, in his own words, "was so close to our ship that it could be distinctly heard in the cabin of the airliner"; that he looked out both sides of the ship "but never did get a glimpse of the airplane"; that he "distinctly heard" the airplane and "noticed a great many passengers turn to look out of the window"; that he went forward to talk to the pilot about the incident and was informed by the latter that he had obtained the airplane's number (R. 28-29; Ex. 5).

Aviation Cadet Arthur L. Lindgren testified that he flew with accused between 11 and 12 a.m. on 2 September 1944 in airplane Number 53F, and that at one stage of the flight accused flew the plane within approximately 100 feet of an airliner (R. 29-30). Lindgren first saw the airliner when accused made a left turn from the westerly course they had been pursuing. At that time, their plane was about 2000 yards to the right and in front of the airliner and at approximately a 300 foot higher altitude (R. 30,31). When accused had made his left turn, their plane was flying at right angles to the course of the airliner, which was flying in a westerly direction, approximately parallel to the course accused had just previously been flying (R. 30). Accused continued to fly at right angles to the course of the airliner, the while making a slight descent, until he made a right turn of approximately 90 degrees (R. 31), which brought their plane parallel to and on a level with the airliner (R. 30). In Lindgren's opinion, their line of descent was too gradual to be classified as a dive (R. 31). He estimated that the nearest they approached to the airliner was 100 feet and testified that at that time they were flying on a level with and parallel to it. Accused flew this way for two or three seconds and then turned and "pulled away" (R. 30). At the time of approaching the airliner accused was cruising and had his plane in "high pitch" (R. 32,33). Lindgren testified that he was riding in the front seat of the plane, glanced back and saw that accused was looking toward the airliner (R. 31), and that he said nothing to accused and the latter made no comment to him at the time or after they returned to the ground (R. 32).

The court was requested to take judicial notice of the provisions of Section 1b, Army Air Forces Regulations 60-16A (R. 29).

4. For the defense.

The accused, after having had his rights as a witness explained to him, elected to testify under oath. He testified that the flight which he made on the night of 14 September 1944, when it is alleged he flew over Greenville, Texas, was an "orientation ride for cadets", the purpose of which was "to orientate the cadets with Greenville, Caddo Mills, Majors Field, and all surrounding territory" (R. 34). On the flight in

question he took off from "South Sulphur" at approximately 2120 (9:20 p.m.) and proceeded in a southwesterly direction toward Caddo Mills (R. 35). Asked to describe his line of flight and give his version of his flight over Greenville, accused did so as follows:

> "We left South Sulphur, flew toward Caddo Mills. I was going to show the cadet Caddo Mills in relation to Majors Field and that would carry me across the Northwest tip of Greenville. I leveled off at 2000 feet. I had told the cadet previously that I would show him Dallas if the visibility was good and it was that night so I thought of that when we were near the Northwest corner of Greenville, I picked up the inner-phone and told him I was going to climb up and show him Dallas. I pulled the throttle back, changed pitch, hit the throttle with heel of my hand, put flaps down, set air speed and pulled the nose up and started to climb. As I started to climb I pulled the throttle back again and run it back and forth a couple of times and leveled off at 4000 feet" (R. 35).

Asked what he could see on the left side of his plane when he purportedly passed over the northwest tip of Greenville, accused replied, "could see sparse lights on left and immediately to left and just a little bit back, could see no lights at all" (R. 35). Accused marked on the map in evidence what he represented to be his line of flight from South Sulphur across the northwest tip of Greenville (R. 36; Def. Ex. a). This line lies across a sizeable area which is included within the city limits of the city of Greenville, Texas. Accused admitted that on 14 September he was familiar with post regulations prohibiting flights over Greenville (R. 38). He also admitted that after returning home he asked his wife if she had heard anyone fly over Greenville. She replied that she had heard a plane but had paid no attention to it (R. 39).

Six witnesses for the defense stated, one orally and five through stipulations, that between 9:00 and 9:30 o'clock on the night of 14 September 1944 a plane flew over the city of Greenville, Texas, crossing it from Southeast to Northwest, and passing over the heart of the city, at such a low altitude and with its motor making so much noise, as definitely to stamp it as an unusual flight (R. 41,42, 43-44; Def. Exs. B, C,D,E,F). (The purpose of this evidence, presumably, was to show that some plane other than the one piloted by the accused was responsible for attracting the attention of residents of Greenville and causing complaint on the night in question).

With reference to Specification 3 - <u>flying close to the airliner on 2 September 1944</u>, the accused testified substantially as follows:

He was flying parallel with the airliner and was approximately one and one-half miles from it at the time he first saw it (R. 37). The airliner was "just a little bit below" him in altitude. He could not have been more than 300 feet above it (R. 39). He made a 90-degree turn toward the airliner, approached it and made another 90-degree turn which again brought him parallel with it (R. 37). He then flew parallel with the airliner for 20 or 30 seconds before it outdistanced him (R. 38). He at no time dived on the airliner (R. 37). In his best judgment, he did not approach closer than 125 to 150 feet to the airliner (R. 39). His purpose in flying close to the airliner was to compare speed with it (R. 39). He was familiar with paragraph 1b, Army Air Forces Regulations 60-16A, but did not think of the regulations at the time (R. 39,40). He "rolled and came up same time, pulled up and gained altitude" at the time of breaking his level flight beside the airliner (R. 38).

Accused's squadron commander, First Lieutenant Harold B. Clapp, testified that accused had been in his squadron since March 1944, during which time he had instructed seven or eight classes, that students instructed by accused had been good, and that there had never been any question of accused's flying ability, either as an instructor or as a pilot (R. 47). Witness had not had any prior violations of regulations by accused brought to his attention (R. 47).

5. Specification 1. The offense of which accused stands convicted under this Specification and the Charge is that of violating Article of War 96 by flying over the City of Greenville, Texas, in violation of local post regulations in effect at Majors Field, Greenville, Texas, prohibiting flights over "Greenville" at any altitude. The boundaries of the area intended to be encompassed by the designation "Greenville" are not specifically fixed by the regulations themselves; so, in the absence of any evidence to show the contrary, we are constrained to hold that the regulations in question prohibited flights at any altitude over the whole of the area included within the corporate limits of the City of Greenville, Texas. The accused admitted in open court that, on the date alleged, he flew over a considerable area lying within the corporate limits of the City of Greenville, a fact which was also adequately established by other evidence. By so flying his plane, accused committed an act in violation of the post regulations in question and to the prejudice of good order and military discipline, and thereby violated the 96th Article of War.

Specification 3.

The pertinent portion of Section 1b, Army Air Forces Regulations 60-16A, is as follows:

> "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."

Accused freely admitted in open court that, at the time and place alleged in the Specification, while on a duty status, actually engaged in his work of instructing an aviation cadet, he deliberately turned the training plane in which he and his student were riding from its course and flew it to within 125 to 150 feet of a loaded airliner, also in flight, which had been within his view for a distance of one and one-half miles. The evidence introduced by the prosecution is legally sufficient, without accused's admissions, to establish substantially the same facts and, also, that accused flew his plane considerably closer to the airliner than he admitted. The only reason assigned by accused for flying his plane in such close proximity to the airliner was that of desiring to check the speed of the latter. He did not undertake to excuse or justify his conduct. Violation by accused of the above-quoted regulations is conclusively established by the evidence of record. He admitted his familiarity with the regulations, did not claim to fall within the exception to the prohibition, and no defensive theory is raised by the record. It is well established that a violation of these regulations constitutes a violation of Article of War 96 (CM 260637, Arthur).

6. War Department records disclose that this officer is 23 years of age and married. He is a high school graduate. He was a precision tool finisher, employed by the L. S. Starrett Company, Athol, Massachusetts, before entering the service. He was called into the service for active training in the Air Corps in January 1943, was appointed and commissioned a temporary Second Lieutenant, Army of the United States, on 12 March 1944, and entered on active duty as an officer the same date.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 30 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 Second Lieutenant Carl H. Abrahamson (0-715423), Air Corps.

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

3. Consideration has been given to the attached memorandum from the Commanding General, Army Air Forces, to The Judge Advocate General dated 25 November 1944 recommending that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution. I concur in that recommendation.

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

Myron C. Cramer.

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 38, 27 Jan 1945)

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

SPJGN
CM 266205

26 OCT 1944

UNITED STATES v. Second Lieutenant CHARLES G. RIEDER (0-760674), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Las Vegas Army Air Field, Las Vegas, Nevada, 27 September 1944. Dismissal and confinement for five (5) years. Disciplinary Barracks.

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

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 Charges and Specifications:

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

Specification 1: In that 2nd Lt. Charles G. Rieder, AC, did at Las Vegas, Nevada, on or about 27 August 1944, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

94-38 LAS VEGAS BRANCH 94-38 No.
FIRST NATIONAL BANK OF NEVADA

Las Vegas, Nevada, 8-27-1944

Pay to the order of Cash $25 00/00

Twenty Five 00/00 Dollars

LVAAF
Las Vegas
Nev.

Harlos D. Sheets
0784980 2nd Lt. AC P. 3021st.

which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 2: In that 2nd Lt. Charles G. Rieder, AC did at Las Vegas, Nevada, 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:

94-38 LAS VEGAS BRANCH 94-38 No.
FIRST NATIONAL BANK OF NEVADA

Las Vegas, Nevada, 8-18-44

Pay to the
order of Cash $25 00/00

Twenty Five 88/88 Dollars

Las Vegas, Nev.
Box 209

Lyle V. Sladek 2nd Lt.
0872240 3021st LVAAF

which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 3: In that 2nd Lt. Charles G. Rieder, AC, did, at Las Vegas, Nevada, on or about 20 August 1944, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

94-38 LAS VEGAS BRANCH 94-38 No.
FIRST NATIONAL BANK OF NEVADA

Las Vegas, Nevada, 8-20-44

Pay to the
order of Cash $25 00/00

Twenty Five 00/00 Dollars

Las Vegas, Nev.
Box 209

Lyle V. Sladek 2nd Lt.
0872240

which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 4: In that 2nd Lt. Charles G. Rieder, AC, did, at Las Vegas, Nevada, on or about 26 August 1944, with intent to defraud, falsely make in its entirety a certain indorsement to check number 78,383, drawn on the Treasurer of the United States by A. P. Blue, Finance Officer, U.S.A. payable to the order of

Harloe D. Sheets, 2nd Lt., AC, in the amount and sum of Fifty Eight and 27/100 Dollars ($58.27), which said indorsement was in the following words and figures, to wit: "Harloe D. Sheets, 2nd Lt., 0784980", a writing of a private nature which might operate to the prejudice of another.

Specification 5: In that 2nd Lt. Charles G. Rieder, AC, did, at Indian Springs Airport (Sub-Post LVAAF), Indian Springs, Nevada, on or about 25 August 1944, feloniously take, steal, and carry away a Billfold of a value of approximately Three Dollars ($3.00), and one Government Check #78,383, of a value of Fifty-eight Dollars and twenty-seven cents ($58.27), the property of 2nd Lt. Harloe D. Sheets.

Specification 6: In that 2nd Lt. Charles G. Rieder, AC, did, at Las Vegas Army Air Field, Las Vegas, Nevada, on or about 1 August 1944, feloniously take, steal, and carry away a Billfold the value of approximately Two Dollars and fifty cents ($2.50), the property of 2nd Lt. Lyle V. Sladek.

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

Specification: In that 2nd Lt. Charles G. Rieder, AC, did, at the Pioneer Club, Las Vegas, Nevada, on or about 27 August 1944, with intent to defraud, willfully, unlawfully and feloniously attempt to pass as true and genuine a certain check in words and figures, to wit:

94-38 LAS VEGAS BRANCH 94-38 No.
FIRST NATIONAL BANK OF NEVADA

Las Vegas, Nevada, 8-27-1944

Pay to the
Order of Cash $25 00/00

Twenty Five 00/00 Dollars

LVAAF
Las Vegas
Nev.

Harloe D. Sheets
0784980 2nd Lt. A.C. P. 3021st.

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said 2nd Lt. Charles G. Rieder, then well, knew, falsely made and forged.

He pleaded guilty to and was found guilty of all the Charges and Specifications. He was sentenced to be dismissed the service, and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. The accused pleaded guilty to all Charges and Specifications and after the effect and meaning of his plea of guilty had been explained to him, conferred with his counsel and announced that he wished his plea of guilty to stand. The prosecution, relying upon the accused's plea of guilty, introduced no evidence (R. 7-8).

4. The evidence for the defense shows that three fellow officers who had known the accused for periods of 4 to 6 months attributed to him an excellent character (R. 9-10). The accused, after explanation of his rights as a witness, elected to make the following unsworn statement through his counsel:

> "The accused has been in service two years and was commissioned in December, 1943, at Stockton Field, California. Previous to his entry in the Army, he worked for a packing company, where he served as an assistant foreman. He enlisted in the Army, was not inducted, and became an aviation cadet. He graduated and was commissioned as a 2nd Lieutenant in the Army Air Corps, and has served at this station and at Del Rio, Texas. When he came to this station, shortly after arriving in Las Vegas, Nevada, he divorced his wife. Shortly thereafter he began drinking excessively for a great period of time up to the dates of the offenses alleged. He admits in this case that the charges are — that he did commit the six offenses as alleged in the specifications of Charge I, and the specification and Charge II. He was never convicted of any crime in civilian life and that he has not been convicted or charged with any offenses in the military service. His record has been exemplary, his conduct good and outstanding. His service in the Army up to this offense has been honorable. That his condition, his drinking and considerable worry concerning his wife weakened his moral stability, lowered his moral standards, and was an influence that led up to this offense. He does not use intoxication as a defense in this case in any way. He does not state that he was drunk at the time these offenses occurred. He asks that the court consider those things as his unsworn statement in this case." (R. 8-9).

5. The Specifications, Charge I, appropriately allege four offenses of forgery and two offenses of larceny and the Specification, Charge II, appropriately alleges an offense of attempting to pass a forged instrument. The offenses of forgery and larceny are violative of Article of War 93 and the offense of attempting to pass a forged instrument is violative of Article of War 96 (MCM, 1928, pars. 149g, 149d, 152c).

The accused's plea of guilty to all Charges and Specifications admits the facts set forth therein and in the absence of a showing that his plea has been improvidently entered, the plea in itself is sufficient basis to support the findings of guilty of the Specifications and the Charges (MCM, 1928, par. 64a, CM 236359, 1943, Bull. JAG, Vol. 2, p. 270). The accused permitted his plea of guilty to stand after full advice of its meaning and effect. Consequently it cannot be said that such plea was improvidently entered. The findings of guilty of all Charges and Specifications are therefore fully warranted.

6. The accused is about 22 years of age. The records of the War Department show that he is single and neither graduated from high school nor attended college. From October, 1941 until January, 1943 he was employed by a chain store as a truck driver and by a meat packing company as a "retort operator". He has had enlisted service from 29 January 1943 until 5 December 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.

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 all Charges and Specifications and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Articles of War 93 or 96.

Abner E. Lifsconb, Judge Advocate.

Robert J. Glanor, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 266205

1st Ind.

War Department, J.A.G.O., 3 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 Second Lieutenant Charles G. Rieder (O-760674), Air Corps.

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

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

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

(Sentence confirmed. G.C.M.O. 15, 8 Jan 1945)

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

SPJGQ
CM 266206

14 DEC 1944

UNITED STATES

v.

Second Lieutenant DONALD H. HESELWOOD (0-768913), Air Corps.

ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND

Trial by G.C.M. convened at Luke Field, Arizona, 26 September 1944. Dismissal and Total Forfeitures.

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

---

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that 2d Lieutenant Donald H. Heselwood, 1st Training Group, 3028th AAF Base Unit, Luke Field, Arizona, did, at Luke Field, Arizona, on or about 11 September 1944, feloniously take, steal, and carry away a winter flight jacket, value about $19.81, containing a wallet and United States currency of a value of about $25.00, the property of 1st Lt. William F. Lawler, Jr.

He pleaded not guilty to and was found guilty of the Specification and the Charge. No evidence of previous conviction was introduced at the trial. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence but recommended that the execution thereof, insofar as it relates to dismissal, be suspended during the pleasure of the President, and that so much thereof as adjudges the forfeiture of all pay and allowances due or to become due be commuted to a forfeiture of one hundred dollars ($100.00) per month for six (6) months, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, briefly summarized, is as follows:

About two and a half years ago a winter flying jacket, size 42L, was issued either by shipping ticket or memorandum receipt to First Lieutenant William T. Lawler, an Air Corps pilot who, during September 1944 was serving with the 3028th Base Unit stationed at Luke Field, Arizona (R. 7, 8, 12).

During this period of time the jacket was in the possession of Lieutenant Lawler and while at Luke Field he had customarily kept it in a locker of the locker-room in Group One Building (R.9) but had not worn it for eight or ten months (R. 14).

It was hanging in the locker on the morning of 11 September 1944 when he changed his clothes at 9:15 at which time he placed his wallet containing $25.00, his AGO card and some personal papers in a pocket of the jacket which already contained a pair of gloves and a jack-knife (R. 9, 10).

He then left the jacket in the locker, went out to do some flying, after which he returned at 1:15 or 1:20 p.m.

When he dressed he looked for his wallet and found the jacket and its contents were missing (R. 11).

At about 10 or 11 a.m. on 11 September 1944 the accused, who was in the military service (R. 8, 35), appeared at the Air Corps Supply Office to turn in certain property (R. 20, 22). At that time he did turn in various articles of equipment and clothing among which was a "Jacket Flying Winter Type B-6, Size 42LS." He received a shipping ticket (WD AC Form 104A) showing receipt of the articles by the Supply Officer (R. 17, 21, 22, 26, 30; Pros. Ex. 6), and the corresponding items were lined out on the accused's individual issue record (WD AAF Form 121) (R. 26, 29).

Because of a discrepancy between the type of jacket mentioned on the shipping ticket which described it as "B6" and that disclosed by the individual issue record which specified type "B3", defense counsel was permitted to introduce the individual issue record out of order (R. 29; Def. Ex. A). It was shown that the B3 type is of heavier weight than the B6 and that it was customary to allow a return of either type in place of the other (R. 27). It also appears that although some jackets were actually marked "L" (long) they were carried upon the stock books as "LS" (long slender) (R. 18, 22, 25).

On this occasion the accused actually turned in a winter flying jacket type B6, size 42L (R. 22, 24, 25) and later in the afternoon, when the attendants at the Supply Office were directed to look for a jacket which contained a bill-fold (R. 23), only one type B6, size 42L

jacket was found among those in the storeroom (R. 19, 33) and in the pockets thereof were a pair of gloves, a pocket knife and a billfold containing some pictures and $25.00 (R. 23, 28, 32).

Sometime between 2 and 3 p.m. on the same day a sergeant of military police who was investigating the theft of Lieutenant Lawler's jacket (R. 48, 50), the Assistant Provost Marshal (R. 45), and an Air Corps officer (R. 40) went with Lieutenant Lawler to the Supply Office where Lieutenant Lawler in the presence of the others identified his jacket, gloves, knife and wallet (R. 41, 45, 50). The wallet had been removed from the jacket and was in the custody of an attendant who turned it over to Lieutenant Lawler (R. 23, 24, 41, 48, 51).

Between 4 or 5 p.m. on 11 September 1944 Lieutenant Colonel Bates, Commanding Officer of the 3028th Base Unit, had a conversation with the accused at headquarters in the presence of the Assistant Provost Marshal, Major Philip B. Putnam, and a sergeant of Military Police (R. 35, 36). After properly advising him of his rights the accused was asked whether he cared to tell where he got the flying jacket which he had turned in at the Air Corps Supply office that morning. He replied that he had taken it from another officer's locker and knew the locker from which he had taken it; that he did so because someone had stolen his jacket and he had to have one to turn in; and he implied that he acted as he did because "a lot of other officers did the same thing." He was, however, not aware of the fact that there was a wallet containing money in the jacket when he took it (R. 36-38, 46, 47, 51, 52).

The jacket, gloves, knife and wallet were admitted in evidence and photographs were substituted therefor as Pros. Exhibits 1, 2, 3 and 4, respectively. Exhibit 5, which were some pencils also found in the jacket, was not introduced (R. 38, 39).

By stipulation it was agreed that the value of the flying jacket on 11 September 1944 was $19.81 (R. 38; Pros. Ex. 7).

4. The accused, having been informed of his rights, elected to remain silent and the defense introduced no testimony (R. 54, 55).

5. The accused is charged under the Specification with feloniously taking, stealing and carrying away a winter flight jacket of the value of about $19.81, containing a wallet and United States currency in the amount of about $25.00, the property of First Lieutenant William F. Lawler, Jr.

It was shown that Lieutenant Lawler was in possession and custody of the jacket in question, under either shipping ticket or memorandum receipt, at the time of the alleged theft. Strictly, the ownership thereof was in the United States and Lieutenant Lawler merely had the right to use and employ it as part of his equipment while in the military service upon which he was engaged.

Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein (underscoring supplied) (par. 149 (g), MCM 1928).

The ownership need not be that of the absolute or general owner, since larceny may be committed by the taking from a bailee or trustee, in whom the law, pending the bailment or other trust, vests a qualified property which is sufficient to constitute him a "special" owner as against the thief (Winthrop's "Military Law and Precedents", 2d Edition (Reprint) p. 686).

Clearly Lieutenant Lawler had such "special" property and alleging ownership in the Specification without qualification was entirely proper and no variance resulted between the allegation and the proof adduced to sustain the Charge (Sec. 451, par. (41), Dig. Ops. JAG 1912-1940, p. 326).

No question of embezzlement arises under the facts disclosed. There was no temporary borrowing by the accused of the jacket in question with a subsequent intent to convert the property to his own use. His purpose at the time he took the jacket from the locker of a brother officer was then and thereafter to treat it as his own and thus permanently deprive the owner thereof of his property, and such would have been the inevitable result of his turning it in as his own to the Supply Officer except for the investigation which disclosed the theft and brought about a restoration to the rightful owner.

Every element of the offense chargedwas properly established and the record of trial fully supports the findings.

Testimony tending to show that the accused had merely taken another's jacket because his had been taken from him and that he was not aware of the presence of the wallet and money in the jacket when he appropriated it is matter of extenuation to be considered in mitigation but constitutes no defense.

It is noted that whereas the Specification designates the owner of the jacket as "1st Lt. William F. Lawler, Jr.," the proof shows his name to be "First Lieutenant William T. Lawler." This slight variance is of no consequence and in no way violated any substantial right of the accused.

6. Seven members of the court recommended clemency because of the accused's "very excellent military record" and in the light of "extenuating circumstances present since Lieutenant Heselwood was on secret orders for immediate overseas assignment and Lieutenant Heselwood's jacket was stolen prior to the offense in question, making it necessary that he obtain a jacket to clear the post."

The Commanding Officer of Luke Field, Phoenix, Arizona, likewise recommended clemency without assigning reasons.

7. Records of the War Department disclose that the accused was born in Tacoma, Washington, is 22½ years of age and unmarried. He was graduated from high school and attended Pacific Lutheran College for 1/2 year. In civil life he was employed as a government storekeeper from June 1941 to February 1942 and as a pipe-fitter in the Seattle-Tacoma Ship Yards in Tacoma, Washington, from April to July 1942. He became an Aviation Cadet on 16 March 1943. After the completion of the prescribed course of training at Luke Field, Phoenix, Arizona, he was commissioned a Second Lieutenant, Army of the United States on 8 February 1944 and was ordered to active duty at the same field on that date.

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

Fletcher R. Andrews, Judge Advocate

Herbert B. Frederick, Judge Advocate

[illegible], Judge Advocate

(182)

1st Ind.

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

DEC 21 1944

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Donald H. Heselwood (0-768913), 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. Seven of the eight members of the court recommended clemency because of the accused's "very excellent military record" and in the light of "extenuating circumstances present since Lieutenant Heselwood was on secret orders for immediate overseas assignment and Lieutenant Heselwood's jacket was stolen prior to the offense in question, making it necessary that he obtain a jacket to clear the post." The Commanding Officer of Luke Field, Arizona, also recommended clemency. The reviewing authority recommended that the execution of the sentence, insofar as it relates to dismissal, be suspended during the pleasure of the President, and that "so much thereof as adjudges the forfeiture of all pay and allowances due or to become due be commuted to a forfeiture of one hundred ($100.00) dollars per month for six (6) months".

Attached to the record of trial is a letter from the Honorable John M. Coffee, House of Representatives, Washington, D. C., with three inclosures, to which consideration has been given.

4. I recommend that the sentence be confirmed but, in view of the previous good record of the accused, the recommendations for clemency, and the circumstances of the case, I further recommend that the forfeitures be reduced to forfeiture of $50 pay per month for six months, that the sentence as thus modified be carried into execution, but that the execution of that portion thereof adjudging dismissal be suspended during good behavior.

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 the above recommendation into effect, should such action meet with approval.

Myron C. Cramer

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

4 Incls.
1 - Record of trial
2 - Dft ltr for sig S/W
3 - Form of action
4 - Ltr fr Cong. Coffee with incls.

(Sentence confirmed but forfeitures reduced to $50 per month for six months. Execution of that portion of sentence adjudging dismissal suspended. G.C.M.O. 19, 10 Jan 1945)

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

SPJGQ
CM 266219

4 NOV 1944

UNITED STATES v. Private First Class JAMES F. MILLS (34745608), 814th Amphibian Truck Company, APO 709.	HEADQUARTERS GUADALCANAL ISLAND COMMAND APO 709 Trial by G.C.M., convened at APO 709, 11 September 1944. Dishonorable discharge, total forfeitures and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class James F. Mills, 814th Amphibian Truck Company, did, at APO 709, on or about 12 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Andrew Brown, Jr., a human being by hitting him in the head with an axe.

He pleaded not guilty to and was found guilty of the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced "to be reduced to the grade of private, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life." Two-thirds of the members present concurred in the finding of guilty and three-fourths of the members present concurred in the sentence. 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 under Article of War 50½.

3. Summary of the evidence.

The evidence for the prosecution was substantially as follows:

On the morning of 12 August 1944, at APO 709, accused was on duty at the wash racks, approximately 100 feet south of his company mess hall, being detailed to build fires and otherwise tend the racks (R. 10, Ex. 5). A pile of scrap lumber was nearby for fuel, an axe being provided for use in maintaining the fires (R. 12). Private First Class Andrew Brown, Jr., the deceased, a member of accused's organization, was detailed on guard duty on this day (R. 11).

At about 5:30 a.m. on 12 August 1944, Lieutenant Albert H. Keppler of the 814th Amphibian Truck Company, while sleeping in his tent, approximately 150 yards from the mess hall, was awakened by accused, who entered the tent. Accused stated that "someone had bashed in Andrew Brown's head, and that he had tripped over him" (R. 9, 10). Lieutenant Keppler sent accused to awaken Captain Elias, a medical officer, in the adjoining tent, and finished dressing (R. 10). Captain Elias was awakened by accused, who advised him of Brown's injury (R. 6). Captain Elias, Lieutenant Keppler, and accused went to the spot near the wash racks, where they found Andrew Brown lying on the ground with his face in a pool of blood, and with blood flowing freely from deep in his ear (R. 7, 8, 10).

Brown, the deceased, was fully dressed in regulation guard's attire and had a carbine slung over his right shoulder (R. 7, 11). Discovering a poor respiration and pulse, Captain Elias obtained some plasma and ordered an ambulance (R. 7). Lieutenant Keppler went to the dispensary and returned with the ambulance (R. 10). The patient was placed on a stretcher and removed to the station hospital in the ambulance. Captain Elias started the plasma treatment in the ambulance. Subsequent to arrival at the hospital, Brown died, death occurring at 6:20 a.m. (R. 7). The injured soldier was identified by Captain Elias to Major Smith, Medical Corps, the night officer on call (R. 8). Major Smith subsequently identified the body of deceased to Colonel Schaefer as being that of Private First Class Andrew Brown, Jr. (R. 9). Colonel Schaefer, Medical Corps, examined the body of Brown, performing an autopsy. There was a deeply depressed area in the skull behind and above the left ear. There were other lacerations on the head from which a small amount of brain tissue protruded. The skull was shattered over an area of 4 by $2\frac{1}{2}$ inches in size and depressed about $1\frac{1}{2}$ inches. There was another severely shattered and depressed area on the back of the skull. The covering of the brain was severely torn with moderately severe lacerations of the left side and in the top of the brain. Examination of the heart and other internal organs indicated a very severe loss of blood. The primary cause of death was the compound comminuted fractures of the skull with lacerations of the brain; the secondary, exsanguination - loss of blood (R. 4, 5; Exs. 1, 2, 3).

Before Brown was removed in the ambulance, his carbine was examined and found to be unloaded. No clip was in the weapon, but there was a magazine on the ground to the left of his body (R. 11).

When accused awakened Lieutenant Keppler he (accused) appeared to be rather excited, although normally he is quiet (R. 13).

The lacerations on the head of the deceased could have been caused by an axe, according to Colonel Schaefer. In his opinion it would be impossible to tell how many separate blows would be necessary to cause the lacerations but probably, at least two (R. 6).

About 6:00 o'clock that morning, Corporal Claude R. Wilkins, of the same organization, and a member of the guard, found a "GI" axe "sticking" from under the wood pile (R. 13). He observed what he considered fresh blood on the head of the axe and turned it over to Lieutenant Keppler (R. 14). Later, scrapings from the dark stains on the butt end of the blade were removed and tested by Captain Murray, Medical Corps (R. 18, 19). The witness, admittedly qualified as an expert, performed a laboratory test, following standard methods. The result showed positive reactions for human blood (R. 19).

The accused, after being advised of his rights, made a statement which was reduced to writing and which he later signed, after reading, and verified under oath (R. 20, 21; Ex. 5). In the statement he relates that he built a fire near the rear of the mess hall about 4:00 o'clock that morning. Brown, the deceased came by, sat down, and warmed his hands. The two had a friendly conversation for a short while, and accused returned to his tent and lay down. About an hour later accused returned and put some more wood on the fire, finding Brown still sitting there on a box. Brown started to joke with accused, which made accused angry, Brown making some remark about how accused "came into the world." Accused was mad and reached for the axe. As Brown started to stand up, accused hit him with the axe, and he "went down" to the ground. The accused further stated that, "I didn't mean to hit him that hard". Blood was running from Brown's head and accused was excited, walked away a couple of times but returned. He finally went to Lieutenant Keppler, informing him that Brown had been struck over the head. Directed by Lieutenant Keppler, the accused went to the adjoining tent, called the doctor (Captain Elias) and later showed them where Brown was lying. The accused held the light while Captain Elias examined Brown, remaining there until the ambulance removed him (Brown) to the hospital. The accused observed Corporal Wilkins pick up the axe and hand it to Lieutenant Keppler (Pros. Ex. 5).

<u>For the defense</u>.

Captain Samuel D. Lipton, Medical Corps, a neuropsychiatrist, whose qualifications as an expert witness were admitted, observed the accused at the Station Hospital on 16 August 1944.

In the opinion of the witness the accused, at that time and at the time of the alleged offense, was "sane and mentally responsible", although he was "a mentally deficient, naive, emotionally immature individual with a mental age of eight years". In the opinion of the witness, accused knew the difference between right and wrong. By "mentally deficient", witness meant that accused lacked "the normal, intellectual capacity, the normal ability to learn" (R. 21-23).

The accused, after being fully advised of his rights as a witness, elected to make an unsworn statement through counsel (R. 23-24). The statement made on behalf of the accused relates his presence at the wash racks early that morning, building a fire to heat water for the cooks. The deceased, Brown, who had been on guard duty, approached accused and they talked for some time while Brown warmed his hands over the fire. Accused then went to his tent for an hour and upon his return at approximately 5:30 a.m. to the same area, Brown again approached him. After talking for some moments, Brown made a "derogatory reference as to how" accused came into the world, indicating illegitimate birth. Following this, accused "struck" Brown "down" with an axe without thinking and without knowing what he had done until the act was completed. Thereafter the accused awakened Lieutenant Keppler and told him that Brown had been struck (R. 24).

4. It is without dispute that Private First Class Andrew Brown, Jr. died at approximately 6:20 o'clock on the morning of 12 August 1944. His death was the direct result of injuries to his skull and brain, received within the preceding hour while on duty as a guard within the area of his organization. An axe was found shortly thereafter in the vicinity of the place where Brown was discovered in an unconscious and bleeding condition. Dark stains on the axe head were examined in the laboratory and the presence of human blood thereon definitely determined. Accused, who was detailed to work, and who was on duty near the place, reported to an officer in his organization that the deceased had been injured. Accused, normally a quiet person, was at this time, highly excited. The corpus delicti being established, it was proper to receive the voluntary statement of the accused, which was in the nature of a confession. The statement admits that accused struck Brown on the head with the axe, accused being angry because of remarks made by the deceased. It is therefore established without doubt that accused inflicted the fatal injuries on Brown at the time and place and in the manner alleged.

Assuming the truth of the accused's assertion that the deceased made insulting remarks about the accused's antecedents and that the accused struck the fatal blow or blows in a fit of anger induced by the insults, the killing nevertheless was done with malice aforethought, for mere insulting or abusive words do not constitute a provocation reducing the offense to manslaughter (MCM, 1928, par. 149a, p. 166). That the accused

intended to kill Brown or, at the very least, to inflict grievous bodily harm upon him is clear from the nature of the attack upon him. Either intent satisfies the requirement that the killing be done with malice aforethought (MCM, 1928, par. 148a, p. 163). The accused was properly convicted of murder.

5. The Charge Sheet shows that accused was 19-10/12 years of age at the time and was inducted into the service 25 March 1943 at Fort Benning, Georgia. He had no prior service.

6. 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. A sentence either of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature, and so punishable by confinement for more than one year by Title 18, sections 452 and 454, United States Code.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

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

SPJGK
CM 266244

26 DEC 1944

UNITED STATES	)	ARMY SERVICE FORCES FOURTH SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Camp Forrest, Tullahoma, Tennessee, 5 October 1944. Dishonorable discharge, total forfeitures and confinement for ten (10) years. Disciplinary Barracks.
Private HUBERT WASSNER (31457219), Co. "C", 1800th Engineer General Service Battalion, APO 402, Nashville, Tennessee.	)	

HOLDING by the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Stricken out by Law Member upon motion of Defense Counsel because the alleged offense occurred prior to accused's induction into the service).

Specification 2: In that Private Hubert Wassner, Company C, 1800th Engineer General Service Battalion, did, at Camp Barkeley, Texas, on or about 4 April 1944, in a letter written by him in German, wrongfully make and utter the following disloyal statement against the United States of America, to wit (English translation): ".....I still hope for a German victory and nobody can change that either .....for the Allies are only envious that the German people are progressed so highly; hence full of hate and anger they sought ways and means to start a war against Germany.....", or words to that effect.

Specification 3: In that Private Hubert Wassner, Company C, 1800th Engineer General Service Battalion, did, at Camp Barkeley, Texas, on or about 23 April 1944, in a letter written by him in German, wrongfully make and utter the following disloyal statement against the United States of America, to wit (English translation): "..... In my secret heart I commemorated the birthday of the Fuehrer, and may he live long and fight a victorious war to the finish for the German and other European people .....a three fold Victory-heil for our Fuehrer Adolf Hitler ...", or words to that effect.

He pleaded not guilty to and was found guilty of the Charge and Specifications 2 and 3 thereof. No evidence was introduced of any previous conviction. 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 a term of ten years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that accused, a 37-year old male, born of Austrian parents in Austria was inducted into the service on 22 March 1944 at Hartford, Connecticut (Pros. Ex. 1, Ex. 4). On 4 April 1944 he was assigned to a military organization stationed at Camp Barkeley, Texas. On the same day he wrote and mailed a letter to a "Mrs. R. Loeffler, P.O. Box 788, Crystal City, Texas" (Pros. Ex. 2A), post marked "Camp Barkeley, Texas, April 5, 1944" and stamped "Detained Alien Enemy Mail Examined by 28-7". On 23 April 1944 he again wrote and mailed a letter to "Mr. Richard Loeffler" at the same address (Pros. Exs. 3 and 3A).

Both letters were written in German. The first letter when translated into English contained the following (R. 13):

> "You know who is German will always be German and nobody can change them and I hope always that the Germans will win the war and nobody can change that either. After what I saw in Germany while I was there, nobody can fool me, for the Allies, they are just jealous that the German people are so far ahead. They were just trying to find a way in their hate to start a war with Germany, but it just did not go as they planned it."

The second letter complained of not having received any reply to the first and when translated into English contained the following (R. 13-14):

"I am in the Army against my will * * * I did not take the oath in the Army * * * I do not want to be an American citizen.

"I had the Fuehrer's birthday in my mind and celebrated all by myself and may he live for a long time for a German victory against bolsheviki and all others, He was a present to his German folk, so I close my letter and hope for an answer. * * * A three fold victory for our Fuehrer, Adolph Hitler. Heil Hitler."

The accused prior to trial voluntarily admitted writing the letters (R. 7- 11, Pros. Ex. 1). A witness who claimed to be familiar with the accused's signature testified that in his opinion the letters and envelopes were signed by the accused (R. 15-16).

Over the objection of defense counsel (R. 17), Form 20 card was admitted in evidence (Pros. Ex. 4) to show that the accused lived in this country 22 years.

4. The defense counsel moved for a finding of not guilty of the Charge and its Specifications on the ground that there was no proof as to the receipt of the letters. His motion was denied by the Law Member subject to objection by any member of the Court. No objection was made by any member (R. 20).

5. Defense counsel informed the court that the rights of the accused as a witness in his own behalf had been explained to him fully and that the accused elected to remain silent.

6. The evidence shows beyond any reasonable doubt that the accused wrote the letters described in Specifications 2 and 3, at the times and places alleged therein. The statements contained in the letters were disloyal statements in that they praised the enemy and criticized the United States (CM 228197, 16 BR 101). The envelopes in which the letters were contained were postmarked and stamped. It may fairly and legally be presumed from the postmark that the letters had been posted in the United States mails at the time and place indicated (Wharton's Criminal Law, 12th Edition, Sec. 1958).

There was no evidence introduced to show that the addressees of the letters actually existed, or, if they did, that the letters were properly addressed to or received by them. Nor is there any allegation in the Specifications of the receipt of or publication of either letter.

By writing and posting the two letters containing disloyal statements did the accused violate the 96th Article of War?

A similar situation was presented to the Boards of Review in two other cases. In each instance the Board held that no offense had been legally charged under Article of War 96. In CM 125607, Smorenberg, the accused was charged with a violation of Article of War 96 in that he "displayed a disloyal attitude toward the United States by writing a letter disloyal to the United States" to the El Paso Morning Times. The letter was actually received by the editor, who testified to its receipt. In finding the record of trial insufficient to support the finding of guilty, the Board stated:

> "Specification 6 does not state an offense. Nothing is charged but a writing. There is no allegation that it was published or that its contents were communicated or became known to any other person than accused himself. The allegation lacks, therefore, that element essential to a charge under the 96th Article of War, namely, the communication of accused's state of mind to another, in order that it might be prejudicial to good order or military discipline."

In CM 129842, Balling, the accused was similarly charged with having violated the 96th Article of War in that he "did * * * write a letter in which were statements, which taken in the text of said letter, constituted disloyal utterances, sympathy with the enemy and resentment against the United States and its Allies". This letter, written by accused "Somewhere in France" in September 1918, was deposited with the company mail to be censored by the company censor, who, upon reading it, turned it over to the Regimental Intelligence Officer. In setting aside the conviction, the Board affirmed the holding in the Smorenberg case (supra), holding the specification insufficient to set forth an offense for the same reasons assigned in that case.

There has been no modification of the views expressed in these two cases, nor has there been any legislation enacted which justifies the Board in overruling the principles thus enunciated. The only statutes of the United States denouncing disloyal utterances are the section of the Espionage Act of 1917, as amended, reading as follows:

> "Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished ***" (50 U.S.C. 33);

and the sections of the act of June 28, 1940, reading in pertinent part:

"(a) It shall be unlawful for any person, with intent to interfere with, impair or influence the loyalty, morale or discipline of the military or naval forces of the United States;

(1) to advise, counsel, urge or in any manner cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or

(2) to distribute any written or printed matter which advises, counsels or urges insubordination, disloyalty, mutiny or refusal of duty by any member of the military or naval forces of the United States; * * * (18 U.S.C. 9).

* * * * * * *

"(a) It shall be unlawful for any person:

(1) * * * * * *

(2) with the intent to cause the overthrow or destruction of any government in the United States to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by force or violence; * * * *" (18 U.S.C. 10).

It is clear that accused is not charged with the commission of any of the offenses made punishable by the foregoing Federal Statutes, by the terms of which disloyal words are punishable only if uttered with the specific intent or purposes therein set forth (CM 226966, Schmidt, 15 B.R. 177). In the final analysis, since there is neither any allegation nor proof of actual communication of accused's views to any other person or of any subversive intent on the part of accused, accused is merely charged with placing his disloyal views in writing without any communication of them. To harbor disloyal thoughts about one's native or adopted country is to be both regretted and condemned, but neither by statute nor by judicial interpretation has this state of mind been made the basis for the imposition of punishment in the United States, either by a civil or military tribunal. In declining to concur in the holding of the Board of Review (one member dissenting) in CM 229062, Irskens, 17 B.R. 43, and CM 229063, Bresky, 17 B.R. 51, that disloyal statements made in answer to questions during the course of an official investigation constituted an offense under Article of War 96, The Judge Advocate General expressed the opinion that to convict the accused under these circumstances "would amount to punishment for

abstract disloyalty, that is, for 'evil thoughts'".

> "In my view these honest official statements disclosing the true sentiments of accused, made only because accused was asked by his military superior to make them, were not of a nature to bring discredit upon the military service and were not to the prejudice of good order and military discipline within the meaning of Article of War 96."

The Secretary of War adopted these views of The Judge Advocate General and vacated the findings of guilty and the sentence. The Board of Review subsequently adopted the same views in CM 235134 Grampp, 21 B.R. 301.

To the same effect is the incidental language used by the Board in CM 109579, Sanghove:

> "A soldier may hold what opinion he chooses respecting the commanders of the army, past and present, with respect to the integrity of purpose of his country and its allies, and with respect to the character of their enemies."

In that case, as also in CM 228197, Kennedy, 15 B.R. 97, the conviction of a violation of Article of War 96 was sustained because the disloyal opinions of the accused were publicly uttered in the presence and hearing of military personnel. Such conduct was held to be prejudicial to good order and military discipline. The same result was reached in CM 235607, Poli 22 B.R. 151 wherein the disloyal statements were sent by the accused to numerous civilians.

It appears from a review of the foregoing cases that, apart from those cases which might properly fall within the terms of the statutes quoted above, in order to sustain a conviction of a violation of the 96th Article of War for the making or uttering of a disloyal statement by one subject to military jurisdiction it must be shown that the disloyal statement was communicated to others and communicated in such a manner as to either be prejudicial to good order and military discipline or bring discredit upon the service.

In the absence of any allegations in Specifications 2 and 3 that accused's disloyal statements were actually communicated to any third person or that the letters were written for any purpose or with any intent prohibited by the cited Federal Statutes, the Board, in keeping with the foregoing views, so consistently adhered to, holds that these Specifications charge no offense under Article of War 96.

7. For the reasons set forth above the Board is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of the Charge or of any of its Specifications, and, therefore, legally insufficient to support the sentence.

(Dissent), Judge Advocate.

Earle Stephens, Judge Advocate.

Norman Moore, Judge Advocate.

(196)

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

SPJGK
CM 266244

26 DEC 1944

UNITED STATES v. Private HUBERT WASSNER (31457219), Company "C", 1800th Engineer General Service Battalion, APO 402, Nashville, Tennessee.	ARMY SERVICE FORCES FOURTH SERVICE COMMAND Trial by G.C.M., convened at Camp Forrest, Tullahoma, Tennessee, 5 October 1944. Dishonorable discharge, total forfeitures and confinement for ten (10) years. Disciplinary Barracks.

DISSENTING OPINION
by
TERRY A. LYON, Judge Advocate.

As stated in the majority holding, the accused has been found guilty of two specifications involving alleged disloyal statements in violation of Article of War 96. The facts are very simple and I regret that there should be any difference of opinion among the members of this Board of Review as to the legal sufficiency of the record to support the findings of guilty.

The undisputed evidence in this case shows that the accused, a soldier of German or Austrian Ancestry, while serving in the United States Army wrote two letters, one dated 4 April 1944 and the other dated 23 April 1944. Each letter is written in the German language. The translation of the letter dated 4 April 1944 is as follows:

"Dear Friends:

I received your letter and the money order and thanks very much. Perhaps you know that I was drafted and I was 10 days in Camp Devens, Mass. After that, I was sent to Texas. I am now at Camp Barkely with the Red Cross. You can imagine what all I already told them, and I had even already handed in the citizenship papers, and in spite of this, these (there is something I cannot translate, because it has been marked out) took me away; but you know who is German will always be German and nobody can change them and I hope always that the Germans will win this war and nobody can change that either. After what I saw in Germany while I was there, nobody can fool me, for the Allies they are just jealous that the German people are so far ahead. They were just trying to find a way in their hate to start a war with Germany, but it just did not go as they had planned it. I get a few letters to write, so I am closing this letter with a German greeting.

Your Friend Hubert

and also a greeting to your wife Lola and your son."

The translation of the letter dated 23 April 1944 is as follows:

"Dear Friend Richard:

Two weeks ago I wrote you a letter from Camp Barkeley, Texas, and now I am waiting for an answer to this letter. Of course, I have not received any yet. Maybe you did not get my letter for you will know or will find out that I am in the Army against my will. Fi[illegible] they throw me out of the factory and then they want me to go [illegible] the Army and fight for such dirt. I did not take no oath in the Army and I sent my Naturalization papers back because I did not want to be an American citizen.

I had the Fuehrer's birthday in my mind and celebrated all by myself and may he live for a long time for a German victory against bolsheviki and all others (he has some kind of expression here which means like 'dirt'.) He was a present to his German folk, so I close my letter and hope for an answer. I send you and the whole family greetings from me.

/s/ Hubert

A three fold victory for our Fuehrer, Adolf Hitler. Heil Hitler."

The envelopes in which the letters were contained are postmarked "Camp Barkeley, Texas". Each is franked as soldier's mail and each has written upon it the name, serial number, station and organization of the accused. One is addressed to Mrs. R. Loeffler, P.O. Box 788, Crystal City, Texas, and the stamps thereon shows that it was posted or mailed at Camp Barkeley, Texas, 12:30 p.m., 5 April 1944. The other is addressed to Mr. Richard Loeffler, P. O. Box 788, Crystal City, Texas, and bears the stamp indicating that it was posted at Camp Barkeley, Texas, at 12:00 a.m., 24 April 1944. The majority holding concedes that the post marks appearing upon the envelopes warrant the legal presumption that the letters had been posted in the United States mails at the time and place indicated on the respective envelopes (Wharton's Criminal Law, 12th Ed., sec. 1958). It is obvious that the letters contained disloyal statements in that they not only criticized the United States and its Allies, but expressed sentiments of extreme loyalty to the Fuehrer and hopes for a German victory. The Board of Review has held in numerous cases that the free and voluntary expression of such sentiments on the part of a member of the military establishment constitutes an offense in violation of Article of War 96 (Cm 228197, Kennedy, 15 B.R. 97, CM 235607, Poli, 22 B.R. 97). The majority holding is in harmony with the general proposition of law. However, the majority of the Board of Review holds that in this case the conviction can not be sustained because there is no allegation or proof of the receipt of or publication of either letter. The majority holding cites two

cases - CM 125607, Smorenberg and CM 129842, Balling, which apear to support this position. It is true that in the case now under consideration the specifications do not allege the receipt of the letters by the addressees. Granting that in this respect the specifications do not comply with the technical niceties of pleading required in some civil jurisdictions, I maintain under the facts in this case, and in the light of the provisions of the 37th Article of War, that such an omission is wholly immaterial. Based upon the 37th Article of War, the Manual for Courts-Martial expressly provides:

> "* * * 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 in fact otherwise injuriously affected thereby * * *" (MCM, 1928, par. 87b).

See also 18 U.S.C.A., section 556, which provides in part as follows:

> "* * * No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insuffucient, nor shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or implication in the matter of form only, which shall not tend to the prejudice of the defendant * * *."

And 28 U.S.C.A., section 391, which provides in part:

> "* * * on the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination upon the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

In harmony with the meaning and purpose of these statutes, Mr. Justice Sutherland in Hagner v. United States (285 U.S. 427, 431) states:

> "* * * The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects not prejudicial will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record

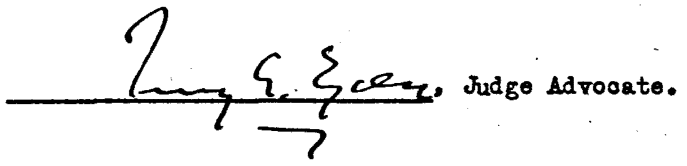
shows with accuracy to what extent he may plead a former acquittal or conviction."

Upon the foregoing authority, and upon reason and common sense, I contend that the failure to allege receipt of the letters is wholly immaterial. So much for the specifications.

As to the question of proof, I am of the opinion that proof that the letters were deposited in the mail raises a presumption of their delivery to the respective addressees (MCM 1928, par. 112), and that in a case of this character, proof of the mailing of the letters is sufficient to constitute a publication. I recognize that a soldier may not be tried or punished for his secret thoughts, however disloyal they may be, but when, as in this case, a soldier of the United States Army voluntarily and not in the course of an official inquiry, writes and mails letters in which he gives expression to disloyal sentiments, he thereby brings discredit upon the military service which is an offense in violation of the 96th Article of War.

I am in complete disagreement with the views expressed in the majority holding that proof of receipt of the letters by the addressee is indispensable. Paraphrasing the language of Best J., in the case of the King v. Sir Francis Burdett (Bart. 43 and Ald. 95, cited with approval in People v. Bihler, N.Y. Sup. 139, p. 819) it is my opinion that the moment the accused delivered the letters from his hands to the United States mails his control over them was gone. He had shot his arrow and it did not depend upon him whether it hit the mark or not. There was an end to the locus poenitentiae, his offense was complete, all that depended upon him was consummated and from that moment upon every principle of common sense, he is liable to be called upon to answer for his act.

Upon the established and admitted facts in this case and the inferences and presumptions which arise upon the facts, I respectfully submit that in my opinion the record of trial is legally sufficient to support the findings of guilty and the sentence and that in the interest of reason, common sense, and justice any former holding or opinion of this office inconsistent herewith should be expressly over-ruled.


, Judge Advocate.

1st Ind.

Hq ASF, JAGO, Washington 25, D.C., JAN 23 1945

TO: The Secretary of War

1. The record of trial and accompanying papers in the case of Private Hubert Wassner (31457219), Company "C", 1800th Engineer General Service Battalion, together with the holding thereon of the Board of Review signed by only two of the three members, the third member being unable to concur in the views expressed in the holding, are transmitted herewith pursuant to Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724), and the act of August 1, 1942 (56 Stat. 732), for your action.

2. The holding of the Board of Review finds that the record of trial is legally insufficient to support the findings and sentence. I do not concur in this holding, but, for reasons hereinafter set forth, am of the opinion that the record of trial is legally sufficient and that the action of the reviewing authority should be confirmed.

3. Private Wassner was found guilty of two specifications in violation of Article of War 96. In each specification he was alleged to have made and uttered, in letters written by him in German, statements expressing sympathy for the German cause. 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 a term of ten years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

4. The majority opinion of the Board of Review, which holds the record of trial legally insufficient to support the findings and sentence, relied strongly upon the holdings in CM 125607, Smorenberg, (1919), and CM 129842, Balling, (1919). The Balling case rests solely upon the Smorenberg case. In both these cases the specifications were held defective in that they did not allege an offense. The Board of Review which considered the Smorenberg case did not support its holding either by reference to precedents or by any stated reason. The written opinion contains nothing concerning the specification held defective other than a resume of the evidence and the statement set out on page 4 of the majority opinion in the case now under consideration. What the 1919 Board of Review considered the compelling reasons for its holding can now be only a matter of conjecture.

Each specification in the present case alleges that the accused did "in a letter written by him in German wrongfully make and utter" certain disloyal statements. The specification in the Smorenberg case alleged that the accused "displayed a disloyal attitude toward the United States by writing a letter disloyal to the United States" to the El Paso Morning Times. The specifications in the two cases are not, so far as their legal sufficiency is concerned, distinguishable.

I cannot see how Wassner could have been misled by the wording of the specifications. The word "utter" is defined by Webster's New International Dictionary as "To give public expression to; to speak; to reveal, disclose; divulge; make known." This being the common meaning of the word it is difficult to conceive that the accused did not know that he was charged with communicating the statements, and that he was thereby unable to prepare an adequate defense. The Manual for Courts-Martial, 1928, contains the following statement on page 74:

> "* * * 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 misled by such defect, or that his substantial rights were in fact otherwise injuriously affected thereby."

I consider that the facts alleged in and to be reasonably implied from each specification do constitute an offense under Article of War 96.

I agree, for the reasons contained therein, with the conclusion of the dissenting opinion that the evidence in the record of trial is legally sufficient to sustain the findings of guilty, and that CM 125607, Smorenberg, and CM 129842, Balling, should no longer be followed in so far as they are in conflict with the views herein expressed.

5. Under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724) and the act of August 1, 1942 (56 Stat. 732), you have authority to confirm the action of the reviewing authority, in approving the sentence, or to disapprove the sentence.

6. I recommend that the action of the reviewing authority approving the sentence be confirmed, but that the period of confinement be reduced to five years, and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General.

2 Incls
1. Record of trial
2. Action

(Action of reviewing authority confirmed, period of confinement reduced to five years, by order of the Under Secretary of War, 9 Feb 1945)

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

SPJGH
CM 266247

23 NOV 1944

UNITED STATES v. Second Lieutenant JOE D. CROMWELL (0-1322895), Infantry.	INFANTRY REPLACEMENT TRAINING CENTER CAMP BLANDING, FLORIDA Trial by G.C.M., convened at Camp Blanding, Florida, 4 October 1944. Dismissal.

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

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

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

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

ADDITIONAL CHARGE: Violation of the 73rd Article of War.

Specification: In that 2d Lt. Joe D. Cromwell, Company "F", 205th Infantry Training Battalion, did, at Camp Blanding, Florida, on or about 28 August 1944, through neglect suffer Private Andy M. Banks, Company "F", 205th Infantry Training Battalion, a prisoner duly committed to his charge, to escape.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of the Charge and its three Specifications, but guilty of the Additional Charge and its Specification. No evidence of any previous conviction was introduced at the trial. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The material evidence adduced by the prosecution relative to the offense of which the accused was convicted may be summarized as follows:

On 28 August 1944 the accused was battalion duty officer of the 205th Infantry Training Battalion, 63rd Infantry Training Regiment, Camp Blanding, Florida (R. 12). In the performance of his duties as battalion duty officer the accused received from the assistant provost sergeant at Post Stockade #1, at about 6:30 a.m. on 28 August 1944, five garrison prisoners to be delivered to their respective companies for training during the day and returned to the stockade at the end of the day (R. 12, 14). The accused gave a receipt for the prisoners. He was unarmed and unaccompanied by an armed guard when he received the prisoners from the stockade. The only person accompanying him was an enlisted man assigned to drive the truck in which the prisoners were to be transported to their respective companies (R. 17). When the accused came out of the stockade with the five prisoners he took a seat beside the driver on the front seat of the truck and the five prisoners got into the back of the truck. The party then drove to the area of Company C, 205th Battalion, where their first stop was made (R. 17). The truck was stopped at a point approximately 25 yards from the Company C orderly room. The accused thereupon got out of the truck and proceeded into the orderly room with four of the prisoners, leaving the fifth prisoner, Private Andy Banks, in the back of the truck. Accused did not instruct the driver to watch Banks (R. 17). The driver remained seated on the front seat, and while the accused was in the orderly room the driver saw Banks jump off of the truck and disappear between two latrines (R. 17-18). The driver did not call to Banks or make any effort to stop him. The driver testified that accused was absent from the truck "about a second or two" (R. 18).

The prosecution introduced into evidence, without objection, the official report made by the accused with respect to the escape of Banks (Pros. Ex. 5). In such report the facts pertaining to the escape are set out as follows:

"Pvt. Andy W. Banks, 34832431, a member of this Company, and a prisoner in Post Stockade #1, escaped from my custody,

while I was Battalion Duty Officer, 0655 28 August 1944, in the area of Company "C" 205th Infantry Training Battalion. While I was delivering other prisoners Pvt. Banks asked and secured my permission to go to the latrine. He went to the latrine and made his escape from there. A thorough search was made of the area but the prisoner was not located. The incident was reported immediately to Battalion Headquarters and Post Stockade #1."

Accused's battalion adjutant testified that on 28 August 1944, and prior thereto, duty officers of the 63rd Infantry Training Regiment were not given specific instructions respecting precautions to be taken in handling prisoners. If 25 prisoners were withdrawn from the stockade at one time they would be handled in the same way that a single prisoner so withdrawn would be handled. No ammunition was provided for the duty officer's use in picking up prisoners (R. 12). He also testified that he had delivered prisoners to company areas for training prior to 28 August 1944, that he had no ammunition, and that none was available in the battalion. The largest number of prisoners he ever received from the stockade at any one time was "2 or 3". It was testified that no members of the regimental guard were "made available" to assist duty officers in escorting prisoners to and from the guardhouse. The adjutant stated, however, that he believed that he himself would have made an effort to obtain an armed guard if he had been escorting a dangerous prisoner (R. 13).

The assistant provost sergeant who delivered custody of the five prisoners to the accused testified that, while the prisoners confined in Stockade #1 are not officially classified into definite categories according to their assumed dangerous tendencies, he himself rated Banks "by his record" as a dangerous prisoner, and one who "would take off if he had a chance". On further examination, this witness defined a dangerous prisoner as "one who is sentenced to a general prison and not capable of going out", and admitted that none of the prisoners whom accused received on 28 August 1944 was "sentenced to be dangerous prisoners" (R. 15-16). In cases where the stockade sent prisoners out on work details on its own responsibility, as distinguished from delivering prisoners to another authority, the unvarying practice was to send armed guards with all prisoners, and no more than three prisoners with one guard. However, it was the practice of the stockade to release any garrison prisoner, whether dangerous or not, to an unarmed duty officer, so long as a proper receipt was given for him (R. 15).

4. Evidence for the defense:

Major Clarence J. Simms, a witness for the defense, testified that on 28 August 1944 he was S-3 and Executive Officer of the 205th Infantry

Training Battalion. Prior to 28 August 1944 the only instructions given to battalion duty officers with respect to the handling of prisoners was merely that the prisoners were to be picked up at the stockade in the morning for delivery to their respective companies for training purposes and returned to the stockade at the end of the day. The instructions contained nothing about armed guards, and it was not the practice in the battalion to use armed guards to pick up prisoners. No ammunition was available for the use of the duty officer in handling prisoners and it was the understanding in the battalion "that ammunition could be only in four places; on the range, in a magazine, in a truck under guard in the company area, or en route between those places". On 29 August 1944 (the day following Banks' escape), the regimental commander issued an order calling attention to "considerable laxness in this regiment with regard to the guarding of prisoners" and setting out specific procedures to be followed in the future (R. 19-20; Def. Ex. A). Two days later, 31 August 1944, the regimental commander issued a further order setting out additional instructions respecting the guarding of prisoners in training, and directing that ammunition be issued for use in that connection (R. 20; Def. Ex. B). These instructions were "the first definite policy set in the regiment on guarding prisoners" (R. 20). Major Simms further testified that the principal duty of the accused in the battalion is that of platoon leader in Company F, and that as a platoon leader he would give the accused a rating of "excellent" (R. 20). On examination by the court, Major Simms testified that during the months of July and August 1944, while the accused was in the battalion, instructions were given trainees respecting the guarding of prisoners. These instructions were given by company officers and they informed trainees "how to guard prisoners properly". Under those instructions prisoners were not "permitted to go the latrine by themselves without their guards" (R. 21). There is no positive testimony that the accused was one of the company officers who gave such instructions to trainees.

Captain Robert O. Kruse, a witness for the defense, testified that he is company commander of Company F, that being the company in which the accused is a platoon leader. He had personally served as battalion duty officer and in that capacity had picked up prisoners in the battalion. On such occasions he had never been accompanied by an armed guard. Prior to 28 August 1944 no ammunition was available in the battalion for use in guarding prisoners when they were being conducted to and from the stockade in connection with training. Furthermore, definite instructions had been issued by higher echelon "that no ammunition would be in the orderly room, supply room, or in the safe". After 28 August ammunition for that purpose was made available in the battalion. He would rate accused's performance of his duties as platoon leader as "excellent". On examination by the court, Captain Kruse

further testified that no instructions regarding guard duty had been given in Company F between the time the accused joined the company and 28 August; that, while he did not obtain the services of an armed guard on the occasions when he personally acted as battalion duty officer and conducted prisoners to and from the stockade, he could have obtained an armed guard if he had applied for one; and that when he was serving as duty officer he sometimes left prisoners in the truck while conducting other prisoners to company orderly rooms but, in such cases, instructed the driver of the truck to watch the prisoners left in the truck (R. 22-23). He stated that, while this method of handling prisoners could not be considered using "due care and diligence" nevertheless it was the customary method in the battalion. To the question "Aren't instructions to the effect that all should use care and diligence in guarding prisoners?" he replied "Yes" (R. 23). As some justification for the procedure followed, he stated that these prisoners were being trained to be soldiers and that efforts were being made to reconstruct them but he admitted under questioning that their actual status was confinement and that they were not parolees.

The accused, after having his rights as a witness explained to him, elected to testify under oath in his own behalf. His testimony in no way contradicted that of the prosecution or his own official report of the escape (Pros. Ex. 5). He merely added certain facts. When he emerged from Company C orderly room he saw Private Banks "getting up out of the truck and the driver was in the front seat. I said to [the driver] where is Banks going and he said to the latrine and I said all right". At this time the accused was 30 or 40 feet from the truck and approximately 150 feet from the latrine. Banks approached the latrine at a fast walk from the south side and the accused approached it at a faster pace from the north side. The entrance to the latrine is on the east side. After Banks disappeared at the south side of the latrine he was not thereafter seen. Just beyond this latrine, a distance of 40 or 50 feet, there is another latrine. A prompt search of the area was made, but Banks was not found (R. 27-30). On examination by the court, the accused testified as follows (R. 30):

"Q. Did you call to Banks to halt?
A. No, sir.
Q. Why?
A. I asked the driver where Banks was going. He was not making a fast movement. He wasn't facing me. There was a canvas over the truck. I asked the driver where he was going and he said to the latrine and I said O.K. I turned and went to the north side of the latrine.
Q. How far was the latrine from where you were?
A. I would say about 150 feet."

5. The accused is charged with suffering "through neglect" the escape of a prisoner duly committed to his charge, in violation of Article of War 73. The evidence shows that prior to the time of the escape here

involved, the practice and methods followed in the battalion in the matter of transporting prisoners from and to the stockade, in connection with their training, were shockingly loose. There had grown up what apparently amounted to a common practice of using no arms or guards whatever in connection with these movements of prisoners. The battalion adjutant testified that he himself when serving as battalion officer had followed this practice, but he stated that the largest number of prisoners he had ever thus escorted without arms at any one time was "2 or 3", and that if he had been escorting a dangerous prisoner he believed that he would have made an effort to obtain an armed guard. The accused's immediate commanding officer, Captain Kruse, testified that he, when serving as battalion officer and escorting prisoners, had never been accompanied by an armed guard, but he admitted that he could have obtained the services of an armed guard if he had applied for one. Also, he conceded that the practice of escorting prisoners without the use of arms and of leaving them in vehicles, watched only by the driver, did not constitute "using due care and diligence". Captain Kruse did not state what was the largest number of prisoners he had ever escorted at any one time without the use of an armed guard.

No orders or instructions in any way authorizing or countenancing the escorting of prisoners in the battalion without the use of arms were introduced or mentioned at the trial. It must be assumed, therefore, that no such orders or instructions existed and that the laxity which had developed in the battalion in the matter of handling prisoners was the result simply of inadequate attention to administrative detail. Captain Kruse admitted that the instructions in the battalion were that "all should use care and diligence in the guarding of prisoners".

The individual responsibility of the accused as a commissioned officer must not be obscured by references to, or considerations of, the laxity of other officers. The fact that other officers, including superior officers of the accused, may have been grossly neglectful and derelict in the performance of duties similar to those which here were entrusted to the accused is at most a mitigating circumstance only; it is no defense. As a minimum, a commissioned officer is expected to exercise common sense and to employ in the performance of his official duties the same measure of care and diligence which an ordinary prudent man would employ in performing like duties in his own affairs. In the instant case, it is reasonable to assume that the accused was familiar with the rule employed by the stockade in the guarding of prisoners, namely, that not more than three prisoners may be assigned to one armed guard. It is incredible, therefore, that he did not realize that his course of conduct in going, unarmed and without an armed guard, to the stockade and receiving custody of five prisoners, with whose previous records he was entirely unfamiliar so far as appears from the record, his placing of the prisoners in the back of a truck, on the front seat of which he and the driver rode, and his departure

from the truck with four of the prisoners, leaving the fifth unguarded in the back of the truck, amounted to a serious neglect of duty. It is obvious that this loose handling of the prisoners afforded a minimum of security. The five prisoners ranged behind the accused and the driver, both of whom were on the front seat of the truck, could easily have overpowered the accused and the driver and made off in the truck. It is apparent, also, that the prisoners were free to jump out of the back of the truck, while it was in progress, and flee at will, with no fear of immediate harm. The leaving of Banks alone in the back of the truck, without even directing the driver to watch him, constituted a particularly flagrant neglect of the accused's duty to take all reasonable precautions to prevent his escape. Banks could easily have been made to accompany the accused to the orderly room, along with the other four prisoners. The most outstanding neglect of duty came, however, when the accused granted Banks permission to go to the latrine unaccompanied.

For the reasons indicated, the Board of Review is of the opinion that the evidence of record establishes, beyond a reasonable doubt, that the accused was guilty of negligence in his handling of prisoner Banks, and that such negligence resulted in Banks' escape. Such conduct was clearly a violation of the 73rd Article of War.

6. The records of the War Department show the accused to be approximately 37 years of age. He is married and has one child. He graduated from the University of Michigan in 1931, with a B.S. degree, and in civil life sold insurance three years, was a store manager for Goodyear Service, Inc. two years, and as a part time employment, was a breeder of small animals for the Rockefeller Foundation for six years. He enlisted in the Army in July 1940, and was commissioned a second lieutenant upon graduation from The Infantry School in July 1943.

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 and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon the conviction of an officer of violating Article of War 73.

Thomas N. Tappy, Judge Advocate.

A. Melnikoff, Judge Advocate.

William H. Gambrell, Judge Advocate.

SPJGH
CM 266247

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 Joe D. Cromwell (0-1322895), 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. In view, however, of the testimony of the accused's battalion executive officer and his company commander that each of them would give the accused an efficiency rating, as a platoon leader, of "Excellent" and in view of the mitigating circumstance, as indicated by the evidence, that the accused fell into his error through the development in the battalion of a general laxity in the matter of handling prisoners, I recommend that the sentence be confirmed but comcuted to a reprimand and forfeiture of $50 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 recommendation hereinabove made, should such recommendation meet with approval.

Myron C. Cramer

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

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

(Sentence confirmed but commuted to reprimand and forfeiture of $50 per month for three months. G.C.M.O. 3, 5 Jan 1945)

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

(211)

SPJGK
CM 266248

14 NOV 1944

UNITED STATES	)	INFANTRY REPLACEMENT TRAINING CENTER Camp Blanding, Florida.
v.	)	Trial by G. C.M., convened at Camp Blanding, Florida, 4 October 1944. Dismissal.
Second Lieutenant WILLIAM I. HANCOCK (O-1055312), Infantry.	)	

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

---

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

2. The accused was tried upon the following charge and specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant William I. Hancock, Company "F", 213th Infantry Training Battalion, 66th Infantry Training Regiment, Camp Blanding, Florida, did at Camp Blanding, Florida, on or about 12 August 1944, with intent to defraud, wrongfully and unlawfully make and utter to Second Lieutenant Paul M. Obst, Company "C", 213th Infantry Training Battalion, 66th Infantry Training Regiment, Camp Blanding, Florida, a certain check in words and figures as follows, to wit:

COLUMBUS BANK AND TRUST COMPANY 64-60
Main Office

(Seal)

Columbus, Georgia, 12 Aug 1944

PAY TO THE ORDER OF Cash $ 30.00

Thirty and - - - - - - - - - - - - - - - - - - - 00/100 DOLLARS

(Member)
NO _____ (Federal Reserve) /s/ William I. Hancock,
(System) 2nd Lt. Inf. 01055312

and by means thereof did fraudulently obtain from Lieutenant Obst thirty dollars ($30.00) lawful money of the United States, he, the said Second Lieutenant William I. Hancock, then well

knowing that he did not have, and not intending that he should have sufficient funds in the Columbus Bank and Trust Company, Columbus, Georgia, for the payment of said check.

Note: Specifications 2 and 3 are identical in form with Specification 1, except as to dates, amounts, drawee bank and names of persons defrauded, which exceptions are as follows:

Spec.	Date	Amount	Drawee Bank	Person Defrauded
2	19 Aug. 1944	$50.00	Columbus Bank and Trust Co.	2nd Lt. Armando J. Garville
3	1 Apr. 1944	$50.00	El Paso Nat'l Bank	2nd Lt. Richard H. Thomas

Specification 4: In that Second Lieutenant William I. Hancock, * * *, did, at Camp Blanding, Florida, on or about 27 July 1944, with intent to deceive Lieutenant Colonel Joseph Argilla, Battalion Commander, 213th Infantry Training Battalion, 66th Infantry Training Regiment, Camp Blanding, Florida, officially report to the said Lieutenant Colonel Argilla, that the balance in his bank account at the El Paso National Bank, El Paso, Texas, on or about 12 March 1944, was six hundred and thirty nine dollars ($639.00), which report was known by the said Second Lieutenant William I. Hancock to be untrue.

Specification 5: (Withdrawn before arraignment by order of reviewing authority).

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 "only so much of the findings of guilty of Specifications 1, 2 and 3 of the Charge as involves findings that accused did, at the times and places alleged, respectively, wrongfully make and utter the checks described without sufficient funds in the banks on which drawn for the payment of said checks, in violation of Article of War 96", approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

In view of the action of the reviewing authority in modifying the findings as to Specifications 1, 2 and 3, it is not necessary to recite all of the evidence relating to these specifications. The material evidence in support of the approved findings of guilty as to these specifications is as follows:

Specification 1. On or about 12 August 1944 the accused issued his personal check for $30.00 on the Columbus Bank and Trust Company, Columbus, Georgia, payable to "Cash" (Ex. 1). This check bears the endorsements, in the order named, of P. M. Obst, C. Warren Plummer, and Armando J. Garville, all second lieutenants. At the time of the trial Lieutenants Obst and Plummer had been transferred from Camp Blanding. Lieutenant Garville received the check from Lieutenant Plummer and cashed it at the Camp Blanding Post Exchange (R. 7). On or about 11 September 1944 Lieutenant Garville was notified that the check had been returned and during the last week of September he "made the check good". Later during that week the accused reimbursed Lieutenant Garville (R. 7,8). On the date on which the check appears to have been issued, 12 August 1944, the accused had to his credit in the drawee bank $50.97. There is no evidence that the check was actually presented to the bank for payment. Three days later, 15 August 1944, the bank charged accused's account with an item of $24.25, thus reducing his credit balance to $26.72. No deposits were thereafter made in the bank in the month of August to the credit of accused (R. 8, Ex. 2).

Specification 2. On 19 August 1944 the accused issued his personal check for $50.00 on the Columbus Bank and Trust Company, Columbus, Georgia, payable to "Cash", and by means thereof obtained from Lieutenant Garville $50.00 in cash. Lieutenant Garville cashed the check at the Camp Blanding Exchange, and on or about 11 September 1944 the check was returned to Lieutenant Garville (presumably by the Camp Blanding Exchange) who "made it good". Lieutenant Garville stated that he was reimbursed by the accused on the morning that he, witness, "made it good" (R. 89, Ex. 3). The records in the drawee bank show that on 19 August, the date the check was issued, accused had to his credit $25.72, and that no subsequent deposits were made by accused during that month (Ex. 2).

Specification 3. It was stipulated that if Second Lieutenant Richard H. Thomas were present and sworn as a witness, he would testify that on 1 April 1944 he paid the accused $50 in exchange for the latter's personal check for that amount, drawn on the El Paso National Bank; that the check "was presented for payment several times and payment was refused"; that he (Thomas) later destroyed the check; and that on or about 27 July 1944 the accused reimbursed him fully by paying him $50 (R. 10,Ex. 4). Five copies of bank statements, identified by the stipulated testimony of the cashier of the El Paso National Bank, El Paso, Texas, as true statements, for the periods and dates shown thereon, of the only checking accounts which accused had with that institution, were introduced in evidence without objection (R. 10, Ex. 5). The first of these statements was for February 1944 and was a statement of a joint account of accused and Mrs. Dorothy V. Hancock (wife of accused). It carried accused's address as Fort Bliss, Texas, and listed an overdraft of $3.39 under date of 10 February 1944. No later entries appear on the February statement. The statement for March 1944, as well as each subsequent statement introduced in evidence, shows the

account to have been carried in the name of accused, alone, and lists his address as "Muroc AGF, Muroc, California". The statement for July was stamped, "Hold, Address Incorrect". The statement of accused's individual account for March 1944 shows a deposit of $251.20 on 8 March, a balance of $57.20 on 12 March, and a balance of $6.41 as of 24 March. No additional deposit appears to have been made to the credit of this account until 2 June 1944, at which time $100 was deposited. During the time intervening between 24 March and 2 June accused's balance was reduced to $2.81 by a series of debits, ranging in amounts from 25 cents to 86 cents, entered on 4, 5, 7, 10, 17, and 18 April, and on 9 and 31 May, respectively. The accused testified, on examination by the court, that these debits represented charges made by the bank in connection with returned checks (R. 18). The balance on deposit to accused's credit in the El Paso National Bank on 1 April 1944 (date of check in question) was $6.41.

Specification 4 (False official statement): The original of an instrument in writing dated 27 July 1944, identified by Lieutenant Colonel Joseph Argilla as bearing accused's signature and being the fifth indorsement on a letter he had written to accused requesting an explanation, was introduced in evidence without objection (R. 11, Ex. 6). Reference to this statement discloses that accused represented to his commanding officer that on or about 12 March 1944 he had to his credit in the El Paso National Bank $639. It will be noted in the recital of the evidence relating to Specification 3 that, according to the records of the bank (Ex. 5), the accused's credit balance in the El Paso National Bank on 12 March 1944 was $57.20, and that no subsequent deposit was made by accused in that bank until 2 June 1944.

4. Having had his rights with reference to testifying explained to him, the accused elected to testify under oath. In response to the question, "Lt. Hancock, at the time you issued the checks in question here, did you honestly believe yourself that there were funds in the bank to meet these checks?", accused replied, "I did" (R. 12). Accused made a similar response to the question whether at the time he represented to Colonel Argilla that his (accused's) bank balance on 12 March 1944 in the El Paso National Bank was $639 he honestly believed such representation to be true (R. 13). Accused stated that before entering the Army, he was engaged in business in Winchester, Virginia. When he entered the military service he turned the business over to his wife, and she managed their bank account. He stated that when his wife joined him at Fort Bliss, Texas, they opened a joint bank account in the El Paso National Bank (R. 13). The bank statements were sent to his wife at their home and he never paid any attention to them. In January 1944 accused was transferred from Fort Bliss, Texas, to Muroc Army Air Base, Muroc, California (R. 18). His wife did not accompany him to his new station. As he was about to depart from Fort Bliss, he asked his wife about their financial condition and she told him that they had approximately $800 in the bank (R. 13,14). His wife corresponded with

him after he reached Muroc and continued to tell him that he had "enough money" (R. 14). Accepting his wife's statement that they had approximately $800 on deposit when he left Fort Bliss and deducting therefrom her average living expenses and checks drawn by himself, he estimated that he had $639 on deposit at the time he went on leave in March (R. 14). Accused stated that he kept no record of the checks which he wrote (R. 18). He issued a number of checks while on leave, one to "Mr. Crumlick" of Miami, Florida, for $100, and gave Lieutenant Thomas the $50 check involved in Specification 3 after returning from his leave (R. 13). His wife closed their joint account without his knowledge, deserted him in March (according to his best recollection) (R. 14), and they have since been divorced. Accused testified that the first notice he received of the account's having been closed was when "Mr. Crumlick" notified him at Fort Benning, Georgia, of the bank's failure to honor his check (R. 19). He did not know who held checks which had not been paid, and had to wait until the holders contacted him. "At Fort Benning all the checks caught up with me at one time and I was doing my best to make them good"(R. 13). Accused testified that he never received any bank statements from the El Paso National Bank and knew nothing about the account in that bank being changed from a joint account to his individual account in March (R. 16). His pay check was being sent to the bank at that time and he assumed that after his wife closed the joint account the bank just opened the individual account upon arrival of his check (R. 16). He never attempted to contact the El Paso bank at any time, either before or after being notified that his account was closed, for the purpose of ascertaining the condition of his bank account (R. 19). In his own words:

> "I had a letter [Crumlick's] saying that the account was closed. I assumed she [accused's wife] closed it. I had all these checks outstanding and I immediately contacted these people and started making them good" (R. 19).

Just before leaving Fort Benning to go to Camp Blanding accused received a check for $216.65 from one Thomas S. Biggs, which he deposited, together with $100 in cash, in the Columbus Bank and Trust Company, Columbus, Georgia. He was using this money to pay off the checks he had previously issued. The Biggs check was worthless and accused had to make restitution to the bank to cover it. This, according to his version, threw him "all out of kilter with the bank account" and was responsible for the two bad checks involved in Specifications 1 and 2 (R. 13). Accused testified that he has made good all checks which he has written (R. 14).

Colonel Argilla testified that for the eight week period following the time accused joined his organization on 9 July 1944 the latter's company commander gave accused three ratings of "very satisfactory" and five of "excellent" in weekly ratings on general efficiency (R. 12).

5. <u>Specifications 1, 2 and 3.</u> Under the approved findings the offenses

of which accused stands convicted under these specifications are those of wrongfully making and uttering the checks without having sufficient funds on deposit in the banks upon which they were drawn to meet them, in violation of Article of War 96. Neither an intent to defraud nor actual knowledge on the part of the drawer that his bank balance is insufficient to meet checks given by him is essential to constitute the making and uttering of worthless checks an offense under Article of War 96.

> "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, 1 Bull. JAG 215)". (CM 249006 (1944), III Bull. JAG 290.)

> "* * * A member of the military establishement is under a particular duty not to issue a check without maintaining a bank balance or credit sufficient to meet it. 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 conduct to the discredit of the military service, the burden of showing that his action was the result of an honest mistake, not caused by his own carelessness or neglect. CM 249232 (1944), II Bull. JAG 290". (underscoring added.)

The evidence of record adequately establishes that accused made, uttered and received value for the three checks in question, and that the check for $50 drawn on the El Paso National Bank (Specification 3) was presented for payment several times without its being honored. There is, however, a lack of proof that the two checks drawn on the Columbus Bank and Trust Company (Specifications 1 and 2) were presented to and payment thereof refused by that institution. On the date on which the check for $30 was issued, accused actually had with the drawee bank a credit in excess of $50. This balance was reduced to $26.72 on 15 August as a result of a charge against accused's account of $24.25. While no further deposits were made in the month of August, there is no testimony as to the status of the account in the month of September. It is frequently proper to draw inferences from established facts, but the Board is of the opinion that neither the trial court nor the Board has the right to speculate on what may have occurred in the absence of proof of presentation or of facts from which it may conclusively be inferred that there was a presentation to the drawee bank and a refusal of payment by it. The reviewing authority by its action has exonerated accused of any fraudulent intent; consequently the gravamen of the offense with regard to these checks is the discredit brought upon the service by their non-payment upon presentation because of lack of funds on deposit or lack of arrangements with the bank for their payment. There being proof neither of the presentation of these two checks to the Columbus Bank and Trust Company nor of the bank's refusal to honor them, the Board is constrained to hold the record legally insufficient to support the findings of guilty of Specifications 1 and 2.

"It was incumbent on the prosecution to establish that accused did not have sufficient funds or credits in the respective banks upon which the checks were drawn to pay the checks when presented (underscoring added). There is no competent evidence to prove this essential element of the offense charged. The mere statement of the witnesses who cashed the checks that they were returned because of 'no account' or 'not sufficient funds' can hardly be said to be proof of this fact (CM 121721, Graydon). It has been held that notations such as 'Not Sufficient Funds' and 'No Account' on returned checks or on slips attached to the checks are not competent to prove that the maker of the checks had insufficient funds or had no account in the bank to meet the checks (Dig. Op. JAG, 1912-40, Sec. 395 (16); See also CM 204927, Parsons). It may be true that such a notation on a returned check would be accepted in every day commercial affairs as proof that the drawer of the check did not have sufficient funds to meet the check but it cannot be accepted in a court of law to prove an essential element of a criminal offense, without holding that the rules of evidence permit the reception, without preliminary foundation, of the unsworn statement of an unknown person." (CM 243091, McCarthy, 31 B.R. 273, III Bull. JAG (April 1944) 150).

The record, however, is sufficient to maintain the finding of guilty of Specification 3, as approved by the reviewing authority. The stipulation that if Lieutenant Thomas were present he would testify that the check had been presented several times and the payment thereof refused (Ex. 4), fortified by the evidence of lack of sufficient funds in accused's account in the drawee bank at all times between 13 March and 1 June 1944 to meet this check (Ex. 5) and accused's acknowledgment of his failure to ascertain the status of his account, fully justifies the approved findings.

Specification 4 (False official statement). The falsity of accused's representation to Colonel Argilla of 27 July 1944 that on 12 March 1944 he had $639 on deposit in the El Paso National Bank, El Paso, Texas, is clearly established. The evidence conclusively shows that on 12 March 1944 accused's credit balance was only $57.20. His contention that on 27 July 1944 he honestly believed his credit balance in the El Paso bank was $639 as of 12 March 1944 is incredible. If the accused was under any misapprehension as to his bank balance at the time he went on leave, such misapprehension must have been removed when the bank refused payment of checks written by him while on leave. Admittedly accused had received notice of the return of some of his checks by the El Paso bank between 12 March 1944 and the date of his statement to Colonel Argilla, 27 July 1944. The letter to which accused was replying, while not introduced in evidence, obviously must have been an official request for an explanation of the Thomas check for $50 mentioned in accused's reply. This was a proper matter for accused's commanding officer to inquire about and accused's

reply was of course an official statement. Accused could scarcely have had any purpose in making a false representation except to deceive his commanding officer as to the circumstances under which he had issued the check to Lieutenant Thomas. The record is legally sufficient to support the finding of guilty of this specification and the making of a false official statement knowing it to be false and with intent to deceive is a violation of Article of War 95 (Dig. Op. JAG 1912-40, par. 453 (18)).

6. War Department records disclose that this officer is 28 years of age. He is a high school graduate and attended Miami Business College for one and one-half years. He joined the Army as an enlisted man on 12 August 1937 and remained in the service until 11 July 1940. He was stationed in the Canal Zone from August 1937 to December 1939. He was operating a tap room in Winchester, Virginia, at the time of reentering the service on 1 June 1942. He attained the grade of corporal as an enlisted man, attended Officers' Candidate School, Antiaircraft Artillery, was commissioned a second lieutenant, Army of the United States, on 29 April 1943, and entered on active duty the same date.

7. The court was legally constituted and had jurisdiction of the person and the offenses. Except as noted, no errors injuriously affecting the substantial rights of 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 Specifications 1 and 2 of the Charge, but legally sufficient to support the findings of guilty of Specification 3 of the Charge as approved by the reviewing authority, Specification 4 of the Charge, the Charge, 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 a conviction of a violation of Article of War 96.

Guy E. Zore, Judge Advocate.

Earle L. Stephens, Judge Advocate.

Norman Mayer, Judge Advocate.

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William I. Hancock (0-1055312), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specifications 1 and 2 of the Charge, but legally sufficient to support the finding of guilty of Specification 3 of the Charge in violation of Article of War 96 (worthless check for $50) as approved by the reviewing authority, and the findings of guilty of Specification 4 of the Charge and the Charge in violation of Article of War 95 (false official statement), and the sentence and to warrant confirmation of the sentence.

3. This office has been officially advised by the Commanding General, Fourth Service Command, that additional charges have been received at his headquarters against the accused for desertion (eight days) terminated by apprehension. This accused has no proper appreciation of the duties and responsibilities of a commissioned officer. I recommend that the sentence 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 into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

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

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

(Findings of guilty of Specifications 1 and 2 disapproved. Sentence confirmed. G.C.M.O. 8, 5 Jan 1945)

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

SPJGN
CM 266302

2 NOV 1944

UNITED STATES	)	MIDDLETOWN AIR SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Laurinburg-Maxton Army Air Base, Maxton, North Carolina, 24, 25, 26 and 27 July 1944. Dismissal, total forfeitures, and confinement for fifteen (15) years.
Second Lieutenant JAMES H. BROWN, JR. (0-763870), 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 Charges and Specifications:

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

Specification: In that 2nd Lt. James H. Brown, Jr., 810th AAF Base Unit, Section C, did, at Laurinburg-Maxton Army Air Base, on or about 3 June 1944, forcibly and feloniously, against her will, have carnal knowledge of 2nd Lt. Helen A. Sabatini, ANC.

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

Specification: In that 2nd Lt. James H. Brown, Jr., 810th AAF Base Unit, Section C, did, at or near Laurel Hill, North Carolina, on or about 4 June 1944, with intent to commit the felony of rape, commit an assault upon Cpl. Yvonne M. Otti, WAC, by seizing said Cpl. Yvonne M. Otti, WAC, and wilfully and feloniously attempting to have carnal knowledge of her forcibly and against her will.

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 for life. The court recommended that clemency be extended by a reduction of the period of confinement to fifteen (15) years. The reviewing authority approved only so much of the sentence as provides for dismissal, total forfeitures and confinement at hard labor for fifteen (15) years, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: The accused and Second Lieutenant Helen A. Sabatini, Army Nurse Corps, both stationed at Laurinburg-Maxton Army Air Base, North Carolina, attended a dance together at the Officers' Club at the base on Saturday night, 3 June 1944. They had met for the first time at a dance at the club on the preceding Wednesday night and had gone to a movie together on Thursday night. Lieutenant Sabatini was single, about 34 years old, and weighed 112 pounds (R. 8, 9, 19).

They left the dance on Saturday night about midnight in the car of the accused but instead of complying with Lieutenant Sabatini's request to be returned to her quarters accused drove off in the opposite direction. Accused was angry because she wished to go home and brushed aside her objections to the route he was taking. He was sober having had only two drinks, as had Lieutenant Sabatini (R. 10). After driving around the base for ten or fifteen minutes accused drove off the road and brought the car to a stop in a lonely spot surrounded by trees and bushes. No barracks or buildings could be seen and no cars passed by the area (R. 11, 31). He put his arm around her and they engaged in some "love making and petting" (R. 29). She did not say anything because he had been angry and she did not wish to antagonize him further (R. 11). Accused asked her to move into the rear seat or to move over so he would not be under the steering wheel but she replied that she was comfortable where she was sitting. Thereupon he got out of the car, came around to her side, grabbed her by the hair, pushed her down in the seat and held her. She "screamed and hollered and was crying". After holding her down awhile he allowed her to get up and she said, "You know, after all you are an officer and on a post like this * * * you can't expect to get away with anything like this, * * * You can get a court-martial". Accused replied he did not care, he was going to "have" her. Lieutenant Sabatini attempted to run from the car but tripped on the long skirt of the evening dress she was wearing and fell. Accused, pursuing her, fell on top of her. He put his hand over her mouth to stifle her screams and she bit his right index finger so hard that her teeth went through the skin (R. 10, 12). Accused struck her across the mouth, pulled her hair and pounded her repeatedly on the head. She told him he could kill her but she would not submit and he rejoined "I will kill you, I will, I will". She was menstruating at the time and so informed him but he stated he would "have" her anyway. She was afraid and because she "knew" that if she resisted further he would kill her she finally consented. Accused pulled her over to the car, took out an old quilt, spread it on the ground and they

engaged in sexual intercourse (R. 13, 20). When the act was completed he said to her, "You hate me now, don't you?" and because she was still afraid of what he might do she said "No" and submitted to his kisses. They entered the car and returned to her quarters. It was then about 1:45 Sunday morning (R. 13-14). Accused tried to put his arms around her but she "slunk" away and went inside (R. 24).

She found that the straps on her evening dress were torn as were the seams of the dress. When she combed her hair it came out in bunches where accused had pulled it. There were scratches on her arm and shoulder and a bruise on her lip. Within fifteen minutes after arriving home she went to the room of a close friend, Lieutenant Florence Dickson, and related in full detail her experiences. Lieutenant Dickson observed that Lieutenant Sabatini was very unsteady, upset and nervous, and had bruises and scratches on her body to which they applied salve (R. 14-15, 52, 54-56). After discussing the matter it was decided that it was best not to make a complaint against accused (R. 15).

Accused telephoned Lieutenant Sabatini around noon on Monday and asked her to go for a ride. She told him he was "a heel" that he had no business calling her, and that he could be court-martialled for what he had done. He retored, "Why don't you try it?" Lieutenant Sabatini thereupon went to her superior, Captain Lawrence J. Radice, Medical Corps, and made a report of the affair (R. 16). Captain Radice examined her and found scratches on the right arm and shoulder and a hemmorhage on the right upper lip. Captain Radice on 7 June 1944, also examined accused and found two small lesions on the right index finger which could have been caused by a bite (R.50-51).

Accused telephoned Sergeant (then Corporal) Yvonne M. Otti, of the WAC section at the base on Saturday evening, 3 June 1944, and made an engagement to meet her the following evening in Laurinburg, North Carolina. Sergeant Otti had never met the accused previously but had seen him around the base (R. 59-60). She was 35 years old and weighed about 126 pounds (R. 71). They met at Laurinburg as planned and drove to the nearby town of Hamlet for dinner on the way drinking some whiskey from a bottle which the accused carried (R.60-61). They had a drink at the restaurant before dinner and another afterwards and then drove back toward Laurinburg pausing to have another drink on the return trip. They passed through a small town, Laurel Hill, where accused turned off the road and parked in a school yard. It was then about 9:30 p.m. (R. 61-62, 103-104).

Accused put his arm around Sergeant Otti and kissed her. She withdrew from his embrace and he grabbed her by the shirt and pulled her close. He contemptuously asked her if she was menstruating or had gonorrhea. She again withdrew and he jumped out of the car, came around to her side

and pushed her down in the seat. He wedged in between her legs, exposed himself and attempted to make penetration. Sergeant Otti grabbed hold of the steering wheel and tried to get up but he pushed her down and beat her on the head. She commenced to cry which angered him and he said he was used to getting what he wanted and would continue the struggle if it took all night. He also said that she could not get him into trouble because he was an officer and his word would be taken before hers and also that he had buddies who would say they had "lain" her the same night (R. 62-63, 68, 84). During the struggle she saw the headlights of a passing car and screamed for help. Her screams were heard in the home of Lester Mayfield who lived near the school grounds and also in the home of A. W. Edwards located about 150 feet away (R. 33-34, 97-98). Accused then struck her a "terrible blow" on the jaw with his fist which stunned her and made her teeth ache. Seizing her by the throat he threatened to kill her if she made another outcry. She pleaded with him saying she did not "go" for that sort of thing and he asserted he would show her what she had been missing. Accused said he would find out if she was a virgin and inserted his finger in her private parts causing intense pain. He continued to struggle with her, attempted to unbutton her coat and shirt, unfastened the garters to her girdle and "attempted to do it" but without success. Finally, becoming enraged, he seized her by the head, struck her head against the windshield and threw her out of the car (R. 64, 68). He had mentioned something about a blanket and now went around to the back of the car. Sergeant Otti told him she had to go to the bathroom and was going back of the school. He remarked if she did not return in five minutes he would come after her. When she reached the rear of the building Sergeant Otti commenced to run and made her way to the Mayfield home where she related to Mr. Mayfield what had happened to her (R. 33-34, 65-66). Mr. Mayfield noted that Sergeant Otti was very nervous, her uniform was untidy, her knees were skinned, her face was bruised, and her hair was down. After she had washed up, Mr. Mayfield drove her back to the base which was reached about 1 a.m. (R. 36, 43-44).

The following day Sergeant Otti found she had a cut on her chin, the ridge of her nose was black and blue, there were bumps on her head, and she ached "all over". That morning she told a barracks mate about the attack on her. The discoloration around her nose increased and she developed a "shiner" (R. 72-73). On Tuesday her superior questioned her about the cause and she thereupon made a report of the incident (R. 74-75). She had not made a report earlier because she realized she had broken the rules by going out with an officer (R. 76). A physical examination of Sergeant Otti on 6 June 1944, disclosed a series of bruises, abrasions, lacerations and contusions on the face, jaw, neck, arms and knees (R. 94, 97).

In a statement (Ex. 5) given to the investigating officer in the case accused admitted having sexual intercourse with Lieutenant Sabatini

but asserted that she cooperated and consented without any coercion on his part. Concerning Sergeant Otti he asserted that they had been familiar but that she balked at sexual intercourse and indicated a desire for unnatural intercourse which caused him to become disgusted and strike her. He denied any intent of securing sexual intercourse by force (R. 108-111).

4. Evidence for the defense: Accused testified that he was 26 years old, married but awaiting a final decree of divorce, and had been in the military service six and one-half years, being stationed in the Hawaiian Islands most of that time (R. 178, 179, 241). His weight was about 185 pounds (R. 296). When he met Lieutenant Sabatini at the Officers' Club on Wednesday night, 31 May, she was very attentive to him, sat very close to him and rested her hand on his leg and inquired if he did not think she had shapely breasts (R. 181, 189-191). They had a "date" the following night and before saying good night they sat in his car by the Nurses Quarters for almost an hour engaging in "every intimacy except actual intercourse". She told him she was menstruating but it would be over in a day or two and then they could have "a good time" (R. 182, 192).

They attended the dance at the club on Saturday night, and drank about a quart of liquor with another couple. About 11:15 p.m. they left the dance and drove to his room in the Bachelor Officers' Quarters to pick up some more liquor. She was coming in with him to his room but was dissuaded by the presence of two enlisted men. They then drove to the Nurses Quarters. Lieutenant Sabatini intended to change her evening dress but decided against it and they sat in the car until around midnight and "made love". Lieutenant Sabatini suggested they "get out of here" so he drove away from the Nurses Quarters and finally turned off a side road and parked (R. 184-185, 195-197). They engaged in kissing, petting and other intimacies and finally he suggested they leave the car and go further from the road to a spot where they could lay down a blanket and not be seen. She willingly accompanied him and as they walked the lights from a car passing by on the main road were cast in their direction which caused Lieutenant Sabatini to hurry and she fell down (R. 216, 218). He spread the blanket down and they continued their "love making". She told him her period of menstruation was about over and removed the Kotex while he removed his trousers and shorts. They then engaged in intercourse. Everything he did was with her consent. While engaged in the sexual act an airplane flew over preparing to land, its landing lights illuminating the area and causing Lieutenant Sabatini to express her fear that they had been seen. When they finished she put on a fresh Kotex and they drove back to the Nurses Quarters where they kissed and said good night (R. 219-221).

Concerning Sergeant Otti accused denied that he ever had any intent to rape her. He testified that after they had left Hamlet, Sergeant Otti placed her hand on his leg and "caressed" it. She did not object when he parked in the school yard and acquiesced in his "fondling and love making". They discussed sexual intercourse and she said "she did not do it that way" (R. 229-230). She asserted that she was a virgin and when he expressed disbelief she permitted him to put his hand on her sexual organs. He concluded she was a virgin and made no further advances but she unbuttoned his trousers and played with his sexual organs. He said "Don't do that" but she continued and maneuvered her body so that her head was six or eight inches from his sexual organ (R. 231-259-262). He decided that she was a pervert, and in anger pushed her out of the car and beat her over the head (R. 232, 236). She got up, asked to be excused in order "to take a leak", and disappeared back of the building. She did not return and as there was no answer to his calls he drove back to the base without her (R. 232-234).

Flight Officer Sheldon P. Johnson recalled seeing accused and Lieutenant Sabatini dancing together at the Officers' Club on Wednesday, 31 May. Lieutenant Sabatini danced very close to accused and kept "shoving her body up into Lieutenant Brown's body". At the end of the dance she pulled him close to her. Later she was sitting very close to accused and kept pulling at his trousers pocket (R. 147-151). Two enlisted men who were on duty at the Bachelor Officers' Quarters on Saturday night, 3 June 1944, testified that on that night accused came to his quarters in his car with a woman who started to enter but returned to the car when she saw them (R. 121-122, 136-141). One of the men thought the woman was about 25, around 5 feet, 5 inches tall and wore a blue evening dress (R. 123). On cross-examination he admitted he was uncertain as to the date of the incident (R. 129).

First Lieutenant Mary E. Doyle, Commanding Officer of the WAC Detachment at the base, attested to the good reputation of accused on the base. She had known him personally for about four months (R. 161-162).

5. Rebuttal testimony for the Prosecution: Lieutenant Sabatini identified a pale yellow evening dress (Pros. Ex. 9) as that worn on the night of 3 June (R. 317-325). She testified her height was 5 feet (R.320).

6. The Specification under Charge I alleges that the accused "did, at Laurinburg-Maxton Army Air Base, on or about 3 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Second Lieutenant Helen A. Sabatini, ANC". The Specification under Charge II alleges that accused "did, at or near Laurel Hill, North Carolina, on or about 4 June 1944, with intent to * * * rape, * * * assault * * *

Corporal Yvonne M. Otti, WAC, by seizing * * * [her] * * * and wilfully and feloniously attempting to have carnal knowledge of her forcibly and against her will". The former offense is laid under Article of War 92 and the latter under Article of War 93. Accused is thus charged with the crimes of rape and assault with intent to rape on successive days. The principles involved in the offenses and the pertinent evidence thereunder will be considered.

Rape is defined by the Manual for Courts-Martial (par. 148b) as "unlawful carnal knowledge of a woman by force and without her consent". The Manual further provides:

> "Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.
>
> "Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent."

Concerning the element of consent it has been further said:

> "Consent, however reluctant, negatives rape; but where the woman is insensible through fright, or where she ceases resistance under fear of death or other great harm (such fear being gaged by her own capacity), the consummated act is rape" (Wharton's Criminal Law, Vol. 1, Sec. 782).

The evidence in this case presents the not unusual situation of directly conflicting testimony by the prosecuting witness and the accused on the question of consent. This issue of fact was decided by the court against the accused. Although their determination does not, of course, preclude the Board from reaching an opposite conclusion, nevertheless, considerable weight must be accorded their findings by reason of the superior position which the court enjoyed in seeing the witnesses and hearing them testify (CM 153479, Dig. Ops. JAG, 1912-40, sec. 395(56)).

Independent of this consideration the Board believes that the greater weight of the evidence compels the same conclusions as that reached by the court. It is clear that Lieutenant Sabatini offered determined resistance to the efforts of the accused to such extent as to cause him to visit considerable violence upon her person. She sustained a hemorrhage of the lip, her shoulder and arm were scratched, and her hair was pulled out in bunches. The dress she wore was ripped on the

straps and at the seams. Her resistance is also shown by the lesions on the finger of accused caused when she bit him deeply as he attempted to stifle her screams. The fact of resistance is apparent and the only question presented is whether such resistance was commensurate with that required under the circumstances. It must be remembered that there was great physical desparity between Lieutenant Sabatini and the accused, she a small woman weighing only 112 pounds, he a man of 185 pounds. The scene of cohabitation was an isolated spot on the air base away from any barracks, habitation or building from which any aid or assistance might be forthcoming. The time was the small hours of the morning. Her appeals not to be molested were unheeded, her threats to bring him before a court-martial were contemptuously spurned. An attempt to flee from the scene came to naught when she tripped on the skirt of her evening gown. Her screams brought nothing but an increase of violent behavior on his part. Her mind was filled with great fear and trepidation by reason of his angry threats to kill her unless she submitted to his carnal designs. Under these circumstances can it be said that she should have continued the unequal and futile struggle? The law does not require that a woman defend her virtue to the extent of placing her life in imminent peril. There are occasions where physical resistance is not only futile but foolhardy in the extreme. Where a woman ceases resistance under these conditions the ensuing coition is not rendered less an act of rape.

The fact that as soon as she reached her quarters Lieutenant Sabatini went to a friend and complained of being ravished corroborates her claim that she was raped. It is difficult to discover any possible motive she might have in falsely charging the accused with rape if she had voluntarily engaged in an assignation in the very free and casual manner which the testimony of accused suggests. The intimation in the testimony of accused that her complaint was prompted by the fear that she had been seen in the act of intercourse when a plane, with its landing lights on, passed overhead, is so fanciful as to be unworthy of serious consideration. The Board concludes that the evidence establishes beyond reasonable doubt the guilt of accused on the charge of rape.

The second offense with which accused is charged is assault upon Sergeant Otti with intent to rape. The assault is admitted but the circumstances giving rise thereto are in dispute. Accused admitted making sexual advances toward Sergeant Otti but claims he desisted when she stated she was a virgin. He explains the assault as caused by the subsequent behavior of Sergeant Otti which indicated she wished to engage in an unnatural sexual practice. His testimony in this connection is wholly unconvincing. Further, it labels him as a mendacious and unprincipled individual of the basest sort, willing, in his attempt to exculpate himself, not only to commit perjury on the witness stand but to blacken the reputation of the woman so unfortunate as to have become entangled with him. The version of the events of the evening given by

Sergeant Otti is entirely credible and is supported and corroborated by other reputable testimony as well as by the attendant circumstances and the physical facts. The offense is clearly proven.

7. At the request of counsel for the defense the court viewed the two areas which the accused and Lieutenant Sabatini (their testimony differing as to the scene) respectively testified was the place of intercourse. The court received testimony from accused at the one location and from Lieutenant Sabatini at the other. It was pointed out in CM ETO 611 (1943), III Bull. JAG 337, that while, in many instances, viewing the premises is helpful and informatory to the court the reception of testimony there is a dangerous practice and may be the source of fatal error. Here, however, the testimony received at the scene was purely cumulative and its reception was not substantial error.

8. The accused is about 26 years old and is twice divorced. The records of the War Department show that he completed the 11th grade of high school and attended the University of Georgia for one year. He was employed as an aircraft mechanic from August 1941 to November 1942, and as a department manager of a chemical company from November 1942 to 25 January 1943. His military service is as follows: member of the Georgia National Guard from 6 June 1935 to 6 June 1936; Reserve Officers' Training Corps student from 1 January 1937 to 1 January 1938; enlisted service (active duty) from 14 June 1938 to 1 August 1941 with highest grade that of sergeant; member Enlisted Reserve Corps (inactive status) from 1 May 1942 to 25 January 1943; enlisted service as an aviation cadet from 25 January 1943 to 7 January 1944; commissioned temporary second lieutenant, Army of the United States, and active duty 7 January 1944.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 92nd or of the 93rd Article of War.

Abner E. Lipscomb, Judge Advocate.

Robert J. Clannon, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

(230)

SPJGN
CM 266302

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James H. Brown, Jr. (O-763870), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted, that the sentence as thus modified be ordered executed, and that the United States Penitentiary, Atlanta, Georgia, be designated as the place of confinement.

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

Myron C. Cramer

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

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

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 33, 19 Jan 1945)

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

SPJGQ
CM 266441

1 NOV 1944

UNITED STATES	XXXVI CORPS
v.	Trial by G.C.M., convened at Camp Howze, Texas, 4 October 1944. Dishonorable discharge and confinement for ten (10) years. Disciplinary Barracks.
Private EDWARD F. MUGAN (17039942), Company C, 140th Infantry.	

HOLDING by the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Edward F. Mugan, Private, Company "C", 140th Infantry, did, at Camp Howze, Texas, on or about 3 August 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 Forces Replacement Depot Number 1, Fort George G. Meade, Maryland for shipment to duty overseas, and did remain absent in desertion until he surrendered himself to the civil authorities and was released to military control at Omaha, Nebraska, on or about 8 September 1944.

He pleaded not guilty to the Specification and to the Charge, but guilty of absence without leave in violation of the 61st Article of War, and was found guilty of the Specification and the Charge. Evidence of one previous conviction, by summary court-martial, for absence without leave for four days in violation of the 61st Article of War, 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 ten years. The reviewing authority approved

the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Competent evidence introduced by the prosecution established the following state of facts:

Special Orders No. 178, Headquarters 140th Infantry, Camp Howze, Texas, dated 30 July 1944 (R. 7; Ex. A), ordered the transfer of the accused, effective 5 August 1944, to Army Ground Forces Replacement Depot No. 1, Fort George G. Meade, Maryland, to report on 5 August 1944, along with a large contingent of other infantry-trained riflemen likewise transferred. Regimental S-3 Field Message No. 2, 31 July 1944 (R. 8; Ex. B) issued pursuant to the mentioned orders, gave instructions to the men so transferred concerning final showdown inspection and assembly for departure on the trains provided. The accused's group was to assemble for train No. 2, at 0430 hours on 3 August 1944. The message referred to the movement as a departure on shipment POR.

The accused's company commander (R. 7) personally read to the accused Articles of War 28 and 58 on 1 August and restricted him to the company area from about 5 o'clock on 2 August until train time. The accused was informed of the train time, and the company commander notified him of the contents of the transfer orders, informed him of the Field Message, and told him that he was going POR to Fort Meade, Maryland, and the time when his train would leave (R. 10-11). This testimony was corroborated by the First Sergeant (R. 14), who further testified that the meaning of POR shipment was explained to the accused (R. 15).

At 0315 on 3 August, the First Sergeant discovered that the accused was missing, and searched for him until 0620, but found that he was gone (R. 15). He notified the company commander (R. 15), who caused further search to be made (R. 9), but the accused was not seen in his organization until 16 September (R. 9). His absence without leave at 0330 on 3 August 1944 and return on 16 September 1944 were duly noted on the morning report (R. 13; Ex. C, D).

His surrender to civil authorities at Omaha, Nebraska, and return to military control, on or about 8 September 1944, were shown by stipulation (R. 16; Ex. E).

4. The accused testified upon oath, after explanation of his rights (R. 17), that he had an emergency furlough in March 1944, due to family trouble, at which time he went home and filed suit for divorce (R. 17-18). In July he asked for a furlough to go home and stop the divorce, as he wanted to straighten things out with his wife (R. 18). The captain told him he was on a POR shipment, but not where he was going or that he was leaving to go overseas (R. 20). He knew that POR meant Preparation for Overseas Replacement,

and knew that his shipment was going out on the morning of 3 August 1944 and that he was restricted (R. 21), but left sometime after midnight, on that morning, and went home to Omaha, Nebraska, where he effected a reconciliation with his wife, but "couldn't" take any action to stop the divorce because he was AWOL. The interlocutory decree previously entered remained in effect (R. 22). His request in July for a furlough was refused. He was in confinement at the time (R. 22-23).

5. The accused was tried on the charge of desertion with the specific intent to shirk important service, the service specified being his transfer to the Replacement Depot. Such transfer, though contemplating overseas replacement, is essentially preparatory, in the absence of a showing that it is directly related to embarkation for foreign duty depending directly and immediately upon the transfer. Accordingly, it falls short of that "actual service designed to protect or promote, in a manner direct and immediate, the national or public interest or welfare" which the decided cases recognize as constituting "important service" within the meaning of the 28th Article of War (C.M. 265447, Hodge, 21 October 1944). For all that appears, the accused might still have rejoined his shipment at Fort Meade in time for movement thence to a port of embarkation for actual departure overseas. The case, though stronger than the Hodge case in that the purpose of the shipment was communicated to the accused, is on all fours with C.M. 264237, Pattillo, 23 October 1944, and fails to disclose absence with the specific intent to avoid an imminent embarkation for foreign duty, under the established rule.

The evidence is not sufficient to sustain the conviction of desertion, but is sufficient to sustain conviction of the lesser included offense of absence without leave, in violation of Article of War 61.

6. 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 the 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 surrendered at the time and place alleged, in violation of Article of War 61, and legally sufficient to support the sentence.

Fletcher R Andrews, Judge Advocate.

Herbert B Fredericks, Judge Advocate.

[illegible], Judge Advocate.

1st Ind.

War Department, J.A.G.O., 7 NOV 1944 - To the Commanding General, XXXVI Corps, Fort Riley, Kansas.

1. In the case of Private Edward F. Mugan (17039942), Company C, 140th Infantry, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that only so much of the findings of guilty of the Charge and the Specification be approved 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 surrendered at the time and place alleged, in violation of Article of War 61. Upon compliance with the foregoing recommendation, and under the provisions of Article of War 50½, you will have authority to order the execution of the sentence.

2. In view of the policy announced in letter dated 5 March 1943 (AG 260.4 (2-12-43)), from The Adjutant General to all officers exercising general court-martial jurisdiction within the continental limits of the United States, "Subject: Uniformity of sentences adjudged by general courts-martial", it is recommended that the confinement be reduced to a period not in excess of five years. It is further recommended that the execution of that portion of the sentence adjudging dishonorable discharge be suspended until the soldier's release from confinement, and that a rehabilitation center be designated as the place of confinement.

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

(CM 266441).

Myron C. Cramer

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

1 Incl.
Record of trial.

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

SPJGH
CM 266442

16 NOV 1944

UNITED STATES	)	ARMORED CENTER
v.	)	Trial by G.C.M., convened at Fort Knox, Kentucky, 29 September and 6 October 1944. Dismissal, total forfeitures and confinement for one (1) year.
Captain EARL L. GILSON (0-391638), Infantry.	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Captain Earl L. Gilson, Infantry, Headquarters Armored Replacement Training Center, did, without proper leave, absent himself from his command at Fort Knox, Kentucky, from about 31 July 1944 to about 8 August 1944.

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

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

Specification 3: In that Captain Earl L. Gilson, * * *, did, at Fort Knox, Kentucky, on or about 12 July 1944, wrongfully borrow the sum of ten dollars ($10.00) in United States Currency from First Sergeant Ronald J. Smith, to the prejudice of good order and military discipline.

Specification 4: (Finding of not guilty).

Specification 5: In that Captain Earl L. Gilson, * * *, did, at Louisville, Kentucky, on or about 17 August 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Seelbach Hotel, Louisville, Kentucky, a certain check, in words and figures as follows, to-wit: "17 August 1944. Pay to the order of Seelbach Hotel, Twenty dollars ($20.00) Bank of St. Helens, Shively, Kentucky, Earl L. Gilson, Capt. Station Hosp. Ft. Knox, " and by means thereof, did, fraudulently obtain from the Seelbach Hotel, Louisville, Kentucky, United States Currency in the amount of Twenty dollars ($20.00) the said Captain Earl L. Gilson then well knowing that he did not have, and not intending that he should have, sufficient funds in the Bank of St. Helens, Shively, Kentucky, for the payment of said check.

Specification 6: (In substantially the same form as Specification 5, except that check drawn on the same bank was dated 19 August 1944 and was payable to the same payee in the amount of $20).

Specification 7: (In substantially the same form as Specification 5, except that check drawn on the same bank was dated 19 August 1944 and was payable to the same payee in the amount of $20).

Specification 8: (In substantially the same form as Specification 5, except that check drawn on the same bank was dated 22 August 1944 and was payable to the same payee in the amount of $25).

Specification 9: (In substantially the same form as Specification 5, except that check drawn on the same bank was dated 22 August 1944 and was payable to the same payee in the amount of $10).

Accused pleaded not guilty to all Charges and Specifications, although after the prosecution had rested he withdrew his plea of not guilty to the 61st Article of War and pleaded guilty thereto (R. 34), apparently intending to plead guilty to the Charge and the Specification thereof. He was found not guilty of Specifications 1, 2 and 4 of the Additional Charge and guilty of all other Specifications and Charges. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for two and one half 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 the 48th Article of War.

3. The evidence for the prosecution pertaining to the Specifications and Charges upon which the accused was found guilty is substantially as follows:

Specification of the Charge.

In addition to accused's inartful plea of guilty to the Charge and its Specification; the prosecution offered in evidence a duly authenticated extract copy of the morning report of Headquarters Armored Replacement Training Center, Fort Knox, Kentucky (Pros. Ex. 1), which shows the accused absent without leave on 31 July 1944. It was stipulated that if Second Lieutenant Joseph P. Camidge, Military Police Section, 1550th Service Unit, Corps of Military Police, were present he would testify that he apprehended the accused in Louisville, Kentucky, on or about 8 August 1944 (R. 11).

Specification 3, Additional Charge.

On or about 12 July 1944, accused borrowed $10 from Sergeant Ronald J. Smith, then of Company C, 9th Battalion, Fort Knox, Kentucky, of which accused was the commanding officer. It was repaid about 1 August 1944 (R. 18). Accused asked for a loan of $5 but Sergeant Smith loaned him $10.

Specifications 5, 6, 7, 8 and 9, Additional Charge.

The accused had an account in the Bank of St. Helens, Shively, Kentucky, during July and August 1944, which had been maintained for about three years (R. 19, 20). Between 16 August and 21 August the balance in the account was $7.41; between 21 August and 25 August it was not more than $6.91; between 25 August and 28 August it was $4.41; between 28 August and 7 September it was $4.16; between 7 September and 18 September it was $3.06; on 18 September a deposit of $181.95 was made, but withdrawals against the account the same day reduced the balance to zero and it so remained until a deposit of $120 was made on 22 September (Pros. Ex. 2).

The accused had borrowed $300 from this bank around May or June 1944 which he agreed to repay at the rate of $75 a month. Payments were to be made by deductions from his bank account on the first of each month. The stipulated deductions were made on the first of June, July and August and the final installment payment was made on 11 September by the accused's wife (R. 22).

A check for $20 dated 17 August 1944 and two checks dated 19 August 1944 for $20 each, all drawn on said bank, were made and uttered by the accused for cash to the Seelbach Hotel, Louisville, Kentucky. A fourth check dated 22 August 1944 for $10, drawn on said bank, was made and uttered to the same hotel by the accused for part cash ($6.25) and part payment of an account with the hotel ($3.75) (R. 27-31; Pros. Exs. 4, 5, 6, 8).

One check dated 22 August 1944 for $25 was made and uttered by the accused to the hotel (Pros. Ex. 7) but it does not appear what value was given by the hotel for this check (R. 30). The evidence does show, however, that the accused reimbursed the hotel $25 in cash for this check (R. 30).

All of these checks were dishonored by the bank upon which they were drawn because of insufficiency of funds (Pros. Ex. 2). The hotel was reimbursed the amounts due on the checks by the accused on or about 10 September 1944, after charges had been preferred and while they were being investigated (R. 27-30).

4. The rights of the accused having been explained to him he elected to remain silent.

5. In addition to accused's plea of guilty, the prosecution introduced competent evidence establishing accused's absence without leave from 31 July 1944 to 8 August 1944. The evidence sustains the findings of guilty of the Charge and Specification.

It is clear from the evidence that accused borrowed $10 from an enlisted man of his command on or about 12 July 1944, which loan was repaid the last of July or the first of August 1944. Under the circumstances here present it was a violation of Article of War 96 for the accused, an officer, to borrow from an enlisted man of his command (CM 230736, Delbrook, 18 BR 29). The evidence sustains the finding of guilty of Specification 3 of the Additional Charge.

The evidence is undisputed that the accused made and uttered to the Seelbach Hotel, Louisville, Kentucky, the checks described in Specifications 5, 6, 7, 8 and 9 of the Additional Charge; that the checks were duly presented to the drawee bank and dishonored; that at the time they were presented to the bank upon which they were drawn the balance in accused's account was woefully insufficient to pay them, his balance from 16 August 1944 through 21 September 1944 never exceeding $7.41.

The accused knew or was charged with knowledge of the state of his bank account.(CM 236070, Wanner, 22 BR 279). His issuance of the checks under the circumstances shown was clearly conduct of a nature to bring discredit on the military service, in violation of the 96th Article of War (CM 232592, Law, 19 BR 117, and cases there cited). In the opinion of the Board of Review the evidence supports the findings of guilty of Specifications 5, 6, 7, 8 and 9 of the Additional Charge and the Additional Charge.

6. The records of the War Department show that accused is 25 years of age. He attended Citizens' Military Training Camp and was commissioned a

second lieutenant of Infantry on 10 April 1940, was promoted to first lieutenant on 6 July 1942 and to captain on 8 February 1943. He was ordered to active duty 11 August 1940. He is a high school graduate and married. In civil life he was a truck driver and gas station attendant.

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

Thomas M. Jaffey, Judge Advocate.

[illegible], Judge Advocate.

William H. Gamble, Judge Advocate.

SPJGH
CM 266442

1st Ind.
NOV 27 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 Captain Earl L. Gilson (0-391638), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed, but that the forfeitures adjudged 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 inclosed letter of Mr. O. M. Rogers of Covington, Kentucky, addressed to the Honorable A. B. Chandler, United States Senator from Kentucky, and forwarded to this office through the Legislative and Liaison Division of the War Department.

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

Myron C. Cramer

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

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Ltr fr O M Rogers 4 Nov 44.
Incl 3 - Dft ltr for sig S/W.
Incl 4 - Form of action.

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 49, 27 Jan 1945)

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

SPJGN
CM 266473

25 OCT 1944

UNITED STATES	)	63D INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Van Dorn, Mississippi, 27 September 1944. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.
Private FRANK J. SANSONE (13126212), Company I, 253rd Infantry.	)	

HOLDING by 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 soldier named above.

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Frank J. Sansone, Company I, 253rd Infantry, having received a lawful command from First Lieutenant William M. MacDonald, his superior officer, to pick up pack lying on the ground and put it on, did, at Camp Van Dorn, Mississippi, on or about 16 September 1944, wilfully disobey the same.

The accused pleaded not guilty to, and was found guilty of, both the Charge and the Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for ten years. The reviewing authority approved the sentence but reduced the period of confinement to five years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The evidence for the prosecution shows that at about 10:20 a.m. on 16 September 1944, Company I, 253rd Infantry, returned to its barracks in Camp Van Dorn, Mississippi, after spending the early morning in the

field (R. 7, 9). The men were instructed to "deposit their rifles and packs in the proper place, and [to] fall out for orientation". An exception was to be made in the case of prisoners, of whom the accused was one. They were to be denied all privileges and were, among other things, to be required to "keep their packs on" throughout the orientation class (R. 9-10).

These directions were conveyed to the accused by Private John E. Zierk, a guard. The accused responded by removing his pack and refusing to put it on again (R. 7). He was the only man in the company who was not permitted to take advantage of the opportunity for rest afforded by the orientation lecture, and it was apparently his belief that, "if the rest of the troops had their packs off, he could leave his off, too" (R. 9). Having indicated his fixed determination to maintain his position, he went to see the first sergeant (R. 7).

First Lieutenant William M. MacDonald, the Executive Officer, was in the orderly room and, upon learning of the accused's recalcitrance, ordered him to be taken back to the "location where he had dropped his pack" (R. 9). Lieutenant MacDonald followed and in the presence of Zierk said: "Sansone, pick up your pack and put it on, right now. That is an order". These words were thrice repeated and thrice disobeyed (R. 7-10). The only audible comments of the accused were that he "wouldn't put the damn thing on", and "I am not going to put it on", or "I will not do it". Several times he shook his head to indicate that he would not comply. A half an hour later the pack was still lying on the ground (R. 9).

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

5. The Specification of the Charge alleges that the accused, "having received a lawful command from First Lieutenant William M. MacDonald, his superior officer, to pick up pack lying on the ground and put it on, did, . . . on or about 16 September 1944, willfully disobey the same". This offense was set forth as a violation of Article of War 64.

Paragraph 102 of the Manual for Courts-Martial, 1928, provides that:

> "Courts-martial will not impose any punishment not sanctioned by the custom of the service, such as carrying a loaded knapsack . . . Military duties, such as guard duty, drills, the sounding of calls, will not be degraded by imposing them as punishments."

Paragraph 134b states that:

> "The order must relate to military duty and be one which the superior officer is authorized under the cir-

cumstances to give the accused . . .

"A person cannot be convicted under this article [64] if the order was illegal; but an order requiring the performance of a military duty or act is disobeyed at the peril of the subordinate."

In applying the language quoted the Boards of Review have rendered the following opinions:

"Accused's company commander directed a cook to tell accused, who was then in the kitchen, to report to the supply room 'on the double'. Accused walked slowly to the supply room. Upon his arrival the company commander ordered him to 'double-time back down there to the kitchen and then double-time back'. Accused failed to obey . . . Held . . . The company commander's order, under the circumstances, was clearly intended only as a punishment. Simple 'double-timing' is not extra fatigue and is not authorized as a punishment under A.W. 104": I Bull JAG, Dec. 1942, p. 363, sec. 422 (6); see also II Bull JAG, June 1943, p. 237, sec. 422 (6).

"A commanding officer is authorized to order a soldier to go on a practice march or hike as a form of additional training, as he is authorized to order other additional training for backward soldiers, provided the additional training is reasonable, as, for example, where a soldier is not up to standard in the manual of arms, close order drill, etc. As a commander, he could no doubt order an additional practice march if the physical condition of the soldier or his state of training is such as to require it and make it a reasonable measure of training. But this is not such a case. Lieutenant X testified that this hike was ordered as a disciplinary measure for accused's neglect of the previous day. A practice march is clearly a military duty and is not in the nature of extra fatigue duty within the purview of Article of War 104. Courts-Martial are prohibited from degrading military duties such as drill by imposing them as punishments (M.C.M., 1928, par. 102, p. 92). Obviously the same prohibition applies to disciplinary punishments; military duties may not be degraded by their use as forms of punishment under Article of War 104." III Bull JAG, March 1944, p. 102, sec. 462 (1).

Carrying a pack is a military duty. Like double-timing or a practice march, it may not be lawfully imposed as a punishment. That the purpose of the order in this case was to punish the accused is obvious, for what other construction can be placed upon his being

singled out from among all of the other men of the company as the one individual to be deprived of an opportunity to rest? The fact cannot be changed or distorted by labeling it a denial of a "privilege".

There is nothing in the record to indicate that the accused was in need of additional training. And even if evidence to that effect were present, this Board could not be convinced that the appropriate place for drilling a soldier in the proper use of a pack would be an orientation class in which his burden would immediately make him conspicuous and subject him to mockery and contempt. No more effective way of degrading a military duty could be devised.

Carrying a pack after hours of drill and during a period of rest contains the same inherent vice as carrying a loaded knapsack. Both are galling to the spirit and entirely unnecessary to the discipline of an American soldier. The order given by Lieutenant MacDonald was accordingly illegal, and the accused in refusing to obey it did not violate Article of War 64.

6. The record shows that the accused is about 19 years of age; that he was inducted on 16 October 1942 at Philadelphia, Pennsylvania; and that he had no prior service.

7. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Abner E. Lipscomb, Judge Advocate.

Robert J. Hannon, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 266473

1st Ind.

War Department, J.A.G.O., 24 OCT 1944

TO: Commanding General, 63d Infantry Division, Camp Van Dorn, Mississippi.

1. In the case of Private Frank J. Sansone (13126212), Company I, 253rd Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. For the reasons stated in the holding by the Board of Review I recommend that the findings of guilty and the sentence be vacated.

2. Under the provisions of Article of War 50½, the record of trial is transmitted for vacation of the sentence in accordance with the foregoing holding.

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 266473).

Myron C. Cramer

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

1 Incl.
Record of trial.

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

SPJGK
CM 266484

(247)

25 OCT 1944

UNITED STATES v. Private CLIFTON JONES (34906835), Section F, 2114th AAF Base Unit, Pilot School, Specialized 4-E and Instructor School, Lockbourne Army Air Base.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Lockbourne Army Air Base, Columbus, Ohio, 2 October 1944. Dishonorable discharge and confinement for four (4) years. Federal Reformatory, Chillicothe, Ohio.

HOLDING by the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates.

---

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

2. The evidence is legally sufficient to support the findings of guilty of the charge and all specifications. The questions requiring consideration are (a) the legality of the approved sentence of confinement for a period of four years, and (b) the propriety of designating a Federal reformatory as the place of confinement.

3. With respect to (a), Specifications 1, 2, 3 and 6 relate to separate larcenies. The property described in each of these specifications is separately shown to be of the value of $30, $50, $8.50, and $10, respectively. Findings of guilty of these specifications authorize a maximum confinement for a period of three years (M.C.M., 1928, par. 104c) The larceny of the money described in Specifications 4 and 5 ($10 and $5, respectively) was committed from the same room at the same time (R. 6B, Exs. A and B). The ownership of the property described in Specification 4 was alleged in Second Lieutenant Dale W. Van Meter, and that covered by Specification 5 in Second Lieutenant Peter B. Vanderhoef.

4. The Manual for Courts-Martial, 1928, states:

"Where the larceny of several articles is substantially one transaction, it is a single larceny even though the articles belong to different persons. Thus, where a thief steals a suitcase containing the property of several individuals, or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification." (M.C.M.,1928, par. 149g.)

Applying this principle of law to the undisputed facts in this case it is obvious that Specifications 4 and 5 involve but one larceny of property of a total value of $15, for which the maximum confinement imposable is six months (M.C.M., 1928, par. 104c). It follows that for all offenses of which accused has been found guilty the maximum authorized confinement is three years and six months, rather than four years as imposed by the court and approved by the reviewing authority (CM 232424, Smith, B.R. 19, p. 81).

5. With reference to (b), the propriety of the designation of a Federal reformatory as the place of confinement, it will be noted that paragraph 90b, Manual for Courts-Martial, 1928, provides:

> "Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, or a military post, station, or camp, will be designated as the place of confinement in cases where a penitentiary is not designated."

War Department letter dated February 26, 1941 (AG 253 (2-6-41)E), subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", authorizes confinement in a reformatory only when confinement in a penitentiary is authorized by law (CM 220093, Unckel).

The only offense of which accused was found guilty which is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by a statute of the United States of general application within the continental United States or by the law of the District of Columbia, is the offense of larceny of $50 as alleged in Specification 2 of the charge. The maximum punishment by confinement authorized by paragraph 104c of the Manual for Courts-Martial for this offense is confinement at hard labor for one year. This offense is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by the law of the District of Columbia (22 D.C. Code 2201). Although an offense of which an accused has been convicted be so recognized a penitentiary may not be designated as the place of confinement under a sentence adjudged by a court-martial,

> "unless, also the period of confinement authorized and adjudged by such court-martial is more than one year" (A.W.42).

Inasmuch as the authority for penitentiary confinement is basically conditioned by Article of War 42 upon conviction of some particular offense recognized by Federal civil statute, it is clear that the further condition pertaining to the period of confinement authorized and adjudged by court-martial likewise relates to the confinement authorized and adjudged for

that particular offense. The entire context of the article supports this view. Confinement in excess of one year not being authorized by the Manual for Courts-Martial for the offense of larceny here in question, it follows that penitentiary confinement in the case is not authorized (CM 226579, Evans, B.R. 15, p. 125).

The values of the various articles, larceny of which was found under the several specifications, may not be aggregated for the purpose of authorizing penitentiary confinement (sec. 399 (2), Dig. Op. JAG, 1912-1940).

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years and six months in a place other than a penitentiary, Federal reformatory or other correctional institution.

Judge Advocate.

Judge Advocate.

Judge Advocate.

1st Ind.

28 OCT 1944

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

TO: Commanding General,
Army Air Forces Eastern Flying Training Command,
Maxwell Field, Alabama.

1. In the case of Private Clifton Jones (34906835), Section F, 2114th AAF Base Unit, Pilot School, Specialized 4-E and Instructor School, Lockbourne Army Air Base, Columbus 17, Ohio, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years and six months in a place other than a penitentiary, Federal reformatory or correctional institution, which holding is hereby approved. Upon reduction of the term of confinement to three years and six months and the designation of a place of confinement other than a penitentiary, Federal reformatory or correctional institution, you will have authority to order the execution of the sentence.

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

(CM 266484).

Myron C. Cramer

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

1 Incl.
Record of trial.

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

SPJGK
CM 266515

21 NOV 1944

UNITED STATES v. First Lieutenant ROBERT T. FORPE (O-734222), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Roswell Army Air Field, Roswell, New Mexico, 2 October 1944. Dismissal and total forfeitures.

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

---

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

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

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

Specification 1: In that First Lieutenant Robert T. Forpe, Air Corps, Section B, 3030th AAF Base Unit, was, at Roswell Army Air Field, Roswell, New Mexico, on or about 31 August 1944, drunk and disorderly while in uniform, in the Roswell Army Air Field Officers' Club, then a public place.

Specification 2: In that First Lieutenant Robert T. Forpe, * * *, having been ordered into arrest by First Lieutenant Oliver A. Livoni, the Officer of the Day, who was then in the execution of his office, did, at Roswell Army Air Field, Roswell, New Mexico, on or about 31 August 1944, wrongfully resist said arrest by refusing to leave the Roswell Army Air Field Officers' Club as a result of which his removal therefrom by force was required.

CHARGE II: Violation of the 63rd Article of War. (Finding of not guilty.)

Specification: (Finding of not guilty).

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

Specification: In that First Lieutenant Robert T. Forpe, * * *, having received a lawful order from Colonel Walter L. Wheeler,

his superior officer, to "leave the Club at once", or words to that effect, did, at Roswell Army Air Field Officers' Club, Roswell Army Air Field, Roswell, New Mexico, on or about 31 August 1944, fail to obey the same.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge II and its Specification, guilty of the specifications of Charge I, of Charge I, not guilty of a violation of Article of War 95 but guilty of a violation of Article of War 96, and guilty of Charge III and its Specification. Evidence of one previous conviction, for being disorderly in a public place while in uniform, in violation of Article of War 96, was introduced (R. 90; Ex. 1). In that case he was sentenced to forfeit $50 of his pay per month for six months. In the instant case, 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. For the prosecution.

A dance was held at the Officers' Club, Roswell Army Air Field, Roswell, New Mexico, on the evening of 31 August 1944. It was attended by a crowd that taxed the capacity of the club. Many were unable to get seats and were standing, as one witness expressed it, "shoulder to shoulder * * * jammed in like sardines" (R. 48). Between 1500 and 2000 people were present, according to most estimates, of which number thirty to forty per cent were civilians, mostly women (R. 19,24,25,41,47). The accused was among those present. He was in uniform and was wearing his insignia of rank (R. 40,54).

During the evening the accused became involved in a slight dispute (apparently over right or priority of passage) with another lieutenant in a congested passageway that connected the main dining room with the "snack bar" (R. 33). There was a brief period during which this other lieutenant (who is not identified of record) had hold of accused's wrists. While this dispute was in process of being terminated, the accused backed through one of the doors of the passageway and onto the feet of the wife of Major Charles G. Ferran (R. 33,47). Mrs. Ferran attempted to push accused off her feet and away from her but without success; so Major Ferran, as he described it, gave accused "quite a push" from the rear (R. 47,49). The accused thereupon whirled to face Major Ferran and said, "Let's not be shoving, Bub" (R. 47-48,49,50). Major Ferran testified, "He (accused) stood over me with rather clenched fists as though he might want to fight, and he was red-faced and glaring at me. He made no attempt to fight although he looked as if he might want to" (R. 48). Major Ferran expressed the opinion that accused was "quite drunk" at the time; his eyes were glassy looking (R.48,50). Captain George S. Wiedemann, Jr., who also described the incident, expressed the opinion that accused was "definitely under the influence of liquor" at the time and that his "reasoning faculties were definitely affected", but described him as still having control over his physical movements (R. 34). Captain Wiedemann was of the opinion that accused recognized

him, but testified that accused's eyes were "glazed" and his stare was that of a man who was not quick in his mental reactions (R. 35).

Later during the evening Major Robert F. Sullivan and Lieutenant Nicholas D. Ditrano were at the bar when the accused approached and said, "Let a fellow get in there and get a beer". Lieutenant Ditrano moved away from the bar, yielding his place to accused, and continued to talk to Major Sullivan. A Miss Roehm, who had temporarily absented herself from Lieutenant Ditrano and Major Sullivan, rejoined them and asked what had happened to their place at the bar. When Lieutenant Ditrano remarked, by way of reply, "The Lieutenant wanted to get a beer", the accused turned around, according to Lieutenant Ditrano, and said, "What did you say, Lieutenant?", "as if he [accused] wanted to do something about it" (R. 23). Major Sullivan had set a bottle of whiskey on the bar preparatory to mixing some drinks. The accused suddenly seized the bottle and began pouring its contents on the floor behind the bar (R. 18,23). Major Sullivan snatched the bottle away from accused and demanded to know what his purpose was (R. 18,23). (If the accused made reply, it is not shown of record.) Major Sullivan spoke of the incident to Major Weldon O. Murchison, who in turn approached accused and told him that he thought he (accused) should go to his quarters. Accused replied, "Major, you are just trying to pull your rank on me". Upon accused's refusing to leave, Major Murchison asked him his name, which accused refused to divulge (R. 29). Major Murchison desisted from his efforts to have accused give his name and returned to his own table upon the arrival of another (unidentified) officer (R. 29). Major Sullivan expressed the opinion, based on accused's appearance and conduct, that accused was "highly intoxicated" at the time (R. 21). Major Murchison expressed the opinion that accused was "drunk" when he talked to him (R. 30). He stated that accused had a "glassy stare" and appeared to be looking "right through" him (R. 30).

Still later during the evening, Colonel Walter L. Wheeler, who, "on one or two occasions", had observed accused pass the table at which he was sitting and had noticed that "he (accused) appeared to be under the influence of alcohol", saw accused standing at the end of the table, approached accused, and requested that he accompany him into an adjoining room, which accused did (R. 9). Arrived there, Colonel Wheeler expressed the opinion that accused had had enough to drink and asked him if he did not think it would be a good idea if he (accused) went home. The accused replied, "No, I don't Colonel; you tell me what I have been doing wrong" (R. 9). During the conversation, accused stated to Colonel Wheeler that he had paid his club dues and that there was no reason why he should leave (R. 14). Colonel Wheeler finally told accused that since he "was immunable to suggestions", there was no alternative except to give him a direct order to leave the club, and added, "Lieutenant, I am now giving you such an order - Leave the club at once" (R. 9-10, 14, 37-38). The

accused did not obey this order and did not leave the club until he was forcibly removed therefrom ten or fifteen minutes later by the Officer of the Day, the Officer of the Guard, and another officer, acting together jointly (R. 10,13,15,37,38,40). After giving the order, Colonel Wheeler returned to his table, "intending to take further action at a later date" (R. 10). He was in uniform and was wearing the insignia of his rank (R. 11). Asked for his opinion as to accused's state of sobriety, Colonel Wheeler replied, "It is my opinion that Lieutenant Forpe was highly intoxicated, - I would not say that he was drunk" (R. 10, 11).

Lieutenant Ernest R. Mitchell, Jr., Assistant Officers' Club officer was present at the time Colonel Wheeler gave accused the order and was the officer who later assisted the Officer of the Day and the Officer of the Guard in removing accused from the club. He testified that "Colonel Andrews" was present at the time Colonel Wheeler was concluding his efforts to have accused leave, and that thereafter Colonel Andrews endeavored to persuade accused to leave; failing in which efforts, Colonel Andrews told accused that "he (accused) would be placed under arrest", and then left the immediate vicinity of the assembled group (R. 38). Lieutenant Mitchell and other acquaintances of accused continued to try to reason with him and to persuade him to leave the club, but without success. Finally the Officer of the Day and the Officer of the Guard arrived (R. 38).

First Lieutenant Oliver A. Livoni was Officer of the Day and First Lieutenant John M. Hammill was Officer of the Guard at Roswell Army Air Field on the date in question. Lieutenant Livoni testified that he received a telephone call at Headquarters from "Colonel Andrews" about 11:30 p.m. and that he was directed by the latter to come to the Officers' Club and to bring the Officer of the Guard with him. He and Lieutenant Hammill obtained a jeep, went to the Officers'Club, reported to Colonel Andrews, and were directed by the latter to arrest accused. Lieutenant Livoni stated that he found accused in the pool room, "in a group of men, apparently just talking to them", approached him, asked his name, "placed him under arrest" and requested him to leave the room with him quietly, which accused, "after some little argument", agreed to do; that they then started toward the nearest exit and when they had covered about one-third of the distance to it, the accused stated that he would have to go out a different way in order to get his cap (R. 53). When, because of the crowded condition of the building, Lieutenant Livoni insisted that they continue toward the nearest exit, accused refused and thereafter continued to refuse to leave without his cap (R. 53,56). Lieutenant Livoni told some of accused's friends to get accused's cap and take care of it. Accused did not object to their doing this but wanted to do it himself (R. 54). Lieutenants Livoni, Hammill, and Mitchell seized accused's arms, and, while they did not actually carry him, applied force to get him out the door (R. 54). Arrived at the jeep, Lieutenant Livoni ordered accused to get in the front seat. When accused failed to do so, he was picked up

bodily and placed in the jeep, and was then carried to the guardhouse and locked up (R. 53). Lieutenant Livoni stated that he was unable to say whether accused was unwilling or unable to obey the orders given him (R. 56). He testified that accused "did not have good control", that his motions were hesitant and without assurance, and his speech was slow, but that accused seemed to understand what he was saying to him and, after considerable thought, would answer (R. 55). Lieutenant Livoni expressed the opinion that accused was drunk at the time (R. 55).

Asked to repeat the exact words employed by him in placing accused in arrest, Lieutenant Livoni replied, "By order of the Commanding Officer, I place you under arrest" (R. 54). It was stipulated that Lieutenant Livoni was "Officer of the Day and acting under the Commanding Officer in placing the accused under arrest" (R. 54).

The testimony of Lieutenants Hammill and Mitchell was in substantial accord with that of Lieutenant Livoni regarding their removal of accused from the club. Lieutenant Mitchell testified that Lieutenant Livoni first asked accused twice to leave the club and that when accused refused, Lieutenant Livoni then told him, "In the name of the Commanding Officer, I am placing you under arrest", or used "words to that effect", and ordered accused to leave the club with him (R. 39). Mitchell stated that accused refused to obey that order, so he and Lieutenants Livoni and Hammill took him by the arms, "not forcibly at that time", and began leading him toward the door. When Lieutenant Livoni refused to permit accused to get his cap, accused said that he was going back and get it, that "he wasn't going to have anybody say that he was too drunk to remember to get his hat" (R. 39,42). Mitchell testified that accused then tried to "break away and head in the general direction of the check room to get his hat", and that he (Mitchell) thereupon pinned one of accused's arms behind his back and assisted in forcing him to leave the club (R. 39-40). Both Lieutenant Mitchell and Lieutenant Hammill expressed the opinion that accused was drunk at the time in question (R. 40,44,61,62).

Captain Alexander M. Forrester, Medical Division, examined accused at the guardhouse about midnight (R. 66). He found accused apparently asleep and recounted his observations as follows:

> "* * * He roused readily after a mild shake or two. He looked about the room with a rather vague look on his face such as anyone would have after deep sleep. His eyes were redder than one would expect from being asleep from natural causes. His pupils were larger than normal, and in the dim light of the room it should have contracted them somewhat but there was no reaction. He stood at command and gave me his tie and belt, as I requested, as in the position in which he was sleeping he seemed to be rather tight about his person. He answered questions well, but was a

little bit belligerent, I will say, about obeying the request made, that is, to remove his tie and belt. He could stand perfectly well and straight, and not sway. He took two or three steps and showed no evidence of ataxia or inability to walk straight. He seemed a little confused. He didn't know exactly where he was, but he knew the situation had been changed, shall I say, during the last few moments. His pulse was slow and regular, and there was no obvious drop in blood pressure as in the case of shock" (R. 67).

A test, run on a specimen of accused's blood taken at the time, showed a concentration of 2½ milligrams of alcohol per 100 cc of blood (R. 67), which, Captain Forrester stated, was slightly in excess of what is considered the boundary line between acute alcoholism mild and acute alcoholism severe (R. 68). He expressed the opinion that at the time he saw him, accused exhibited signs of acute alcoholism mild (R. 69). He also stated that the concentration of alcohol would ordinarily begin declining after the expiration of 45 minutes from the time the last drink was taken, and expressed the further opinion that a concentration of 2½ milligrams of alcohol per 100 cc of blood would work an impairment of the mental faculties of the normal person (R. 69).

4. <u>For the defense.</u>

Major Alonzo W. Parrott testified that he had known accused for about fourteen months as an instructor in the 4-Engine Pilot School and that from his observation of accused's work he would say that accused is a very efficient instructor (R. 73,74). He had never known of accused's reporting for duty or attempting to perform his duty while in an intoxicated condition. Major Parrott stated that he had himself been an instructor and that the work subjects one to a very considerable mental and nervous strain (R. 74). Captain J. Johnson Taylor gave substantially the same testimony (R. 75-76).

Having had his rights as a witness explained to him, the accused elected to testify under oath. He testified substantially as follows: He is 23 years of age and entered the service as a cadet in March 1942. He has been an instructor, first in the twin-engine school and later in the four-engine school, since 5 December 1942, except for the brief period during which he was a student in the 4-engine transition school (R. 83). He customarily flew as an instructor 80 to 90 hours each month (R. 83). The sense of responsibility which he felt while in the air with students subjected him to a decided nervous and mental strain (R. 83-84). He had made application on two occasions for overseas duty (R. 84). He had been drinking to some extent during recent months, more heavily in the more recent past (R. 84). He went to town in the early afternoon of 31 August 1944 and

took several drinks before returning to the club, probably 12 or 13 in all, of which number four or five were hard liquor and the remainder beer (R. 85,87). He arrived at the club about 8:00 p.m. and between that time and the time he was removed from the club, drank about six drinks of Bourbon and five or six bottles of beer (R. 87-88). These drinks were interspersed, the beer at times being used as a chaser (R. 88). He had not eaten since about eleven o'clock in the morning (R. 88). Asked if he would say he was drunk, he replied, "Yes, Sir, I would" (R. 88). He did not think that he was disorderly. He remembered having "a little fuss at the bar", as well as "a little trouble", and "being pushed quite hard" while going into the dining room from the "snack-bar" (R. 85). He also recalled some officer's advising him to leave the club but stated that he did not recall anything he said to this officer (R. 85). He did not feel at the time that he had committed any wrong, nor that he should be made to leave the club. He remembered two officers telling him that he was under arrest and he recalled going with them willingly until he thought of his cap (R. 85-86). He objected to leaving the club without his cap and remembered refusing to go without it but he did not otherwise resist going with the officers (R. 86). He remembered going out of the club to the jeep and remembered the blood test, but except for the matters mentioned, did not recall any other events of the evening, except talking to people at the dance (R. 86).

5. Specification 1, Charge I: The accused admitted in open court, without qualification and without endeavoring to limit his admissions to any particular part of the evening, that he was drunk at the Officers' Club on the date alleged in the Specification. The evidence is legally sufficient to establish beyond reasonable doubt that he was drunk at the time he maliciously poured Major Sullivan's whiskey on the floor, as well as at the time he engaged in the dispute with the lieutenant in the passageway between the dining room and the "snack bar". Despite the fact that he testified in his own behalf, accused made no effort to justify his conduct in engaging in this dispute, so it may reasonably be inferred that he had no justification for his conduct in this respect. The mentioned acts clearly constituted disorderly conduct. The Officers' Club was obviously a public place on the night in question, and the accused was in uniform. All elements of the offense charged being clearly established by competent evidence, the record of trial is legally sufficient to support the findings.

Specification 2, Charge I: The accused stands convicted of wrongfully resisting arrest by the Officer of the Day. The Officer of the Day informed accused that he was placing him under arrest "by order of the Commanding Officer"; and it was stipulated that the Officer of the Day was "acting under the Commanding Officer in placing the accused under arrest". If the stipulation is to be given any legal significance - and it is to be presumed that it was intended to serve some worthwhile purpose in the

trial - it must be construed as a stipulation that the Officer of the Day was acting under authority of, that is, on orders from or by direction of, the commanding officer at the time of ordering accused into arrest. Given this construction, the stipulation suffices to make accused's arrest a legal one, because the commanding officer is authorized to act "through other officers" in placing an officer in arrest (MCM, 1928, par. 20). The presumption which obtains in favor of the legality of an arrest is sufficient, in the absence of evidence tending to show the contrary, to support a finding that the commanding officer either had personal knowledge of or had made inquiry into accused's offense, as required by paragraph 19, Manual for Courts-Martial, 1928, before ordering accused arrested. The arrest being legal, the evidence is legally sufficient to show that accused wrongfully resisted it. It was not his prerogative under the circumstances to select the route by which he and the arresting officer should leave the Officers' Club. The decision and demands of the Officer of the Day appear to have been reasonable under the circumstances, and when accused refused to comply with those demands and made it necessary to use force in order to compel his compliance therewith, he wrongfully resisted arrest. The record is legally sufficient to support the findings.

Charge III and its Specification: The accused stands convicted of an offense of having failed to obey a lawful order of his superior officer, in violation of Article of War 96. The evidence of record establishes beyond doubt that Colonel Wheeler, accused's superior officer, gave accused a direct order on the night of 31 August 1944 to leave the Officers' Club immediately, and that accused failed to obey the order. The only question requiring discussion is whether the order was legal within the meaning of the Articles of War. The legal test by which this question must be determined is contained in paragraph 134b, Manual for Courts-Martial, 1928, and is as follows:

> "The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. * * *".

The situation which gave rise to the order in question was that accused had become obviously drunk in a public place, in the presence and within the view of a great number of people who were assembled for the purpose of entertainment, and had declined to heed Colonel Wheeler's friendly suggestions that he leave the club. It is the military duty of military personnel, particularly officers, to deport themselves in such manner at all times as not to bring discredit upon the military service. Accused having become patently drunk, as clearly shown by the evidence, it was his military duty to withdraw himself from the assembly of people and thereby avoid bringing discredit upon the military service. When he failed to discharge this duty, it was both proper and legal that his superior officer should order him to do so. It is perfectly clear that

Colonel Wheeler's order related to a military duty of the accused; that it was one which Colonel Wheeler was, under the circumstances, authorized to give, and that it was therefore a legal order, which accused was legally obliged to obey. The evidence does not indicate that accused was too drunk to appreciate the rank of Colonel Wheeler, the nature of the order, or to comply therewith. The record is legally sufficient to support the findings.

6. War Department records disclose that this officer is 23 years of age and single. He is a high school graduate. His principal business experience in civil life was as a cost clerk. He entered the service on 2 March 1942 as an aviation cadet, was appointed and commissioned a second lieutenant, Army of the United States, Air Corps, Reserve, on 3 December 1942, and entered on active duty the same day. He was promoted to the grade of first lieutenant on 17 November 1943. He was administered a reprimand under authority of Article of War 104 on 17 May 1944 for being intoxicated and using abusive language in the presence of women at the Officers' Club on 30 April 1944 while demanding that the check room attendant sell him cigarettes after all sales had been discontinued. On 25 May 1944, under authority of Article of War 104, accused was again reprimanded and was restricted to the limits of Roswell Army Air Field for one week for violating state and local motor vehicle operation laws, resulting in a collision with an Army motor vehicle, on 18 May 1944. It was alleged that at the time of this collision the accused's breath smelled strongly of liquor.

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

Thomas E. Jones, Judge Advocate.

Earle Stephens, Judge Advocate.

Norman Mayer, Judge Advocate.

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Robert T. Forpe (0-734222), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused in this case has been found guilty of (a) being drunk and disorderly in uniform, (b) wrongfully resisting arrest, and (c) failing to obey a lawful order of his superior officer, all in violation of Article of War 96. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The record of trial discloses that on 24 August 1944 the accused was found guilty by a general court-martial of being drunk and disorderly in uniform, for which the approved sentence involved the forfeiture of $50 of his pay per month for six months. His 201 file discloses that on 17 May 1944 accused was reprimanded under the authority of Article of War 104 for being intoxicated and using abusive language in the presence of women at the Officers' Club on 30 April 1944, and that on 25 May 1944, under the authority of Article of War 104, he was again reprimanded and restricted to the limits of his post for one week for violation of state and local motor vehicle operation laws. It clearly appears that the accused has no proper appreciation of the duties and responsibilities of a commissioned officer. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

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

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 17, 10 Jan 1945)

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

SPJGN
CM 266642

8 NOV 1944

UNITED STATES	)	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Keesler Field, Mississippi, 28 September 1944. Dismissal.
Second Lieutenant LLOYD F. CAREY (0-557156), 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 Charges and Specifications:

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

Specification: In that Second Lieutenant Lloyd F. Carey, Section "K" (Emergency Rescue Student Section) (Air Platoon), 3704th Army Air Forces Base Unit, was, at Biloxi, Mississippi, on or about 9 September 1944, in a public place, to wit, the Marine Room, Buena Vista Hotel, drunk and disorderly while in uniform.

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

Specification: In that Second Lieutenant Lloyd F. Carey, Section "K" (Emergency Rescue Student Section) (Air Platoon), 3704th Army Air Forces Base Unit, did, at Biloxi, Mississippi, on or about 9 September 1944, wrongfully strike Miss Sarah Novoselsky on the face with his hand and pull her hair.

He pleaded not guilty to and was found guilty of both Charges and the Specifications thereunder. 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 evidence for the prosecution shows that about 9:30 o'clock in the evening of 9 September 1944, accused, in uniform, was in the Marine Room, a cocktail lounge and bar, of the Buena Vista Hotel in Biloxi, Mississippi. The room was very crowded (R. 7, 9, 11). The accused approached a table at which Sarah Novoselsky, her sister Esther and girl friend Esther Meltzer, were seated and attempted to engage them in conversation. They observed that he was very drunk and sought to ignore him whereupon he leaned over, picked up Sarah Novoselsky's glass and took a drink. He began to rock the chair on which she was sitting and she told him to stop it. He brought his head down very close to her head, placed his arm around her back and his hand on her "bust". She "instinctively" slapped him in the face and then told him to move on but instead he pulled her head back by the hair and slapped her in the face with such force that it stunned her and made her mouth bleed. A soldier seated at the next table characterized his blow as "an awful wallop". Accused then staggered off running against a slot machine and knocking it over (R. 7-8, 14-15, 17-18).

A military police officer was summoned and found accused standing in front of the bar with a partially filled bottle of whiskey in his hands. He said to accused "Let's go out" but as accused refused, he took accused by the arm and said "The police have you; let's go". Accused still refused to move and the military police officer pushed him out the door. Accused clung to the door, fell down and the military police officer got him by the collar and carried him out. Accused was unquestionably drunk, in such officer's opinion (R. 20-21).

Some time subsequent to the incident Miss Novoselsky received a letter of apology from accused. At the trial she expressed her feeling that his actions were the result of his drunken condition and for that reason he should be treated leniently (R. 13).

4. Evidence for the defense: Accused testified that he had entered federal service in 1941 with a coast artillery organization of the Arkansas National Guard, had served in Alaska for sixteen months and then had been assigned to the Air Corps for training. He was made a flight officer 3 November 1943 and was commissioned a second lieutenant 16 July 1944. He is 26 years old and the pilot of a "PBY" (R. 23-24, 28).

Concerning the charges he stated that he commenced to drink early that evening, ate no supper, drank "too much" beer and whiskey both on the field and in the Marine Room and became drunk. He recalled going over to the table where three young women were sitting but disclaimed any knowledge of subsequent events until the time the military police officer came up to him. He stated that he had never been in any trouble before in the Army, had never been court-martialled or reprimanded (R. 25-29).

Major Kent J. Prim, Captains Alexander F. McNiven and Richard D. Hathaway, accused's superiors, attested to his efficiency in the performance of his duties. Accused's crew was rated as one of the best crews in the squadron (R. 30-33).

5. It is alleged in the Specification, Charge I, that accused was drunk and disorderly in uniform, 9 September 1944, in a public place, to wit: the Marine Room of the Buena Vista Hotel in Biloxi, Mississippi. The Specification, Charge II, alleges that at the same time and place he wrongfully struck Sarah Novoselsky in the face with his hand and pulled her hair. The former offense is charged as a violation of Article of War 95 and the latter as a violation of Article of War 96.

It is undisputed that accused, wearing his uniform, was in a crowded hotel lounge and cocktail bar in an advanced state of intoxication. He attempted to force his presence upon three young ladies seated in the lounge, persisted in annoying them beyond sufferance, placed his arm around one of them and his hand on her breast, and when she justifiably slapped him, proceeded to seize her by the hair and strike her in the face with his hand with great force. Stumbling away he knocked over a slot machine and when a military police officer attempted to remove him from the scene he resisted to such extent that it was necessary to drag him out bodily. The allegations of the Specifications are thus proven beyond any reasonable doubt. His condition and conduct in the hotel lounge is clearly encompassed within the language "being grossly drunk and conspicuously disorderly in a public place" cited by the Manual for Courts-Martial (par. 151) as an instance of a violation of Article of War 95.

6. The accused is a married man, about 26 years of age. He is a high school graduate and also attended a business college for a short time. He entered military service as an enlisted man on 6 January 1941 serving as a battery clerk with the grade of sergeant until 4 January 1943 when he began training as an air corps cadet. On 3 November 1943 he was appointed a flight officer with the rating of pilot. Upon completion of his training he was commissioned, effective 16 July 1944, a temporary second lieutenant, Army of the United States, and entered upon active duty on that date.

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

Abner E. Lipscomb, Judge Advocate.

Robert J. Cannon, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN
CM 266642

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 Lloyd F. Carey (0-557156), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed but commuted to a reprimand and forfeiture of $50 of his pay per month for six 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

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

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

(Sentence confirmed but commuted to reprimand and forfeiture of $50 per month for six months. G.C.M.O. 680, 29 Dec 1944)

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

SPJGK
CM 266655

27 OCT 1944

UNITED STATES	FORT LEWIS, WASHINGTON
v.	Trial by G.C.M., convened at Fort Lewis, Washington, 9 October 1944. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.
Sergeant CHARLES L. BROWN (6943456), Company A, 158th Medical Training Battalion.	

HOLDING by the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates.

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

2. The record of trial is legally sufficient to support the findings of guilty of Charge I and the specifications thereunder and legally sufficient to support the sentence.

3. The only question for consideration is the legality of the findings of guilty of Charge II and its specification, which are as follows:

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

Specification: In that Sgt Charles L Brown, Company A, 158th Medical Training Battalion, having received a lawful order from Lt CYRUS P. WILLIAMS, to proceed by the most direct route on the first available transportation from Pittsburgh, Pa. to Company A, 158th Medical Training Battalion, Fort Lewis, Washington, the said Lt. CYRUS P. WILLIAMS being in the execution of his office, did at Pittsburgh, Pa. on or about 31 August 1944 fail to obey the same.

The evidence shows that accused was a member of Company A, 158th Medical Training Battalion, Fort Lewis, Washington (R. 6). It will be noted that he is charged with failure to obey the order of Second Lieutenant Cyrus P. Williams directing him to proceed by direct route, etc. from Pittsburgh, Pennsylvania, to Company A, 158th Medical Training Battalion, Fort Lewis, Washington. The stipulated testimony of Lieutenant Williams is that he gave the accused an order at Pittsburgh, 31 August 1944, to report via the most direct route on first available transportation to Company A, 159th Battalion, 69th Training Battalion, Fort Lewis, Washington, reporting on arrival to his commanding officer in Fort Lewis. It was further stipulated that a copy of the order was served upon the accused which he acknowledged by signing. Without objection this copy was received in evidence

as Exhibit 2 (R. 8). This document, which purports to be a pass and order, orders accused to proceed to Company A, 159th Battalion, Fort Lewis, Washington, "reporting on arrival to his commanding officer". As above stated, this order is signed by Lieutenant Williams. The prosecution also introduced in evidence paragraph 7, Special Orders No. 95, Army Service Forces, Third Service Command, Headquarters Pittsburgh, Sub-District, Logan Armory, Pittsburgh, Pennsylvania, dated 31 August 1944. This order "By Order of Colonel Crumrine" orders the accused, described as "Sgt. Charles L. Brown 6943456, Co. A, 158th Medical Tng Bn", to proceed without delay from Pittsburgh, Pennsylvania, to Fort Lewis, Washington, and provides that accused "upon arrival thereat will report to the CO thereof" (R. 12,13, Ex. 5).

4. From the evidence it is obvious that there is a material variance between the allegation and the proof. Accused is charged with failing to obey an order of Second Lieutenant Williams that he report to Company A, 158th Medical Battalion, Fort Lewis, Washington. The stipulated testimony of Lieutenant Williams is that he ordered accused to report to Company A, 159th Medical Battalion. This is confirmed by prosecution's Exhibit 2 signed by Lieutenant Williams. The commanding officer of the 159th Medical Battalion was called as a witness to show that the accused did not report to him. Moreover, prosecution's Exhibit 4, an order of Colonel Crumrine, which takes precedence over the order of Lieutenant Williams, directs that accused report upon arrival at Fort Lewis to the commanding officer at Fort Lewis. We cannot hold the record legally sufficient to support the specification because of this fatal variance in the proof, and we cannot hold accused guilty of violating an order of Colonel Crumrine, first, because there is no proof that accused did not report to the commanding officer of Fort Lewis, Washington, and, secondly, because accused is not charged with any disobedience of the order of Colonel Crumrine.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its specifications, and legally sufficient to support the sentence, but legally insufficient to support the findings of guilty of Charge II and its specification.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.
28 OCT 1944

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

TO: Commanding General,
Fort Lewis, Washington.

1. In the case of Sergeant Charles L. Brown (6943456), Company A, 158th Medical Training Battalion, Fort Lewis, Washington, 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 Charge I and its specifications and the sentence, but legally insufficient to support the findings of guilty of Charge II and its specification, which holding is hereby approved. Upon disapproval of the findings of guilty of Charge II and its specification, you will have authority to order the execution of the sentence.

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

(CM 266655).

Myron C. Cramer

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

1 Incl.
Record of trial.

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

SPJGN
CM 266660

13 NOV 1944

UNITED STATES	SECOND AIR FORCE
v.	Trial by G.C.M., convened at Army Air Field, Great Bend, Kansas, 12-13 September 1944. Dishonorable discharge and confinement for life. Penitentiary.
Private JAMES MIGUEL (32778952), 243rd Army Air Forces Base Unit, Section A.	

REVIEW by 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 soldier named above.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private James Miguel, 243rd Army Air Forces Base Unit, did, at Great Bend, Kansas, on or about 1 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Mary E. Caranci.

The accused pleaded not guilty to, and was found guilty of, the Charge and the Specification. After evidence of one previous conviction by summary court-martial of absence without leave had been introduced, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that Mrs. Mary A. Caranci, age seventeen, was the wife of Private Ralph Caranci and the mother of an infant son (R. 9-11). She and her family shared a basement

apartment at 21st and Tyler Streets in Great Bend, Kansas, with Private William J. Semperkiewicz and Maxine Semperkiewicz, his wife (R. 8, 26, 30, 32, 35). In August and September of 1944 Mrs. Caranci was temporarily deprived of her husband's companionship because of his confinement in the guardhouse (R. 12, 19). During his absence she was employed by a "cab company" (R. 12-13).

For amusement she frequently attended dances at the city auditorium (R. 11, 20). At one of these her husband, several months prior to his incarceration, had introduced her to the accused, who by reason of his racial extraction was commonly known as "Gypsy" (R. 9, 11; Pros. Ex. 1). While "coming from the cab stand" on Saturday, 26 August 1944, she met the accused for the second time. Later that night she saw him at the auditorium and had a few dances with him. Although she had come to the hall alone, she was escorted home by "a boy named Steve" (R. 11-12; Pros. Ex. 1).

The following Wednesday the accused visited her at the cab stand and attempted to "make a date" with her. She replied that she "might go to the dance and see him there". This half-promise was not kept (R. 13).

Mrs. Caranci went to a carnival the next night, which was 31 August 1944, and again encountered the accused. He informed her that he was with another couple and invited her to accompany them to the "Gold Fish Bowl". When she expressed some reluctance, he represented that her husband had requested him "to take [her] out and show [her] a good time" (R. 9, 13, 20; Pros. Ex. 1). Believing the accused to be a friend of Private Caranci, she accepted and was introduced to Technical Sergeant Hugh J. Dietz and a Miss Edwards (R. 9, 21, 38-39, 41; Pros. Ex. 1). They all immediately left the carnival and set out for "up-town" to obtain some liquor (R. 9; Pros. Ex. 1). After a long and diligent search, the accused and Mrs. Caranci finally obtained a pint of whiskey from a colored porter at the Parrish Hotel. Abandoning their original intention of spending the evening at the Gold Fish Bowl, the two couples proceeded instead to Miss Edwards' "trailer house" (R. 9, 14, 39; Pros. Ex. 1).

Their visit lasted about an hour or an hour and a half. During that period Dietz, the accused, and Mrs. Caranci each consumed three drinks, but only one was poured for Miss Edwards (R. 14, 20, 22, 24, 39; Pros. Ex. 1). Since he had a little earlier shared the contents of a quart of whiskey with some other friends, Dietz was intoxicated (R. 15, 41). Some "lewd" stories were told, and the accused may have placed his arm around Mrs. Caranci, but there was no "petting" of any kind (R. 14-15, 40-41; Pros. Ex. 1). Although he momentarily switched off the lights, they were at her insistence "put on" again. At one point in the conversation she remarked that she had a greater capacity for liquor than her husband (R. 14-15).

Someone having mentioned that it was about 1:00 a.m., she announced that she "had to go home" (R. 9, 15). Since she lived a mile away, she intended to order a cab, but the accused insisted on walking the distance with her. He had repeatedly stated in the course of the evening that he "wouldn't think of touching" her, and he now again assured her that he would be "a perfect gentleman". When she informed him that he might escort her upon the condition that he "behave himself", he replied that "he didn't fool around with girls in Great Bend, he always went to Wichita" (R. 9, 15-16, 21, 24).

Most of the mile was covered by them on foot in an uneventful manner, he all the while conducting himself with absolute propriety (R. 9). Within a few blocks of her residence they came to a part of the town in which "there were few houses" and "no light except the stars and the moon" (Pros. Ex. 1). Here his manner changed. He stopped, took her in his arms, and kissed her. She repulsed him, and they continued their walk (R. 9; Pros. Ex. 1). "About one and one-fourth blocks" from her home and a half a block from the nearest house "he again grabbed [her] and said he was going to do something whether [she] liked it or not . . ." (R. 9, 16). When she resisted and began screaming for "Maxine", he struck her in the face and knocked her to the ground (R. 9-10, 16, 18; Pros. Ex. 1). She regained her feet, but he seized her arm and drew her after him to the other side of the road. Although she fought, scratched, and cried for help, he hurled her to the ground, pulled her into a ditch, and forcibly removed her panties. Upon her continuing to make an outcry he struck her in the face again. After a further scuffle and despite her yelling, "you broke my jaw, you broke my jaw", he forced her legs apart, inserted his penis, and had sexual intercourse with her for about two or three minutes (R. 9-10, 16-17, 21, 23; Pros. Ex. 1). She did not believe that the act was completed, for "if it had been [she] could have felt it" (R. 20).

When he released her and they had both risen to their feet, he picked up her panties, placed them in the pocket of her jacket, admonished her not to forget them, and departed (R. 9-10; Pros. Ex. 1). Mrs. Caranci, who was in a weakened condition "got home the best way [she] could" (R. 18). When she reached the door, the lights were still on in the apartment (R. 18, 23). She called for Maxine who immediately came to her assistance. To Maxine's questions Mrs. Caranci's only answer was, "he is up the road, he is up the road" (R. 27, 29, 35). Maxine and her husband immediately borrowed a car belonging to Mrs. P. E. Heater, their landlady, and set out in search of the attacker (R. 27, 31, 35). In the meantime Mrs. Heater, upon going to Mrs. Caranci's aid, found her shoes to be "all muddy" with "grass all caught in the heels. She had mud on her face and her hair was down and she had grass and weeds in her hair" (R. 33). Her jaw had "begun to swell and turn black and blue" (R. 18, 27, 33).

Not being able to "locate anybody" after two separate attempts, Maxine and her husband drove Mrs. Caranci to the police station for the purpose of making a complaint (R. 27, 36). The information supplied by them resulted in the prompt arrest of the accused as he was entering the South Gate of the Army Air Field at Great Bend (Pros. Ex. 1). Having completed this mission, they went to the office of Dr. R. J. Wheeler. He examined Mrs. Caranci thoroughly and testified as follows concerning his observations:

> "I noticed an elliptical scratch on the right check about one inch from the outer edge of the right nostril. Merely the first layer of skin was scratched off. The right eye was simply redding, the left upper eyelid was bruised and black and blue. It was also black and blue just beneath the right eyebrow, particularly the outer one-half. There was also a bruise on the front of the chin in the midline. There was a little redness beneath the chin and across the throat about two and a half inches from the edge of the chin. There was some grass in her hair. There was slight redness of the skin on the right arm. The patient was not wearing any under-pants. I do not recall seeing any torn clothing and have no notes in regard to that point. The examination of the privates was negative; that is, nothing unusual was observed. There was no bruising or laceration either in or about private parts. A smear was made from the vaginal secretions and examined under the microscope at the time. We were unable to see any spermatozoa. This examination we would not consider entirely accurate because I am not equipped with ideal lighting facilities for making microscopic examinations after night. I usually do that work by daylight. Two smears were made of the vaginal secretions on microscopic slides. A portion of one slide was covered with a cover glass with the idea that chemical examination might be made later to see if there was chemical evidence of spermodic fluid in the vagina. These slides were turned over to Captain Fairlee. * * * As to whether there was any penetration of a sexual nature, I would be unable to say from my examination as this woman has had one child and the problem is naturally quite different from that in examining a virgin" (R. 47).

On the next day which was Saturday, 2 September 1944, Mrs. Caranci complained to Captain Ralph Jacobs of the Medical Corps that she was suffering from a pain in her jaw and that she had difficulty in chewing. After noting the "multiple abrasions and bruises of the face, a moderate black eye on the left and some swelling of the left side of the jaw with tenderness on movement", he took two X-rays of her skull. They disclosed "a simple linear, complete fracture of the right mandible, extending from the base of the third unerupted molar to the angle of the

jaw" (R. 43; Pros. Exs. 2, 3). That evening at 7:00 p.m. Mrs. Caranci was treated for this injury by Dr. George F. Kutina, a dentist. He "reduced the fracture . . . by ligating the lower teeth to the upper teeth with non-corrosive wire, using the upper jaw as a splint" (R. 50-51). In his opinion the healing of the fracture would require three weeks (R. 52).

Chief of Police Vance H. Houdyshell visited the scene of the attack on the morning of 1 September 1944. From the numerous "shoe tracks and marks" still visible and the broken vegetation he formed the conclusion that "quite a struggle" had occurred (R. 53-54). Several hours later in the early evening he was present when Corporal Michael C. Robinson, an investigator for the Provost Marshal's office, obtained a statement from the accused. It was freely and voluntarily given, and although it was not in the accused's own words, it accurately reflected "what he wanted to say" (R. 25-26, 57-58, 64-65, 67-68). Since he could not read, it was read to him in full before he signed (R. 58-63, 66). In it he admitted that he had assaulted Mrs. Caranci and had had sexual intercourse with her (Pros. Ex. 1). Both before the statement was reduced to writing and again before he affixed his signature he was adequately warned of his rights under Article of War 24 (R. 25, 56-57, 59, 64-65).

4. The accused, after he had been apprised of his rights relative to testifying or remaining silent, took the stand on his own behalf. Four other witnesses were presented by the defense. Mr. Milton Horner, for whom Mrs. Caranci worked as a cab driver, remembered that on or about 10 June 1944 she had stated in his presence that "last night was the first time she had ever stepped out on her husband" (R. 69-70). Sergeant Gustave C. Chovan of the military police was certain that he had seen Mrs. Caranci and the accused together both on the street and at the dance on Wednesday night, 23 August 1944, or three days prior to the date which she had fixed in her testimony. Upon cross-examination, however, Sergeant Chovan stated that the dance was only three days before the assault upon her. Of this fact he was "sure" (R. 72-77). Private Steve Kolonoski had been at a dance on 30 August 1944 with both Mrs. Caranci and the accused, had had her as one of his partners, and had walked her home (R. 78-79). Miss Jessie Edwards had heard Mrs. Caranci say on the night of 31 August 1944 that "I can drink anyone under the table". Mrs. Caranci may not have meant what she said, for "she didn't drink much" (R. 80).

In his own testimony the accused stated that he was twenty-eight years old and weighed two hundred and ten pounds (R. 94). He had had no schooling prior to entering the Army, had learned the trade of coppersmith, and had earned some money as a wrestler (R. 94-95, 101, 105).

Private Caranci had requested him "to look out for my wife and see if she steps out on me with other men" (R. 83, 102). Two days later on a Wednesday the accused accompanied her to a dance and was with her most of the evening. On the succeeding Friday he arranged to meet her again at the dance, "but she didn't show up" (R. 84-85).

At Miss Edwards' trailer on the night of 31 August 1944 Mrs. Caranci "killed the bottle". While Dietz and Miss Edwards were "necking on the bed", Mrs. Caranci related a filthy joke, and when the accused kissed her twice, she returned the caresses. After leaving the trailer and walking about a half a block, the accused again kissed Mrs. Caranci without any objection on her part (R. 87, 97, 102). Both at the dance and now again while walking with her he had promised to behave like a gentleman, but all the way to the vicinity of her home he "was kissing and hugging her and putting /his/ hands all over her" (R. 88, 97, 106). When they reached a point from which they could see the lights in her apartment, he decided that it "looked like a good place to lay her". He pulled her pants down and when she began calling for Maxine, he slapped her (R. 88-89, 98-100, 107). By that time "the liquor was working on" him, and although he experienced an orgasm, he did not know whether he inserted his penis (R. 88-89, 99, 103, 107, 109). He did not hear her say "you broke my jaw, you broke my jaw" (R. 100, 105). He was in a "daze" (R. 90).

No one had threatened him at the time he made the statement which was introduced into evidence as Prosecution's Exhibit 1 (R. 105). Noticing, however, that there was a Masonic ring on the hand of the Chief of Police it occurred to him that "that man is a Mason, the same as my father, and God, I do not think he would let anything happen to me" (R. 108). Having formed this conclusion, the accused voluntarily related what had happened on the morning of 1 September 1944 (R. 93, 108, 110).

5. Upon being recalled on rebuttal as a witness for the prosecution Mrs. Caranci again briefly narrated the circumstances of the attack upon her. She was certain that the accused had effected penetration but she believed that no discharge occurred within her body, he having previously withdrawn (R. 112-114). Only once on their walk toward her home had he kissed her (R. 114).

Captain Ralph Jacobs, also recalled as a witness for the prosecution, testified that normally orgasm is "an integral part of intercourse" and that the presence of sperm or sperm fluid can be determined from a vaginal smear. If, by chance, the smear should be taken "from a part of the vagina which does not contain the sperm, obviously the sperm will not be seen" (R. 115-116).

The last rebuttal witness for the prosecution was Captain Chester W. Fairlie of the Medical Corps to whom Doctor Wheeler had turned over two slides containing vaginal smears taken from Mrs. Caranci. The application

of the Florence Test revealed the presence of semen on one but not on the other. The results were not conclusive, for certain other substances such as crushed insects and "extracts from organs of the body" can induce the same reactions. The presence of semen was, however, "a strong possibility" (R. 118-121).

6. The Specification of the Charge alleges that the accused did, "on or about 1 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Mary E. Caranci". This was set forth as a violation of Article of War 92.

The accused, a two hundred and ten pound athlete, threw the prosecutrix to the ground, forcibly removed her panties, struck her in the face with sufficient violence to break her jaw, and, despite her protestations and resistance, had sexual intercourse with her. This brutal act was unquestionably rape within the meaning of paragraph 149b of the Manual for Courts-Martial, 1928, which defines the offense as "the unlawful carnal knowledge of a woman by force and without her consent". The only material issue raised by the defense was that of penetration. As to this the testimony of the prosecutrix was definite and unequivocal. The accused, on the other hand, while recollecting all of the other circumstances of the attack, suffered a complete lapse of memory on this most vital point. Having observed and examined both witnesses, the court chose to believe Mrs. Caranci, and there is absolutely nothing in the record to intimate that they erred in so doing. On the contrary, the testimony of Captain Fairlie indicates that the accused not only effected penetration but that his penis was still within her when he completed his orgasm.

The confession was voluntarily given and properly received in evidence. No unlawful promises or threats were employed to procure it. Although the Masonic ring worn by Chief of Police may have induced some ill-founded hopes in the accused, they were all self-generated and cannot accordingly be held to vitiate or outlaw admissions otherwise freely made.

7. The record shows that the accused is about 28 years old; that he was inducted on 27 March 1943 at Newark, New Jersey; and that he had no prior service.

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

tence and to warrant confirmation thereof. A sentence of death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92.

Abner E. Lipscomb, Judge Advocate.

Robert J. Conner, Judge Advocate.

Gabriel H. Goldin, Judge Advocate.

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

SPJGQ
CM 266722

4 NOV 1944

UNITED STATES v. First Lieutenant JAMES F. BENTON (0-1308203), 6th Company, First Student Training Regiment, The Infantry School.	THE INFANTRY SCHOOL Trial by G.C.M., convened at Fort Benning, Georgia, 6 October 1944. Dismissal, total forfeitures.

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

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

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that First Lieutenant James F. Benton, Sixth Company, First Student Training Regiment, The Infantry School, Fort Benning, Georgia, (then assigned to Headquarters, 29th Battalion, Infantry Replacement Training Center, Fort McClellan, Alabama), did, when en route from Fort McClellan, Alabama to Fort Benning, Georgia, on or about 2 September 1944, wrongfully disobey and fail to comply with the following order, to-wit:

"HEADQUARTERS
INFANTRY REPLACEMENT TRAINING CENTER
Fort McClellan, Alabama

30 Aug 1944

SPECIAL ORDERS)
:
NUMBER 208) EXTRACT

7 The following Os are placed on DS at FT BENNING GA for the purpose of attending the Officers' Advanced Course Class No 68 and will depart fr this sta so as to arrive on 6 Sep 1944 rptg upon arrival to CO 1st Student Tng Reg (Main Post)
1 1ST LT JAMES F BENTON (LS) 01308203 Hq 29th Bn

* * * * * * * * * * *

The above named Os are reld fr asgd to their present orgns and are atchd unasgd to IORP eff 5 Sep 1944. Dependents are not atzd to accompany Os. Upon completion of this DS o/a 9 Dec 1944 the above named Os will return to their permanent sta. TCT. TDN 501-14 P 432-02 212/50425. AUTH: Ltr Hq R&SC AGF file 352 GNRST dtd 1 Aug 1944 subject: "Sep 1944 Classes, The Infantry School".

By command of Brig Gen RANSOM:

NOEL F. THARALSON
Maj AGD
Adj

OFFICIAL:

/s/ Noel F Tharalson
/t/ NOEL F. THARALSON
Maj AGD
Adj "

in that he departed from Fort McClellan, Alabama, on or about 2 September 1944 and failed to report to his said organization at Fort Benning, Georgia, until on or about 12 September 1944.

He pleaded not guilty to the Charge and to the Specification, and was found guilty of both. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Competent evidence introduced by the prosecution established the following facts:

The accused officer, while stationed at the Infantry Replacement Training Center, Fort McClellan, Alabama, received orders (Par. 7, SO 208, dated 30 August 1944, Headquarters, that command, R. 6; Ex. 1) placing him on detached service to attend Officers' Advanced Course Class Number 68 at The Infantry School, Fort Benning, Georgia, to arrive on 6 September 1944, reporting upon arrival to the commanding officer, First Student Training Regiment. Effective 5 September 1944, he was relieved from his then assigned organization and attached unassigned to the Infantry Officers' Replacement Pool. The officers' register at his station of departure showed him as signing out at 1230 hours on 6 September 1944, destination as ordered (R. 6; Ex. 3). The morning report of his assigned organization at Fort Benning, Georgia (R. 12), for the day ending at 2400 hours, 9 September 1944, showed him attached as of 6 September 1944, but not yet joined (R. 6-7; Ex. 4). The court took judicial notice of required travel time between the stations concerned as fourteen hours, as shown by the current Official Railway Guide (R. 7).

Sergeant Milan Ranilovich, Military Police, Fort Benning, Georgia, knew the accused as a First Lieutenant of Infantry, Army of the United States (R. 7). The witness was on duty as Special Investigator for the Provost Marshal, working in Columbus, Georgia. On 9 September 1944, he had seen the accused in Police Headquarters at Columbus, Georgia, brought there by the Assistant Provost Marshal (R. 8). On 12 September 1944, he saw the accused at the railroad station in Columbus, Georgia, shortly after one o'clock in the morning. The witness asked the accused whether he was on leave. The accused said "I'm on VOCO from Atlanta General Hospital". Asked for his orders, the accused said that he was allowed forty-eight hours (R. 8). The witness told the accused that he had seen him before and would have to detain him, and took the accused to Police Headquarters (R. 8-9). There the accused stated to the Assistant Provost Marshal and the Military Police (R. 9), that he was registered at the Cardinal Hotel under the name of Lieutenant Roberts. The Military Police went to his room, found it in the name of "Lieutenant Roberts", and took possession of his luggage. There they found his orders (R. 9; Ex. 1).

The accused made a voluntary statement, written, sworn and signed, to the Investigating Officer, after due explanation of his rights (R. 13-14), wherein he stated that he left Fort McClellan, Alabama, on 2 September 1944, after arranging with an officer to sign out for him on "the appropriate date". He went to Atlanta and checked into a hotel. He began drinking heavily on 5 September, due to a "serious situation" which arose, being "afraid to face the consequences soberly". On 6 September he went to Columbus, Georgia, where he continued drinking. After staying at a night club until it closed, he stayed in the railroad station until morning, then took a room at the Cardinal Hotel, where he stayed and continued "this same schedule" until he was "picked up" by the Military Police on the morning of 12 September (R. 15; Ex. 5).

The morning report of his assigned organization at Fort Benning, Georgia, shows him attached 16 September 1944 (R. 15; Ex. 6).

4. The defense introduced no evidence. The accused, after explanation of his rights (R. 15-16), elected to make an unsworn statement through counsel (R. 16). This was to the effect that he enlisted in the Iowa National Guard 8 January 1941, was inducted into the Federal Service with his unit on 10 February 1941, served at Camp Claiborne, Louisiana, and Fort Dix, New Jersey, was promoted to first sergeant, went to Northern Ireland with his organization in January, 1942, and was returned to the United States in September, 1942, to attend Officer Candidate School at Fort Benning, Georgia (R. 17). He was commissioned and served with the 80th Division at Camp Forrest, Tennessee, and then as Adjutant of the Second Ranger Battalion. He was found to be physically disqualified for overseas service, later held to be fit for general service. He served as a Battalion Adjutant at the Infantry Replacement Training Center at Fort McClellan, Alabama, until ordered to Advance Class at The Infantry School, Fort Benning, Georgia. He had been informed that two days was the travel time to Fort Benning, and obtained verbal orders of his com-

manding officer for 2 and 3 September, allowing him 4 and 5 September to travel to Fort Benning to arrive 6 September as ordered (R. 17). He went to Atlanta, and, while there, certain embarrassing circumstances arose which impelled him to engage in heavy drinking and made him reluctant to report, which condition prevailed until his apprehension 12 September 1944.

5. To charge the accused with wrongfully disobeying and failing to comply on or about 2 September with a command to report on 6 September involves some measure of resort to intellectual acrobatics, but the device is not without justification in the instant case, as it permits an examination of the course of conduct resulting in the disobedience alleged. Assumably, the same consideration dictated the selection of the 96th rather than the 61st Article of War under which to lay the Charge, with its attendant broadening of the Specification.

Extract copy of the morning report of the accused's station of departure at Fort McClellan, Alabama (R. 6; Ex. 2), showing him not joined at Fort Benning, Georgia, was incompetent, as patently based on hearsay, and was erroneously admitted, even in the absence of objection. (CM 155032 (1923), CM 143629 (1921), Dig. Op. JAG 1912-40, Sec. 395 (18); CM 229552 (1943), II Bull. JAG 60; CM 224325 (1942), I Bull. JAG 212; CM 231469 (1943), II Bull. JAG 184). Further, this entry was immaterial, being dated 5 September 1944, the day before the accused was ordered to report to the station. However, in the presence of ample competent evidence to compel the findings, this error was not prejudicial to the substantial rights of the accused. (CM 127490 (1919), CM 130415 (1919), Dig. Op. JAG 1912-30, Sec. 1284, p. 364; CM 211829 (1939), 10 BR 133, 137; CMETO 1693 (1944), III Bull. JAG 185.)

The unquestioned proof is that the accused had his orders in ample time to report to his assigned station, and left his former station not only in time to arrive in full compliance therewith, but, by the indulgence of his commanding officer, to dally along the way. It is established without question that he failed to report as ordered, and further failed to do so for six days thereafter, of his own volition, and until apprehension compelled him so to report. His only explanation is that he was too weak and timid to show himself under some embarrassing circumstances, undefined in the record, and preferred to seek oblivion in strong drink for eight days. This is no defense, and neither is it an explanation becoming an officer with any regard for his responsibilities or his own self-respect.

6. War Department records disclose that the accused officer is 30 years of age and unmarried. He was an office clerk in civil life, with 3½ years of college education. He served in an enlisted status from 8 January 1941 in the Iowa National Guard, from 10 February 1941 in the Federal service, advancing to the grade of first sergeant. He was commissioned through Officer Candidate School at Fort Benning, Georgia, 8 January 1943, being returned from Ireland for that purpose. He was

promoted to the grade of first lieutenant, 14 May 1943. After being classified for limited service by reason of varicose veins, he was restored to general service 19 September 1944, upon findings of a Retiring Board.

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

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ
CM 266722

1st Ind.

War Department, J.A.G.O., NOV 17 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant James F. Benton (0-1308203), 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 forfeitures be remitted, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to the possibility of salvage which ordinarily suggests a recommendation of clemency in cases of this character, but it is felt that, upon the whole record, the accused has displayed such weakness of character as to render his retention as an officer incompatible with the best interests of the service.

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 suitable to carry the above recommendation into effect, should such action meet with approval.

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 32, 19 Jan 1945)

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

SPJGK
CM 266723

9 NOV 1944

UNITED STATES	THE INFANTRY SCHOOL
v.	Trial by G.C.M., convened at Fort Benning, Georgia, 27 September 1944. Dishonorable discharge, total forfeitures, and to be hanged by the neck until dead.
Private CURN L. JONES (33122994), Company A, Service Battalion, 2nd Student Training Regiment, The Infantry School, Fort Benning, Georgia.	

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

---

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Curn L. Jones, Company "A", Service Battalion, Second Student Training Regiment, The Infantry School, Fort Benning, Georgia, did, at or near Columbus, Georgia, on or about 30 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class Dooley E. Parnell, Second Company, Officer Candidate Reception Unit, The Infantry School, Fort Benning, Georgia, a human being, by cutting him on the body with a sharp instrument.

This accused was charged jointly with Private First Class Allen M. McDonald, Company A, Service Battalion, First Student Training Regiment, The Infantry School, Fort Benning, Georgia, with the commission of this murder. The joint charges were referred for trial to the court appointed by paragraph 43, Special Orders No. 220, Headquarters The Infantry School, Fort Benning, Georgia, dated 12 September 1944. The court convened for the joint trial 27 September 1944, but before the arraignment the defense moved for a severance of the joint charge stating that the interests of accused were conflicting. Without any objection by the prosecution, the court granted the motion. It was thereupon agreed by prosecution and the defense that the court would proceed with the separate trial of the accused Jones. The specification was accordingly amended and the trial resumed as to accused Jones. He pleaded not guilty to and was found guilty of the Charge and its Specification, all members of the court present concurring. No evidence

was introduced of any previous conviction. He was sentenced by the court, all members present concurring, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be hanged by the neck until dead.

3. The evidence for the prosecution shows that on the afternoon of 30 August 1944, Private First Class Dooley E. Parnell, Second Company, Officer Candidate Replacement Unit, The Infantry School, Fort Benning, Georgia (R. 126) went to Columbus, Georgia, with Private First Class Ray E. Collins. They attended a theater and then purchased a "fifth" of whiskey which they and others drank during the course of the afternoon. Parnell and Collins then had dinner and thereafter went to the bus station in Columbus for transportation back to Fort Benning. At about 9:30 P.M. EWT, prior to arrival of the bus, Parnell, saying that he thought he would stay in town a little longer, left Collins. At that time Parnell was not drunk (R. 32,33,38,39) During the afternoon Parnell cashed a money order for $20 and put the money in his wallet. He spent $5 or $6 of this while he was with Collins (R. 38).

At about 10 P.M. EWT, Parnell entered Clyde's Cafe, located on Glade Road, Columbus, Georgia, in the colored district. Glade Road is on the route to Fort Benning (R. 40,41). The cafe is "off limits" to white military personnel, although there is no sign to that effect in the cafe (R. 70,75,122). Parnell ordered two bottles of beer, one for himself and one for a "colored boy" (R. 64,65,69). They drank the beer and Parnell then ordered two more beers. Parnell had a piece of paper and said to several persons that if they were 18 they could read it (R. 46). An employee of the cafe told Parnell to leave "because he was in the wrong place" (R. 58,70,122). Parnell then ordered a Coca Cola. After Parnell had been in the cafe about fifteen minutes (R. 54,122), the accused, Private Allen McDonald, and two girls, Hattie and Bedella Johnson (all colored) entered (R. 47,71,94,106). The owner of the cafe, Mr. Moran Hawkins, told the accused "to take him [Parnell] out" (R. 70,94). The accused approached Parnell who was standing at the bar drinking the Coca Cola and said, "What in the Hell are you doing in this place" (R. 48,100). The accused was behind Parnell and struck him on the back or the side of the head with his fist (R. 48,49,70,94,107,119). Private McDonald then hit Parnell (R. 48, 94,107,119). The accused and McDonald each struck Parnell about fifteen times and also kicked him (R. 49,70). Parnell did not offer any resistance or fight back (R. 48,49,66,107,119). While Parnell was being forced out the door (R. 49,112,123), Mr. Hawkins ran to the front of the counter and told the accused to "leave Parnell alone" (R. 62). While in the cafe Parnell "did not do anything out of the way" (R. 54,73). After being forced outside, Parnell raised the Coca Cola bottle, which he was still carrying in his hand, but the accused and McDonald knocked it to the ground (R.77). The accused then struck Parnell with "one of those big army knives" (R. 78, 79). Then they "carried him" around to the side of the cafe (R. 79). The accused and McDonald forced Parnell to the ground and continued to beat him (R. 95,108). They then got up. Parnell arose, walked a few steps and fell

(R. 96). Blood was flowing from his back (R. 109). The accused went back in the cafe for his hat and someone said, "What did you all do to that man". The accused replied, "I killed him. Don't anyone of you all know my name. Don't tell anything about it" (R. 67). At this time the accused was holding a knife in one hand (R. ~~79~~) and kept repeating, "Don't nobody know me" (R.79, 80,119,123). The accused then left and Private McDonald escorted the Johnson girls home (R. 97, 109).

Parnell continued to lie where he had fallen, on his back with his head about three feet from the highway, in a pool of water (R. 42,51,79,123). The police arrived about ten minutes later (R. 135) and Parnell was immediately taken to the Station Hospital, Fort Benning, Georgia (R. 40,41). Clyde's Cafe has outside lighting which illuminated the scene of the attack (R. 50,53,78, 97). Parnell's wallet was empty (R. 16).

Upon reaching the Station Hospital, Parnell was declared dead (R. 15,16, 43). An autopsy was performed the following day at the Station Hospital (R. 21,22). This autopsy revealed:

> "* * * multiple stab wounds and incisions of the thorax, abdomen, and right forearm, a stab wound of the right asygos vein, a right hemothorax, an incised wound of the 6th left costal cartilage, a stab wound of the pericardium, a hemopericardium, stab wound of the right ventricle of the heart, stab wounds of the mesentery, stab wounds of the upper jejunum, and multiple superficial abrasions." (R. 26).

The immediate cause of death was a stab wound of the right ventricle of the heart (R. 25). Other wounds could have caused death (R. 28). The injuries were inflicted by a narrow penetrating instrument with a sharp cutting edge, possibly a knife (R. 26-27). The deceased lived for about 15 minutes after he was stabbed (R. 28).

The accused was identified by six eye witnesses as the person who attacked Parnell in the cafe (R. 61,72,86,94,106,119,124). Photographs of Parnell's body taken the morning following his death showed the stab wounds and abrasions. The body as shown in the photographs was recognized as the victim of the attack by the same six witnesses. These photographs were introduced and admitted in evidence without objection (Pros. Exs. 1 and 2).

4. Sergeant John D. Bennett, a witness for the defense, testified that he had known the accused for a period of 30 months while they were both in the same military organization. In his opinion the reputation of the accused was good (R. 128).

Having been fully advised of his rights accused elected to make an unsworn statement through his counsel, the substance of which was as follows:

Accused left Fort Benning at about 7:00 P.M. EWT, 30 August 1944, and went to Columbus, Georgia. He later went to the home of Hattie Johnson in Phenix City. Private McDonald, Hattie and Bedella Johnson and he then went to Clyde's Cafe, arriving at about 9:30 P.M. EWT. At Clyde's Cafe he met a girl and left the cafe with her and went to the USO in Columbus, He stayed at the USO until midnight and then returned to Fort Benning, Georgia. The military police stopped him at the outpost, examined some red paint on his trousers, and released him. He knows nothing of the stabbing and was in Clyde's place only about two minutes (R. 133,134).

5. The Specification of the Charge avers that the accused did on 30 August 1944 at Columbus, Georgia, "with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Private First Class Dooley E. Parnell * * * a human being, by cutting him on the body with a sharp instrument".

In substance it charges the accused with the murder of Parnell.

> "Murder is the unlawful killing of a human being with malice aforethought * * * Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed." (MCM, 1928, par. 148a.)

> "Malice in this connection is not limited in its meaning to hatred, ill-will, or malevolence, but denotes a wicked and corrupt disregard of the lives and safety of others -- a failure to appreciate social duty. It relates not merely to the state of mind of the slayer, but also to the moral aspect of the act as indicated by the circumstances attending it. If his act or conduct denotes depravity at the time of the wrongful act, or is such as to indicate a wicked, depraved, and malignant spirit, the law will infer malice, without reference to what was passing in the slayer's mind at the time, * * * Specific malice toward the victim is not necessary to constitute murder; the malice may be toward a group of persons, and may exist without former grudges or antecedent menaces. It may consist in the intention to do great bodily harm, as well as in the intention to kill; and whether the intention is the one or the other, if death occurs, the homicide is murder." ("Homicide", 26 American Jurisprudence, Sec. 40).

It was shown by eye witnesses and by the nature of the wounds that the accused used a knife in such a manner as to drive its blade into the heart of Parnell. Where such a weapon is used in a manner likely to, and does,

cause death, the law presumes malice from the act. A knife with a blade as long and as sharp as the one used by the accused is a dangerous weapon (Wharton's Criminal Law, 12th Ed., Sec. 426). The malice of the accused is further shown by the numerous stab wounds in vital parts of the body. The intent to kill was clearly present.

The accused defended on the ground that he was not present during the altercation or the killing that followed. He presented this defense in an unsworn statement which need not be treated as evidence by the court (MCM 1928, par. 76). However, there can be no doubt that the accused was the one who attacked Parnell. Six witnesses saw him do so and identified him in court. Following the stabbing of Parnell the accused returned to the cafe and repeated numerous times, "Don't nobody know me". He also said, "I killed him".

The homicide that was committed by the accused was not in the performance of any legal duty so as to make it legally justifiable, nor was it in self-defense so as to make it legally excusable. In order that a killing on the grounds of self-defense may be legally excused the killing must have been believed on reasonable grounds by the killer to be necessary to save his life or to prevent great bodily harm to himself. No such evidence was shown. To the contrary, the circumstances and the direct evidence disclose an unprovoked and vicious attack, coupled with a total disregard of the life of Parnell. It was a willful, deliberate, malicious and premeditated killing as averred in the Specification. The evidence amply sustains the findings of guilty and the sentence.

6. The Charge Sheet and the Staff Judge Advocate's review show that the accused is 23 years of age and was born at Brunswick, Virginia. His education consists of 6 years in grammar school. Prior to induction he was employed by the Savoy Hotel at Petersburg, Virginia, as an elevator operator earning $15.00 per week. He has been employed as a laborer on building contracts and did pick and shovel work on excavations. He was inducted at Richmond, Virginia, on 15 January 1942. He is classified as Grade V by his Army General Classification Test score. He received basic training at Camp Wheeler, Georgia, and thereafter was transferred to Fort Benning, Georgia. The accused reads and writes with difficulty but has a good vocabulary. There is no evidence of previous admissible or inadmissible convictions by court-martial. A character witness for the accused testified that he "had a pretty good reputation" in his company and always performed his duties (R. 128).

7. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed by the court 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. The death penalty is authorized upon a conviction of a violation of Article of War 92.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 27 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 Curn L. Jones (33122994), Company A, Service Battalion, 2nd Student Training Regiment, The Infantry School, Fort Benning, Georgia.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. The accused was found guilty of murder in violation of Article of War 92, all members of the court present concurring. He was sentenced by the court, all members present concurring, to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The evidence shows that on the night of 30 August 1944 Private First Class Dooley E. Parnell, a white soldier, entered a colored cafe in the colored district in Columbus, Georgia, "off limits" to white military personnel, and ordered two bottles of beer, one for himself and one "for a colored boy". Parnell had been drinking, but was not drunk or disorderly. An employee of the cafe asked him to leave. Parnell ignored the request and ordered two more bottles of beer and a Coca Cola. Later the accused and another colored soldier, Private First Class Allen M. McDonald, accompanied by two girls, entered the cafe. The manager of the cafe who had previously requested Parnell to leave then told accused "to take him [Parnell] out". The accused approached Parnell, who was standing at the bar holding a Coca Cola bottle in his hand, and said, "What the hell are you doing in this place?" and struck Parnell on the back of the head with his fist. Then Private McDonald struck Parnell. Parnell did not fight back. The accused and McDonald continued striking Parnell as they pushed him out of the door on to the sidewalk or street. The assault continued outdoors. Private Jones stuck Parnell with "one of those big Army knives". The deceased died within 15 minutes, his death having been caused by multiple stab wounds and incisions. The evidence clearly shows that the accused was the aggressor and did the stabbing and cutting, but his companion, McDonald, participated in the assault. After Parnell had collapsed the accused, while holding the knife in his hand, was heard to say, "I killed him. Don't anyone of you all know my name. Don't tell anything about it". In a separate trial by general court-martial (CM 266724) McDonald was also found guilty of the murder of Parnell and sentenced to be hanged. The record of trial and the opinion of the Board of Review, together with my views and recommendations in that case are also transmitted to you for consideration in connection with this case. In view of the brutal nature of the homicide on the part

of accused Jones, I recommend that the sentence of death as to Jones be confirmed and carried into execution at a time and place to be designated by the Commanding General, The Infantry School, Fort Benning, Georgia.

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 110, 28 Mar 1945)

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

SPJGK
CM 266724

9 NOV 1944

UNITED STATES	THE INFANTRY SCHOOL
v.	Trial by G.C.M., convened at Fort Benning, Georgia, 29 September 1944. To be hanged by the neck until dead.
Private First Class ALLEN M. McDONALD (37103369), Company "A", Service Battalion, First Student Training Regiment, The Infantry School.	

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

---

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Allen M. McDonald, Company "A", Service Battalion, First Student Training Regiment, The Infantry School, Fort Benning, Georgia, did, at or near Columbus, Georgia, on or about 30 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class Dooley E. Parnell, Second Company, Officer Candidate Reception Unit, The Infantry School, Fort Benning, Georgia, a human being, by cutting him on the body with a sharp instrument.

The accused was charged jointly with Private Curn L. Jones, Company A, Service Battalion, Second Student Training Regiment, The Infantry School, Fort Benning, Georgia, with the commission of this murder. The joint charges were referred for trial to the court appointed by paragraph 43, Special Orders No. 220, Headquarters, The Infantry School, Fort Benning, Georgia, dated 12 September 1944. The court convened for the joint trial 27 September 1944, and before the arraignment the defense moved for a severance upon the ground that the interests of the two accused were

conflicting. Without objection by the prosecution, the court granted the motion. Thereafter, on 29 September 1944, this accused was separately tried by a general court-martial convened by paragraph 4, Special Orders No. 233, Headquarters The Infantry School, Fort Benning, Georgia, dated 27 September 1944. Before the arraignment and by consent of the defense, the specification was amended by striking therefrom all reference to Private Curn L. Jones. The accused pleaded not guilty to and was found guilty of the Charge and the Specification, all members of the court concurring in the findings of guilty. No evidence of any previous conviction was introduced. He was sentenced to be hanged by the neck until dead, all members of the court concurring in the sentence. 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 about 9:40 p.m., EWT, Private First Class Dooley E. Parnell, a member of Second Company of the Second Student Training Regiment, Fort Benning, Georgia, was seen in apparent good health as he walked out of the front door of the Howard Bus Station on Broadway, in Columbus, Georgia (R. 30-31).

At about 10:00 p.m., EWT, Parnell, unaccompanied, entered "Clyde's Cafe", 1508 Glade Road, Columbus, Georgia, located in the colored district. The bus route to Fort Benning, Georgia, runs along Glade Road (R. 35). All colored districts in Columbus are "off limits" to white military personnel (R. 83). Parnell ordered two bottles of beer, one for himself and one for a "colored boy" named Roger Pearce. He had a piece of paper with writing on it and questioned several "boys" present as to their ages, saying that if they were 18 they could read it. Willie Johnson, an employee of the cafe, asked Parnell to leave (R. 36,48). Parnell ignored this request and ordered two more beers and later a Coca Cola. The owner of the cafe, Mr. Moran Hawkins, came into the cafe and requested that he leave (R. 37,48). After Parnell had been in the cafe about 15 minutes the accused and a Private Curn L. Jones, accompanied by two girls, Hattie and Bedella Johnson, entered (R. 37,74,86,100). Mr. Hawkins told the accused and Jones "to see if they could get him [Parnell] out" (R. 66,73,86). The accused and Jones thereupon approached Parnell who was standing at the bar holding a Coca Cola bottle in his hand and, without any words being spoken, Jones struck Parnell on the back of the head. The accused then struck him (R. 37,86, 101,109). While still in the cafe the accused and Jones each struck Parnell about 15 times (R. 38). Parnell did not fight back or attempt to use the bottle as a weapon (R. 39,48,72,101). As the accused and Jones continued to strike Parnell they pushed him toward the door (R. 38). Jones had a knife in his hand (R. 66). The fight continued out doors. Outside, Parnell "held the bottle up" and Jones "run up under him" striking him with a knife which had a blade about 5 inches long (R. 53,56,59,67,68). Jones stabbed Parnell in the back (R. 77). When this blow was struck the accused was holding Parnell by one arm (R. 54). Parnell made no effort to strike anyone with the Coca Cola bottle, although he did raise it and the accused immediately knocked it from his hand (R. 53,90). After Parnell was stabbed, the accused and Jones "carried" him to the side of the cafe (R. 59).

The three were then seen on the ground, accused and Jones still striking Parnell, who made no effort to fight back (R. 87,102). Shortly thereafter the accused and Jones picked themselves up and approached the two girls, Hattie and Bedella Johnson, who also were outside the cafe at this time (R. 88). Jones ran into the cafe to get his hat, "hollering " over and over "Don't nobody call my name" or "don't nobody know me" (R. 54,69, 109). At this time Jones was holding a knife covered with blood (R. 56, 60,69) and made reference that "I" or "We" had just killed "him" (R. 111). At about the same time Mr. Hawkins made the statement "I think they killed the white soldier" (R. 110). He called the police. Jones left and the accused escorted the two girls home (R. 88,103).

After the accused and Jones ceased their attack, Parnell arose from the ground, walked a few steps and fell (R. 63,88). He lay face down with his head in or near a puddle of water (R. 40,70). The police arrived about ten minutes later and Parnell who was then dead was immediately taken to the Station Hospital, Fort Benning, Georgia (R. 41,80,81).

Clyde's Cafe has outside lighting which illuminated the scene of the attack (R. 40,43,67). No one at any time during the attack saw the accused with a knife (R. 59,74,91,107).

Upon reaching the Station Hospital at about 2200, EWT, Parnell was officially declared dead (R. 13,14). An autopsy was performed the next day at the Station Hospital (R. 19,20). This autopsy revealed:

> "* * * multiple stab wounds and incisions of the thorax, abdomen and right forearm; stab wound of the right azygos vein; right hemothorax; incised wound of the sixth left costal cartilage; stab wound of the pericardium; hemopericardium; stab wound in the right ventricle of the heart; stab wounds of the mesentery; stab wounds of the upper jejunum; multiple superficial abrasions. Of these, two could have unquestionably contributed to the factor of shock which attended his demise. They were the injuries which reached up to the vein on the side of the spinal column and released about a quart of blood" (R. 24).

The direct cause of death was the stab wound which penetrated the heart. However, the wound in the intestines could have caused death (R. 15,24,26). The wounds were probably inflicted by one or more single edged, sharp, penetrating instruments having a minimum length of about 8 cm since some of the wounds extended to a depth of 8 cm (R. 24,25). The blows were struck with considerable force since one wound cut through a cartilage a distance of 4 cm (R. 28). Parnell died about 15 minutes after he was stabbed (R. 27).

Photographs of Parnell's body were taken on 31 August 1944 showing four of the seven wounds described (R. 9,26; Pros. Exs. 1,2), and admitted

in evidence without objection (R. 12). The body shown in the photographs was identified by witnesses who knew Parnell and by witnesses who were present at the time of the attack made upon him by Jones and the accused (R. 41,57, 72,82,104,110).

4. For the defense: The witness, Private First Class Ray E. Collier, was recalled by the defense and testified that when Parnell left the Howard Bus Station in Columbus about 9:40 p.m. he was sober but that during the day Parnell had purchased a bottle of bourbon whiskey and had consumed about four drinks from the bottle (R. 115-116).

Mr. Roger Pearce, Columbus, Georgia, testified that he saw a "white soldier" come in Clyde's Place on 30 August 1944 and that this soldier bought two bottles of beer, giving him one. They drank the beers and the soldier ordered two more. An employee "cussed" at Parnell and told him to get out. Parnell said, "Aw, come on now don't be thataway" and remained in the place. He drank another bottle of beer with Pearce. At that time Parnell was not drunk and did not appear to have been drinking anything except beer (R. 118). The accused and Jones then came in. Jones hit the "white boy" across the head. The accused kicked him and they "carried" him out the door (R. 119). The witness did not go outside but a short time later saw Jones reenter the cafe, saying, "Don't nobody know my name". Jones also said, "I killed him" (R. 120). The witness then went outside and saw "the man laying on the ground" (R. 121).

Sergeant John D. Bennett, Company "A", Service Battalion, First Student Training Regiment, Fort Benning, Georgia, testified that he is in the same organization as the accused and has known him for about 30 months. The accused has the reputation of "being a pretty good soldier" (R. 124,125).

First Sergeant Milton L. Turner, Headquarters Company, First Student Training Regiment, The Infantry School, Fort Benning, Georgia, testified that he knew the accused as a student cook and that his manner of performance of military duties was very good. (R. 125,126.)

Willie Johnson, who had previously testified as a witness for the prosecution, was recalled as a witness for the defense (R. 121). He reiterated that it was Jones who had the knife and who stabbed Parnell (R. 122-123). He denied that he told Parnell to get out of the cafe (R. 122).

The accused having been fully advised concerning his right to testify in his own behalf elected to do so (R. 128). He stated that on the night of 30 August 1944 he and Private Jones went to the home of Hattie and Bedella Johnson. The four then went by bus to Clyde's Place on Glade Road arriving there between 9 and 9:30 p.m. EWT. / He had never been there before. Before he could get in an order he heard a "rustling" behind him and upon turning

around he saw Jones strike Parnell and "kept on striking him". The accused grabbed Jones and tried to separate the fight but was unable to do so. Jones pushed Parnell out of the door. The accused followed with the Johnson girls behind him. On the outside Parnell drew back his hand containing a Coca Cola bottle to strike Jones and did strike Jones on the neck. Jones rushed in and they both fell to the ground. He did not see any knife in Jones' hand nor did he see Jones stab Parnell with a knife. They both got up together and Parnell walked off to the right toward a truck that was parked on a highway and that was the last that the accused saw of him. Jones came back and went into the cafe to get his cap and asked the accused to "take the girls home". The Johnson girls said "lets go" and the three left and caught a bus (R. 130-131). After taking the girls home he went to the USO and later returned to Fort Benning, Georgia, and went to bed (R. 133-134). He saw Jones hit Parnell ten or fifteen times before Jones forced Parnell out the door. Parnell made no effort to defend himself. The accused grabbed one of Jones' arms in an effort to prevent Jones from striking Parnell (R. 135). No one told the accused to get Parnell out of the cafe (R. 136). On the outside Jones struck Parnell "all over". Jones got him down on the ground and continued to hit Parnell. The accused looked on (R. 137). The accused did not see any blood on Parnell and did not know he was cut until Jones told him (R. 138). He did not see Parnell hit Jones at any time except once with the Coca Cola bottle (R. 140). Accused denied that he hit Parnell at any time or that he "laid a finger on him" (R. 142).

5. The evidence discloses a clear case of homicide constituting murder as against Jones. Without legal justification or excuse Jones killed Parnell by stabbing him with a knife. This was shown not only by the prosecution but also by the defense.

> "Murder is the unlawful killing of a human being with malice aforethought. * * * Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed." (MCM, 1928, par. 148a).

It was shown beyond any doubt by the witnesses who saw Jones stab Parnell with a knife and by the nature of the wounds that Jones did use a knife in such a manner as to drive its blade into the heart of Parnell. Where such a weapon is used in a manner likely to, and does, cause death the law presumes malice. (Wharton's Criminal Law, 12th Ed., Sec. 426, p. 655.) Malice on the part of Jones was also shown by the numerous stab wounds in vital parts of Parnell's body. The evidence clearly supports the conclusion that Jones intended to kill and did kill Parnell.

Jones was at all times the aggressor and therefore could not have been acting in self-defense. Nor can homicide be excused on the ground that Jones was acting in a lawful manner in ejecting Parnell from the cafe at the request of the owner. It was not necessary either to beat or to kill Parnell in order to eject him. Furthermore the fatal blows were struck after Parnell was outside of the cafe.

The evidence therefore legally and amply supports the conclusion that Jones murdered Parnell.

In the instant case however the accused McDonald is charged with the murder of Parnell.

> "All persons present concurring and participating, by some overt act, in the commission of the homicide are equally guilty with the one who struck the fatal blow, fired the fatal shot, etc., and it need not be shown that there was an actual verbal agreement to stand by and aid one another. Those who advise, encourage, aid, or abet the killing of another are as guilty as though they take the person's life with their own hands." (Sec. 58, "Homicide", 26 American Jurisprudence.)

> "It is a familiar rule that when several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance or in prosecution of the common design for which they combine; and if a culpable homicide results in the pursuance of the common purpose of the conspiracy, all are alike criminally responsible, including conspirators who were not personally present at the time of the commission of the homicidal act, or did not actually participate therein. Where one of the conspirators commits a homicide in the furtherance of the original design, it is, in the construction of law, the act of all, even though such killing was not a part of the prearranged plan." (Sec. 64, "Homicide", 26 American Jurisprudence.)

> "In order that one person may be held responsible for a homicide which is committed while a conspiracy to do an unlawful act is being carried out, a conspiracy, combination, or common design must have existed between him and the person who actually committed the homicidal act, and that act must have been in the furtherance of the conspiracy. Prearrangement is not essential, however; it is sufficient if the combination was entered into in an emergency." (Sec. 65, "Homicide", 26 American Jurisprudence.)

It was shown by several witnesses that the accused joined in the attack upon Parnell inside of the cafe. He was seen to strike him numerous blows and to kick him and force him outside of the cafe. In his defense he claimed that he did not touch Parnell, but was protecting him by holding on to Jones.

His contention was not corroborated by any other evidence. Six disinterested witnesses testified to the contrary. On the outside of the cafe after the accused and Jones had accomplished their apparent purpose of ejecting Parnell from the cafe the accused continued the attack. Willie Johnson actually saw Jones stab Parnell in the back. The accused must have seen this act. Parnell's body shows seven severe stab wounds. The accused was the person nearest to Jones and Parnell when these blows were delivered and must have seen Jones deliver them. Notwithstanding, according to the Johnson girl, who was a disinterested witness and one most likely to be friendly to the accused, the accused continued to beat Parnell while he lay helpless upon the ground. The picture presented by the evidence is a clear one of the accused's participation in the deadly assault upon Parnell, even though he personally was not wielding the knife that struck the fatal blow. Under such circumstances the accused is as guilty of murder as Jones.

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal". (18 U.S.C. 550.)

Whether the accused actually saw Jones use a knife during the joint attack upon Parnell is immaterial where, as was shown, the two were engaged in a joint undertaking in assaulting Parnell. In State v. Darling (216 Mo. 450, 115 S.W. 1002, 26 American Jurisprudence, Sec. 66, Note 10) the court held:

> "If two or more persons enter into a conspiracy that one of the number shall assault and whip another, and all go together to the place where such other is, for the purpose of encouraging the assault on him, and one of them makes an assault with a deadly weapon, resulting in the death of the person assaulted, the use of such weapon must be regarded as the act of all the conspirators, although they did not know that the one who used it had it in his possession or had formed any design to kill."

In CM NATO 1123 (1944), the Board of Review stated with reference to two persons convicted of assault with intent to murder:

> "It does not clearly appear which of the accused wielded the knife but it is not controverted that one of the accused held the victim while the other struck him with the weapon. The blows were so vicious that one wound penetrated to the victim's left lung. From the nature of the weapons used, the severity of the wound inflicted, the absence of proof of any legal excuse, legal justification or provocation, and from other attending circumstances, the court was justified in inferring that the assault was made wantonly, willfully and with malice aforethought. Had death ensued, the homicide would have been murder. Accused was properly found guilty of assault with intent to commit murder as alleged (MCM, 1928, par. 149l; Winthrop, 1920 Reprint, p. 688)."

Under the law and the facts in this case the Board of Review is of the opinion that by reason of accused's participation with Jones in the fatal assault upon Parnell, the court was fully warranted in finding accused guilty of murder in violation of Article of War 92.

6. The accused is 24 years of age and was born in Jackson, Mississippi. He completed 7 years of grammar school in 1938. From 1938 to 1942 he was a laborer on his father's farm at Round Pond, Arkansas. His mother, father, three brothers and five sisters are living. There is no information concerning any convictions by civil courts. He is married.

Accused was inducted on 16 January 1942 at Camp Joseph T. Robinson, Arkansas, and received his basic training at Fort McClellan, Alabama. Since April of 1942, he has been assigned to Company "A", Service Battalion, First Student Training Regiment with primary duty of waiter and cook in officers' mess. His company commander states that accused's general character and standing in the Army are excellent, and his mental condition and military fitness are good. While with Company "A", he received disciplinary action under Article of War 104 on 27 May 1944 for unauthorized possession of ammunition. There is no record of any previous convictions by court-martial.

7. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed by the court 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. The death penalty is authorized upon a conviction of a violation of Article of War 92.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 27 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private First Class Allen M. McDonald (37103369), Company A, Service Battalion, First Student Training Regiment, The Infantry School, Fort Benning, Georgia.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. The accused was found guilty of murder in violation of Article of War 92, all members of the court present concurring. He was sentenced by the court, all members of the court concurring, to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The evidence shows that on the night of 30 August 1944 Private First Class Dooley E. Parnell, a white soldier, entered a colored cafe in the colored district of Columbus, Georgia, "off limits" to white military personnel, and ordered two bottles of beer, one for himself and one "for a colored boy". Parnell had been drinking, but was neither drunk nor disorderly. An employee of the cafe asked him to leave. Parnell ignored the request and ordered two more bottles of beer and a Coca Cola. Later the accused and another colored soldier, Private Curn L. Jones, accompanied by two girls entered the cafe. The manager of the cafe, who had previously requested Parnell to leave, asked accused and Private Jones "to see if they could get him [Parnell] out". The accused and Jones thereupon approached Parnell, who was standing at the bar, and without any words Private Jones struck Parnell on the back of the head. Then the accused struck him. Parnell did not fight back. Jones and accused continued to strike Parnell as they pushed him out of the door on to the sidewalk or street. The assault continued outdoors where Jones was seen to strike Parnell several times with an open knife which had a blade about five inches long. Parnell died within 15 minutes, his death having been caused by multiple stab wounds and incisions. The evidence clearly shows that Jones was the aggressor and did the stabbing and cutting. Although accused McDonald did not use any weapon, he participated in the assault in such manner as makes him legally responsible in equal degree with Private Jones, who actually did the killing. In a separate trial by a general court-martial (CM 266723) Private Jones was also found guilty of the murder of Parnell and sentenced to be hanged. The record of trial and the opinion of the Board of Review, together with my views and recommendations in that case are also submitted to you for consideration in connection with this case. The accused has been in the military service since 16 January 1942 without any previous conviction. Two witnesses testified that he is "a good worker" and "a pretty good soldier". While the accused by reason of his participation in the fatal assault is guilty of

murder, I am convinced that he did not intend that Parnell should be killed. Under all the circumstances, and particularly in view of the undisputed proof that the accused Jones was the aggressor and did the actual killing, I recommend that the sentence of death as to accused McDonald be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and to confinement at hard labor for life, and that the United States Penitentiary, Atlanta, Georgia, be designated as the place of confinement.

3. Consideration has been given to a letter from the father and mother of the accused to the President requesting clemency in behalf of their son. The letter accompanies the record of trial.

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

Myron C. Cramer

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr.
for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. fr. mother and father
of accused to Pres.

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for life. G.C.M.O. 109, 27 Mar 1945)

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

SPJGQ
CM 266734

14 Nov 1944

UNITED STATES v. Privates JOSEPH W. MURPHY (17109555) and STEPHEN A. WEDGE (31130172), both of 232nd Army Air Forces Base Unit, Section A, Dalhart Army Air Field, Dalhart, Texas.	SECOND AIR FORCE Trial by G.C.M., convened at Dalhart Army Air Field, Dalhart, Texas, 11-14 September 1944. Each: Dishonorable discharge and confinement for ten (10) years. Disciplinary Barracks.

- - - - - - - - - - -

HOLDING by the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates.

- - - - - - - - - - -

1. The Board of Review has examined the record of trial in the case of the soldiers named above.

2. The accused were tried together on separate Specifications and Charges. In our opinion the record of trial is legally sufficient to support the findings of guilty against Wedge, and legally sufficient to support the findings of guilty against Murphy except with respect to the Specifications and one of the Charges herewith set forth, which are the only ones necessary to consider.

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

Specification: In that Private Joseph W. Murphy, 232nd Army Air Forces Base Unit, Section A, did, at Dalhart Army Air Field, Dalhart, Texas, on or about 15 May 1944, unlawfully sell to Sergeant Sidney Carpenter, a twenty-one jewel Elgin wristwatch, Serial Number AF 43-33061 of the value of $14.30 issued for use in the Military Service of the United States.

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

Specification 1: In that Private Joseph W. Murphy, 232nd Army Air Forces Base Unit, Section A, did, at Dalhart Army Air Field, Dalhart, Texas, on or about 20 May 1944, feloniously receive, have, and conceal one Elgin military navigation wristwatch of the goods and chattels of the United States Government, then lately

> before feloniously stolen, taken, and carried away; the said Private Joseph W. Murphy then well knowing the said goods and chattels to have been so feloniously stolen, taken, and carried away.

3. In the main, the case is concerned with a series of thefts from the mail, most of them by Wedge, and with the receipt by Murphy from Wedge of articles thus stolen, with knowledge of that fact.

With reference to the Specification of Charge III, there was proof that Murphy received the watch in question from Wedge and subsequently sold it to Carpenter (R. 85-87; Exs. 8, 23). However, in our opinion there was not sufficient evidence to prove beyond a reasonable doubt that the watch was issued for use in the military service of the United States. In this connection we are required to exclude from our consideration Wedge's extrajudicial confessions, which, according to well-known principles of law, are incompetent against Murphy (M.C.M. 1928, par. 114c). In his own confession, Murphy described the watch as a "stainless steel military watch of Elgin make" (Ex. 8). Among other matter engraved on the watch was the inscription "Ord. No. W535AC -34898" (Ex. 23). Probably the letters "Ord. No." referred to "Ordnance Number", as "Ord." is the official abbreviation for "Ordnance" (Par. 3, AR 850-150, 18 Sept. 1944). The only other evidence on the point under consideration is contained in the following announcement by the trial judge advocate:

> "The trial judge advocate and counsel for the defense entered into a stipulation and agreement that a certain piece of property displayed in court as government property, a watch known as a navigator's or 'hack' watch, was government property. At that time it was not pointed out to the court the value of that watch. It is approximately $14.30." (R. 94)

This announcement was followed by complete silence on the part of the accused, the defense counsel, and the law member. Apparently the trial judge advocate intended to refer to a prior stipulation, but no such stipulation appears in the record. Assuming that the announcement by the trial judge advocate, followed by silence on the part of the interested parties, amounted in itself to a stipulation, and that it referred to the watch in question, we have merely a stipulation that the watch was government property. In our opinion this falls short of proving beyond a reasonable doubt that the watch was issued for use in the military service. Murphy's description of the property as a "military watch", and the presence of "Ord. No." engraved on it, are equally ineffective to sustain the allegation. In reaching this conclusion we are mindful of the

proposition that the fact of issuance for use in the military service may be proved by circumstantial evidence (M.C.M. 1928, par. 144a). In the present case, however, the evidence is too inconclusive to meet the required quantum of proof.

Specification 1 of Charge IV charges Murphy with receiving a stolen Elgin military navigation wrist watch belonging to the United States Government, knowing it to have been stolen. Presumably this was the same watch previously referred to. As against Murphy, there is no competent evidence in the record tending to prove that any such watch was stolen. Wedge confessed to stealing such a watch, but, as already noted, his confession is inadmissible against Murphy. According to Carpenter, Murphy said that Wedge had given him the watch, but there was no intimation that it had been stolen (R. 86). Even if Murphy had admitted that the watch was stolen property, the case against him would fail for want of proof of the corpus delicti (M.C.M. 1928, par. 114a). In our opinion the Specification was not proved.

4. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge III and the Specification thereof as to Murphy, and the finding of guilty of Specification 1 of Charge IV as to Murphy. With the above exceptions the record of trial is legally sufficient to support the findings against each of the accused and is legally sufficient to support the sentences.

Fletcher R. Andrews, Judge Advocate.

Herbert A. Anderson, Judge Advocate.

[illegible], Judge Advocate.

1st Ind.

War Department, J.A.G.O., NOV 21 1944 - To the Commanding General, Second Air Force, Colorado Springs, Colorado.

1. In the case of Privates Joseph W. Murphy (17109555) and Stephen A. Wedge (31130172), both of 232nd Army Air Forces Base Unit, Section A, Dalhart Army Air Field, Dalhart, Texas, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that the findings of guilty of Charge III and the Specification thereof as to Murphy, and the finding of guilty of Specification 1 of Charge IV as to Murphy be disapproved. Upon compliance with the foregoing recommendation, and under the provisions of Article of War 50½, you will have authority to order the execution of the sentences.

2. It is noted that the United States Disciplinary Barracks was designated as the place of confinement. Among other offenses, each accused was convicted of stealing from the mail. This is a violation of Title 18 United States Code, Section 317, for which penitentiary confinement is authorized. In view of the nature of the offense, it is recommended that you designate a Federal reformatory as the place of confinement (See Bull. JAG, July 1944, pp. 280, 281).

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

(CM 266734).

Myron C. Cramer

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

1 Incl.
Record of trial.

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

SPJGH
CM 266820

30 NOV 1944

UNITED STATES v. First Lieutenant JOHN J. NESTOR, JR. (0-566308), Air Corps.	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Keesler Field, Mississippi, 29 September 1944. Dismissal.

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

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

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

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

Specification 1: In that First Lieutenant John J. Nestor, Jr., Section "T" (Basic Student Section), 3704th Army Air Forces Base Unit, was at Biloxi, Mississippi, on or about 22 August 1944, drunk and disorderly in uniform in a public place, to wit, at or near the Sho Boat.

Specification 2: In that First Lieutenant John J. Nestor, Jr., * * *, was at Biloxi, Mississippi, on or about 30 June 1944, drunk in uniform in a public place, to wit, Beach Drive at or near the White House Hotel.

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

Specification: In that First Lieutenant John J. Nestor, Jr., * * *, was, at Biloxi, Mississippi, on or about 20 May 1944, in a public place, to wit, the Rendezvous Lounge, Beach Drive, disorderly while in uniform.

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

3. The evidence introduced by the prosecution in support of each Charge and Specification is hereinafter summarized separately. The Charges and Specifications are considered in chronological order.

a. Specification, Charge II.

Sometime between midnight and 1:30 a.m. on 20 May 1944, accused in uniform entered the Rendezvous Lounge, a drinking establishment located in Biloxi, Mississippi. He was accompanied by one Estelle Holden and another woman (R. 50, 51, 62, 63). She had been almost a nightly visitor at the Lounge during the preceding several weeks (R. 60). Mr. L. E. Morgan operated the Lounge, assisted by Mr. Paul LeBlanc and a Mr. Tuschik whom he employed in managerial capacities. Mr. Francis Ryan was employed as the house officer (R. 49, 53, 69, 75). Accused and Miss Holden remained there until 3 a.m., closing time, consuming several drinks. Accused then insisted that Miss Holden leave with him but she was heard to refuse saying, "I don't want to go with you any further, you have caused too much excitement all night long, and I don't want any more of it" (R. 51, 52). Accused went to the men's room and shortly thereafter Miss Holden went to the ladies' rest room. When accused emerged, Mr. Morgan informed him Miss Holden had departed as she had asked him to do. Accused left the establishment and thereafter Miss Holden emerged from the ladies' room and returned to the bar to finish her drink. The doors of the establishment were then locked and the Lounge was closed for the night, the house officer, Mr. Ryan, opening the door only to permit the remaining guests to leave as they finished their refreshments (R. 52).

Within a few minutes accused pounded on the front door of the Lounge. Mr. Ryan opened it and told accused that the establishment was closed for the night. Accused then inserted his foot in the door and forced his way inside. In a loud, belligerent tone of voice accused stated that if ladies were permitted to remain drinking in the establishment so should he (R. 61, 66). Mr. Tuschik went to the door and also explained to accused that the establishment was closed. As Mr. LeBlanc followed Mr. Tuschik to the doorway accused picked up a chair and swung it at Mr. Tuschik and then pushed Mr. LeBlanc over a table. The latter regained his feet and physically ejected accused from the establishment, both of them falling to the ground outside the door (R. 53-55, 64, 65, 67, 71, 77). Accused then challenged Mr. LeBlanc to fight but when his offer was accepted accused left the scene and hurried a short distance down the street followed by Mr. LeBlanc (R. 55, 65, 71, 77, 80). They resumed their argument near a

USO center located in the vicinity where Staff Sergeant Leland W. Proffitt, a member of the military police, came upon them. When asked what the difficulty was accused stated he was not permitted to enter the Rendezvous Lounge although some civilians were still being served. Sergeant Proffitt escorted accused to the Lounge and obtained his hat which had been left there. He then took accused to the White House Hotel (R. 81-83).

b. Specification 2, Charge I.

On 30 June 1944, Captain Clifford L. Scott, who was Commander of the Guard in charge of military police at accused's station, Keesler Field, went to the White House Hotel sometime between 2:30 and 3 a.m. in response to a telephone call. He found accused in uniform lying sound asleep on a bench at a nearby bus stop. It took him several minutes to arouse accused who smelled strongly of liquor, was unsteady on his feet and who, in Captain Scott's opinion, was drunk. He drove accused to his quarters and released him (R. 34-36). Private Floyd K. Sherman, who accompanied Captain Scott on this trip to the White House Hotel, observed accused both after he had been awakened and during the ten minute drive to accused's quarters. The latter had a strong odor of liquor about him and in Sherman's opinion he was drunk. Accused was courteous during the ride and expressed his appreciation for the service accorded him by Captain Scott (R. 38-40).

c. Specification 1, Charge I.

About 11 p.m. on the evening of 21 August 1944, First Lieutenant Wendell Starrick joined accused and two ladies at the Sho-Boat, a night club in Biloxi, Mississippi. Accused had consumed a few drinks before meeting Lieutenant Starrick that evening and had two or three more thereafter (R. 11, 12, 20, 21). Sometime before midnight Captain Clifford L. Scott observed accused at the Sho-Boat in the company of several officers, a couple of ladies and some civilians. Accused was drinking "rather heavily, had lipstick over his face, and presented an untidy appearance". Lieutenant Starrick, however, did not notice any lipstick on accused's face during this evening. Accused informed Captain Scott that he had a date with all the whiskey in New Orleans and that the young lady he was escorting that evening had a warehouse full of it (R. 7, 8, 26).

Between midnight and 12:30 a.m., 22 August 1944, Captain Scott again observed accused at the Sho-Boat and found that he was "still untidy and still had lipstick on his face and was under the influence of liquor". However, he did not believe that accused "was drunk enough at that time to arrest him if I could get Lieutenant Starrick to take him home" (R. 9).

Around 1 a.m. that same night Captain Scott returned to the Sho-Boat and, as he drove into the parking yard, he was hailed by the occupants of a nearby automobile. He stepped over to the automobile which was "in full view of the neon lights" encircling the Sho-Boat, found it occupied by the two young ladies whom accused and Lieutenant Starrick were escorting that evening, one seated in the front seat and the other in the rear of the automobile (R. 9, 10, 12). Accused walked from in back of the automobile, approached Captain Scott standing near the left rear fender, spread his legs apart, unbuttoned his trousers and prepared to urinate on or near Captain Scott's feet, telling Captain Scott to continue talking and nobody would hear him and further stating something to the effect that when "you got to go, you got to go". Lieutenant Starrick heard Captain Scott say, "You know better than to do that" and then Captain Scott escorted accused to the rear of the automobile and instructed Lieutenant Starrick to take him out of town or he would be forced to arrest him. Captain Scott was of the opinion that accused was drunk at this time. In Lieutenant Starrick's opinion, although accused had consumed quite a bit of liquor he was in no way disorderly (R. 10, 12, 23, 25; Pros. Ex. 1).

Accused's party then drove down the highway about a quarter of a mile and stopped at the Bungalow Cafe for coffee and sandwiches (R. 12, 23). Within 15 minutes after the incident in the parking yard of the Sho-Boat, Captain Scott entered the Bungalow Cafe and saw the accused walking through the dining room with his cap on the side of his head and his arm around some woman. Captain Scott approached accused and sternly reminded him he had previously instructed him to go home. Accused replied that he was leaving as soon as he had something to eat. Accused then rejoined his party at a table on the porch and Captain Scott inquired if accused thought he was joking and remarked that accused was having quite a bit of fun at his expense. Accused laughed, clapped his hands and remarked that he was having "a hell of a good time". Captain Scott then placed accused under arrest, escorted him to the station hospital for a blood alcohol test and then placed him in confinement (R. 11). Accused's blood alcohol count was tested about 2 a.m., 22 August 1944, by Corporal Byrd J. Gates, a qualified laboratory technician, and revealed an alcohol count of 1.8 mgs. per 1 cc of blood. Corporal Gates testified that "The Army says that 1.5 alcohol is enough to show a man is intoxicated" (R. 42, 43, 48; Pros. Ex. 3).

In a statement accused voluntarily gave to the investigating officer, after his rights had been fully explained to him, accused admitted having a few drinks before he telephoned Lieutenant Starrick to join him that evening and having a few more drinks after the lieutenant arrived. As he left the Sho-Boat he saw Captain Scott talking to Lieutenant Starrick and their two female companions. He described the events happening immediately thereafter in the following language (Pros. Ex. 2):

"Out of sheer thoughtlessness and with an air of bravado I told Captain Scott that I 'had to go' and proceeded toward the left rear fender of the car. I gave all indications that I would urinate but really had no intention to. It was one of those things a person does when his mind is not absolutely clear. Captain Scott seemed angry and told me to get in the automobile which I did without hesitation."

4. The evidence offered by the defense with respect to the Charges and Specifications may be summarized chronologically as follows:

Specification, Charge II.

It was stipulated by the prosecution, defense and the accused that if Estelle Holden were present she would testify as follows. Around 20 May 1944, she was in the employ of the White House Hotel working in the bar and lounge and that night she was with accused at the Rendezvous Lounge from 1 a.m. until about 3 a.m. when accused stepped outside to hail a taxicab to escort her home. Estelle knew the individuals who operated this establishment. Although she realized that they refused to permit accused to re-enter the Lounge, at first she stated that she did not hear any words, commotion or disturbance at the door. Later in her deposition she admitted she heard a commotion but did not see it. She observed accused in the street five or ten minutes after he had sought to re-enter and observed that accused was avoiding Mr. LeBlanc who appeared to wish to engage in a fight with him. Thereafter Mrs. Morgan, the wife of the proprietor, and Mr. Tuschik took Estelle home. After the disturbance Mrs. Morgan and Mr. LeBlanc remarked that accused was "yellow" because he ran away (Def. Ex. A).

First Lieutenant Clinton B. Green, who knew of accused's difficulty at the Rendezvous Lounge, agreed with Estelle, about a week or two before the trial of this case, to visit the Rendezvous Lounge and chat with Mr. Morgan, the proprietor. They did so and during the conversation Mr. Morgan stated that accused was "yellow" and that he was going to get what was coming to him, was going to be "busted" (R. 103, 104).

After accused had been fully advised of his rights as a witness he elected to take the stand and testify in his own defense. With respect to the events transpiring on the early morning of 20 May 1944, accused testified that when he visited the Rendezvous Lounge with Estelle Holden he had two hats in his possession. He left the bar about 2:30 a.m. to hail a cab to transport Miss Holden to her home. She had not previously indicated that she did not wish to accompany him (R. 114, 115). After accused had

procured a taxi he sought to re-enter the Lounge but was refused admission by the house policeman although he informed the officer that he merely wished to obtain a hat and escort his female companion to the cab. He motioned the taxi to move on when he saw he was denied admission. Mr. Tuschik approached accused and also told him he could not enter. After Mr. LeBlanc joined the group they pushed accused and he grasped a nearby chair, raised it shoulder high to defend himself but did not push Mr. LeBlanc over a table (R. 115, 116, 127, 131, 132). Accused was then ejected from the bar and, without sparring with Mr. LeBlanc although the latter offered to fight him, he "just stumbled around" and then started up the street. Accused was not afraid because he knew none of his opponents could overtake him (R. 116, 117, 135). Accused didn't know why he failed to suggest to the house policemen that they send Miss Holden to the taxi although she sat at the bar but 40 feet from the door (R. 128, 130). When accused returned to the Lounge in the company of the military policeman he sent the latter inside to obtain his hat but said nothing about Estelle Holden because he "had gone through enough trouble at that time". Although he subsequently saw her he admitted he never asked her why she did not leave the Lounge when she saw he was denied admission thereto (R. 137, 139).

Specification 2, Charge I.

The accused testified that on the evening of 29 June 1944 and early morning of 30 June 1944 he consumed seven or eight bottles of beer in the apartment of Marguerite Laughlin who occupied a portion of a cottage owned by the White House Hotel. He went to sleep on the bench at the bus stop because he was tired. He denied that he was drunk (R. 112, 113, 124). Accused was known to be a heavy sleeper (R. 106).

Specification 1, Charge I.

Miss Gloria Scharfenstein who accompanied accused on the evening of 21 August testified that she met accused between 4:30 and 5 p.m. that day and eventually accompanied him to the Sho-Boat. Accused consumed his first drink about 9 p.m., soon after they arrived at the Sho-Boat, and had not more than four or six drinks before Captain Scott took him into custody (R. 92, 95, 99). She testified that accused was not drunk or disorderly to her knowledge, that his uniform was tidy and that he had no lipstick on his face (R. 88, 90). Accused did have severe sun blisters on his face which might have appeared to be lipstick if one failed to observe them closely (R. 101). She stated that Captain Scott laughed and joked with accused's party at the Sho-Boat and that she and the other young lady in the party conversed with Captain Scott at accused's automobile when they were leaving the Sho-Boat and questioned him about his duties for the evening (R. 90, 94). After leaving the Sho-Boat the group stopped at

the Bungalow Bar, at Miss Scharfenstein's and Lieutenant Starrick's suggestion, to obtain something to eat (R. 100). When Captain Scott there took accused into custody, she testified that the captain stated to him that he was not arresting him for what he had done that evening but for previous things that he had done (R. 91, 95).

With respect to the events of that evening, accused testified that he consumed two drinks on the afternoon of 21 August 1944, and that evening went to the Sho-Boat with Gloria Scharfenstein and Blanche Lefkowitz where he consumed three drinks before Lieutenant Starrick joined the party about 10:30 p.m. and consumed about the same number thereafter. He denied that he was drunk while at the Sho-Boat or at the Bungalow Cafe (R. 107, 119). He stated that he had no lipstick on his face but that he was suffering from sun sores (R. 108). Accused heard Captain Scott mention at one time during the evening that he ought to go home and suggest that Lieutenant Starrick conduct him there (R. 118). When at the automobile outside the Sho-Boat, accused admitted that he said, "I gotta go", that he then proceeded to the left rear fender of the automobile about an arm's length from the captain and made a motion toward his trousers which he thought would cause the captain to leave. However, Captain Scott promptly stated that accused "knew better than that" to which accused replied affirmatively. He denied that he opened his trousers. Captain Scott then suggested that Lieutenant Starrick accompany accused to his quarters (R. 111) While at the Bungalow Cafe accused stated that he merely put his arm on the shoulder of a girl at the bar (R. 108). Captain Scott approached accused's table at the Bungalow Cafe, at first laughed with accused and asked him if he wasn't having a lot of fun, and then stated that he thought accused had previously started for his quarters. Thereafter accused was taken into custody (R. 109).

Lieutenant Colonel Francis W. Johnson testified that he had observed accused generally at Keesler Field and that to his knowledge accused bore a fine reputation on the field (R. 86, 87).

5. In rebuttal, Captain Scott testified that accused was about 18 inches from and partly facing him when, on 22 August 1944, he unbuttoned his trousers and told the captain to remain where he was and "nobody will know the difference". He had accused fasten his trousers before he turned him over to Lieutenant Starrick, stating that if the lieutenant did not take accused home he would arrest him (R. 142, 143).

Mr. L. E. Morgan was recalled as a witness and testified that just before accused left the Rendezvous Lounge on 20 May 1944, he heard Estelle Holden tell accused that she would not accompany him any longer

that evening. When she went to the ladies' room she told Mr. Morgan to inform accused that she had left the establishment when he reappeared from the men's washroom (R. 145, 146). He admitted that a week or ten days prior to the trial of this case, Estelle Holden and some companions came to the Lounge and he informed them that in his opinion accused was "yellow" and would be "busted" because of his conduct (R. 147). He further testified that he and Mrs. Morgan left together after closing the Rendezvous Lounge that night and did not escort Estelle Holden to her home (R. 151).

After conclusion of the prosecution's rebuttal, accused resumed the stand and denied all the damaging matters testified to by the rebuttal witnesses (R. 152, 153).

6. It is apparent from the evidence that, on the early morning of 20 May 1944, accused forced his way into the Rendezvous Lounge, a drinking establishment at Biloxi, Mississippi, after he had been denied admission because the establishment had been closed for the night, swung a chair at one of the employees who protested his re-entry and pushed another employee over a table. It required the exercise of physical force to remove accused from the Lounge. There is contradiction in the evidence as to whether or not his female companion of the evening wished him to escort her home. Mr. Morgan's testimony about her remarks to accused that she did not wish him to escort her home was admissible. He was not giving hearsay testimony. He was not relating any circumstances of which he had no personal knowledge and of which he had been informed by some other person having such knowledge. He was testifying to a verbal act occurring in his presence and his testimony was as competent and admissible as if he had been testifying to an assault occurring in his presence. Accused's illogical failure to advise his opponents that he merely wished to obtain a hat and escort his female companion to a taxicab, and his failure to make arrangements for her transportation home after the military police returned to the Lounge with him clearly support Mr. Morgan's testimony.

On the other hand, Estelle Holden's testimony that she had not refused to permit accused to escort her to her home is unworthy of credence. Although she sat but 40 feet from the door she at first sought to convince the court she heard no commotion when accused forced his re-entry to the Lounge. Later she admitted she heard some commotion but did not see it. Such testimony is scarcely believable. It is apparent that she was attempting to testify favorably to the accused without religious adherence to the truth. That she was willing to lend her assistance to accused is supported by the visit she and Lieutenant Green, also a defense witness, made to the Rendezvous Lounge a week or so prior to the trial to question Mr. Morgan about the events of this night.

Thus, it is clear that without any legitimate provocation accused forced his entry into a public establishment which had been closed for the night, despite the warranted protests of employees thereof, and then committed assaults upon two of them when informed he could not remain. Accused's conduct in fomenting this public brawl was both unseemly and disreputable and constituted a breach of the peace. For an officer to engage "in unseemly altercations or broils with military persons or civilians, breaches of the peace, or other disorderly or violent conduct of a disreputable character in public" constitutes conduct unbecoming an officer and a gentleman under Article of War 95 (Winthrop's Military Law and Precedents, 2nd ed., p. 718). The record of trial sustains the findings of guilty of Charge II and its Specification.

The evidence conclusively demonstrates that accused was drunk in uniform when found sleeping on the bench at the bus stop near the White House Hotel on the early morning of 30 June 1944. Such conduct constituted an offense against good order and military discipline. The record of trial sustains the finding of guilty of Specification 2 of Charge I.

The evidence offered under Specification 1, Charge I, demonstrates that accused was drunk and disorderly in the lighted parking yard of the Sho-Boat night club on the early morning of 22 August 1944, when he disarranged his trousers and gave every indication of preparing to urinate on or near Captain Scott's feet as the latter conversed with the two young ladies seated in accused's automobile. Although Corporal Gates testified that accused's blood alcohol count exceeded the level of sobriety as determined by "the Army", that testimony was inadmissible. The corporal had not been qualified as a witness competent to furnish testimony on such a medical matter nor was it established whether or not he was testifying as to the contents of an official publication. However, there is competent evidence in the record as to accused's condition. Not only was Captain Scott of the opinion that accused was drunk, but accused's companion, Lieutenant Starrick, admitted that accused had been drinking heavily and accused himself, in his statement to the investigating officer, admitted at least that his mind was not "absolutely clear" and that his unseemly behavior was prompted by "sheer thoughtlessness and with an air of bravado". It is also apparent that Captain Scott was most clement with accused and urged him promptly to leave town so that he would not be forced to arrest him. It is of no moment that Captain Scott did not arrest accused until he saw his warning had been disregarded. We have no concern with accused's arrest. The only material matter requiring our attention is the evidence as to accused's conduct in and about the Sho-Boat night club and it clearly establishes accused's commission of the offense alleged. The evidence sustains the findings of guilty of Charge I and Specification 1 thereof.

7. On 30 November 1944, the Honorable Fred A. Hartley, Member of Congress, from the State of New Jersey, appeared before the Board of Review and was accorded a full hearing on behalf of the accused.

8. Accused is 25 years of age. He is a high school graduate and entered military service on 29 July 1941, following his graduation from Seton Hall College with a B.S. degree. He entered the Army Air Forces Administrative Officer Candidate School on 6 August 1942, and was graduated therefrom and commissioned a second lieutenant on 28 October 1942. On 18 February 1944 he was promoted to first lieutenant.

9. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and 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 H. Tappy, Judge Advocate.

[illegible], Judge Advocate.

William H. Gaunbrell, Judge Advocate.

SPJGH
CM 266820

1st Ind.

War Department, J.A.G.O., DEC 19 1944 - To the Secretary of War.

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of First Lieutenant John J. Nestor, Jr. (0-566308), 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. Accused was found guilty of disorderly conduct while in uniform in a public place on 20 May 1944, in violation of Article of War 95, and guilty of being drunk in uniform in a public place on 30 June 1944, and of being drunk and disorderly in uniform in a public place on 22 August 1944, both in violation of Article of War 96. Accused's conduct on these three separate occasions as revealed by the record clearly demonstrates his moral unfitness to remain an officer. I recommend that the sentence be confirmed and carried into execution.

3. Consideration has been given to the inclosed letters from the Honorable Fred A. Hartley, Jr., Member of Congress, and the Honorable Mary T. Norton, Member of Congress, both of which request clemency in behalf of accused.

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

Myron C. Cramer

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

5 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. ltr. for sig. S/W.
Incl 3 - Form of action.
Incl 4 - Ltr. fr. Hon. Fred A. Hartley, Jr.
Incl 5 - Ltr. fr. Hon. Mary T. Norton.

(Sentence confirmed. G.C.M.O. 55, 27 Jan 1945)

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

SPJGN
CM 266918

3 NOV 1944

UNITED STATES	)	I TROOP CARRIER COMMAND
	)	
v.	)	Trial by G.C.M., convened at Bowman Field, Louisville, Kentucky, 12 October 1944. Dismissal, total forfeitures and confinement for five (5) years.
Second Lieutenant HAROLD C. FREEMAN (0-1551402), Ordnance Department.	)	

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 Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that 2nd Lieutenant Harold C. Freeman, Attached to 808th Army Air Forces Base Unit, Section A (General), did at Muroc Army Air Base, Muroc, California, on or about 11 April 1943 desert the service of the United States and did remain absent in desertion until he surrendered himself at Freeman Armory, Cincinnati, Ohio on or about 2 August 1944.

The accused pleaded not guilty to, and was found guilty of, both the Charge and Specification. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for seven years. The reviewing authority approved the sentence but reduced the period of confinement to five years and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused on 11 April 1943 absented himself without leave from the 1034th Ordnance Company stationed at Muroc, California (R. 4; Pros. Ex. 1). Approximately fifteen and one-half months later on 2 August 1944 he voluntarily surrendered himself to the military police in Cincinnati, Ohio. At the time he was wearing civilian clothes (R. 4; Pros. Ex. 3). He was immediately attached as a casual to the 1540th Service Unit at Fort Knox, Kentucky (R. 4; Pros. Ex. 2).

4. Having been fully apprised of his rights relative to testifying or remaining silent, the accused took the stand on his own behalf. After having graduated from the Ordnance Officer Candidate School, he reported to the 1034th Ordnance Company, Muroc, California on 5 December 1942 (R. 4-5). During the ensuing months, aside from two weeks in which he performed the functions of Mess Officer and Supply Officer, he was assigned only routine duties none of which befitted his training at Officer Candidate School (R. 5, 8). One "reason was that there were too many officers". Upon requesting a transfer the accused was told to "hang around". He was finally sent to Laredo, Texas to learn aeriel gunnery, but upon completing his course he was again sent to Muroc. This time no duties of any kind were delegated to him. He immediately asked for a transfer to a bomber squadron. The reply of his commanding officer was, "Hang Around, something will happen" (R. 5).

By 7 April 1944 he "was fed up", "primarily because [he] didn't have anything to do". He left the hospital in which he had spent the past two days because of "a headache" and went to Los Angeles. He did not "report back [but] just kept on going" from town to town (R. 6). Not long after the commencement of his itinerary he visited a gambling house in Las Vegas and won $3,000 in one day. This sum provided him with a livelihood for the following fifteen months during which he worked only five weeks "all told" (R. 7-8). Shortly after this windfall and while still in Las Vegas, he changed into civilian clothes. He had left all his uniforms in California and was in need of wearing apparel (R. 6-8).

Although upon his departure from the hospital he had given no thought to the date of his return, he never intended to leave the army permanently. He "just wanted to get away from the desert at the time" (R. 6-7). His organization was not then alerted or at the point of going overseas (R. 8-9).

5. The Specification of the Charge alleges that the accused did, "on or about 11 April 1943, desert the service of the United States and did remain absent in desertion until he surrendered himself * * * on or about 2 August 1944". This offense was laid under Article of War 58.

Paragraph 130 of the Manual for Courts-Martial, 1928, states, among other things, the following:

> "If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent * * *. Although accused may testify that he intended to return, such testimony is not compelling as the court may believe or reject the testimony of any witness in whole or in part."

This language is directly applicable to the evidence summarized above.

The absence of the accused for approximately fifteen and one-half months was so prolonged as to create an almost conclusive presumption of intent to desert. His wearing of civilian clothes during the same period was clearly susceptible of the same interpretation. Proof of these circumstances caused the accused to be confronted with the alternative of offering a satisfactory explanation or of bearing the consequences for desertion. As was said in III Bull. JAG, June 1944, p. 232, sec. 416 (9),

> "When there was submitted competent proof of substantial nature that accused was absent without leave for 37 days from his organization [which was stationed in an active theatre of operations], the burden was cast upon him to go forward with the proof - the 'burden of explanation' - and to show that, during the period of his unauthorized absence he intended to return to the service. Although he took the stand under oath and was not only given every opportunity to explain his absence without leave, but was also repeatedly interrogated with reference thereto, he pointedly refused to offer any explanation whatsoever, save only that he missed his train on his attempted return to his station after the expiration of his pass. Such fact alone is wholly inadequate to defeat the inference of intent not to return, a reasonable and just inference to be drawn from the prosecution's evidence" CM ETO 1629 (1944).

The explanation offered by the accused in this case is equally unsatisfactory and unconvincing. That he was "fed up" with his inactivity provides no excuse for leaving his duly assigned place of duty for fifteen and one-half months. Although he asserted that he intended to return, the court, in the light of all of the evidence, quite properly refused to believe that he entertained such intention at the inception of his unauthorized absence.

6. The accused who is married and the father of two children is about 34 years old. He attended high school for four years and studied metallurgy at a trade school for one year. From November 1934 to December 1941 he was employed as a metal finisher by the Yellow Truck and Coach Company of Pontiac, Michigan. After enlisted service from 7 April 1942 to 27 November 1942, he was commissioned a second lieutenant on 28 November 1942. Since the last date he has been on active duty as an officer.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 58.

Abner E. Lipscomb, Judge Advocate.

Robert J. Olvanor, Judge Advocate.

Gabriel F. Gadeen, Judge Advocate.

SPJGN
CM 266918

1st Ind.

War Department, J.A.G.O., NOV 10 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Harold C. Freeman (0-1551402), Ordnance Department.

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

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

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

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 5, 5 Jan 1945)

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

SPJGQ
CM 266930

2 NOV 1944

UNITED STATES	FOURTH AIR FORCE
v.	Trial by G.C.M., convened at Tonopah Army Air Field, Tonopah, Nevada, 4 October 1944. Dismissal.
First Lieutenant ROBERT E. RANKIN (0-854858), Air Corps.	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that First Lieutenant Robert E. Rankin, Squadron A, 422nd Army Air Force Base Unit, did, at Tonopah, Nevada, on or about 17 March 1944, with intent to deceive, wrongfully and unlawfully make and utter to Paul A. Kastner, a certain check, in words and figures as follows, to wit:

Midland, Texas 3-17 1944

FIRST NATIONAL BANK
(Write name of your bank on this line)
Pay to the
Order of Cash——————————$50/00

Fifty and no/100——————————Dollars

470th Gp. Hq. Rob't Rankin
1st Lt AC 0854858

he, the said First Lieutenant Robert E. Rankin, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Midland, Texas, for the payment of said check.

Specification 2: In that First Lieutenant Robert E. Rankin, Squadron A, 422nd Army Air Force Base Unit, did at Tonopah, Nevada, on or about 17 March 1944, with intent to deceive, wrongfully and unlawfully make and utter to Paul A. Kastner, a certain check, in words and figures as follows, to wit:

94-59 ~~Tonopah Branch~~ 94-59
No.
FIRST NATIONAL BANK ~~OF NEVADA~~
Midland, Texas
~~Tonopah,--Nevada~~ 3-17 1944

Pay to the
Order of Cash $100.00

One Hundred and no/100 Dollars

470th Gp. Hq. Rob't Rankin
1st Lt AC 0854858

he, the said First Lieutenant Robert E. Rankin, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Midland, Texas, for the payment of said check.

Specification 3: This Specification is identical with Specification 1.

Specification 4: In that First Lieutenant Robert E. Rankin, Squadron A, 422nd Army Air Force Base Unit, did, at Tonopah, Nevada, on or about 17 March 1944, with intent to deceive, wrongfully and unlawfully make and utter to Paul A. Kastner, a certain check, in words and figures as follows, to wit:

94-59 ~~Tonopah Branch 94-59~~
No.
FIRST NATIONAL BANK ~~OF NEVADA~~
Midland, Tex
~~Tonopah,-Nevada~~ 3-17 1944

Pay to the
Order of Cash $50/00

Fifty and no/100 Dollars

470th Gp. Hq. Rob't Rankin
1st Lt AC 0854858

he, the said First Lieutenant Robert E. Rankin, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Midland, Texas, for the payment of said check.

Specification 5: In that First Lieutenant Robert E. Rankin, Squadron A, 422nd Army Air Force Base Unit, did, at Tonopah, Nevada, on or about 7 June 1944, with intent to deceive, wrongfully and unlawfully make and utter to the Ace Club, a certain check, in words and figures as follows, to wit:

THE FIRST NATIONAL BANK 88-388
Of Midland, Texas 11

Midland, Texas 6-7 1944 No.__

Pay to the
Order of Cash----------$50/00

Fifty and no/100----------Dollars

For Sqdn "A"

Rob't Rankin
1st Lt AC 0854858

he, the said First Lieutenant Robert E. Rankin, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Midland, Texas, for the payment of said check.

Specification 6: This Specification is identical with Specification 5.

Specification 7: This Specification is identical with Specification 5 except for the dates which, in this instance, are "21 June 1944" and "6-21 1944", respectively.

Specifications 8, 9 and 10: These Specifications are identical with Specification 4 except in the following respects:

Specification:	Date:	Uttered to:
8	21 June 1944	Ace Club
9	28 June 1944	Ace Club
10	28 June 1944	Ace Club

and excepting further, that the words "Tonopah, Nevada" are not deleted in Specification 10 and the letters:

"Sqd. 'A'" are substituted in Specifications 8, 9 and 10 for the numerals and letters "470th Gp. Hq."

The accused pleaded guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. By letter of the Commanding General of the Fourth Air Force it appears that this was a rehearing held at his direction upon the disapproval of a former trial of the accused (R. 3).

An inspection of the record of the former trial discloses that the accused was arraigned and tried upon eleven Specifications laid under Article of War 95. He was found not guilty of Specification 1. Accordingly, upon rehearing, he was arraigned and tried only upon the remaining ten Specifications.

4. The evidence for the prosecution, briefly summarized, is as follows:

By stipulation it was agreed that the accused was on 17 March, and at all times since has been in the military service (R. 10).

On 17 March 1944, the accused requested Paul Kastner, manager of the Mizpah Hotel Club in Tonopah, Nevada, to cash four checks for him, one in the amount of $100, three in the amount of $50 each, and all drawn upon the First National Bank of Midland, Texas by the accused. In each instance Kastner gave the accused cash in the face amount of the checks given to him by the accused. All of the checks were dishonored upon presentment and were returned to Kastner unpaid (R. 10, 11; Pros. Exs. 1a, 2a, 3a and 4a).

The Mizpah Hotel Club was evidently a place for gambling and as Kastner imagined the proceeds of the checks were to be used in gambling by the accused who appeared to have done some drinking, he warned him "to take it easy", but the accused replied it was "O.K." (R. 12).

Some time after the dishonor of the checks Kastner received $35.00 from the accused on account of his indebtedness and later a Captain Clothey paid Kastner $150 on behalf of the accused which amount was divided between Kastner and the Ace Club, Kastner taking $50.00 and the Ace Club $100 (R. 12).

The testimony of John A. Kelly, proprietor and manager of the Ace Club in Tonopah, Nevada, as given at the former trial, was then, by stipulation, admitted in evidence because of the witness' inability to be in court on account of illness (R. 12, 13).

From this testimony it appears that on 7 June 1944 Kelly cashed two checks for the accused each drawn upon the First National Bank of Midland, Texas in the amount of $50 and signed by the accused (R. 13, 14; Pros. Exs. 5a and 6a). In each instance Kelly paid the accused cash in the face amount of the check (R. 16). When the accused presented the first check he displayed his "army identification" and a deposit book to show that he had money in the bank upon which the check was drawn. In conversation with Kelly he said he did not get a chance to do much banking in Tonopah and wanted to send money to his family in Bishop, California. The amount appearing in the deposit book was sufficient to cover the checks the accused then cashed (R. 17). Upon presentment to the bank both checks were dishonored and returned to Kelly unpaid with a "Return Item Advice Letter" under date of 3 July 1944 advising that the account upon which the checks were drawn was closed (R. 14; Pros. Ex. 7a).

On 21 June 1944 and again on 28 June 1944 the accused prevailed upon Kelly to cash other checks for him. Two were cashed on 21 June and two on 28 June. All were drawn by the accused on the First National Bank of Midland, Texas, each was in the amount of $50.00 and Kelly gave the accused cash for the face value of each (R. 14-16; Pros. Exs. 8a, 10a, 12a and 13a). None of the checks were paid upon presentation and they were returned to Kelly with "Return Advice Letters" on 10 July 1944 and 18 July 1944, respectively, advising that the account upon which the checks were drawn had been closed (R. 15, 16; Pros. Exs. 9a, 11a, and 14a).

In the latter part of June or the first of July Kelly informed the accused about the matter and asked him to come in and take care of them. This he did not do although he promised that he would when his attention was again called to it (R. 16).

After Lieutenant Burns had made inquiry of Kelly and learned that he held a number of worthless checks issued by the accused, Burns said he would report it "to the Base". Several days later Captain Clothey informed Kelly that the accused had promised to pay a certain amount monthly until the checks were paid and some time thereafter Kelly received $100 on account of the amount owing (R. 16, 17).

By deposition of the cashier of the First National Bank of Midland, Texas, it was shown that the accused had small accounts with the bank prior to 10 April 1944 but on that date his father borrowed $350 from the bank and the proceeds were placed to the accused's credit at that time. By 26 April 1944 this amount had been reduced to a balance of $65.00 and remained so until 8 May 1944 when the bank paid and charged a check of $20.00. On 1 March 1944 there was nothing to the credit or account of the accused in the bank. On 7 June 1944 the balance to the accused's credit had been reduced to 25 cents. The only deposit made after 1 March 1944 was the one on 10 April 1944. The last charge made to the account was 25 cents for the return of a check on 16 June 1944. Thus, while the account was not officially closed, there was no money in the account (R. 18; Pros. Ex. 15a).

On 16 August 1944 the accused, after proper warning and advice as to his rights made the following sworn statement:

"In the latter part of February and the early part of March I did a considerable amount of gambling. In the process I overdrew my bank account Midland Tex. and the checks were returned to Tonopah. Seeing the predicament I was in, I took a leave in April to go home and borrow money to pay this mess off. I borrowed $350.00 from 1st National Bank, Midland, Texas. On my return to Tonopah I brought my wife and 5 months old baby in an attempt to settle down and live a more sensible life. Upon my return I found that the amount of my indebtedness exceeded the amount I had borrowed. I payed what I could knowing it would be impossible for me to make any more payments because I had to pay on the bank note and support my family which took my whole check.

"Paul Kastner who had checks of mine was threatening to turn me over to the base Provost Marshal. I couldn't see any way out. Already being in extremely deep water I decided to go in a little deeper in an attempt to get myself out completely. I gave checks to Ace Club in hopes of winning enought to pay everybody off. The outcome of which is entirely too evident.

"Later when the checks were turned over to Base S-2 my C.O. called me up and gave me a chance to pay them off at rate of $50.00 a month. The first of August I payed $165 on this in order to get it out of the way as quickly as possible." (R. 18; Pros. Ex. 16a).

5. The accused, having been informed of his rights, elected to be sworn as a witness and stated that he had made a total payment of $200 on account of the checks in question - one payment of $35 and another to Captain Clothey on 1 August 1944 in the amount of $165. At the time he cashed the checks he knew he had no account in the bank.

When asked whether he had anything further to tell the court in regard to the matter he replied: "The story runs right along with my statement. I have nothing else to add to the statement" (R. 20).

6. Notwithstanding that the accused pleaded guilty to all of the Specifications and the Charge, the prosecution, nevertheless, introduced sufficient, competent evidence to establish the guilt of the accused.

He drew and cashed ten checks in the aggregate face value of $550 upon a bank in which, by his own testimony, he knew he had no account.

True, the victims of his spurious checks were both admittedly managers of gambling clubs and it is patent from a consideration of all the evidence that the accused cashed the checks in order to use the proceeds for the purpose of gambling. Yet this state of affairs constitutes no defense. Even in case an officer gives a check in payment of a preexisting gambling debt, which check is, therefore, without consideration in the eye of the law, such conduct would clearly be discreditable to the military service under certain circumstances and in many cases conduct unbecoming an officer and a gentleman (CM 202601, Sperti, 6 B.R. 171 at p. 219). In this case there is no contention that any of the checks were given in payment of gambling debts nor does the evidence support such a situation. Whatever he may have done with the proceeds of the checks thereafter it is certain that he obtained them by fraud in the first instance at the time when he cashed the checks.

The manager of the Mizpah Hotel Club, where the first series of checks was cashed, testified that he cautioned the accused to "go easy" but he failed to heed the advice until he was deeply in debt because of the bad checks.

According to the accused, he thereupon arranged for a loan of $350 from the bank in Midland, Texas, in order to pay his obligations. What actually became of that money and how it was disbursed is not shown. It was placed to the credit of the accused on 10 April 1944 but was reduced to a balance of $65 by 26 April 1944; yet the manager of the Mizpah Hotel Club had not been reimbursed by that date.

The accused says he was then dunned for the payment and threats were made to turn him over to the Provost Marshal and then it was that he went to the Ace Club in the hope of restoring his vanished funds by further gambling.

By falsely representing that he wished to send money to his family in California and was unable to get into town to do his banking he prevailed upon the manager of this club to give him funds, and to give the manager further assurances of his purported good faith he fraudulently and deceitfully displayed a bank deposit book which disclosed that the accused had on deposit sufficient funds to cover the checks he proposed to cash, a representation which he then knew to be false.

This is a plain case of indulgence, by a young and inexperienced officer, in a grandiose scheme for enhancing his fortunes by wrongfully gambling with funds obtained by false pretense, in the hope of winning enough to cover the fraud and pay off prior debts.

Such behavior is conduct unbecoming an officer and a gentleman and should not be condoned even though he had won. That he lost in his gamble merely made the discovery of his frauds more certain.

7. Article of War 50½ provides: "Upon . . . rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding." An examination of the record of trial of the original proceeding and the record of trial in this proceeding discloses that the accused was not tried herein for any offense of which he was found not guilty by the first court, nor is the sentence imposed in this proceeding in excess of nor more severe than the original sentence.

8. Records of the War Department disclose that the accused was born in Midland, Texas, is 27½ years of age and single. (According to the accused's statement in the record of trial he is now married and has a child 5 months of age.) After graduation from high school in 1935 he attended and was graduated from Texas Technological College with a degree of Bachelor of Science in 1941. He is a member of the American Association of Petroleum Geologists. In civil life he did seasonal work, during his college years, in surveying. He enlisted in April 1942, became an aviation cadet, and after attending the Army Air Forces Technical School, Scott Field, Illinois, was commissioned a second lieutenant, Air-Reserve on 8 August 1942. On 14 July 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 of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Fredrien, Judge Advocate.

[illegible], Judge Advocate.

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 First Lieutenant Robert E. Rankin (0-854858), 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 execution thereof be suspended during good behavior.

3. Consideration has been given to the attached letter from the Honorable R. E. Thomason, House of Representatives, Washington, D. C., dated 24 November 1944, and to its inclosures.

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

Myron C. Cramer

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

4 Incls.
1 - Record of trial.
2 - Dft ltr for sig S/W.
3 - Form of action
4 - Ltr fr Cong. Thomason dated 24 Nov. 44 and incls.

(Sentence confirmed but execution suspended. G.C.M.O. 10, 5 Jan 1945)

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

SPJGQ
CM 267032

11 DEC 1944

UNITED STATES v. Technician Fifth Grade WILLIE C. EDWARDS (38061025), Headquarters and Service Company, 1327th Engineer General Service Regiment.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Claiborne, Louisiana, 29 September 1944. Dishonorable discharge and confinement for thirty (30) years. United States Penitentiary, Leavenworth, Kansas.

REVIEW by the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates.

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

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

CHARGE: Violation of the 66th Article of War.

Specification: In that Technician Fifth Grade Willie C. Edwards, Headquarters and Service Company, 1327th Engineer General Service Regiment, did, at Camp Claiborne, Louisiana, on or about 16 August 1944, voluntarily join in a mutiny which had been begun in Camp Claiborne, Louisiana, against the lawful military authority of First Lieutenant Harry N. Jessen, his superior officer, and, did, with intent to override for the time being in concert with sundry other members of said Camp Claiborne, Louisiana, assembled in Camp Claiborne, Louisiana, enter Headquarters Building 1327th Engineer General Service Regiment in said Camp Claiborne, Louisiana, contrary to the order of the said First Lieutenant Harry N. Jessen.

He pleaded not guilty to and was found guilty of the Charge and Specification. 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 thirty years. 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 in the military service on 16 August 1944 (R. 6).

At about 10:15 p.m. on 16 August 1944 Captain Harry N. Jessen, supply officer of the 1327th Engineer General Service Regiment (then a lieutenant (R. 8)), was called to regimental headquarters where he found a crowd of approximately 50 or 75 men milling around, noisily (R. 6, 7). About 90% of the men were armed (R. 11, 12) and some had fixed bayonets (R. 19). They were looking for ammunition because "they wanted to get those 'jodies'" (R. 7, 9, 15, 17, 25). (It is apparent that they referred to white civilians against whom they had a supposed grievance.) Lieutenant Jessen told them they could not have any ammunition; that they were acting on rumor and would have to wait (R. 15).

The mob was gathered in front of the entrance to regimental headquarters (R. 6, 17). This building was on an elevation of about 4 feet from the ground (R. 16) and was reached by a stairway consisting of about 7 or 8 steps (R. 10). It was divided by a passageway about 18 feet long and 8 feet wide with headquarters on one side and a supply room on the other (R. 9, 10).

Lieutenant Jessen moved away from the crowd toward the stairway figuring they would probably try to get into the building although he assured the men there was nothing "back there" to which someone answered: "Well there must be some back there; they have guards on it." He explained that the reason for the guard was because valuable engineer equipment was stored there (R. 7, 27, 28). As he moved over to the stairs he told the mob to stay out and repeated that there was nothing in there; but the crowd kept walking up closer to the steps (R. 7). The accused was a member of the mob at that time but was not "out in front" (R. 8, 28) and he was going about making remarks such as: "I wouldn't take anything like that from my own mother" and "we want ammunition" (R. 14, 27).

Lieutenant Jessen was in uniform and wore the insignia of his rank (R. 8).

As the crowd pressed on him the lieutenant stood by the stairway at the foot of the steps (R. 10, 16, 27) and ordered the men to stop, or halt saying: "Don't go in there; stay back" (R. 7, 8, 17, 18, 27). He moved over in front of the steps but the mob came on, squeezed him to a side, brushing past him and entered the building (R. 7, 8, 11, 16, 18). He knew that the group in front of him heard his order (R. 7) but since there was a lot of noise he could not say "how far back" he was heard (R. 8, 14) although the order was given loud enough to be heard (R. 14).

Among the 20 or 25 who thus entered the building (R. 8) was the accused who, although he was not one who "squeezed" Lieutenant Jessen (R. 8, 11), was seen going up the stairway with the others (R. 10, 11, 14) and entering the passageway in the building (R. 11, 12). Lieutenant Jessen could not say with certainty that the accused was armed with a rifle (R. 11) although he believed he had a carbine (R. 12).

Meanwhile Captain Leroy A. Newell, 1327th Engineer General Service Regiment, who was also present when the mob gathered in front of regimental headquarters demanding ammunition, and had assisted in trying to quiet the men, get them under control and have them go back to their areas, saw that it was evident the men were bent upon going into the headquarters building. When the men moved up to the steps as Lieutenant Jessen was ordering them to stop and stay out of the building, Captain Newell cut ahead of the crowd and proceeded to the door of the supply room to stand between the men and the ammunition which was stored there (R. 17, 18, 20). This room was locked at the time (R. 20) but he nevertheless stood in the doorway and told the crowd of 20 or 30 (R. 24) that he was going to stand there and they would have to move him out. He also advised them that the ammunition stored there was of 50 calibre and would be of no use to them but they insisted that they wanted it because "they had to get ammunition to square up with the farmers that killed their comrades" (R. 23, 25). Captain Newell saw the accused in this crowd (R. 18, 20) and was able to recognize him because he had seen him before at least once or twice a week over a period of about half a year (R. 22). Some of the men were armed with rifles and some had fixed bayonets (R. 19) but Captain Newell did not notice whether the accused was armed (R. 21) and he could not recall that he did or said anything at the time (R. 18).

While the Captain was talking to the men he heard a crash (R. 20) and when he went out to investigate he found the window of the storeroom open and that someone had climbed in and stolen the ammunition (R. 18). He recovered a couple of cases and picked up what ammunition he could (R. 18, 25, 26).

As soon as the crowd had rushed past him Lieutenant Jessen went to the top of the stairway and saw the men to the number of about 20 or 25 disappear through the officers' entrance into the passageway inside of headquarters (R. 8, 11, 16). Others went in through the enlisted men's entrance and some went around the back until no one remained in front. As he stood at the top of the steps the phone rang and he entered the building, going to the adjutant's office to answer it. While he was talking on the phone the accused entered the adjutant's office from the hallway. Lieutenant Jessen asked him if he wanted to see him and when the accused failed to answer he told him to wait for him outside (R. 8, 11). The accused refused again to answer but paced back and forth in front of the desk (R. 13).

When he finished telephoning, Lieutenant Jessen walked outside and a few minutes later the crowd returned from around the back of the building and from both the officers' and enlisted men's entrances and gathered again in front. The lieutenant again addressed them and while he was doing so the accused walked around in back of him and said: "We should blow this place up and this would be a good place to start", or words to that effect (R. 9, 12, 13).

Captain Newell did not hear the accused say anything in his presence nor did he at any time threaten or offer violence (R. 21). When he returned to the door of the storeroom the crowd had quieted down and most of the men had dispersed. A few stayed around and went away later (R. 18, 25, 26).

4. The accused, having been informed of his rights, elected to remain silent and the defense offered no evidence.

5. Neither the opening nor closing argument by the prosecution was recorded but the brief argument of defense counsel is set forth as follows for reasons hereinafter stated:

> "This court has heard four previous trials and the evidence therein concerning, in all, five men involved in the events occurring on 16 August 1944. They are in a position at this time to adjudge how guilty this man was, compared with the others tried here. There is one accuser against this man. That is the man whom the accused has worked for, and I believe that Captain Jessen properly identified him and knew him well, but Captain Newell, having been either inside or outside of regimental headquarters, did not hear the accused make any statements that night. Captain Newell, under oath, cannot say that the accused carried a gun. Both of the officers have testified that outside of the remarks alleged to have been made by the accused, the accused did not offer nor threaten to offer any violence against any officer, nor show any disrespect.
>
> "Captain Newell even testifies that this man, so far as he knows, since he was in front of him, could not have broken into the supply room to get ammunition. In fact, this accused, it cannot be proven, did any act of violence. The reason I bring that out is that this court has heard cases here where men have offered violence, and, therefore, they are in a perfect position to adjudge the comparative guilt of this accused." (R. 29, 30).

6. The accused is charged with joining in a mutiny against the lawful military authority of First Lieutenant Harry N. Jessen at Camp Claiborne, Louisiana, on 16 August 1944.

Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority (MCM, 1928, par. 136a). It has been defined as consisting in an unlawful opposition or resistance to, or defiance of superior military authority, with a deliberate purpose to usurp, subvert, or override the same, or to eject with authority from office (Winthrop, Military Law and Precedents, 2d Edition (Rep. 1920) p. 578).

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 (MCM 1928, supra). This intent may be openly declared in words, or it may be implied from the act or acts done, — as, for example, from the actual subversion or suppression of the superior authority, from an assumption of the command which belongs to the superior, a taking up of arms and assuming a menacing attitude, and the like; or it may be gathered from a variety of circumstances no one of which perhaps would of itself alone have justified the inference. But the fact of combination — that the opposition or resistance is the proceeding of a number of individuals acting together apparently with a common purpose — is, though not conclusive, the most significant, and most usual evidence of the existence of the intent in question. However, while the intent indicated is essential to the offense, the same is not completed unless the opposition or resistance be manifested by some overt act or acts, or specific conduct. Mere intention however deliberate and fixed, or conspiracy however unanimous, will fail to constitute mutiny. Words alone, unaccompanied by acts, will not suffice (Winthrop, supra, pp. 580, 581).

Joining in a mutiny is the offense of one who takes part in a mutiny at any stage of its progress, whether he engages in actively executing its purpose, or, being present, stimulates and encourages those who do. The joining in a mutiny constitutes a conspiracy and the doctrines of the common law thus become applicable to the status - viz: that all the participators are principals and each is alike guilty of the offense; that the act or declaration of anyone in pursuance of the common design is the act or declaration of every other; and that the common design being established, all things done to promote it are admissible in evidence against each individual concerned (Winthrop, supra, p. 583).

There can be no actual mutiny until there has been an overt act of insubordination joined in by two or more persons. Therefore, no person can be found guilty of joining in a mutiny unless an overt act of mutiny

is proved; and a person cannot join in a mutiny without joining in some overt act. Hence presence of the accused at the scene of mutiny is necessary to complete the offense charged. The proof required to establish guilt is (a) The occurrence of certain collective insubordination in a company, party, post, camp, detachment, or other command in the Army of the United States; and, (b) that the accused joined in such certain collective insubordination (MCM, 1928, par. 136b).

The record of this trial discloses that there was a riotous disturbance at the headquarters of the 1327th Engineer General Service Regiment in Camp Claiborne, Louisiana on the night of 16 August 1944 when, at 10 o'clock Captain Newell and Lieutenant Jessen appeared upon the scene and attempted to quell the disorder. Although the cause of the excitement and unrest is in no way apparent in the record except by inference, and is not essential in the determination of the guilt or innocence of the accused, it was known to the court that this case is only one of a series which resulted from a general uprising which took place in certain parts of Camp Claiborne on the night of 16-17 August 1944. Twenty-three soldiers were tried by general court-martial for their participation therein and it is apparent from the comments of the defense counsel in his argument that he relied upon the members of the court to permit their memories of the details which were supplied, from time to time, in the presentation of other, kindred cases, to supply the deficiencies of evidence, if any, in this case. Had the prosecution appealed to the court to utilize their knowledge of facts obtained in the trial of other cases for the purposes of comparison in arriving at the findings or the sentence in this case such action might have been fatal to the proceedings. However, though the suggestion of defense counsel was irregular and improper, it is clearly evident that he was urging such action in mitigation and extenuation, and no substantial right of the accused can be said to have been injured thereby. Inasmuch as the legal sufficiency of each record of trial must rest solely upon the facts disclosed by the record thereof it is incumbent upon the prosecution to establish every salient feature of each case separately, irrespective of how many similar cases arising out of the same transaction may have been tried by the same court theretofore.

However, without inquiry into what may have been the initial cause of the tumultuous gathering of troops at regimental headquarters on the occasion in question, it is clearly evident that a boisterous and unruly mob, many bearing arms, had congregated there for the purpose of procuring ammunition. Since no one in authority had authorized or directed that any of the men should take up arms at that time of night and embark upon a marauding expedition in search of ammunition, such actions were unlawful and, of themselves, imported insubordination against constituted authority irrespective of positive proof that someone in authority had specifically

ordered them not to do so at that time and place. It is a fundamental rule of the service that soldiers shall not use the arms with which they are supplied except for military purposes under proper authorization and superior authority and they may not, at any time, arbitrarily take up such arms and utilize them for any private purpose.

But the guilt of the accused does not rest upon this phase of the matter. When it became evident that the crowd was determined to go into the regimental headquarters in search of ammunition, Lieutenant Jessen, standing by the foot of the stairway leading thereto, specifically ordered them not to do so. Notwithstanding such orders by a superior military authority known by them to be such, the mob broke into groups, one of which, including the accused, brushed past the lieutenant and entered the headquarters by the front, or officers' entrance, and others going in by way of the enlisted men's entrance. This defiance of Lieutenant Jessen's orders by the concerted acts of the members of the mob then, and their violent efforts later to overcome the authority and resistance of Captain Newell who sought in vain to prevent them from going into the room where ammunition was stored, constituted mutiny of a grave character and each man present was guilty of the offense.

The accused's presence and participation was plainly evidenced by overt acts and by statements from which his intent and the spirit of the mob may readily be inferred. He was seen to brush past Lieutenant Jessen and go up the stairway into the headquarters where the mob proposed to search for ammunition by their own declared intentions. While the men were breaking into the storeroom the accused came from that direction, insolently strode up and down the room in which Lieutenant Jessen was telephoning, and refused to leave when told to do so; and, when the mob finally left the building and again congregated in the front, the accused expressed the opinion "We should blow this place up and this would be a good place to start."

Every element of the offense charged is thus sufficiently shown to prove the guilt of the accused beyond any reasonable doubt. That the mob spirit subsided after the episode at the supply room and the crowd eventually dispersed without further violence is no defense. The offense was complete when, by concerted insubordination, the men who constituted the mob defiantly disobeyed the direct orders of their superior officer and willfully overrode his authority.

7. The Charge Sheet discloses that the accused is 23 years of age. He was inducted into service on 21 October 1941 and has had no prior service.

8. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that 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 mutiny.

Esther R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

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

SPJGQ
CM 267160

14 DEC 1944

UNITED STATES v. Private First Class ERNEST B. COLLIER (34910947), Headquarters and Service Company, 1327th Engineer General Service Regiment.	)	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Claiborne, Louisiana, 28 September 1944. Dishonorable discharge and confinement for thirty (30) years. United States Penitentiary, Leavenworth, Kansas.

REVIEW by the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates.

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

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

CHARGE: Violation of the 66th Article of War.

Specification: In that Private First Class Ernest B. Collier, Headquarters and Service Company, 1327th Engineer General Service Regiment, Camp Claiborne, Louisiana, did, at Camp Claiborne, Louisiana, on or about 16 August 1944, attempt to create a mutiny in Camp Claiborne, Louisiana, by urging members of said Camp Claiborne, Louisiana, concertedly to refuse to obey the lawful orders of Second Lieutenant Creed C. Coffee, Jr., their superior officer, to remain where they were and not go to the bivouac area, with the intent to override, for the time being, lawful military authority.

He pleaded not guilty to and was found guilty of the Specification and the Charge. 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 a period of thirty years. 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 in the military service on 16 August 1944 as a member of Headquarters and Service Company, 1327th Engineer General Service Regiment, stationed at Camp Claiborne, Louisiana (R. 12, 23).

At about 10 o'clock p.m. on the night of 16 August 1944 Colonel Ristedt, the regimental commander, ordered all officers to go to their companies because of a rumor to the effect that four men had been shot, out in the bivouac area (R. 6, 14). Second Lieutenant Creed C. Coffee, Company Commander of the accused's organization, thereupon proceeded to go to his company area and, in doing so, passed regimental headquarters, which lay between the officers quarters and his company area (R. 6). He was dressed in coveralls and wore the insignia of his rank. At regimental headquarters he saw 3 or 4 officers, among whom were Captain Newell and Lieutenant Fischer, the officer of the day, surrounded by about 100 or 200 enlisted men. There was a great deal of commotion in the crowd. The men were doing a considerable amount of talking among themselves and with the officers, but it seemed impossible for the officers to get the attention of any more than 3 or 4 of the men at one time. Most of the men were armed with rifles, some with bayonets affixed; they wore steel helmets and about 50 of them had gas masks (R. 7, 24).

Lieutenant Coffee stepped up and, in as loud a voice as he could command, ordered them to go back to their companies and put up their rifles. However, no one paid any particular attention to him and Lieutenant Fischer then called him to one side and informed him that the men were in a "pretty bad mood" and "they weren't minding any orders". The men were arguing with Captain Newell (R. 7) who was trying to urge them to go back to their company areas and await further developments (R. 24).

Thereupon Second Lieutenant Charles Becker, administrative officer of the Headquarters and Service Company (R. 23) told Lieutenant Coffee that he would go up to the company and see what was going on there. As he approached his company area he saw a group of about 5 or 10 men "strung out, more or less in a line" ahead of him. He addressed them saying: "All right, let's put up those rifles and go back to bed". Someone whom the lieutenant could not identify said "No, don't put up your rifles", and the group continued on to the Headquarters and Service Company area where others joined it (R. 24, 25). Lieutenant Becker was dressed in fatigues but wore a helmet liner and the insignia of his office was on both the uniform and the liner (R. 35, 36).

Meanwhile the regimental commander had arrived at regimental headquarters and stated that he was going out to the bivouac area to investigate the rumor (R. 7). Lieutenant Coffee then went to his company area and found

another group in his company street. He told them to gather around him as he had something to tell them. Someone out of the crowd, in the darkness, yelled: "Fuck you", and although the lieutenant went among the men to find out who had made the remark, he was unable to do so and the crowd more or less scattered (R. 7, 8, 25).

Shortly thereafter Lieutenant Coffee made another trip to regimental headquarters and when he returned he found 25 or 30 men standing around the company orderly room. They appeared to be stirred up about the rumor and were trying to verify it but were arguing with one another as Lieutenant Panasuk, the regimental motor officer, drove up in a jeep. He told them that he had just spoken to a truck-driver who had returned from the bivouac area and who had said there had been absolutely no trouble in the bivouac area and that the rumor was unfounded (R. 7, 8, 17).

As Lieutenant Panasuk was talking, men from other sections of the regimental area joined the group at the orderly room. Upon hearing the report the men broke up into small groups, dropped their loud voices, but continued to argue quietly among themselves and to talk with the officers (R. 8, 17, 25, 26, 28, 33). The report seemed to "confuse" or "non plus" them. "They didn't quite know who to believe then . . . they didn't know quite what to do" (R. 33).

At about this time the accused, who was armed with a rifle (R. 9, 12) asked Lieutenant Coffee some questions (R. 9) and requested ammunition (R. 13). Then the accused made the statement several times "that the men should go on out to the bivouac area and quit fooling around, that they weren't doing anything there" and something to the effect "that he would rather die for his own race over on this side of the water rather than go fight for his country on the other side". Lieutenant Coffee had a bull's eye lantern and, although there was a light over the orderly room so that most of the group could be seen, he flashed the lamp in the accused's face, as he continued talking, in an attempt to "shut him up" (R. 9, 26). The accused was making a "stump speech" advocating that "they ought to get started doing something" and repeated that he would rather die for his race here, out fighting the white civilians, because if they couldn't get the protection that they thought they deserved here, he didn't want to die overseas". He also said "he would rather have his ass kicked up and down the street rather than let them get away with what he thought they had done" (R. 10, 20, 28, 29).

At this point the first sergeant came out and told the accused twice to leave. He did not leave immediately but later did "stalk off to the edge of the crowd". Lieutenant Coffee did not know whether he ever left the crowd (R. 10, 11, 16, 17, 26, 31) but neither he nor Lieutenant Becker heard anything further from him thereafter (R. 16, 27, 32).

Shortly thereafter a truck driven by a member of the company drove up and the crowd rushed up to it with the suggestion that it be used to go to the bivouac area. Lieutenant Coffee had repeatedly told them that they could not go to the bivouac area or have ammunition (R. 11, 16). In this instance the truck driver told the men they could not have the truck and he "personally backed them down" (R. 11, 27, 33, 34). Within a short time the crowd moved down toward the motor pool (R. 17).

Lieutenant Coffee had not seen the accused in the crowd at regimental headquarters (R. 13) and he was not the only one talking in the group at the orderly room where all, or the greater majority, were talking, some louder than others (R. 15, 29); but the only statements advocating that the mob go out to the bivouac area were made by the accused (R. 30).

Upon cross-examination Lieutenant Coffee stated that different groups had disobeyed orders and had gone beyond the point where they would obey orders before the accused made the statements attributed to him but that the group at the orderly room had quieted down before the accused began advocating disobedience (R. 20).

4. The accused, having been advised of his rights, elected to be sworn as a witness and testified, substantially, as follows:

He was born in Panama City, Florida, completed the 8th grade of schooling and is 30 years of age. He was inducted into service on 22 January 1944.

Shortly after dinner on the night of 16 August 1944 he and three other soldiers walked over to No. 6 Theater in Camp Claiborne intending to go to the show, but finding it closed, went on to No. 4 Service Club where they played cards (R. 37). Afterwards they returned to their barracks where the accused undressed but sat up to write a letter. When a bugle sounded he got up. All of the men rushed to dress and as a rumor was circulated that four men were killed out at the bivouac area, practically everybody ran to the rifle racks, "grabbed their rifles and everything", and all left except the accused and Curtis Mosley. The accused took his time dressing and finally told Mosley he would "walk out and find out something". He took his canteen and helmet liner, and, filling his canteen at the latrine, put it on his "cartridge belt". As he left the latrine there was a crowd of men standing by the barracks (R. 38). He paid very little attention to who was talking. Lieutenant Panasuk then asked him: "Soldier, where are you going with the rifle?" and the accused answered "I don't know. I just fell out with the rest of them." The lieutenant ordered him to go back to his barracks and he obeyed but remained standing in the door (R.39). He saw a big crowd at the orderly room

and heard loud talking, whereupon he pushed through the crowd and walked up to Lieutenant Coffee and engaged in a controversy with him as to what should be done about going to the assistance of the men in the bivouac area, and questioning the wisdom and fairness of Lieutenant Coffee's decision not to let the men go. He had apparently asked for ammunition, for he said Lieutenant Coffee told him: "No, I can't issue no ammunition: it is out of my power, Collier" thus showing, according to accused, that the lieutenant recognized him at that time. Later, as he continued to argue, the first sergeant called out his name; "Collier", and the accused answered "Yes, sir", whereupon the sergeant said "I thought so" and ordered him to "move out". As he started to go, Lieutenant Coffee turned a light on him, and the accused turned around and said: "Sir, this is Ernest Collier", to which Lieutenant Coffee replied "I just wanted to see who you was" (R. 39, 40). The accused then moved out to the back of the crowd where he told David Johnson that "if they are going we should go on ahead; if they ain't let's go to the barracks." As he then moved toward the barracks he heard a shot somewhere in the direction of the orderly room and Lieutenants Coffee and Becker started to go there but someone said "Don't go down there" and the accused saw a man working the "operating rod" on his rifle. The accused continued on to the barracks, undressed, finished writing his letter, and then lay across his bed but did not go to sleep (R. 41). Being disturbed by men coming in and going out of the barracks, he again dressed partially, went to the latrine and then to the orderly room where he heard Lieutenants Coffee and Becker and two sergeants discussing "the way they should transact things". He left shortly thereafter and went to bed without having gone out of the company area at any time (R. 42).

He stated that while he was talking to Lieutenant Coffee there were loud voices all around him "cussing and doing everything else" but he denied making the statement about "fighting white folks" (R. 43) and insisted he had not gone to the bivouac area (R. 44).

On cross-examination he admitted that before he talked with Lieutenant Coffee he did want go to to the bivouac area "if he was going" (R. 44); that he was the only one of the men who talked "personally" and "face-to-face" with Lieutenant Coffee (R. 44); and that he was armed with an M1 rifle at the time because "everybody else had a rifle" (R. 46).

He denied that he and Private Curtis Mosley had gone to the bivouac area together although he had seen Mosley in the company area when the accused came out of his hut "the last time", which was when he talked with Lieutenant Coffee (R. 46, 47), after which he returned to his hut and finished writing his letter. This was before 12 p.m. (R. 47).

He also denied hearing Lieutenant Panasuk talk to the men and stated that he "never heard him say anything to nobody" (R. 48), although he admitted shortly thereafter that Lieutenant Panasuk had told him to go to his hut. He obeyed but left the hut again later to go to the orderly room to mail a letter (R.49, 50).

Private Curtis Mosley saw the accused on the evening of 16 August 1944 at about dusk writing a letter in his hut. Nearly all the men were in quarters at that time. Mosley had heard the news "from the other barracks somewhere" that some of the boys out at the bivouac area had been killed (R. 51), so he got up and went to the door and saw "everybody was just gathered around out there in the area". None of the men had arms at the time. Mosley then went up to the orderly room and talked to Sergeant Epps (R. 52). He did not see the accused at the time nor did he later hear him talking to Lieutenant Coffee and he did not see the accused during all the while he (Mosley) was at the bivouac area (R. 52, 53). When Mosley returned to the barracks from the bivouac area, the accused came in soon after, fully clothed. This was around 2 o'clock in the morning (R. 54, 55).

5. For reasons hereinafter stated the following excerpt from the closing argument of defense counsel is quoted:

> "I ask the court to take judicial notice of the evidence presented here in the previous three trials, which is now a matter of record, that hundreds of men out of the 1300 in the 1327th Engineer General Service Regiment became instantaneously and unanimously excited, approximately 10 o'clock on the night of 16 August 1944, and that as a result of a rumor, of which they did not know at that time the truth or falsity, that four men had been killed in the bivouac area." (R. 56).

6. The accused is charged with attempting to create a mutiny by urging "members" of Camp Claiborne, Louisiana, concertedly to refuse to obey the lawful orders of Second Lieutenant Creed C. Coffee, Jr., their superior officer.

No objection was made to the Specification and it is clearly apparent that by the term "members" it was intended to designate soldiers in the military service then stationed at Camp Claiborne. Such is the only connotation possible and it was so understood and accepted.

Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority (MCM, 1928, par. 136a).

It has been defined as consisting in an unlawful opposition or resistance to, or defiance of superior military authority, with a deliberate purpose to usurp, subvert, or override the same, or to eject with authority from office (Winthrop Military Law and Precedents, 2d Edition (Rep. 1920) p. 578).

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. This intent which distinguishes mutiny is the intent to resist lawful authority in concert 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 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 support a conviction of the offense of attempting to create a mutiny is: (a) An act or acts of the 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 in the Army of the United States (MCM, 1928, par. 136a).

A considerable portion of the testimony in this case is devoted to the establishment of facts and circumstances which are not shown to have any connection whatever with the accused at the time and place when and where he is alleged to have committed the offense with which he stands charged. Ordinarily such incompetent, irrelevant and immaterial matter should and would be excluded and the failure to do so might be deemed to constitute error prejudicial to the rights of the accused. However, under all of the circumstances surrounding the trial of the accused, it is apparent that the court was not improperly influenced by such immaterial and irrelevant matters to the injury of the accused.

It was common knowledge that there had been a series of uprisings in certain sections of Camp Claiborne, Louisiana on the night of 16 August 1944 as a result of which more than a score of soldiers had been charged with

offenses cognizable by general courts-martial. Some had already been tried prior to the accused. Indeed, defense counsel specifically requested the court in this case to take judicial notice of the evidence which had been presented in three previous trials. However improper this request may have been, it was evidently made in good faith and in the hope that a knowledge of the disorderly conditions which existed generally in the various sections of the camp on the night in question would actuate the court to mercy toward the accused on the theory that such conditions constituted extenuating and mitigating circumstances. It is not necessarily to be implied that the substantial rights of the accused have been injuriously affected by the admission of incompetent testimony; nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony had been excluded enough legal evidence remains to support a conviction. The reviewer must, in justice to the accused, reach the conclusion that the legal evidence of itself substantially compelled a conviction (CM 127490 [1919]).

The rule is that the reception of any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If such evidence is eliminated from the record and that which remains is not of sufficient probative force as virtually to compel a finding of guilty the findings should be disapproved (CM 130415 (1919); Dig. Ops. JAG 1912-30, sec. 1284; CM 237711, Fleischer, 24 B.R. 89; CM 241597, Fahey, 26 B.R. 305).

The testimony in this case, other than such as could properly be deemed irrelevant and immaterial, is of such quantity and quality as practically to compel conviction in the minds of conscientious and reasonable men, and the substantial rights of the accused were, therefore, not adversely affected by the admission of such incompetent testimony. Moreover, no objection was made to any of the irrelevant matters and, especially in view of the request of defense counsel, it cannot be said that any substantial right of the accused was violated by their reception in evidence.

Nor is it necessary to consider any episode narrated in the record except the one which transpired in the vicinity of the orderly room of the headquarters and service company of the 1327th Engineer General Service Regiment. Defense counsel would, apparently, have it otherwise; for the burden of his argument is that the accused could not attempt to create a mutiny which was already in existence. It is contended that, inasmuch as there were riotous, even mutinous, mobs elsewhere because of the prevalent rumors throughout the camp that some soldiers had been killed in an adjacent bivouac area, it necessarily follows that the men who comprised the excited and restless group at the orderly room were likewise mutinous before the accused committed the acts with which he is charged.

It may be admitted that the crowd in the Headquarters and Service Company area were in a bad mood before Lieutenant Coffee began to reason with them. Excitement was high, tempers were short and nerves were on edge. But even though there was an air of defiance in the attitude of the group and they gave unmistakable evidence of reaching the point beyond which they would not obey orders, there is no proof in the record of a single, concerted act of insubordination or violence toward, or disobedience of, either Lieutenant Coffee or Lieutenant Panasuk and without concerted insubordination with intent to override lawful military authority there can be no mutiny. That the corwd was fitful and unruly cannot avail the accused for it is just such a state of affairs which affords the most advantageous opportunity of incitement to mutiny, and this the accused knew or ought to have known.

It is plainly evident that wherever excitement and unrest were found within the regiment on the night in question, responsible, military authorities endeavored to suppress them. It was so in the Headquarters and Service Company area. Lieutenant Panasuk assured the men who had congregated there that the rumors were without foundation. He told them that he had spoken to someone who had just returned from the bivouac area and who had told him there had been absolutely no trouble there.

Whatever may have been the degree of excitement theretofore pervading the group of soldiers, it thereupon subsided considerably. The report left them confused and in doubt of the propriety of their actions. They broke up into groups, and dropped the loud tone of their voices. The situation was propitious and presented a still more favorable opportunity for the superior officers to bring about order and discipline by reasoning with the men, but it was lost through the unwarranted and belligerent attitude of the accused.

At this moment he assumed a dominant and aggressive role. He admitted, in the trial, that he was the only one of the group who talked "personally" and "face to face" with Lieutenant Coffee. He asked questions and demanded ammunition. It was unnecessary for him to state why they wanted it, as it could not conceivably have been put to any lawful purpose. When he was told he could have none and that it was beyond the officer's power to give him any, the accused expressed the opinion that "they ought to get started doing something", repeatedly urging the men to join him and "go on out to the bivouac area and quit fooling around", because they were accomplishing nothing there; and he undoubtedly sought to influence his companions in race prejudice by stating that he "would rather die for his own race over on this side of the water" than "go fight for his country on the other side."

Under the circumstances his actions and his words constituted an incitement to mutiny and the record shows that the men did thereafter move off toward the motor pool although it is silent as to what transpired there.

Thus it has been shown that the accused committed acts in Camp Claiborne which proximately tended to create an intended, concerted insubordination against lawful military authority with the intent to create such insubordination and proof of these elements of the attempt to create a mutiny sufficiently appears beyond any reasonable doubt.

7. The charge sheet discloses that the accused is 30 years of age. He was inducted into service on 22 January 1944 and has had no prior service.

8. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that 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 which is recognized as 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 and 13).

(on leave), Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

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

SPJGH
CM 267246

1 DEC 1944

UNITED STATES v. Second Lieutenant JULIAN S. COLLENDER (O-685774), Air Corps.	FOURTH AIR FORCE Trial by G.C.M., convened at McChord Field, Washington, 21, 28 and 29 September 1944. Dismissal.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lt. Julian S. Collender, Squadron "V", 464th AAF Base Unit, did, at Tacoma, Washington, on or about 10 August 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Derby Club Restaurant, Tacoma, Washington, a corporation, a certain check, in words and figures substantially as follows, to wit:

Tacoma WASHINGTON Aug. 10 19 44
(Kings Hiway Branch)

Manufacturer's Trust Co. Brooklyn, N.Y.
(Fill in name of bank) (City)

PAY TO Cash - - - - - - - - - - OR ORDER $25.00

COUNTER CHECK

Twenty-Five and no/100 - - - - - - - - - - - - - - DOLLARS

/s/ Julian S. Collender
0-685774

and by means thereof did fraudulently obtain from the Derby Club Restaurant, Tacoma, Washington, a corporation, currency in the amount of Twenty-Five Dollars ($25.00), he, the said 2nd Lt. Julian S. Collender, then and there well knowing that he did not have and not intending that he should have sufficient funds in or credit with the said bank for the payment of said check in full upon its presentation and that said check would not be paid by said bank upon presentation for payment.

Specification 2: Same allegations as Specification 1, except check in the amount of $35 and dated 2 August 1944.

Specification 3: Same allegations as Specification 1, except check dated 8 August 1944.

Specification 4: Same allegations as Specification 1, except check dated 9 August 1944.

Specification 5: Same allegations as Specification 1, except check dated 3 August 1944.

Specification 6: Same allegations as Specification 1, except check in the amount of $15 and dated 4 August 1944.

Specification 7: In that 2nd Lt. Julian S. Collender, Squadron "V", 464th AAF Base Unit, did, at McChord Field, Washington, on or about 12 August 1944, with intent to defraud, wrongfully and unlawfully make and utter to the McChord Field Officers' Mess Association, McChord Field, Washington, a certain check, in words and figures substantially as follows, to wit:

TO National Bank of Wash. NO. _____
Name of Bank

_____

Tacoma Wash
City State Aug. 12 19 44

PAY TO THE ORDER OF Cash - - - - - - - - - - - $ 40.00

Forty and no/100 - - - - - - - - - - - - - - - - DOLLARS

ARMY
SERIAL
NUMBER 0-685774 /s/ Julian S. Collender
Signature Here

and by means thereof did fraudulently obtain from the McChord Field Officers' Mess Association, McChord Field, Washington, currency in the amount of Forty Dollars ($40.00), he, the said 2nd Lt. Julian S. Collender, then and there well knowing that he did not have and not intending that he should have sufficient funds in or credit with the said bank for the payment of said check in full upon its presentation and that said check would not be paid by said bank upon presentation for payment.

Specification 8: Same allegations as Specification 7, except check in the amount of $50 and dated 16 August 1944.

Specification 9: Same allegations as Specification 7, except check in the amount of $50 and dated 17 August 1944.

Specification 10: Same allegations as Specification 7, except check in the amount of $50 and dated 14 August 1944.

Specification 11: Same allegations as Specification 7, except check in the amount of $50 and dated 15 August 1944.

Specification 12: Same allegations as Specification 7, except check in the amount of $25, dated 12 August 1944 and made and uttered to Olympic Hotel, Seattle, Washington.

Specification 13: Same allegations as Specification 7, except check in the amount of $25, dated 14 August 1944, and made and uttered to Olympic Hotel, Seattle, Washington.

Specification 14: Same allegations as Specification 7, except check in the amount of $110, dated 15 August 1944, made and uttered to Michael Bernard Bard, Seattle, Washington.

Specification 15: Same allegations as Specification 7, except check in the amount of $215, dated 17 August 1944, made and uttered to Michael Bernard Bard, Seattle, Washington.

The accused pleaded not guilty to and was found guilty of all Specifications and the Charge. There was no evidence of previous convictions. He was sentenced to be dismissed the service and to be confined at hard labor for twelve years. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under the 48th Article of War.

3. For the prosecution:

a. Specifications 1-6:

The checks (Prosecution's Exhibits 16, 11, 14, 15, 12 and 13, respectively) aggregating $150, described in these Specifications, were made by accused on the dates and for the amounts alleged, were drawn on the Manufacturer's Trust Company, Brooklyn, New York, and cashed for the accused by the Derby Club Restaurant (R. 57, 61-66). One of the checks, Prosecution's Exhibit 16, was not deposited for collection because other checks of accused had already been returned dishonored (R. 67). The five other checks were deposited for collection by the Derby Club Restaurant, and were dishonored by the drawee bank when presented for payment (R. 65).

b. Specifications 7-11:

The checks (Prosecution's Exhibits, 3, 6, 7, 4 and 5 respectively) aggregating $240, described in these Specifications, were made by accused on the dates and for the amounts alleged, were drawn on the National Bank of Washington, Tacoma, Washington, and were cashed for the accused by the McChord Field Officers' Mess Association, or received in payment of accused's account (R. 11-22). Two of the checks, Prosecution's Exhibits 6 and 7, were not deposited for collection because accused had indicated they would not be honored (R. 21, 23). The three other checks were deposited for collection by the McChord Field Officers' Mess Association and were dishonored by the drawee bank when presented for payment (R. 12, 16-17, 18). The three checks last mentioned, Prosecution's Exhibits 3, 4 and 5, were redeemed by accused on 11 September 1944 by payment of cash to the McChord Field Officers' Mess Association and the other two, Prosecution's Exhibits 6 and 7, were redeemed in like manner on 27 September 1944 (R. 35-36).

c. Specifications 12 and 13:

The checks described in these Specifications (Prosecution's Exhibits 8 and 9) each for $25, were made by accused on the dates and for the amounts alleged, were drawn on the National Bank of Washington, Tacoma, Washington, and were given to the Olympic Hotel, Seattle, Washington, a portion of one (Prosecution's Exhibit 8) in payment of accused's hotel bill and the balance in cash and the other (Prosecution's Exhibit 9) was for cash. They were each deposited for collection by the Olympic Hotel and were dishonored by the drawee bank when presented for payment (R. 45-49).

d. Specifications 14 and 15:

It was stipulated that if Michael Bernard Bard were present and sworn as a witness, he would testify that on 15 August 1944 accused drew a check (Prosecution's Exhibit 1) for $110 on the National Bank of

Washington, Tacoma, Washington, to the order of cash and requested Bard to cash it, which he did. On 17 August 1944 accused drew a check (Prosecution's Exhibit 2) for $215 on the same bank, also to the order of cash, which Bard cashed at accused's request. Bard deposited the two checks for collection, both of which were returned to him dishonored by the drawee bank. At the time of trial these two checks had not been redeemed by accused (R. 8-9).

e. Accused's account in the Manufacturer's Trust Company, Brooklyn, New York, was closed on 15 November 1943, and at least until 13 September 1944 there were no funds on deposit in this bank to accused's credit (R. 69; Pros. Ex. 17).

f. The account of the accused in the National Bank of Washington, Tacoma, Washington, was opened 25 July 1944 and closed 18 August 1944 (R. 51-52; Pros. Exs. 10, 10a). Only one deposit was ever made in this account, namely, a deposit of $100 made on 25 July 1944 (R. 52). The balance in this account on 4 August 1944 and thereafter was $1 or less until it was closed entirely on 18 August 1944 (R. 54).

4. Accused made an unsworn statement to the effect that at the time he drew the six checks (Specs. 1-6) on the Manufacturer's Trust Company, Brooklyn, New York, he intended to have sufficient funds on deposit to pay them. He had never been notified that the account, which was a joint account with his wife, had been closed. After drawing the six checks he telephoned his wife and instructed her to deposit sufficient funds in the account, $150 or $200, to cover the checks given to the Derby Club Restaurant. Subsequently, his wife wrote him she had discovered that the account had been closed, and that it was impossible to open a new joint account on which he could draw because the bank would be without a specimen of his signature for such new account. He requested the manager of the Olympic Hotel to hold the two checks (Specs. 12, 13) until the first of the next month, at which time he would pay them. He offered in open court to turn over all his pay checks to defense counsel to redeem all the dishonored checks, and stated that regardless of the outcome of his trial he intended to redeem all of them (R. 84).

5. The proof establishes that at the time accused made and uttered the six checks (Specs. 1-6) drawn on the Manufacturer's Trust Company, Brooklyn, New York, he had no funds on deposit, a joint account which he and his wife previously had with that bank having been closed 15 November 1943.

The proof further establishes that at the time accused made and uttered the remaining nine checks (Specs. 7-15) totaling $615,

drawn on the National Bank of Washington, Tacoma, Washington, the balance on deposit in accused's account did not exceed $1.

A person is chargeable with knowledge of the status of his bank account, at least when he is the only person authorized to draw on it (CM 236070, Wanner, 22 B.R. 279, 2 Bull. JAG 384). There is no evidence that anyone other than accused was authorized to draw on the account with the National Bank of Washington, Tacoma, Washington. Moreover, there is no evidence that the total depletion of the account with the Manufacturer's Trust Company, Brooklyn, New York, was caused by withdrawals made by accused's wife, who had this account jointly with accused. Under such circumstances, accused is chargeable with knowledge of the condition of both accounts at the time he made and uttered all of the checks covered by the Specifications. The evidence conclusively establishes the commission of the offenses alleged and sustains the findings of guilty of the Charge and all Specifications thereunder.

6. Accused is 23 years old and has a wife and infant son. He is a high school graduate. He enlisted in the Army 20 March 1941 after attending college for one and one half years. He was appointed an aviation cadet in September 1942 and upon completion of the prescribed Army Air Forces Bombardier Training Course was commissioned a second lieutenant, Army of the United States.

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 occurred during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Thomas N. Tobey, Judge Advocate.

[illegible], Judge Advocate.

William H. Bambrell, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 19 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 Julian S. Collender (0-685774), 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. There are no extenuating circumstances. I recommend that the sentence as approved by the reviewing authority, although inadequate, be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 46, 27 Jan 1945)

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

SPJGK
CM 267247

6 DEC 1944

UNITED STATES	)	FOURTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Tonopah Army Air Field, Tonopah, Nevada, 21 September 1944. Dismissal.
	)	
First Lieutenant CLARENCE O. BEWLEY (O-1587126), Quartermaster Corps.	)	

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

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that First Lieutenant Clarence O. Bewley, Quartermaster Corps, Squadron A, 422nd Army Air Force Base Unit, did, at Tonopah Army Air Field, Tonopah, Nevada, on or about 13 August 1944, knowingly and willfully misappropriate one (1) Dodge Engine Block Assembly and one (1) Dodge Crankshaft of the total value in excess of One Hundred Dollars ($100.00), property of the United States furnished and intended for the military service thereof.

ADDITIONAL CHARGE: Violation of the 94th Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to the Charges and their respective Specifications. He was found guilty of the Charge and its Specification, and not guilty of the Additional Charge and its Specification. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service and to be fined $500. The reviewing authority approved the sentence, remitted the fine imposed, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution pertinent to the Charge and its Specification may be summarized as follows:

On the dates hereinafter referred to the accused, a first lieutenant, Quartermaster Corps, Army of the United States, was stationed at Tonopah Army Air Field, Tonopah, Nevada. His duty assignment was that of Motor Pool Officer (R. 8, 14; Pros. Ex. 1). He was the owner of a Dodge automobile the engine of which bore the number D22-7281 (R. 8; Pros. Exs. 2, 4, 7).

On 9 August 1944 accused was convoy commander of a convoy of vehicles from Tonopah Army Air Base to Los Angeles, California. Before he left for Los Angeles the Base Motor Maintenance Officer at Tonopah Army Air Field asked him to procure certain motor parts and "anything he could get that would help" from the 3rd Echelon Repair Shop located in Los Angeles, California. He did not request him to get a Dodge motor block or crank shaft (R. 15). On 9 August 1944 the accused arrived at the 3rd Echelon Repair Shop, Los Angeles, California, and requested and procured from the officer in charge one Dodge motor block and a crank shaft and other motor parts (R. 11). A Property Issue Slip was issued to the accused indicating the issuance to him and the receipt by him of the motor parts, the motor block and crank shaft "for the commanding officer" of the Tonopah Army Air Field (Pros. Ex. 5). Accused stated to the officer in charge that he wanted the motor block to "remove a deadline vehicle" at his station (R.11). The officer in charge assumed that accused meant a Government vehicle (R. 12). All of the articles thus delivered belonged to the Government (R. 11, 43). The block and crank shaft were loaded on a truck and transported to the Tonopah Army Air Field as directed by the accused (R. 16). Upon his return to Tonopah Army Air Base accused did not show the Base Motor Maintenance Officer the Property Issue Slip nor did he mention the Dodge motor block and crank shaft (R. 14). At the Tonopah Army Air Field there are usually Government owned Dodge motor vehicles in need of a new motor block assembly and a crank shaft (R. 15).

On 29 July 1944 the accused was heard to say that the cylinders of the motor of his automobile were scored (R. 21) and that the condition of the engine was such that the motor could not be rebored (R. 24).

On or about 1 August 1944 accused had a mechanic remove the motor from his Dodge automobile (R. 16). This motor and the Dodge motor block and crank shaft procured by the accused from the 3rd Echelon Repair Shop in Los Angeles were then placed in the 3rd Echelon Shop of the Tonopah Army Air Force and on 13 August 1944 the accused with several enlisted men assisting him made a complete engine out of the motor block and crank shaft by adding to them parts of the engine removed from the accused's automobile and other motor parts that accused had purchased (R. 17, 18, 22, 25, 40).

The engine thus assembled was offered in evidence without objection (Pros. Ex. 6, R. 19).

On 18 August 1944 the accused voluntarily admitted to an Investigating Officer with reference to the motor block and crank shaft:

> "* * * . He procured it through the Third Echelon Maintenance Shop in Los Angeles. I believe it was on or about the 8th or 9th of August. He stated that he was there to pick up other parts for the TAAF, short parts what were needed. He stated that Lt. Sasser had desired that he get these parts, that he had knowledge of the shortages, that in securing these parts he saw a shipment of parts from, I believe it was Santa Maria Army Air Base and that these parts had been sent up to Third Echelon and among those parts he noticed a Dodge motor block. He also noticed a crank shaft for a Dodge motor. He also stated, I believe, something regarding finding bearings there. He told me that he had consulted with the men of the Third Echelon Shop, one of the names I recall was W. O. Jeffress and that when the Property Issue slip was made up for the short parts which were desired by TAAF Motor Transportation, he had included on that slip these parts that he had located at the Third Echelon Maintenance Shop in Los Angeles." (R. 28).

At the same time the accused admitted orally that he took the block and crank shaft to Tonopah Army Air Field and had them placed in the Third Echelon Shop and that on the 13th of August with the help of two enlisted men he disassembled the engine of his Dodge automobile and by using parts from this engine and other parts that he had purchased he assembled as an engine the new motor block (R. 28). Photographs of the two motors in their condition after this took place were admitted in evidence without objection (R. 29; Pros. Exs. 7, 8). The accused stated that it was his intention to place the new motor block thus assembled in his automobile (R. 29), and that he had arranged with a mechanic to do this work (R. 30). On the same day - 13 August 1944 - the military police seized the motor thus assembled (R. 9).

It was stipulated by the trial judge advocate, the defense counsel and the accused that the Dodge engine block and crank shaft, the subject matter of the Specification of the Charge, "has a total value in excess of $100" (R. 45).

4. The accused having been advised concerning his right to testify under oath, to remain silent, or to make an unsworn statement elected to testify under oath (R. 46). His entire testimony pertained only to the Additional Charge and its Specification of which he was found not guilty and will not therefore be reviewed (R. 47-48).

Major E. E. Smith testified on behalf of the accused that during a period of 3½ weeks he was familiar with the manner in which accused performed his duties and that during that time accused rendered service of a definite value and appeared to be a willing and conscientious worker (R. 48-49).

5. The pertinent part of Article of War 94 provides as follows:

"Any person subject to military law who * * * knowingly and wilfully misappropriates, applies to his own use or benefit * * * property of the United States furnished or intended for the military service thereof * * * shall, upon conviction be punished * * *".

The accused stands convicted of misappropriating one Dodge engine block assembly and one Dodge crank shaft of the total value in excess of $100, property of the United States furnished and intended for the military service thereof, in violation of the above Article of War.

The evidence shows beyond any reasonable doubt that the accused, at the time and place averred in the Specification in his capacity as an officer in the Army of the United States obtained possession, at an Army repair shop, of a Dodge motor block assembly and crank shaft, and that these articles were the property of the United States furnished and intended for military service. It was stipulated that the articles were worth more than $100. However, their value is not material as the sentence imposed did not include any confinement. Furthermore the Table of Maximum Punishment has no application to offenses committed by officers.

It was shown by the witnesses for the prosecution and by the voluntary admission of the accused that accused took these articles back to his station and, for the purpose of installing them in his privately owned automobile, accused, with the aid of several enlisted men acting under his orders, completed the assembly of the motor block and crank shaft with other parts so as to assemble a complete engine. He had arranged with a mechanic to install the new motor thus assembled in his own automobile but before this was accomplished the motor was seized by the military police.

The Manual for Courts-Martial, 1928, paragraph 150i, page 185 provides that the proof required to show misappropriation and misapplication is:

"(a) That the accused misappropriated or applied to his own use certain property in the manner alleged; (b) that such property belonged to the United States and that it was furnished

or intended for the military service thereof, as alleged; (c) the facts and circumstances of the case indicating that the act of the accused was willfully and knowingly done; and (d) the value of the property, as specified".

The acts of accused as disclosed by the evidence show the assumption by him of complete control over the motor block and crank shaft, and their conversion into a reassembled engine for the purpose of placing it into his own automobile. Such conduct constitutes misappropriation or misapplication. The gist of the offense alleged is that the accused willfully applied or appropriated to his own use certain property belonging to the United States furnished or intended for the military service thereof. It comprehends the application of such property to the exclusion of any purpose for which it was furnished. The motor block and crank shaft were undoubedly intended for use in a Government vehicle and not in the vehicle of a private individual.

In the instant case the accused was authorized to procure the motor block and crank shaft by the Base Motor Maintenance Officer. These articles were usable in Government motor trucks and intended for that purpose. By appropriating them to his own private needs and use he "misappropriated" them in violation of the 94th Article of War. CM 243287, Poole, B.R. 27, p. 321; JAG Bull. Vol. III, p. 226.

6. War Department records show the accused to be 31½ years of age and single. He attended elementary and high school through the 11th grade. On 9 May 1932 he enlisted in the U. S. Marine Corps and served until 15 May 1938 when he was honorably discharged. On 23 March 1941 he enlisted in the U. S. Army and served until 27 January 1943 when he was commissioned Second Lieutenant, Q.M.C., A.U.S. He was promoted to First Lieutenant on 10 September 1943.

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 of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of the 94th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 19 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 Clarence O. Bewley (O-1587126), Quartermaster Corps.

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

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

Myron C. Cramer

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

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

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 40, 27 Jan 1945)

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

SPJGN

CM 267311

8 NOV 1944

UNITED STATES	SECOND AIR FORCE
v.	Trial by G.C.M., convened at Galveston, Texas, 11 October 1944. Dismissal, total forfeitures and confinement for eighteen (18) months.
First Lieutenant CLAIR E. DRISCOLL (O-792444), 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 Charges and Specifications:

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

Specification: In that First Lieutenant Clair E. Driscoll, 215th Army Air Forces Base Unit, did, without proper leave absent himself from his organization at Army Air Base, Pueblo, Colorado, from about 11 June 1944 to about 23 August 1944.

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

Specification 1: In that First Lieutenant Clair E. Driscoll, 215th Army Air Forces Base Unit, did, at Galveston, Texas, on or about 26 May 1944, make and utter to Louise Bird of Galveston, Texas, a certain check in words and figures as follows, to wit:

Sheldon National Bank
Sheldon, Iowa

May 26, 1944

Pay to the order of CASH _____ $15.00

Fifteen and 00 _____ Dollars

/s/ Clair E Driscoll
1st Lt 0792444

and by means thereof did obtain from Louise Bird, the sum of $15.00, lawful money of the United States and did thereafter wrongfully fail to maintain a sufficient bank balance in the said Sheldon National Bank of Sheldon, Iowa, for the payment of said check.

Specification 2: In that First Lieutenant Clair E. Driscoll, 215th Army Air Forces Base Unit, did, at Galveston, Texas, on or about 26 May 1944, make and utter to Louise Bird of Galveston, Texas, a certain check in words and figures as follows, to wit:

Sheldon National Bank
Sheldon, Iowa

May 26, 1944

Pay to the order of CASH _____ $15.00

Fifteen and 00 _____ Dollars

/s/ Clair E Driscoll
1st Lt 0792444

and by means thereof did obtain from Louise Bird, the sum of $15.00, lawful money of the United States and did thereafter wrongfully fail to maintain a sufficient bank balance in the said Sheldon National Bank of Sheldon, Iowa, for the payment of said check.

Specification 3: In that First Lieutenant Clair E. Driscoll, 215th Army Air Forces Base Unit, did, at Galveston, Texas, on or about 8 June 1944 make and utter to Louise Bird of Galveston, Texas, a certain check in words and figures as follows, to wit:

Sheldon National Bank
Sheldon, Iowa

June 8, 1944

Pay to the order of CASH _____ $15.00

Fifteen and 00 _____ Dollars

/s/ Clair E. Driscoll
1st Lt 0792444

---

and by means thereof did obtain from Louise Bird, the sum of $15.00, lawful money of the United States, and did thereafter wrongfully fail to maintain a sufficient balance in the said Sheldon National Bank of Sheldon, Iowa, for the payment of said check.

Specification 4: In that First Lieutenant Clair E. Driscoll, 215th Army Air Forces Base Unit, did, at Galveston, Texas, on or about 8 June 1944, make and utter to Louise Bird of Galveston, Texas, a certain check in words and figures as follows, to wit:

Sheldon National Bank
Sheldon, Iowa

June 8, 1944

Pay to the order of CASH _____ $15.00

Fifteen and 00 _____ Dollars

/s/ Clair E. Driscoll
1st Lt 0792444

---

and by means thereof did obtain from Louise Bird, the sum of $15.00, lawful money of the United States, and did thereafter wrongfully fail to maintain a sufficient bank balance in the said Sheldon National Bank of Sheldon, Iowa, for the payment of said check.

Specification 5: In that First Lieutenant Clair E Driscoll, 215th Army Air Forces Base Unit, did, at Galveston, Texas, on or about 9 June 1944, make and utter to Louise Bird of Galveston, Texas, a certain check in words and figures as follows, to wit:

Sheldon National Bank
Sheldon, Iowa

June 9, 1944

Pay to the order of CASH _____ $15.00

Fifteen and 00 _____ Dollars

/s/ Clair E Driscoll
1st Lt 0792444

---

and by means thereof did obtain from Louise Bird, the sum of $15.00, lawful money of the United States, and did thereafter wrongfully fail to maintain a sufficient bank balance in the said Sheldon National Bank of Sheldon, Iowa, for the payment of said check.

The accused pleaded guilty to, and was found guilty of, both Charges and all Specifications thereunder. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for eighteen 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 the accused absented himself without leave on 11 June 1944 from the 215th Army Air Forces Base Unit, Pueblo, Colorado, to which he had just been assigned (R. 9; Pros. Ex. 1). He remained absent until he was arrested seventy-three days later, on 23 August 1944, in Sioux City, Iowa (R. 9; Pros. Ex. 1A).

Five checks, each in the sum of $15.00, drawn on the Sheldon National Bank of Sheldon, Iowa, and signed "Clair E Driscoll" were introduced as Prosecution Exhibit No. 2. Two were dated 26 May 1944, two 8 June 1944, and one 9 June 1944 (R. 9; Pros. Ex. 2). Payment was refused on all of them because of "No account" (R. 9; Pros. Ex. 3). Although an account had been maintained by the accused with the drawee bank prior to 11 March 1944, it was closed on that date and never reopened (R. 9; Pros. Ex. 3).

4. After his rights as a witness had been fully explained to him, the accused elected to remain silent. No evidence was offered on his behalf.

5. The Specification of Charge I alleges that the accused "did, without proper leave absent himself from his organization * * * from about 11 June 1944 to about 23 August 1944". This was set forth as a violation of Article of War 61.

The morning reports of the 215th Army Air Forces Base Unit coupled with the accused's plea of guilty clearly establish that he was absent without leave for seventy-three days. No explanation of any kind having been made by the defense, the record is sufficient beyond a reasonable doubt to support the Specification of Charge I.

6. Specifications 1, 2, 3, 4 and 5 of Charge II allege that the accused did on or about 26 May, 8 June, and 9 June 1944 "make and utter to Louise Bird of Galveston, Texas", five checks, each in the sum of $15.00, drawn on the Sheldon National Bank of Sheldon, Iowa, "and by means thereof did obtain from" her the face value of the said checks in cash "and did thereafter wrongfully fail to maintain a sufficient bank balance in the said Sheldon National Bank of Sheldon, Iowa", for their payment. These offenses were laid under Article of War 96.

The five worthless checks referred to have been introduced into evidence together with an affidavit by the President of the Sheldon National Bank stating the accused's account was closed on 11 March 1944. These two items of proof read in conjunction with the accused's plea of guilty are adequate to sustain all of the Specifications of Charge II.

7. The accused, who is single, is about 28 years old. After attending high school for four years in Sheldon, Iowa, he was in business for himself as an electrician from 1936 to 1940 and was employed by the Sheldon Auto Company as a parts clerk for ten months between 1940 and 1941. In the meantime from 1 August 1934 to 15 August 1941 he served in the Iowa National Guard and was honorably discharged with the rating of Sergeant. After enlisted service in the Army between 10 February 1941 to 2 October 1942, he was commissioned a second lieutenant in the Air Reserve on 3 October 1942. Early in 1943 he went overseas to North Africa. In the ensuing months he participated in some fifty aerial sorties against the enemy, earned the Air Medal with nine oak leaf clusters, and on 3 September was promoted to the rank of first lieutenant. About 1 October 1943 he had sexual intercourse with a native French girl in Algiers and contracted syphilis. Upon his return to this country shortly thereafter he was given treatment, found to be not incapacitated, and assigned to general military service. On 19 April 1944 he was sentenced to a forfeiture of $100 per month for one month for absenting himself without leave for two days. In the following month he committed the first of the offenses described in paragraph 3 above. A psychiatric examination after his return to military control showed him to be sane, but "apathetic," "not responsive", and anxious "to get it over with."

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61 or Article of War 96.

Abner E. Lipscomb, Judge Advocate

Robert J. O'Connor, Judge Advocate

Gabriel H. Golden, Judge Advocate

SPJGN
CM 267311

1st Ind.

War Department, J.A.G.O., NOV 28 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 Clair E. Driscoll (0-792444), Air Corps.

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

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 34, 19 Jan 1945)

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

SPJGN
CM 267337

13 NOV 1944

UNITED STATES	)	SIXTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	Trial by G.C.M., convened at Camp Ellis, Illinois, 29 August 1944. Dishonorable discharge and confinement for one (1) year and six (6) months. Disciplinary Barracks.
Private WILLIAM HARBISON (33790940), 3119th Quartermaster Service Company.	)	

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

---

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

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

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

Specification: In that Private William Harbison, 3119th Quartermaster Service Company did, at Camp Ellis, Illinois, on or about 26 July 1944, with intent to do him bodily harm, commit an assault upon Sergeant Frank A. Zdebski, Military Police Company, 1624th Service Unit, by willfully and feloniously striking the said Sergeant Frank A. Zdebski in the face and stomach with his fists.

CHARGE II: Violation of the 65th Article of War.

Specification: In that Private William Harbison, 3119th Quartermaster Service Company, having received a

> lawful order from Sergeant Frank A. Zdebski, Military Police Company, 1624th Service Unit, a noncommissioned officer who was then in the execution of his office, to get back in ranks and be quiet, did at Camp Ellis, Illinois, on or about 26 July 1944, willfully disobey the same.

The accused pleaded not guilty to and was found guilty of the Charges and Specifications thereunder. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for one year and six months. 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 pursuant to the provisions of Article of War 50½.

3. The evidence clearly establishes that the accused willfully disobeyed the lawful order of a noncommissioned officer as alleged in the Specification, Charge II. The evidence also shows that the accused committed an assault upon a noncommissioned officer by engaging in a fight with him and striking him in the face and stomach with his, the accused's, fists (R. 10, 13). Since the Specification, Charge I, alleges that this assault was "with intent to do bodily harm" the only question requiring discussion is whether a simple assault and battery legally warrants the inference that the assault was made with the intent alleged. In IV BR 233, the Board of Review stated that:

> "Assault with intent to do bodily harm is, of course, more aggravated than ordinary assault and battery, and comprehends offenses such as a serious and determined assault by several persons upon one, or by a large powerful man or a skilled fighter upon a smaller unskilled man, or an aggressive assault planned or persisted in so as to show clearly an intent to do serious harm. CM 193112, Marx."

In the present case no such aggravated assault as is above described is shown. On the other hand, the evidence shows no more than a brief scuffle between the accused and the sergeant whom he struck. The Board of Review is of the opinion, therefore, that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification of Charge I, and Charge I, as involves a finding

of guilty of the lesser included offense of assault and battery, in violation of Article of War 96.

4. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification of Charge I, and Charge I, as involves a finding of guilty of the lesser included offense of assault and battery, in violation of Article of War 96, legally sufficient to support the findings of guilty of the Specification of Charge II, and Charge II, 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.

NOV 14 '44 PM

Abner E. Lipscomb, Judge Advocate.

Robert J. O'Connor, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 267337

1st Ind.

War Department, J.A.G.O., NOV 13 1944 To the Commanding General, Sixth Service Command, Army Service Forces, Chicago 6, Illinois.

1. In the case of Private William Harbison (33790940), 3119th Quartermaster Service Company, I concur in the foregoing holding by the Board of Review, and for the reasons therein stated, recommend that only so much of the findings of guilty of the Specification of Charge I, and Charge I, be approved as involves a finding of guilty of the lesser included offense of assault and battery, in violation of Article of War 96, and that only so much of the sentence be approved as involves dishonorable discharge, total forfeitures, and confinement at hard labor for one year. Upon compliance with this recommendation you will have authority to order the execution of the sentence.

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

(CM 267337).

Myron C. Cramer

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

1 Incl.
Record of trial.

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

SPJGH
CM 267342

15 DEC 1944

UNITED STATES	66TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Camp Rucker, Alabama, 25 October 1944. Dishonorable discharge and confinement for ten (10) years. Disciplinary Barracks.
Private MELVIN ROSE (34670811), Company K, 263d Infantry	

HOLDING by the BOARD OF REVIEW
TAPPY, MELNIKER and GAMBRELL, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Melvin Rose, Company K, 263d Infantry, did, at Camp Rucker, Alabama, on or about 4 September 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: "Movement to and shipment from Port of Embarkation"; and did remain absent in desertion until on or about 13 September 1944.

Specification 2: In that Private Melvin Rose, Company K, 263d Infantry, did, at Seymour Johnson Field, North Carolina on or about 18 September 1944, desert the service of the United States by absenting himself without proper leave from his place of confinement, and did remain absent in desertion until on or about 25 September 1944.

Accused pleaded not guilty to and was found guilty of the Charge and both Specifications. Evidence of two prior convictions by special courts-martial for absence without leave was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The record of trial is legally sufficient to sustain the findings of guilty of Specification 2 of the Charge and the Charge and to support the sentence. The only question requiring consideration here is whether or not the record of trial is legally sufficient to sustain the finding of guilty of Specification 1 of the Charge.

4. On 27 August 1944, while accused's organization was at Camp Rucker, Alabama, his company commander told him that he had been alerted for shipment "to a Port of Embarkation for probable overseas shipment" and he read to him the 28th Article of War, telling him that if thereafter he absented himself without leave he would be subject to trial for desertion. Accused replied that the proposed shipment was probably a good thing "as every once in a while he got the urge to go home, and he went home, and if he was overseas he wouldn't be able to do this" (R. 7, 8). Pursuant to Special Orders No. 207, Headquarters 66th Infantry Division, 1 September 1944, accused was ordered to be transferred to Army Ground Forces Replacement Depot No. 1, Fort George G. Meade, Maryland (Pros. Ex. 4). On 4 September 1944 he absented himself without leave from Camp Rucker and remained absent until 13 September 1944 when he was returned to military control and confined at Seymour Johnson Field, North Carolina (R. 9; Pros. Exs. 1, 2, 3).

5. After his rights as a witness had been fully explained to him, accused elected to remain silent and the defense rested without introducing any evidence.

6. Accused is charged in Specification 1 with absenting himself without leave with intent to shirk important service, to wit: "Movement to and shipment from Port of Embarkation". It is well settled that if the finding of guilty of this Specification is to be sustained, the proof must establish that accused knew or had reason to believe that his embarkation for foreign service was imminent and that his absence would avoid it (CM 268622, Sfer; CM 268240, Closson; CM 265447, Hodge; CM 264237, Pattillo). Accused was told nothing to indicate that his embarkation for shipment overseas was imminent. He was only told he was going to be transferred to a port of

embarkation for "probable overseas shipment", when in fact he was to be transferred to a replacement depot. Certainly, if overseas shipment is but a probability it cannot be said to be imminent. "Imminent" means "threatening to occur immediately; near at hand; impending" (Webster's New International Dictionary, 2nd ed.). "Probable", in effect, means more likely to occur than not. Imminent has a definite temporal connotation but probable refers only to the likelihood of the occurrence of an event and is no indication of the time it may occur (Webster's, supra).

A person's intention is a mental state which is generally established as a fact by proof of (a) the information or knowledge accused possessed and (b) his conduct thereafter. If accused had knowledge that he was scheduled for imminent shipment overseas, his unauthorized absence causing him to avoid such shipment would be proof of his intent to avoid such shipment. If, on the other hand, accused knew only that he was scheduled for a certain transfer which probably would result sometime in the future in his shipment overseas and he thereafter absented himself without leave, that evidence would be insufficient to establish that when he absented himself without leave accused intended to avoid imminent overseas shipment. He cannot be found guilty of intending to avoid what, so far as the evidence shows, he did not have reason to believe existed.

We need not here consider whether the proof is sufficient to establish desertion under Article of War 58 since that is not an offense included within the one with which accused is charged (CM 268622, Sfer, supra). The evidence, however, is sufficient to sustain so much of the finding of guilty of Specification 1 of the Charge as involves absence without leave for the period alleged, in violation of Article of War 61.

7. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of Specification 1 of the Charge as involves a finding of guilty of absence without leave by the accused from his organization and station, at the time and place alleged, terminated at the time alleged, in violation of Article of War 61, legally sufficient to support the findings of guilty of Specification 2 of the Charge and the Charge, and legally sufficient to support the sentence.

Thomas N. Jaffy, Judge Advocate.

[illegible], Judge Advocate.

William H. Bamberger, Judge Advocate.

SPJGH
CM 267342 1st Ind.

War Department, J.A.G.O., DEC 19 1944 - To the Secretary of War.

1. In the case of Private Melvin Rose (34670811), Company K, 263d Infantry, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that so much of the finding of guilty of Specification 1 of the Charge be vacated as involves a finding of guilty of an offense other than absence without leave by the accused from his organization and station, at the time and place alleged terminated at the time alleged, in violation of Article of War 61.

2. 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.

3. Inclosed is a form of action designed to carry into effect the recommendation hereinbefore made, should such action meet with approval.

Myron C. Cramer

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

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

(So much of finding of guilty of Specification 1 of Charge vacated as involves finding of guilty of an offense other than absence without leave in violation of Article of War 61. Sentence approved and ordered executed. G.C.M.O. 1, 4 Jan 1945)

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

SPJGQ
CM 267382

22 DEC 1944

UNITED STATES v. First Sergeant THOMAS A. TERRY (33034239), Private LAWRENCE W. BEAL (33811357), and Sergeant CHARLIE B. COLEMAN (35640053), all of Company B, 1327th Engineer General Service Regiment.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Claiborne, Louisiana, 30 September 1944. Each: Dishonorable discharge and confinement for life. Penitentiary.

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

REVIEW by the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

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

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

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

As to First Sergeant Terry:
CHARGE: Violation of the 66th Article of War.

Specification: In that First Sergeant Thomas A. Terry, Company B, 1327th Engineer General Service Regiment, Camp Claiborne, Louisiana, did, at Camp Claiborne, Louisiana, on or about 16 August 1944, voluntarily join in a mutiny which had been begun in Camp Claiborne, Louisiana, against the lawful military authority of Captain Thomas F. Farrar, his commanding officer, and did, with intent to override for the time being, in concert with sundry other members of said Camp, refuse to quiet down and disperse.

As to Private Beal:
CHARGE I: Violation of the 64th Article of War.

Specification: In that Private Lawrence W. Beal, Company B, 1327th Engineer General Service Regiment, Camp Claiborne, Louisiana, having received a lawful command from Captain Thomas F. Farrar, his superior officer, to quiet down, did, at Camp Claiborne, Louisiana, on or about 16 August 1944, willfully disobey the same.

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

Specification: In that Private Lawrence W. Beal, Company B, 1327th Engineer General Service Regiment, Camp Claiborne, Louisiana, did, at Camp Claiborne, Louisiana, on or about 16 August 1944, voluntarily join in a mutiny which had been begun in Camp Claiborne, Louisiana, against the lawful military authority of Captain Thomas F. Farrar, his commanding officer, and did, with intent to override for the time being, in concert with sundry other members of said Camp, refuse to quiet down and disperse.

As to Sergeant Coleman:
CHARGE: Violation of the 66th Article of War.

Specification: In that Sergeant Charlie B. Coleman, Company B, 1327th Engineer General Service Regiment, Camp Claiborne, Louisiana, did, at Camp Claiborne, Louisiana, on or about 16 August 1944, voluntarily join in a mutiny which had been begun in Camp Claiborne, Louisiana, against the lawful military authority of Captain Thomas F. Farrar, his commanding officer, and did, with intent to override for the time being, in concert with sundry other members of said Camp, refuse to quiet down and disperse.

The appointing authority directed a common trial of the accused and they were so tried without objection by any. Each was accorded the separate right of challenge and each separately indicated satisfaction with the court as constituted and sworn. Each was separately arraigned and pleaded not guilty to, and, by separate findings, each was found guilty of the respective Charges and Specifications. No evidence of previous conviction was introduced. Each was separately 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 remainder of his natural life. By separate actions the reviewing authority approved the sentence as to each, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement for each, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution, briefly summarized, is as follows:

Each of the accused was, on 16 August 1944, in the military service as a member of Company B, 1327th Engineer General Service Regiment, stationed at Camp Claiborne, Louisiana (R. 11).

On the night of 16 August 1944 certain rumors to the effect that four negro soldiers had been shot while on guard in Bivouac Area No. 1 were prevalent throughout certain sections of Camp Claiborne (R. 14,18,27, 31,32) and many soldiers in the camp area had become wrought up into a fervor of excited resentment against white civilians who they believed had done the killing (R. 14).

Immediately after the outbreak of the rumor, Colonel Ristedt, the commanding officer of the 1327th Engineer General Service Regiment, ordered all the line officers to report to regimental headquarters because of brewing trouble. First Lieutenant Gene H. May of Company B, who had gone to bed, immediately dressed, and, before going to his company area, went to regimental headquarters (R. 31,32). He was wearing the insignia of his office (R. 36). Upon arriving there he found a mob of men, among whom was the accused Terry, gathered around the colonel and other officers (R. 32). Colonel Ristedt then ordered Lieutenant May to go to Company B area and maintain order while he went out to make an investigation at the bivouac area (R. 27). He further ordered that all personnel should stay in the company area (R. 13,15).

Meanwhile Captain Thomas F. Farrar, commanding officer of Company B, who also had gone to bed, was aroused when he heard Captain Newell going through the officers quarters repeating the rumor about someone being shot and telling all of the officers to go to their companies. He quickly donned his fatigue uniform which bore the insignia of his office (R. 17, 18) and hurried to the Company B area (R. 11,12).

When he arrived he saw men of his company moving in and out of the barracks, some carrying rifles with fixed bayonets; others had gas masks. More than half of the men were armed (R. 12,18). None of them had any authority to have rifles in their possession and the arms were kept locked (R. 12,29). There was a lot of confusion (R. 12), as the crowd was highly excited and rebellious (R. 18). He heard cries of "Hurry up and get your rifles; don't forget your gas masks; let's get going" (R. 12). When he asked what was going on the men gathered around him. The crowd would alternately grow and diminish as he spoke and at one time or another it appeared to him that the whole company was present (R. 13,18).

It was about 10:15 or 10:20 p.m. when Lieutenant May arrived in the company area (R. 27). As he approached, there were between 100 and 130 men congregated around Captain Farrar (R. 27,33). He described the scene as one of "mad uproar" with the men talking so loud that no one could understand what anyone was saying (R. 28,33). Because of the disorder the captain told them to quiet down and let one man talk. Thereafter, the accused Terry, Coleman and Beal acted as spokesmen for the company (R. 13). When Captain Farrar asked what was the matter, or what had happened, some one told him that four of their men had been killed out in the bivouac area where they had been stationed as guards (R. 14,18) and that "they were going out to kill themselves some white civilians to make up for it" (R. 18).

When asked how they knew of the killings they said someone had come around and told them. Captain Farrar argued with them and cautioned them to wait before doing anything, whereupon the accused Beal got quite close to him and, with his face about a foot away from the captain's, shouted at the top of his voice that colored soldiers had been killed by white civilians but since the captain was a white officer of course he did not want to see any white people killed. Captain Farrar thereupon ordered him to keep quiet and told him if he wanted to talk to lower his voice (R. 14, 19,28,35).

At this point Lieutenant May made some statement about soldiers not being killed except when it is necessary and the crowd immediately seized upon and misconstrued it and Beal again yelled at the top of his voice and, with his face close to the captain's, in a defiant manner asked, "Since when is it necessary that colored soldiers be killed by civilians?" (R. 14).

Because of the temper and angry mood of the crowd, Captain Farrar refrained from issuing any direct orders for the men to go to their barracks and put away their arms because he "was positive that, after (he) found out what the situation was, any orders given would have been disobeyed and it would have been worse than nothing" (R. 13,18,19). He did, however, reason with the leaders and with the mob and gave them such orders as he felt would be obeyed (R. 19). Thus he cautioned them to wait before taking any action; he repeatedly told them to stay in the company area under orders from the regimental commander, who had directed that none of the personnel should leave their organization areas; and he did order them to quiet down (R. 13,14).

About 10 or 15 minutes after Lieutenant May arrived he noticed a group of the men storming into the orderly room and on toward a small ordnance room where excess M1 rifles and carbines were kept locked up. As he proceeded into the orderly room he saw the men taking the hinges off the door in order to get into the ordnance room (R. 28,29). No one was authorized to have any rifle or carbine at the time (R. 29). Yet all of the men were later armed with either rifles or carbines (R. 28,29) and all of the rifle racks were found to be empty that night (R. 29). Captain Farrar saw Terry with a carbine and he "believed" Coleman and Beal each had an M1 rifle (R. 23). Lieutenant May testified that Beal was armed with a rifle and "to the best of his knowledge" Coleman had a carbine or rifle (R. 28,29).

The disorder continued unabated and the accused Coleman announced that they were going out to the bivouac area. Captain Farrar continued to reason with him because he "figured that if (he) could explain to him (Coleman) where it would be to his own advantage to stay in the company, (he) would probably get more results". Coleman answered, however, that "he didn't care". The captain explained that if they went out to the bivouac area unarmed and the civilians out there had ammunition the men "would be just like so many clay pigeons". Again Coleman said he didn't care; that he was going out regardless; and that he would just as soon be killed here

fighting for his own men as he would overseas (R. 15). He appeared to be quite upset about the rumor and stated that "he would be satisfied if he could go out and even himself by getting four civilians to make up for four of his own men that had been killed" (R. 29,30).

Someone then asked why they did not go out to the bivouac area and find out about the situation there and Captain Farrar again told them that the orders from Colonel Ristedt, to all of them, were that "we would stay in the company area" and, accordingly, they would all stay there (R. 15,16). At about this time Coleman and Beal disappeared and neither Captain Farrar nor Lieutenant May saw them thereafter (R. 26,30).

By this time the accused Terry had returned from regimental headquarters and Captain Farrar turned to him for assistance in quelling the disorder and controlling the insubordinate attitude of the men. He attempted to reason with Terry, telling him that, under the circumstances, as first sergeant and a colored soldier he would have more influence over the men of his own race than a white officer and urged him to reason with the crowd and tell them not to go to the bivouac area but to stay in the company area (R. 16,30,31). The only result he obtained was a lot of loud talk from Terry to the effect that the captain had failed the men by putting soldiers on guard in the bivouac area without any ammunition with which to protect themselves; and that he thought the men were right in wanting to go to the bivouac area. In fact, he did absolutely nothing to quiet the men as the captain had requested (R. 16), but blamed the regiment, the Army and the government for wilful neglect in failing to furnish ammunition to the men at the bivouac area (R. 30,31). In front of all the men he asked Captain Farrar if he would be willing to die for one of his men and when the captain answered "Why of course I would and you know it" Terry made no remark but merely smiled and laughed (R. 31). Finally, the accused Terry told the men that they might just as well go out to the bivouac area because they would all be punished anyway (R. 17) and, presently, all the men were advocating going to the bivouac area (R. 30).

Meanwhile various groups of men from companies further up the line continued to pass through the company area going toward the motor pool, and Captain Farrar heard someone say, "The convoy is leaving, come on", whereupon some of the men of his company left (R. 17). To Captain Farrar's personal knowledge Terry remained in the company area but Coleman and Beal, as stated, had disappeared (R. 26,30).

Throughout all of these events there were mutterings and exclamations from others in the mob but the accused Terry, Coleman and Beal were the only ones who directly addressed Captain Farrar, and, as leaders more or less directed the actions of the others, and all of their actions and words were opposite and contrary to what the officers sought to accomplish (R. 17, 21,22,24,36).

The mutinous spirit of the men continued into the morning when none of the men appeared for customary 6 o'clock reveille. Captain Farrar had remained in the orderly room all night and when he went out to hold reveille formation no one was in attendance although it was the duty of the one in charge of quarters to "whistle the men out" at that time. He thereupon went into the barracks and ordered the men out but it took about 20 minutes to turn out the company (R. 25).

Captain Farrar characterized the military services of Terry and Coleman as "good" and "very good", respectively, but he stated that Beal remained a private because he was always inclined to talk when he should be listening (R. 22,23). All three were of the "leader type" and had influence over the men (R. 17). Lieutenant May said the services of Terry and Coleman were "very satisfactory" but that Beal "was a soldier in the platoon as soldiering goes" (R. 35).

First Lieutenant Donald J. Coolidge, 1327th Engineer General Service Regiment, was the investigating officer in the case. As such, he had interviews with Coleman and Beal and, after they had been properly warned of their rights, took separate statements from each. These were admitted in evidence without objection and without caution that each statement was only to be considered as evidence against the accused who had made it (R. 39).

Sergeant Coleman's statement is as follows:

"I was in my barracks packing my barracks bags Wednesday night, August 16th, 1944, along with the rest of my squad. I am a squad leader; the 2nd Squad of the 2nd Platoon of Co. 'B'. Somebody came through the area hollering that four men had been shot down out at the permanent bivouac area. I heard someone say that John H. Moore, one of my squad, had been one of those shot. Moore was out at the bivouac area at that time. I went outside and found the whole company gathered around Capt. Farrar, our company commander. Everyone was saying that they wanted to go out to the bivouac area to see what had happened. We all went down to the intersection of the 14th St. Loop with the road to the motor pool; it appeared to me that the whole regiment was gathered there. Col. Ristedt was there. Col. Ristedt said he would take four non-coms out to the bivouac area. The convoy pulled out with Col. Ristedt in the lead truck. I rode out on a different truck, but came back with the convoy on the same truck with Col. Ristedt." (Ex. B).

Private Beal's statement is as follows:

"On the night of 16 August 1944, I heard shouts to 'fall out', and I fell out. I did not see Capt. Farrar in the company area at that time. A crowd was gathered in the company area, talking about 4 boys being killed in the bivouac area. Someone said that the Colonel

was going to select a crew of non-coms to go to the bivouac area. I went back to my barracks and got my rifle and came back out. Everybody was shouting 'get your rifle' and 'get anybody's rifle'. Capt. Farrar was in the area at this time. I came up and started to tell him about what had been going on. Then Lt. May came up. Lt. May said 'No soldier was killed in the bivouac area unless it was necessary'. I shouted 'when was it necessary for a soldier to get killed and why was it necessary for a soldier to get killed?' Someone hollered 'there are the trucks up at the motor pool.' A few said 'let's go down to the motor pool and maybe they will take a convoy.'. I went down to the motor pool. I got on a truck and went out to the bivouac area with the convoy. I came back and went to bed." (Ex. A).

4. Each of the accused, having been informed of his rights, elected to remain silent and no evidence was introduced by the defense.

5. In similar specifications, First Sergeant Thomas A. Terry, Sergeant Charlie B. Coleman and Private Lawrence W. Beal, all members of Company B, 1327th Engineer General Service Regiment, stationed at Camp Claiborne, Louisiana, are charged with joining in a mutiny against the lawful military authority of Captain Thomas F. Farrar, their commanding officer.

Mutiny imports collective insubordination and necessarily includes some combination by two or more persons in resisting lawful military authority (MCM 1928, par. 136a). It has been defined as consisting in an unlawful opposition or resistance to, or defiance of superior military authority, with a deliberate purpose to usurp, subvert, or override the same, or to eject with authority from office. (Winthrop, Military Law and Precedents, 2d Edition (Rep. 1920) p. 578).

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. (MCM, 1928, supra). This intent may be openly declared in words, or it may be implied from the act or acts done, - as, for example, from the actual subversion or suppression of the superior authority, from an assumption of the command which belongs to the superior, a taking up of arms and assuming a menacing attitude; or, it may be gathered from a variety of circumstances no one of which perhaps would of itself alone have justified the inference. But the fact of combination - that the opposition or resistance is the proceeding of a number of individuals acting together apparently with a common purpose - is, though not conclusive, the most significant, and most usual evidence of the existence of the intent in question. (Winthrop, pp. 580,581).

Joining in a mutiny is the offense of one who takes part in a mutiny at any stage of its progress, whether he engages in actively executing its purpose, or, being present, stimulates and encourages those who do. The joining in a mutiny constitutes a conspiracy and the doctrines of the common law thus become applicable to the status - viz. that all the participators are principals and each is alike guilty of the offense; that the act or declaration of anyone in pursuance of the common design is the act or declaration of every other; and that, the common design being established, all things done to promote it are admissible in evidence against each individual concerned. (Winthrop, p. 583).

While the intent above indicated is essential to the offense, the same is not complete unless the opposition or resistance be manifested by some overt act or acts, or specific conduct. Mere intention, however deliberate and fixed, or conspiracy, however unanimous, will fail to constitute mutiny. Words alone, unaccompanied by acts, will not suffice. (Winthrop, p. 581; MCM 1928, par. 136b). Therefore, no person can be found guilty of joining in a mutiny unless an overt act of mutiny is proved and a person cannot join in a mutiny unless he has joined in some overt act. Hence, the presence of the accused at the scene of the mutiny is necessary to establish guilt of the offense. (MCM 1928, par. 136b).

The evidence in this case discloses that, on the night of 16 August 1944, the troops of the 1327th Engineer General Service Regiment stationed in Camp Claiborne, Louisiana, were greatly excited because of rumors to the effect that certain members of the regiment on guard duty in a bivouac area adjacent to the camp had been killed by white civilians. The excitement, which was disorderly in the vicinity of regimental headquarters, reached more violent proportions in the area of Company B because it was members of this company who were believed to have been killed. Consequently, when Captain Farrar, the commanding officer of the company, arrived in the company area he was surrounded by highly agitated members of his command, more than half of whom were already armed and many of whom were so boisterous in expressing their opinions that no one could be understood. The captain thereupon ordered them to be quiet so that he might learn the cause of their unrest and it was then that he was informed by the men of the rumor which had disturbed them and of their determination to go out to the bivouac area to avenge the deaths of their comrades.

Undoubtedly Captain Farrar was confronted with a situation which demanded a tactful rather than an arbitrary and peremptory exercise of the lawful power and authority which he possessed. The men of his command were inflamed by the notion that an injustice had been done to some of their comrades in arms and, however vague and indefinite the rumor upon which their misguided ideas were founded, they were not wholly without justification in seeking lawful redress by appealing to their superiors. To this extent, the disorderly congregation of the troops in the company area and their vociferous discussions among themselves and with their officers were reasonable reactions to be expected under the circumstances and could not of themselves be deemed to constitute mutinous conduct.

However, it is apparent that, before Captain Farrar appeared, more than half of the men of the company had seized arms and were bearing them when he arrived. Since none of them had any authority to do so, this unlawful act, when viewed in the light of their expressed intention to go to the bivouac area for the purpose of private revenge and their tumultuous conduct in preparing to do so, certainly bordered closely upon, if it did not, in fact, constitute a riot. A riot is a tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and who afterwards execute the same in a violent and turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful. (MCM 1928, par. 146c).

Not every mutiny necessarily includes riotous conduct, for, as has been stated, a mutiny may consist in a passive, concerted refusal to obey the lawful orders of a superior. But when a mob of soldiers are engaged in a tumultuous disturbance within a company or other command in the Army of the United States, the line of demarcation between such conduct and mutiny is exceedingly fine and the moment the concerted actions of the rioting soldiers transcend the bounds of that discipline and obedience which they owe, at all times, to the lawful authority of their superiors by a show of insubordination, subversion, usurpation or overriding of such authority, there is a mutiny.

Whatever may have been the justification for their conduct before the commanding officer came upon the scene, it could no longer avail the troops after Captain Farrar had reasoned with them, ordered them to quiet down, cautioned them to wait before taking any action and relayed to them the order of the regimental commander that all personnel should remain in the company area.

It is clearly apparent that the mob which, to Lieutenant May, appeared to be in a "mad uproar" was determined to go to the bivouac area and it is equally apparent that Captain Farrar, in the lawful exercise of his authority and in obedience to the superior orders of his regimental commander, forbade them to do so. It matters not how the authority is exercised, so long as the evidence shows, as it does here, that the superior sought to exercise it. It may be, and usually is, demonstrated by direct orders, but the exercise, or attempt to exercise authority may be otherwise shown. (CM 145286 (1921); Dig. Op. JAG 1912-1940, par. 424).

It is also plainly evident that there was something more insidious and dangerous in the attitude of the men than mere resentment against the supposed death of their fellows. Back of this and constituting a grave aggravation of conditions was the matter of race animosity and prejudice. So it was that all efforts of the captain to reason with his troops were flouted and rendered useless by insidious comparisons suggested openly before the men by those who were in duty bound to assist him instead and the natural and probable consequence was the concerted insubordination which followed.

Little wonder that shortly after the insolent and inflammatory remarks of Beal who, though merely a private, was, like Terry and Coleman, above the average and of the "leader type", some element of the mob broke into the ordnance room of the orderly building where the crowd was congregated and where rifles and carbines were stored, and that thereafter almost everyone of the men was found armed. This was not an independent act of a separate group but a concerted insubordination of a portion of the main body, then and there present, against the express efforts of Captain Farrar to preserve order and maintain discipline, and constituted mutiny in which all who were present were principals whether they engaged actively in this violent act or, being present, stimulated or encouraged the others who executed it.

There is little question that both Beal and Coleman were present at the time of this violent occurrence. Beal evidently contributed to it by his disparaging remarks and his defiant attitude toward Captain Farrar and shortly thereafter, and regardless of continued, additional efforts upon the part of the captain to persuade him to reason, Coleman announced that they were going out to the bivouac area notwithstanding, and he and Beal did so, by their own admissions.

It was, of course, improper to admit the respective extra judicial statements of Beal and Coleman in evidence without cautionary instructions to the court that each was to be considered as evidence only against the one who had made the statement. However, inasmuch as each statement refers solely to the actions of the accused who made it and in no way involves either of the other accused, no substantial rights of any of the accused were violated by this impropriety. The phrases "Everyone was saying that they wanted to go out to the bivouac area" and "we all went down . . . to the motor pool", appearing in Coleman's statement, are not sufficiently definite, even when read with the context of the complete statement, to identify either of the other accused or include them therein.

Thus it is conclusively shown, beyond reasonable doubt, that Coleman and Beal were guilty of the additional overt act of leaving the company area in defiance of the lawful efforts of their commanding officer to prevent them from so doing.

Terry's guilt, however, rests upon other facts and circumstances. It is not shown that he was present when the ordnance room was invaded or when Beal and Coleman made their remarks and later disappeared. He had been at regimental headquarters when Lieutenant May stopped there for instructions from Colonel Ristedt and it may fairly be presumed that he was fully aware of the general unrest and disquiet which pervaded the regiment on that night and which confronted his company commander as Terry arrived at the company orderly room. His actions thereafter are, accordingly, extremely significant. Although he is not charged with failure to suppress the mutiny which transpired, it is proper to bear in mind that any soldier being present at any mutiny, who does not use his utmost endeavor to suppress the same, is guilty of a grave offense under Article of War 67. Inasmuch as this duty is enjoined upon every member of the military establishment, it is entirely

appropriate to impute to the first sergeant of a company full knowledge of his responsibilities thereunder and to measure his conduct at and during a mutiny in the light of such knowledge.

Terry must be held to have known not only that Captain Farrar was using every power in his means short of force and violence to restore order and discipline, but that it was his duty, as first sergeant, to assist him in so doing. Instead, he required his commanding officer to resort to a racial appeal in an effort to obtain his cooperation and then, not only refused to lend his aid but instead, took sides with the men, openly maintained that they were right, criticized and condemned the military authorities and the government for purported negligence and finally told the men to disobey the orders of Colonel Ristedt and Captain Farrar on the ground that they would be punished in any event on the morrow. As a result, members of the company did leave thereafter. Thus, at a time when the men were almost all under arms, himself included, and when he could not possibly have been unaware of the already insubordinate attitude of the mob, he inflamed them still further and incited them to the mutinous act which they forthwith committed.

Regardless of technical interpretation of the situation in which Terry was involved, his guilt is evident beyond reasonable doubt, for, he not only excited but was present at either a mutiny which his own words and actions fomented or at a mutiny which, being already in progress, was stimulated and encouraged by his conduct.

With regard to Beal the question arises whether the charge against him of wilful disobedience of the lawful command of his superior officer, in addition to the allegation of concerted insubordination contained in another charge, constitutes an unreasonable multiplication of charges arising out of what is substantially the same transaction. It has been held that when the individual act of disobedience and the concerted insubordination are, in fact, the same act, it is improper to lay them as separate offenses. (CM 249636 (1944), Bull. JAG, June 1944, p. 234). In this case, however, the individual act of disobedience consisted in Beal's reprehensible conduct in shouting defiantly at Captain Farrar after he had been ordered to be quiet, whereas the concerted insubordination lay in his presence at the storming of the ordnance room and the disobedience of the order not to leave the company area. Inasmuch as the first disobedience of the captain's order by Beal preceded his second disobedience in leaving the area by an appreciable interval of time and before any actual, concerted insubordination took place, the two offenses were sufficiently separate and distinct to warrant charging both. But, even though this were not so, the matter would not be prejudicial to the accused inasmuch as the sentence imposed upon him is sustained by either of the charges of which he was found guilty. That it constituted no prejudice in fact is evident from the imposition of like sentences upon all of the accused.

(392)

It is noted that the specific act of insubordination alleged in the respective specifications charging violation of the 66th Article of War is a concerted refusal to quiet down and disperse whereas the proof shows a concerted refusal to quiet down as well as other mutinous acts such as the breaking into the ordnance room and the disobedience of the order not to leave the company area. In CM 266173 Britton, it was said that although "refuse to disperse" is an inapt and unartful choice of language to express the disobedience of orders not to leave the company area, it is not so widely different in meaning and effect as to have misled the accused. Moreover, the gravamen of the offense of joining in a mutiny as charged is (1) that there was a mutiny against lawful military authority at the time and place specified; and (2) that the accused joined in it. The allegations of the specifications are complete in this respect. Those portions of the specifications which set forth the means and method pursued by the accused in joining the mutiny are merely descriptive. (CM 125432 (1919); Dig. Op. JAG, 1912-1940, sec. 424, CM ETO895 (1944) Bull. JAG, April 1944, p. 144).

6. The charge sheet discloses the following:

First Sergeant Terry is 31 years of age. He was inducted on 24 March 1941 and has had no prior service.

Sergeant Coleman is 21 years of age. He was inducted on 27 November 1942 and has had no prior service.

Private Beal is 19 years of age. He was inducted on 22 January 1944 and has had no prior service.

7. The court was legally constituted and had jurisdiction of the subject matter and the persons. No errors injuriously affecting the substantial rights of any 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 to each of the accused. The sentence imposed upon each 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 mutiny.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

(on leave), Judge Advocate.

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

SPJGH
CM 267440

24 NOV 1944

UNITED STATES v. First Lieutenant LOUIS V. SAMS (0-1280978), Finance Department.	FERRYING DIVISION AIR TRANSPORT COMMAND Trial by G.C.M., convened at Gore Field, Great Falls, Montana, 23 September 1944. Dismissal, total forfeitures and confinement for six (6) years.

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

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

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

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

Specification: In that First Lieutenant Louis V. Sams, Headquarters and Headquarters Squadron, 557th Army Air Forces Base Unit (7th Ferrying Group), Ferrying Division, Air Transport Command, then Second Lieutenant Louis V. Sams, Headquarters and Headquarters Squadron, 557th Army Air Forces Base Unit (7th Ferrying Group), Ferrying Division, Air Transport Command, did, at Gore Field, Great Falls, Montana, from on or about 9 February 1944 to on or about 5 June 1944, feloniously embezzle by fraudulently converting to his own use the sum of $2,522.75, lawful money of the United States, the property of Bachelor Officers' Quarters Fund, 7th Ferrying Group, Gore Field, Great Falls, Montana, entrusted to him by the Commanding Officer, 7th Ferrying Group, Ferrying Division, Air Transport Command and the Commanding Officer, 557th Army Air Forces Base Unit (7th Ferrying Group), Ferrying Division, Air Transport Command.

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

Specification: In that First Lieutenant Louis V. Sams, * * *, did, at Gore Field, Great Falls, Montana, on or about 15 May 1944, with intent to deceive the auditors and administrative inspectors of Bachelor Officers' Quarters Fund, 7th Ferrying Group, Gore Field, Great Falls, Montana, officially certify in writing by means of a voucher that he, the said First Lieutenant Louis V. Sams as officer in charge of the Bachelor Officers' Quarters Fund aforesaid, had paid to Strain Brothers on 15 May 1944 the sum of $865.76 for drapery material, which said certificate so made in said voucher was known by the said First Lieutenant Louis V. Sams to be untrue in that he, as officer in charge of the Bachelor Officers' Quarters Fund aforesaid, had not paid to Strain Brothers on 15 May 1944, or at any other time, the sum of $865.76 for drapery material.

The accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for six years. The reviewing authority approved only so much of the findings of guilty of Charge I and its Specification as involves findings that accused did, at the place alleged, from on or about 9 February 1944 to on or about 2 June 1944 embezzle the sum of $2047.75, property of the Bachelor officers' Quarters Fund, entrusted to him as alleged, in violation of Article of War 93, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. In support of both Charges and their Specifications the prosecution introduced evidence showing that on 27 November 1943, accused was detailed by proper authority as Officer in Charge of the Bachelor Officers' Quarters, 7th Ferrying Group, Air Transport Command, Gore Field, Great Falls, Montana, and that he served as such until he was relieved on 2 June 1944 (R. 7, 8; Exs. 2, 3). In his capacity as Officer in Charge accused was custodian of the Bachelor Officers' Quarters Fund. This fund comprised money obtained from charges levied against certain officers for rental of their quarters on the field and was used to maintain and operate the Bachelor Officers' Quarters. It was kept on deposit in the Great Falls National Bank in an account entitled "Bachelor Officers' Quarters Fund" and during the period accused was custodian of it he alone had authority to sign checks against it (R. 9, 14, 16).

Sometime prior to 22 July 1944 an audit of this fund was made by Second Lieutenant Charles M. Wider, Assistant Budget and Fiscal Officer at Gore Field, He found certain of the checks, vouchers and other records

concerning this fund in an appropriate file maintained for that purpose, but others he uncovered in a chest of drawers in accused's living quarters. His audit disclosed the following situations existing with respect to this fund:

a. Check No. 177 for $350, payable to Central Exchange, dated 9 February 1944, signed by accused and found by the auditor in accused's personal chest of drawers was drawn against this fund and the check bears a perforated bank cancellation indicating it was paid by the bank on 9 February 1944, although the indorsement of the Central Exchange does not appear thereon. The bank statement of the Bachelor Officers' Quarters Fund shows that a check for $350 was cashed by the bank on 9 February 1944 (R. 12-14, 17; Exs. 4, 6). This check would not have been payable in due course without the payee's indorsement thereon. However, if it had originally been made payable to "Cash" and had been presented by the accused to the drawee bank, it would have been paid (R. 13). A close examination of this check (Ex. 6) reveals that the "en" of the word "Central" is ink blurred and that the "tr" of the word, omitting the cross of the "t", is recognizable as an "h". The stub for this check No. 177 is dated 24 February 1944, rather than 9 February 1944, the date of the check itself, and recites a payment of $350 to Central Exchange for "chests per invoice" (R. 17; Ex. 6). William Carrell, the owner and manager of Central Exchange, always indorsed checks payable to his concern by writing its name followed by his own. Central Exchange had never received this check for $350 (R. 33).

b. Another check numbered 178 for $200, payable to Central Exchange, dated 14 February 1944, signed by accused and found by the auditor in accused's personal chest of drawers was drawn against this fund and bears a perforated bank cancellation indicating that it was paid by the bank on 14 February 1944, although the indorsement of the Central Exchange does not appear thereon. The bank statement shows a withdrawal of $200 from the fund's account on 14 February 1944 (R. 17, 18; Exs. 4, 7). This check would not have been payable in due course without the payee's indorsement thereon. However, if it had originally been made payable to "Cash" and had been presented by accused to the drawee bank, it would have been paid (R. 10-12). An examination of this check (Ex. 7) also reveals the same writing characteristics mentioned above with respect to Exhibit 6 as to the blur of "en" of the word Central and the "h" form of the letters "tr". The stub for this check No. 178 is dated 29 February 1944, rather than 14 February 1944, the date of the check itself, and recites a payment of $200 to Central Exchange for "rugs and mirror per bill" (R. 18; Ex. 7). Central Exchange had never received this check for $200 (R. 34).

c. Voucher No. 13 relative to this fund bears the certification of accused that on 31 March 1944, as custodian of the fund, he paid Central Exchange the sum of $362.75 for 44 chests of drawers, plus freight charges, by check numbered 238a. At the bottom of the voucher appears a certification to the correctness of this account signed "Central Exchange, Wm Carrell". This voucher was found by the auditor in the file of records of this fund (R. 18, 19; Ex. 8). Neither check No. 238a nor its stub could be found by the auditor. A withdrawal of $362.75 was made from the bank account of this fund on 16 March 1944, although voucher No. 13 is dated 31 March 1944 (R. 19, 20; Exs. 4, 9). However, Central Exchange had no such transaction with accused involving 44 chests of drawers, it never received any such check for $362.75 from accused and the signature appearing on voucher No. 13 (Ex. 8) was not that of William Carrell (R. 34).

d. Voucher No. 9 relative to this fund bears the certification of accused that on 20 April 1944, as custodian of this fund, he paid Central Exchange the sum of $235 for "100 lamps @ 2.35 each" by check numbered 261a. At the bottom of the voucher appears a certification to the correctness of this account signed "Central Exchange, Wm Carrell" (R. 20; Ex. 10). No canceled check No. 261a and no stub for it could be found by the auditor. A withdrawal of $235 was made from the bank account of this fund on 24 April 1944, although voucher No. 9 is dated 20 April 1944 (R. 20; Exs. 4, 10, 11). However, Central Exchange had no such transaction with accused involving 100 lamps, it never received any such check for $235 from accused and the signature appearing on voucher No. 9 (Ex. 10) was not that of William Carrell (R. 34).

e. Among the records maintained by accused relative to this fund were found the following check stubs containing the following information (R. 21-24; Ex. 12):

Check Stub No.	Date of Check	Payee of Check	Item Paid	Amount of Check
294a	5 May 44	Monarch Lumber Co.	Material	$225
294b	5 May 44	Monarch Lumber Co.	Material	$275
295a	9 May 44	Industrial Chemical Laboratory	Disinfectants	$175
306a	24 May 44	Strain Bros.	Rag rugs	$125
307a	31 May 44	Central Exchange	Mirrors	$100
			TOTAL	$900

The bank statement of this fund shows that $225 was withdrawn from the account on 8 May 1944; $275 on 5 May 1944; $175 on 13 May 1944; $125 on 24 May 1944; $100 on 31 May 1944 (R. 21, 22; Ex. 4). No canceled checks for these check stubs were found by the auditor. These disbursements were not entered on the cash journal of the fund and no vouchers could be found in the fund's file to

support them (R. 22-24). With respect to the entries made on the check stubs itemized above it was established by competent evidence that (a) Monarch Lumber Company had no transactions with accused involving the sale of materials for $225 and $275 and received no checks for these amounts (R. 36); (b) Industrial Chemical Laboratory had no invoice against accused or the fund for $175 worth of disinfectants and it received no check for that amount (R. 32; Ex. 5a); Strain Brothers never made any sale of $125 worth of rag rugs to accused or the fund and never received the check for that amount (R. 38); Central Exchange never sold $100 worth of mirrors to accused or the fund and did not receive the check for that amount (R. 35).

(1) Apparently in an effort to create other entries to justify these five withdrawals totaling $900, the accused falsified other records of the fund in the following manner. According to Strain Brothers' original sales slip E 7413-44, it billed the fund of the Bachelor Officers' Quarters $1.25 on 6 December 1943, for certain pull chain cords (R. 25, 27, 38; Ex. 15). The duplicate carbon copy of this sales slip E 7413-44 was found among the records of the fund attached to fund voucher No. 11a (R. 24-26; Exs. 14, 17). However, the duplicate sales slip had been altered in material respects. The date had been changed to "5/15" and the body of the slip recited that the article sold was 869 yards of drapery material at a price of $865.76 (Ex. 14). Voucher No. 11a to which this altered sales slip had been attached contained a certification by accused that on 15 May 1944 he paid Strain Brothers $865.76 for drapery material per check No. 304a. At the bottom of the voucher appeared a certification to the correctness of the account by "Eliz. Gates Cashier" (Ex. 17). The auditor found no check No. 304a nor any check stub therefor (R. 27). The bank statement for the fund showed no withdrawal of $865.76 in the month of May 1944 (Ex. 4). In fact, Strain Brothers never engaged in this transaction and never received $865.76 from the fund or accused. The signature "Eliz. Gates Cashier" appearing on voucher No. 11a had not been made by Elizabeth Gates, cashier of Strain Brothers, and she had never received any check from accused or the fund for $865.76 (R. 37, 39).

(2) The remaining $34.24 of the total of $900 was accounted for by the following false records. On 15 May 1944, Gore Field Exchange billed the Bachelor Officers' Quarters Fund $98 for 35 gallons of Deo-sec-tol and on 16 May 1944, accused paid this bill by check No. 305 for $98 issued against the fund. A fund voucher dated 16 May 1944, to evidence receipt of this payment was signed by Major David Karelitz, post exchange officer (R. 32; Ex. 5). Among the records pertaining to this fund was found a torn and mutilated voucher, dated 16 May 1944, and containing accused's certification of payment of this sum of $98 to "Post Exchange" (Ex. 5, Incl. #2). However, among the fund's records there was also found a bill from Gore Field Exchange,

dated 15 May 1944, not only for this $98 transaction but also including an item of 24 gallons of hand soap sold to "B.O.Q. Office" for $34.24. Fund voucher No. 12, 16 May 1944, also found among the fund records, bore accused's certification of the payment of $132.24 (total of $98 and $34.24) to the "Post Exchange" by check No. 305a in satisfaction of the above-mentioned bill. On this voucher in the appropriate signature blank under the certificate as to the correctness of the amount appeared the name "David Karelitz, Capt". No check No. 305a for $34.24 was found by the auditor (R. 28, 29; Ex. 5 and incl.). As a matter of fact, the item of 24 gallons of hand soap had not been charged on the bill when it was originally submitted to accused by the Gore Field Exchange and no such sale had ever been made by it to accused. No payment of $34.24 had ever been made to the Exchange by accused and the signature of Major David Karelitz appearing on the fund's voucher No. 12 for a total of $132.24 had not been written by Major Karelitz (Ex. 5).

f. It is quite apparent from this that, although the records of the fund indicated that two fictitious accounts against the fund, one for $865.76 and the other for $34.24, had been paid by check, no such payments had in fact been made. These two fictitious charges total $900. Similarly, the five cashed checks which are discussed in paragraph e above also totaled $900. Although fictitious checkbook entries had been prepared to justify each one of those checks, no vouchers or other records existed to justify the expenditure of $900 except the two false vouchers discussed in paragraphs e (1) and e (2) above (R. 29; Ex. 12).

g. The fund's bank statement reflects a withdrawal of $475 made on 5 June 1944 but no canceled check for this amount could be found by the auditor and no entries on the cash journal, no voucher and no other explanation among the records of the fund could be found to justify this withdrawal (R. 30). An uncashed check for $475, dated 5 June 1944, payable to cash and signed by accused was found by the auditor in a blouse of accused hanging in his living quarters (R. 30; Ex. 18).

On 24 July 1944, after he had been fully advised of his rights, accused made a sworn statement to the investigating officer relative to the offenses charged (R. 39, 40; Ex. 19). In his statement accused admitted that he was Officer in Charge of the Bachelor Officers' Quarters from 30 November 1943 to 31 May 1944, and that he had complete control of all records and of the fund. He confessed that from February to June 1944, he withdrew various sums of money from the fund's bank account and used it for his own purposes. To the best of his knowledge the amounts so withdrawn totaled $2522.75. He asserted he had no intent to defraud but always intended to restore the amount of his peculations. He further stated that no person other than himself had knowledge of his illegal activities (Ex. 19).

4. The defense introduced evidence to show that the Bachelor Officers' Quarters Fund comprised all sums collected from married officers all of whom were charged 50 cents per night for accommodations in these quarters inasmuch as they received rental allowances from the Government. The money so collected was to be used for the maintenance and operation of these quarters and to pay for purchases made therefor and services rendered thereto (R. 42-44, 46, 47). Second Lieutenant J. E. Dobbs who succeeded accused as Officer in Charge of the Bachelor Officers' Quarters had received no specific instructions concerning expenditures that he was authorized to make from this fund. On the matter of expenditures he followed the instructions of his superior officer, a Major Kempner, as issued from time to time (R. 51-54).

The accused assumed the stand and was sworn as a witness in his own behalf although the record does not indicate that prior thereto he was advised of his rights as a witness (R. 56). He testified that he received no specific instructions concerning the use of this fund when it was turned over to him as custodian thereof. He stated that he was continuously being instructed by higher authority to spend the fund for the Bachelor Officers' Quarters so as to prevent any substantial accumulation of money (R. 57-59). He could find no "constituted authority" to advise him how the funds were to be used (R. 59). He asserted that laxity in the methods of maintaining the fund and accounting for it created a temptation too great to be thrown before any man (R. 60).

5. Proof of accused's unauthorized withdrawal of funds from the Bachelor Officers' Quarters account, exclusive of his own confession, rests in large measure upon the entries shown on the bank statement of the Bachelor Officers' Quarters Fund, a copy of which was admitted in evidence without objection by the defense. The cashier of the bank testified that he had in his possession "the individual account and ledger sheet of the Bachelor Officers' Quarters Fund" and also the "statements of the Great Falls National Bank, of the account of the Bachelor Officers' Quarters Fund covering the period from January 31, 1944 through June 30, 1944", and identified Exhibit No. 4 (copy of bank statement) as "an exact duplicate of the ledger sheet" for the particular period covered thereby. The copy of the bank statement was then received in evidence (R. 13, 14).

Any writing, record or memorandum of any act, transaction or occurrence is admissible in evidence in a trial by court-martial if made in the regular course of business and if it was the regular course of business to make such memorandum or record at the time of the act or within a reasonable time thereafter (28 U.S.C. 695; CM 261107, DuBoff). Exhibit 4 was identified as an exact duplicate of the ledger sheet of the Bachelor

Officers' Quarters Fund. Any objections to the admissibility of this exhibit on the grounds that the original had not been shown to be unavailable or that the information contained in the statement had been compiled from other original sources, i.e. objections that this copy was not the best evidence, were waived by failure to object at the time the document was proferred in evidence (MCM, 1928, par. 116a, 117a). Thus, this statement was properly admitted in evidence if the ledger sheet, of which it was a copy, was itself admissible under the rule recited above relative to entries made in the regular course of business. Although the ledger sheet was identified by the cashier of the bank as a record relative to the Bachelor Officers' Quarters Fund, it was not identified expressly as a record kept in the usual course of business by the bank. However, the failure so to identify it was not fatal to its admissibility. It is a matter of common knowledge that it is the usual course of business for all banks to keep and maintain ledger records of the accounts of their depositor. That the cashier of the bank was identifying such a ledger record is an inescapable conclusion. The bank statement was properly admitted in evidence.

Subparagraphs a through e inclusive and subparagraph g of paragraph 3 hereof contain summaries of the transactions involved in Charge I and its Specification. Subparagraphs a and b show that accused withdrew a total of $550 from the fund's account and charged it on his records in payment of fund bills which, if in fact they existed, were never paid. It is clear from an examination of the two checks involved that they were first drawn to "Cash" and after they had been paid, canceled and returned by the bank, the word "Cash" was altered to the word "Central" and the word "Exchange" then appended. Subparagraph c shows that accused withdrew $362.75 from the account and falsified various records to set up this withdrawal as payment of a fund bill which in fact never existed. Subparagraph d involves a withdrawal of $235 the circumstances of which were almost identical with those of the withdrawal discussed in subparagraph c. Subparagraph e involves five withdrawals totaling $900 where again the records were falsified to reflect those withdrawals as payments made on particular fund bills which in fact never existed. Subparagraph g demonstrates that accused withdrew $475 from this account but no record of any description could be found to reflect or justify this withdrawal.

The reviewing authority approved so much of the court's findings of guilty of Charge I and its Specification as involves the embezzlement of $2047.75 as alleged, apparently disapproving the finding of guilty of embezzlement of the item of $475 mentioned immediately above. The evidence of the prosecution, coupled with accused's confession, amply sustains these approved findings of guilty. Accused's excuse that he had few instructions

as to the use to be made of the fund and was under continuous pressure to spend it so that no substantial amount would accumulate did not justify personal appropriation of any part of the fund. This fund and its accretions were entrusted to accused to use for the maintenance and operation of the Bachelor Officers' Quarters. His failure to account for the sum of $2047.75 except by false records leads to the logical inference that he misappropriated that amount from the fund which is confirmed by his confession and, accordingly, establishes commission of the offense of embezzlement (2 Bull. JAG 341, CM 234153, Shirley, 20 BR 259; 2 Bull. JAG 383, CM 235010, Angyn, 21 BR 225). The record of trial sustains the findings of guilty of Charge I and its Specification.

The evidence introduced under Charge II and its Specification (see paragraph e (1) hereof) clearly establishes that, in order to create false records to cover a portion of the shortage in the fund, accused prepared voucher No. 11a and filed it with the other records relating to the fund. This voucher contained a certification by accused that he had paid $865.76 to Strain Brothers to discharge an obligation of the fund to that concern in that amount. The voucher was false inasmuch as no such obligation was owed to Strain Brothers. The signature of an employee of Strain Brothers appearing on the voucher in certification of the correctness of the charge was a forgery. It is quite apparent that this false official voucher was prepared for no other purpose than to deceive all who should examine the records of the fund. The evidence sustains the findings of guilty of Charge II and its Specification.

Although the record of trial does not indicate that accused was advised of his rights before he was sworn as a witness, that fact is not fatal to the validity of the trial. Accused gave no incriminating testimony. Other evidence in the record amply demonstrates his guilt. Thus, even if he had not been warned concerning his rights, it did not injuriously affect any of his substantial rights and, accordingly, the error does not affect the validity of these proceedings (MCM, 1928, par. 87b).

6. There is attached to the record of trial a recommendation for clemency signed by two of the five members of the court hearing this case. One recommended a reduction in the period of confinement to five years and the other recommended a reduction thereof to four years.

7. Accused is 39 years of age. He was inducted into the military service on 2 April 1942 and was eventually advanced to the grade of master sergeant. On 28 April 1943 he was commissioned a second lieutenant and ordered to active duty with the Finance Department after graduation from the Officer Candidate School, Finance Department, Duke University, North

Carolina. On 13 May 1944, accused was promoted to first lieutenant, Air Corps, although no order was found relieving him from duty with the Finance Department and detailing him to duty with the Air Corps. Accused is a graduate of the University of Kansas and attended Westminster Law School for two years. In civilian life from 1938 to 1942 he was a business specialist making examinations, audits and analyses of accounting systems. Prior thereto he had been successively employed as an examiner of building and loan associations by the Federal Home Land Bank and as a Deputy Building & Loan Commissioner by the State of Colorado. Accused is the father of two children, aged 8 and 10, and is the stepfather of another child aged 7.

8. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and 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 93.

Thomas N. Tobey, Judge Advocate.

[illegible], Judge Advocate.

William H. Gaunbrell, Judge Advocate.

1st Ind.

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

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of First Lieutenant Louis V. Sams (0-1280978), Finance Department.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and to support the sentence and to warrant confirmation of the sentence. As approved by the reviewing authority, the accused was found guilty of embezzling the sum of $2047.75 from the Bachelor Officers' Quarters Fund, 7th Ferrying Group, Gore Field, Montana, a fund of which he was custodian, and of making a false official certificate in writing to conceal his embezzlement of a portion of this fund in the amount of $865.76. Although there is no evidence of any previous conviction, accused's 201 file reveals that on 26 June 1943, a duly constituted Board of Officers appointed by the Commanding Officer, Headquarters Air Transport Command Replacement Center, Camp Luna, Las Vegas, New Mexico, found that on 25 June 1943 a shortage of $250 existed in other funds of which accused was then custodian and that accused was accountable for this shortage. The Board's recommendation that accused be required to make reimbursement thereof was approved by the same Commanding Officer who convened this Board. I recommend that the sentence be confirmed but that the period of confinement be reduced to three years. As thus modified I recommend that the sentence be confirmed and carried into execution and that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement.

3. Consideration has been given to a letter from accused to the President, dated 29 October 1944, and to an inclosure sent therewith dated 7 October 1944, and entitled "SUBJECT: Case of United States vs 1st Lt. Louis V. Sams".

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-Rec. of trial.
Incl.2-Drft. of ltr. for sig. S/W.
Incl.3-Form of Action.
Incl.4-Ltr. fr. Lt. Sams, 29 Oct. 44, w/incl.

(Sentence confirmed but confinement reduced to three years. G.C.M.O. 58, 27 Jan 1945)

25-57186-100

vol 43 Army JAG Bd. Rev

vol. 43 Army JAG Bd. Rev.
TITLE

DATE	BORROWER'S NAME	EXT.