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

SPJGK
CM 267476

5 DEC 1944

UNITED STATES v. Second Lieutenant GERSON WILSON (0-868091), Air Corps.	)	ARMY AIR FORCES EASTERN TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Boca Raton Army Air Field, Florida, 14 October 1944. Dismissal and total forfeitures.

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. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Gerson Wilson, Air Corps, Section H, 3501st Army Air Forces Base Unit, did, at the Boca Raton Club, Boca Raton Army Air Field, Florida, between 7 August 1944 and 3 September 1944, inclusive, feloniously receive, have and purchase two automobile tires, to wit: One Acme, Recap, 600x16, Serial No. XN158568; one Acme, Recap, 600x16, Serial No. 1I232039; and two inner tubes used in connection therewith, of a total value of about Nineteen ($19.00) Dollars, the property of the Boca Raton Club, Incorporated, Boca Raton, Florida, then lately before feloniously stolen, taken and carried away; he, the said Second Lieutenant Gerson Wilson, Air Corps, then well knowing the said property to have been so feloniously stolen, taken, and carried away.

Specification 2: In that Second Lieutenant Gerson Wilson, Air Corps, Section H, 3501st Army Air Forces Base Unit, did, at the Boca Raton Club, Boca Raton Army Air Field, Florida,

on or about 28 August 1944, feloniously purchase from one Private Isaac J. Phelps, one automobile tire, to wit: One Atlas 600x16, Serial No. 57556V4 and one inner tube used in connection therewith, of a total value of about Nine Dollars and Fifty Cents ($9.50), the property of the Boca Raton Club, Incorporated, Boca Raton, Florida, then lately before feloniously stolen, taken and carried away; he, the said Second Lieutenant Gerson Wilson, Air Corps, then well knowing the said property to have been so feloniously stolen, taken and carried away.

Specification 3: In that Second Lieutenant Gerson Wilson, Air Corps, Section H, 3501st Army Air Forces Base Unit, did, at the Boca Raton Club, Boca Raton Army Air Field, Florida, on or about 28 August 1944, feloniously sell to one Lieutenant Dorothy G. Heath, ANC, one automobile tire, to wit: One Atlas 600x16, Serial No. 57556V4 and one inner tube used in connection therewith, of a total value of about Nine Dollars and Fifty Cents ($9.50), the property of the Boca Raton Club, Incorporated, Boca Raton, Florida, then lately before feloniously stolen, taken and carried away; he, the said Second Lieutenant Gerson Wilson, Air Corps, then well knowing said property to have been so feloniously stolen, taken, and carried away.

Specification 4: In that Second Lieutenant Gerson Wilson, Air Corps, Section H, 3501st Army Air Forces Base Unit, did, at the Boca Raton Club, Boca Raton Army Air Field, Florida, between 7 August 1944 and 3 September 1944, inclusive, feloniously receive, have and purchase, from one, Private Isaac J. Phelps, four automobile tires, to wit: One Acme 600x16, Serial No. YU18074; one Goodyear, 600x16, Serial Number of which has been eradicated, One Atlas, 600x16, Serial No. 81181287; and One Atlas, 600x16, Serial No. ZN-515006, and four inner tubes used in connection therewith, of a total value of about Thirty-Six ($36.00) Dollars, the property of the Boca Raton Club, Incorporated, Boca Raton, Florida, then lately before feloniously stolen, taken and carried away; he, the said Second Lieutenant Gerson Wilson, Air Corps, then well knowing said property to have been so feloniously stolen, taken, and carried away.

Specification 5: In that Second Lieutenant Gerson Wilson, Air Corps, Section H, 3501st Army Air Forces Base Unit, did, at Boca Raton Army Air Field, Florida, between 7 August 1944 and 3 September 1944, inclusive, feloniously sell to Captain Nell L. Jackson, two automobile tires, to wit: One Acme

600x16, Serial No. YU18074; one Goodyear, 600x16, Serial Number of which has been eradicated, and two inner tubes used in connection therewith, of a total value of about Eighteen ($18.00) Dollars, the property of the Boca Raton Club, Incorporated, Boca Raton, Florida, then lately before feloniously stolen, taken and carried away; he, the said Second Lieutenant Gerson Wilson, Air Corps, then well knowing said property to have been so feloniously stolen, taken, and carried away.

Specification 6: In that Second Lieutenant Gerson Wilson, Air Corps, Section H, 3501st Army Air Forces Base Unit, did, at Boca Raton Army Air Field, Florida, between 7 August 1944 and 3 September 1944, inclusive, feloniously sell to Mr. Charles Stevens, two automobile tires, to wit: One Atlas 600x16, Serial No. 81181287; and one Atlas 600x16, Serial No. ZN-515006, and two inner tubes used in connection therewith, of a total value of about Eighteen ($18.00) Dollars, the property of the Boca Raton Club, Incorporated, Boca Raton, Florida, then lately before feloniously stolen, taken and carried away; he, the said Second Lieutenant Gerson Wilson, Air Corps, then well knowing said property to have been so feloniously stolen, taken, and carried away.

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

3. Evidence

(a) For the Prosecution:

The accused, Second Lieutenant Gerson Wilson during the occurrences complained of and at the time of the trial was in the military service assigned to Section H, 3501 AAFBU stationed at Boca Raton Army Air Field, Boca Raton, Florida (R. 6). During August 1944 he was washing his automobile on a parking lot near the Boca Raton Club, Boca Raton, Florida, (which had been taken over and was occupied by the Army of the United States) when a colored soldier, Private Isaac J. Phelps, an attendant on the lot (unknown to the accused), washing an automobile nearby, overheard the accused state that he was in need of an automobile tire for his car. Phelps approached accused and told him that he could get him two automobile tires from a wrecked truck stored in the garage in back of the Club. Phelps told accused that the tires were "hot". The accused told Phelps to get the tires. That night the accused left the keys in his

car, and Phelps took the car around to the back of the Club, took two rims and two tires and tubes (Exhibits 5, 6) from one of the vehicles in the Boca Raton Club garage and placed them in the car of the accused (R. 27, 28). The accused then returned to his car, examined the tires, paid Phelps $20 for them, covered the tires with a canvas and drove the car away (R. 29).

A week or ten days later, the accused asked Phelps to get him some more tires, leaving his car with the keys in it at the Boca Raton Club. Phelps then obtained four rims, tires and tubes (Exs. 2, 3, 4, 8) from one of the motor vehicles stored in the garage of the Boca Raton Club, and placed them in the car of the accused. When the accused returned to his car, he covered the tires with a canvas and drove with Phelps into Boca Raton. The accused paid Phelps $25 for the four tires (R. 28-30). At the request of an enlisted man, the accused delivered two of the tires to Zimm's Bar in Boca Raton, where he was paid $20 for them by the bartender. He left the other two tires in one of the buildings at the Boca Raton Army Air Field at the direction of the same enlisted man. He was told by the enlisted man that the two tires left at Zimm's Bar were for a Mr. Stevens and that the other two tires were for a Captain Jackson. The enlisted man paid the accused $20 for the latter two tires (Ex. 16).

Thereafter, also during August 1944, Lieutenant Heath, upon instructions from the accused, left her car at night time on the parking lot near the Boca Raton Club with the keys in it. The accused had told her that his "boy" would place a tire and tube in the car (R. 25). While Lieutenant Heath and the accused were inside the Club, Phelps obtained a tire and tube from one of the vehicles stored in the garage of the Boca Raton Club and placed them in the car of Lieutenant Heath (R. 31). When Lieutenant Heath and the accused returned to the car, Lieutenant Heath examined the tire and tube and offered to give the accused a check for $15.00 for the tire and tube, the price set therefor by the accused. The accused stated that he preferred cash, but that if Lieutenant Heath did not have the cash, he would accept, and did accept, from Lieutenant Heath her check for $15.00, made payable to the accused (R. 24; Ex. 7). Accused paid Phelps $12 for this tire and tube (R. 31).

During September 1944 the tires and tubes mentioned above were recovered by an investigator from the office of the Provost Marshal, Boca Raton Army Air Field; two from the automobile of the accused; two from that of Captain Jackson; two from that of Mr. Stevens; and one from the automobile of Lieutenant Heath (R. 13-19). All were identified as the property of the Boca Raton Club, Incorporated, by the General Superintendent of the Club (R. 7-12, 13). The tubes were in the tires when recovered and were received in evidence as Exhibits 9 to 15, inclusive.

It was agreed by stipulation of record that the tires and tubes are of the following values:

Atlas 600x16, 57556V4	Tire, Exhibit 1	—	$7.00
	Tube, Exhibit 9	—	2.50
Atlas 600x16, ZN515006	Tire, Exhibit 2	—	7.00
	Tube, Exhibit 10	—	2.50
Atlas 600x16, 81181287	Tire, Exhibit 3	—	6.50
	Tube, Exhibit 11	—	2.50
Acme 600x16, YU18074	Tire, Exhibit 4	—	6.00
	Tube, Exhibit 12	—	2.50
Acme 600x16, 11232039	Tire, Exhibit 5	—	7.00
	Tube, Exhibit 13	—	2.50
Acme 600x16, XN158568	Tire, Exhibit 6	—	7.00
	Tube, Exhibit 14	—	2.50
Goodyear 600x16	Tire, Exhibit 8	—	6.50
	Tube, Exhibit 15	—	2.50

On 9 September 1944 the accused voluntarily made a statement concerning his connection with the foregoing transactions which was reduced to writing, signed, and sworn to by him and admitted in evidence without objection (R. 36; Pros. Ex. 16).

In substance the accused set forth in his statement that he was washing his car at the "wash rack" behind the Boca Raton Club where he had mentioned the fact that he needed a tire for his car. He knew Phelps, not by name, but by having seen him around the parking lot. Phelps told him that he could get him two tires that would fit his car from someone whose car had been wrecked and who was selling the tires. Phelps said the price would be around $15. Accused said he would take them. Three or four days later Phelps approached the accused at the parking lot and said he had the tires. Accused told him that his car was in Garage No. 55 with the keys in it and Phelps could use it to get the tires. Several hours later he saw Phelps who informed him that the tires were in the accused's car. Accused went to the car and found the tires were there and acceptable so he paid Phelps $15 in cash. The tires remained over night in the car visible to anyone. A day or so later accused removed the tires and tubes from the rims upon which they were mounted and mounted them on his own car himself altho he tried to find a garage where he could get that work done.

About a week later two enlisted men whom he knew by sight and who had heard about his having obtained two tires told the accused that a Captain Jackson and a Mr. Stevens, owner of Zimm's Bar, wanted some tires. Accused told them that he would find out if there were any more tires available from the person from whom he had obtained his tires.

Several days later he saw Phelps and told him that several of his friends needed tires and asked him if he had any available. Phelps said he could get two 600x16 tires - the same as those he had previously obtained. This sounded logical to the accused as there should be two

more tires from the same wreck available.

"I told Phelps then to get me the two tires and that same evening I went to the Club about 7:30 or 8:00 to dress. I told Phelps that while I was dressing he could use my car, which was in the garage, and obtain the tires. Phelps told me at this time that he could get me four tires so I said, 'Okay, I'll take them'. When I finished dressing and came out of the Club there were four tires in the back seat of my car. Phelps asked me to drive him to Boca Raton as I was going to the field and he got in the back seat of my car and pulled the canvas top down over the tires, covering them and he sat on the tires. I never covered the tires myself nor did I tell him to cover them.

"I drove Phelps to Boca Raton and dropped him and then went to Zimm's Bar and delivered two of the tires to the bartender for Mr. Stemphens the owner of Zimms', and I collected $20.00 for these tires. I then drove to the field and left the remaining two tires at Building No. 1018, I think, which is the place the enlisted men had told me to leave the tires. Three or four days later I ran into the enlisted men who had asked me to get the tires for Captain Jackson and one of them gave me $20.00 for these two tires.

"The day following the time I left the two tires at Zimm's bar I gave Phelps $20.00 as I had only collected for these two tires at that time. A day or so later I saw Phelps and he said he was broke so I gave him $10.00 of my money and when I collected for the tires I obtained for Captain Jackson I gave Phelps $10.00 more. I collected $40.00 for these four tires and I paid Phelps $40.00.

"About a week or so later I was at one of the gas stations at Boca Raton, and Lieutenant Heath, a nurse, was there with her car. I heard her mention that she needed a tire and I told her that I might find one for her if I would contact the person from whom I had obtained my tires. The next time I saw Phelps I asked him if he could get another tire and he said yes. The next time, a day or so later, I saw Lieutenant Heath I had her drive her 1936 Ford Convertible to the Club. I met her at the parking lot and after pointing out her car to Phelps, Lieutenant Heath, another nurse and I went into the grill of the Club and waited. About an hour or an hour and one-half later I went out and Lieutenant Heath's car was there with the tire in the rumble seat. I went into the club and notified Lieutenant Heath and she gave me a check, payable to me for $15.00. I cashed the check the next day and gave Phelps the $15.00 when I saw him.

"I purchased seven tires in all from Private Phelps, - (Two for myself and five for the other persons mentioned above). I always paid Phelps the exact amount I collected for the tires. I had no knowledge of where Phelps was procuring the tires other than the fact he told me he was getting them from wrecked cars. After I had purchased more than four tires I assumed that from whatever source he was obtaining the tires must be a person who dealt in wrecked cars. I never questioned him as to the source and I had positively no knowledge that he was getting the tires from vehicles parked in the Boca Raton Club garages." (Pros.Ex.16).

b. For the defense.

Captain J. A. Shell, commanding officer of Private Isaac J. Phelps testified that Phelps' reputation for truth and veracity was bad (R. 39).

The accused having been advised concering his right to testify on his own behalf elected to testify under oath. He related in substance the same facts that appear in his statement offered in evidence by the prosecution (Pros. Ex. 16) and copied at length above.

4. Discussion.

Wharton's Criminal Law, Chapter XXVII makes the following pertinent observations:

"Par. 1229. Receiving stolen goods knowing them to be stolen, and with intent to prevent the owner from recovering their full enjoyment, is now a substantive offense, if not by common law, at least by statute".

"Par. 1230. The first point to be shown * * * is that the goods were stolen, and to prove this fact the thief is a competent witness. His testimony, however, like that of all other accomplices, is to be scrupulously weighed, and upon it, if uncorroborated, a conviction should not be permitted to rest."

"Par. 1231. Guilty knowledge, involving guilty intent on the part of the defendant, is essential to the constitution of the offense. This may be shown either by the evidence of the principal felon, supported by corroborating facts, or inductively by proving that the defendant * * * aided in concealing the stolen property, or the like."

"Par. 1232. Whether the defendant knew that the goods were stolen is to be determined by all the facts of the case. It is not necessary that he should have heard the facts from eye-

witnesses. He is required to use the circumspection usual with persons taking goods by private purchase; and this is eminently the case with dealers buying at greatly depreciated rates. That which a man in the defendant's position ought to have suspected, he must be regarded as having suspected, as far as was necessary to put him on his guard and on his inquiries. But it has been said that, to justify a conviction in the case of goods found, it is not sufficient to show that the prisoner had a general knowledge of the circumstances under which the goods were taken, unless the jury is also satisfied that he knew that the circumstances were such as constituted a larceny. The proof in any case is to be inferential; and among the inferences prominent are inadequacy of price, irresponsibility of vendor or depositor, and secrecy of transaction."

The accused stands convicted by Specifications 1, 2 and 4 of receiving stolen goods with the knowledge that they were stolen; and by Specifications 3, 5 and 6 of selling stolen goods to two officers and a civilian with the same knowledge. The evidence for the prosecution and the testimony of the accused under oath show beyond doubt that at the times and places set forth in the Specifications the accused did receive the tires and tubes described in Specifications 1, 2 and 4 and did effect a sale of the tires and tubes described in Specifications 3, 5 and 6 to the persons named therein. The tires and tubes were clearly proved to be the property of the Boca Raton Club and were feloniously removed, - that is, stolen - from the motor vehicles belonging to that Club while they were in storage for the duration of the occupancy of the Club property by the Army. The value of the respective articles was proved by stipulation. The only issue of fact averred by the Specifications and denied by the accused was the knowledge on his part that the articles were stolen property.

All of the elements of the offenses charged were proved without contradiction or question except that of knowledge on the part of the accused that the articles had been stolen.

While this element must be proved beyond a reasonable doubt in order to sustain the conviction, yet in the proof it is not necessary to prove actual knowledge. Knowledge may be inferred. It is sufficient to show that the circumstances surrounding the transactions were sufficiently suspicious to put a man of ordinary intelligence on inquiry (CM 234472, Cannon, 21 BR 1). As stated above, among the facts from which such an inference may be drawn are (1) irresponsibility of the vendor or depositor, and (2) secrecy of the transaction. Both of these facts are present in the instant case.

The colored soldier Private Isaac J. Phelps testified that he told the accused at the time he made the first purchase of tires and tubes that they were "hot", which in the vernacular of the criminal means "stolen", and that he was getting the tires from a wrecked motor vehicle stored in the nearby garage of the club. The finding of guilty knowledge on the part of the accused is therefore supported by direct evidence. Phelps, however, is a self confessed and a convicted thief and having acted in the nature of an accomplice his testimony must be carefully scrutinized. Phelps' commanding officer testified that Phelps' reputation for truth and veracity was bad. If the findings of guilty knowledge on the part of the accused officer rested solely upon the uncorroborated testimony of Phelps, it is doubtful, in view of the foregoing circumstances and the principles of law set forth above, if the findings could be legally sustained. Phelps' testimony is however supported by the surrounding circumstances of the case appearing in the record. It is incredible that the accused - an army officer, unable to purchase tires in the neighborhood, could deal so extensively in tires with a colored parking lot attendant without knowledge that the tires were stolen, or that he an officer could expect a private in that position to be able to get for him seven tires and tubes in a legitimate manner. His admitted act of driving his car to a spot behind the club, leaving it there with the keys in it, and then returning to it and finding the tires and tubes mounted on rims placed in his car was such an unusual circumstance as to be inconsistent with innocence of guilty knowledge. So too was his story of driving his car at night considerable distances to make delivery of the tires and tubes to places designated by an enlisted man. The surrounding circumstances therefore - apart from Phelps' damaging testimony - strongly support the conclusion of guilt. Taken together the evidence excludes every reasonable hypothesis except that of the accused's guilt. There is no valid reason for disturbing the findings of the court.

It has been suggested that the findings of guilty of Specifications 1, 2 and 4 cannot be sustained because, instead of being guilty of receiving stolen goods, the accused was actually a party to the theft and therefore could not be legally guilty of being a receiver (Wharton's Criminal Law, 12th Ed. Section 1234).

We do not concur with that conclusion. The accused denied all knowledge of the theft. Phelps testified that the accused knew that the tires were stolen and intimated that he also knew where and how he was stealing them. The court having heard and observed the witnesses had the right to accept as true any part of the testimony and reject any part. It could accept as true the fact that the accused knew he was buying and dealing in stolen goods and reject the inference from Phelps' testimony that Phelps was stealing the tires for accused at his suggestion or request.

The evidence clearly supported the conclusion that when accused received the tires they were stolen tires and he knew it. The evidence was not convincing that accused knew how Phelps was stealing the tires and had him steal the tires for him. Such a conclusion was conjectural. The conclusion reached by the court was without a doubt the correct one. Knowing that the tires were stolen his act of selling them to others was clearly conduct of a nature to bring discredit upon the service and therefore a violation of Article of War 96 as averred in Specifications 3, 5 and 6.

6. War Department records show accused to be 23½ years of age and single. He graduated from high school and from New York University. On 27 May 1943 he was appointed an aviation cadet and upon completion of his training in a communications course he was on 16 December 1943 commissioned second lieutenant, Air Corps.

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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 15 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Gerson Wilson (O-868091), Air Corps.

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

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 63, 27 Jan 1945)

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

SPJGN

CM 267586

21 NOV 1944

UNITED STATES v. Second Lieutenant OTTO WILLIAM ERNEST GERSON, (0-1592849), Quartermaster Corps.	)	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort McClellan, Alabama, 23 October 1944. Dismissal, total forfeitures and confinement for three (3) years.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Otto William Ernest Gerson, Quartermaster Corps, did, at Anniston, Alabama, on or about a date between 1 September 1943 and 13 October 1943, wrongfully make and utter the following disloyal statement against the United States of America to Miss Odessa Knight, Anniston, Alabama: "I am sick and tired of this war. I don't care if we lose it or win it. If I go overseas, I'll convince the Germans. I'll give up. I'll convince the Germans that I'm a German and that I have people in Germany," or words to that effect.

Specification 2: In that Second Lieutenant Otto William Ernest Gerson, Quartermaster Corps, did, at Anniston, Alabama, on or about a date between 1 September 1943 and 13 October 1943, wrongfully make and utter the following disloyal statement against the United States of America to Miss Odessa Knight, Anniston, Alabama: "People in this country are stupid. The Germans are smart. We Germans act and then tell you what we do. Hitler has the right to rule the world as well as President Roosevelt and Churchill," or words to that effect.

Specification 3: In that Second Lieutenant Otto William Ernest Gerson, Quartermaster Corps, did, at Anniston, Alabama, on or about a date between 1 September 1943 and 13 October 1943, wrongfully make and utter the following disloyal statement against the United States of America to Miss Odessa Knight, Anniston, Alabama: "You have things figured out all wrong. Naziism and Hitlerism are alright. You know, you are talking to a Nazi now"; thereby standing up, raised his arm in the Nazi salute and said: "Heil Hitler. That is the way I like it, me and Hitler," or words to that effect.

Specification 4: In that Second Lieutenant Otto William Ernest Gerson, Quartermaster Corps, did, at Anniston, Alabama, on or about 21 October 1943, wrongfully make and utter the following disloyal statement against the United States of America to Miss Trannie Washburn, Anniston, Alabama: "I am a Nazi. It is something to be proud of to be a Nazi," or words to that effect.

He pleaded not guilty to and was found guilty of the Charge and its Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might 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 48.

3. The evidence for the prosecution shows that Miss Odessa Knight of Anniston, Alabama, became acquainted with the accused, who was stationed at nearby Fort McClellan, during the summer of 1943. On or about 1 September 1943 she and the accused commenced having social engagements with some regularity which continued until about the middle of October 1943. On various occasions during this period of time the accused made remarks to her while they were in her apartment substantially as alleged in Specifications 1 - 3 inclusive (R. 9, 10, 11, 23). Miss Knight considered the remarks very strange and shortly after 13 October 1943 reported them to a Colonel Healy and a Major Houck (R. 17).

On 21 October 1943 Miss Trannie Washburn also of Anniston, Alabama, became acquainted with the accused at the accounting section at Fort McClellan where she was employed. They had a social engagement that night and while at her apartment the accused made the remarks to her substantially as alleged in Specification 4 (R. 25-26, 30).

4. The evidence for the defense shows that three officers with whom the accused had associated for periods of time of three months to over a year attributed to the accused a reputation for good character and veracity. They considered the accused a loyal American citizen who was proud of being an American of German descent (R. 49-51, 52; Exs. 2-3). There was also received in evidence a letter to the accused from

Lieutenant Colonel P. M. Hickcox regretting the accused's difficulties and recalling that the accused had previously attempted to secure an overseas assignment (R. 37-38, Ex. 1).

The accused after explanation of his rights as a witness, elected to testify in his own behalf. He had had social engagements with Miss Knight regularly from about 1 September 1943 until he was transferred from Fort McClellan about 29 October 1943. During this time he may have told her that he was disgusted with the war but he categorically denied making the other statements as related by her and that he had given the Nazi salute (R. 35-36). He first met Miss Washburn on 21 October 1943 and had a "date" with her that night but did not make the remarks as related by her (R. 36). He had been inducted into the service on 21 March 1941 and had been commissioned on 18 June 1943 upon completion of Officers Candidate School. Although of German ancestry he had been born in this country and had "kidded" Miss Knight about his being a German (R. 36-39). He speaks German fluently since his family had spoken it at home but he professes that he is a patriotic American who desires us to win the war and disclaims any connection with any hostile movement (R. 39-46). He believes that Miss Knight "twisted" his remarks to her (R. 47).

5. Specifications 1-3, inclusive, allege that the accused between 1 September 1943 and 13 October 1943 wrongfully made certain particularized disloyal statements against the United States of America to a named person at a designated place. Specification 4 alleges a similar offense on 21 October 1943 in which the particularized disloyal statement was made to another person. "Expressing sentiments disloyal to the government and in sympathy with the enemy" is conduct that is clearly of a nature to bring discredit upon the military service and therefore violative of Article of War 96. (Winthrop's Military Law and Precedents, 2nd Ed., 1920, p. 728; MCM, 1928, par. 152b).

The evidence of the prosecution from two witnesses shows conclusively that the accused uttered the remarks as alleged. The remarks were made on separate occasions to two different persons. The remarks plainly express sentiments disloyal to the United States of America and import sympathy for the enemy. Although one of the persons to whom the remarks were made possibly might have misconstrued them, it is not probable that both of such persons would do so. The conclusion is, therefore, inescapable that the remarks were made as shown by the prosecution's witnesses and that such witnesses did not distort them or their context from their plain meaning. An officer who makes such remarks is guilty of conduct that is discreditable to the military service. The court, acting within its province, elected to disbelieve the accused's denials of the utterance of the remarks. The evidence therefore, beyond a reasonable doubt establishes the accused's guilt of the offenses as alleged and amply supports the court's findings of guilty of the Charge and its Specifications.

6. The accused is about 36 years old. He is a high school graduate; he attended Pace Institute for four years receiving a certificate in accounting therefrom in 1935; and during 1938 he attended the Pittsburgh School of Accounting. He is single and has partially completed the examination for Certified Public Accountants in the state of Pennsylvania. From September, 1933 until September, 1936 he was employed as a bookkeeper by the Seaboard Western Grain Company of New York City. From October, 1936 until April, 1940 he was employed by a national accounting firm as an accountant and from November, 1940 until March, 1941 he was employed in a similar capacity by another national accounting firm. His salaries varied from $90 to $170 per month. He has had enlisted service from 21 March 1941 until 5 November 1941 when he was inactivated because he was over 28 years old. He was recalled to active duty on 14 January 1942 and, after completing Officers Candidate School on 18 June 1943, he was commissioned a second lieutenant. He has had active duty as an officer since the latter date.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and its Specifications and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Robert J. Bonner, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 267586

1st Ind.

War Department, J.A.G.O., DEC 7 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 Otto William Ernest Gerson (0-1592849), Quartermaster Corps.

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

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 48, 27 Jan 1945)

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

SPJGQ
CM 267587

16 NOV 1944

UNITED STATES V. Second Lieutenant WILLIAM R. MCCORMICK (0-1647173), Signal Corps.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Murphy, Florida, 20 October 1944. Dismissal, 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 Charges and Specifications:

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

Specification 1: In that Second Lieutenant William R. McCormick, Company A, 47th Signal Heavy Construction Battalion, did, without proper leave, absent himself from his organization and station at Camp Murphy, Florida, from about 1100, 27 September 1944 until about 1900, 27 September 1944.

Specification 2: In that Second Lieutenant William R. McCormick, Company A, 47th Signal Heavy Construction Battalion, did, at Camp Murphy, Florida, on or about 27 September 1944, wrongfully fail to repair at the fixed time to the properly appointed place for the duty of being inspected by an officer from the Inspector General's Department.

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

Specification 1: (Finding of not guilty).

Specification 2: In that Second Lieutenant William R. McCormick, Company A, 47th Signal Heavy Construction Battalion, did, at Camp Murphy, Florida, on or about 27 September 1944, wrongfully take and use without authority one 1/4 ton truck, property of the United States of America.

Specification 3: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications and was found guilty of Specifications 1 and 2 of Charge I, of Charge I, of Specification 2 of Charge II and of Charge II, and not guilty of Specifications 1 and 3 of Charge II. Evidence of no previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence, but recommended that the execution of that portion thereof adjudging dismissal be suspended and that all forfeitures in excess of $50.00 per month for six months be remitted, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution was introduced chiefly in the form of stipulations that certain absent witnesses would, if present, testify according to their depositions previously taken, which were introduced in evidence as Exhibits (R. 7, 8, 9). The evidence relating to the various Specifications and the two Charges is closely intermingled and concerns events within the same brief period of time, so it will be considered together.

The accused, with other officers, had attended a party on the night of 26 September 1944 and had become intoxicated (R. 8; Pros. Ex. C, p.2; Pros. Ex. D, p. 3). First Lieutenants Warren (Ex. C) and Berger (Ex. D) tried to awaken him in barracks at about 0720 on 27 September 1944, and were unable so to do. Captain Billhymer, (R. 7; Pros. Ex. A), his company commander, found that the accused was not in the motor pool, where he was on duty as company motor officer, went to the accused's barracks at about 1000, and succeeded in awakening him. Captain Billhymer told the accused to get out of bed and "get on the ball and get to work"; that it was ten o'clock. In about fifteen minutes, accused reported at the motor pool (Ex. A, p. 1). There Captain Billhymer ordered him to be at Battalion Headquarters at 1300 with certain personal data, and told him that "the IG would check him". He did not appear at Battalion Headquarters at 1300, nor by 1400 (Ex. A, pp. 2, 3). The company morning report showed the accused absent without leave on 27 September 1944 from 0700 to 1000 and from 1030 to 1900 (R. 7; Pros. Ex. B).

At about 1100, the accused came to the motor pool and had Technician Fifth Grade Kesselder (R. 8; Pros. Ex. E) and Private First Class Kuehl (R. 8; Pros. Ex. F) leave a detail to which they were assigned and get in a "jeep" with him. Under the accused's orders, the dispatcher, Private First Class Stalbaum (R. 9; Pros. Ex. G), made a dispatch order for the jeep to the training area. At the accused's direction, Kesselder (Ex. E) drove the jeep, with the accused and Kuehl, off the post and to a point about halfway between Camp Murphy and West Palm Beach, where the accused's automobile was stuck in the sand on a side road. On the way, they stopped at a tavern and had two beers, then at another tavern and had another beer (Ex. E, p. 2; Ex. F, p. 1). They found the accused's car at about 2:00 o'clock in the afternoon and worked until about 4:00 o'clock getting it out of the sand (Ex. E, pp. 7, 8). While the two soldiers were so occupied, the accused went to a nearby house, where he and a lady friend were drinking. After the men got the car out, they also went in and had some drinks (Ex. E, p. 2; Ex. F, p. 1, 2). Kuehl then drove the jeep back to camp (Ex. F, p. 2; Ex. E, p. 2) and the accused had Kesselder drive the accused's car and take him to hunt for a telephone. They ended up in West Palm Beach (Ex. E, p. 2, 3). There the accused went into a hotel while Kesselder waited outside in the car for about an hour, until the accused came back with a military policeman, who took the accused and Kesselder back to camp, by way of the police station (Ex. E, p. 3). Corporal Arslan (R. 7, 8) was the military policeman. Under orders to "pick up" the accused, he observed the accused come out of the hotel and vomit in the street, and arrested him at about 1950.

Post Regulations, (R. 9; Ex. I), permitted certain designated officers only to authorize dispatch of military vehicles off the post. Major Hollard (R. 9; Ex. H), the accused's battalion commander, was so authorized, but had delegated no such authority to the accused. By the orders and practice in effect before and after the promulgation of the Post Regulations referred to, the battalion commander's authorization was required for such use, unless the vehicle was to go to a training area. The accused's organization had no training area at the time, and the training area which it formerly had used was in the opposite direction from that taken by the accused (R. 9; Pros. Ex. H).

4. For the defense also, the stipulated testimony of absent witnesses was introduced, according to depositions previously taken (R. 10; Def. Exs. 1, 2, 3).

The accused had once loaned five dollars to Kesselder, who had not yet been able to repay it (Ex. 1).

Captain Johnson (Ex. 2) and First Lieutenant Roderick (Ex. 3), were with the accused at the officers' party the night before. The accused

left the party and later returned. The accused got very drunk and behaved accordingly. They left the party at about 1:00 a.m. On the way back to camp, the accused turned onto a side road and stuck the car in soft sand. They worked on it until about 4:30 a.m., then left it and got back to camp about 6:00 a.m. The accused was still drunk and they had trouble getting him home. On the side road where the car was stuck, they had stopped at a house at about 2:00 a.m. and had some more drinks, staying there about an hour (Ex. 3, p.2, 3).

The accused, at his own request, testified under oath (R. 10). He recounted his enlisted service, from November 1940, five and a half months in New Zealand and New Caledonia, becoming a Technician Third Grade. On the night of 26 September there was an officers' farewell party in Palm Beach. "Everyone seems to get gloriously tight" at "these parties". The accused and three other officers drank two pints of whiskey before the party. The accused had eaten nothing but two sandwiches since the night before, and those at and before noon. He went to the party, had a few drinks and ate a chicken dinner, then went to see a friend, and had no recollection of returning to the party. Captain Johnson, Lieutenants Berger and Roderick, and Lieutenant Celaya rode with him to the party, in a car which the accused had rented for a week. After the party, he recalled picking up a woman waiting for a bus, and his next recollection was of being in the ditch and trying to get a ride back to camp (R. 11, 12). He was told later that he was the one who stuck the car in the sand (R. 13). His next recollection was of being awakened by Captain Billhymer, who told him that it was noon, then laughed and said it was 10:00 o'clock, and for him to get on the ball and get to work (R. 13). He had not seen the Post Regulations concerning taking vehicles off the post, and Major Hollard had given him no specific instructions in that regard (R. 12). On the morning of 27 September, he was sick and hazy, hardly knew what was going on, and was "so down in the dumps" that he could "hardly stay in one piece". He has always been on friendly terms with enlisted men (R. 13).

5. The evidence with regard to the circumstances of the case was notably more expansive in scope than that usually employed to prove absence without leave, failure to repair at the fixed time to an appointed place for duty, or wrongful use of an Army vehicle, and much of it was of rather tenuous relevancy either to the specifications of which the accused was convicted or to the two specifications of which he was acquitted. He was acquitted of wrongfully striking Lieutenant Berger (when the latter attempted to awaken him on the morning in question) and of wrongfully drinking intoxicating beverages in a public bar in the presence of the two enlisted men who went with him

to recover his automobile. However, the defense apparently regarded this latitude as not objectionable, since not only was no objection made, but the defense went forward to prove and enlarge upon the fact and extent of the accused's intoxication on the preceding night, apparently regarding such conduct as extenuating the offenses proved.

The extract copy of the morning report (Pros. Ex. B) does not show the date of the entry, but that is abundantly proved by the other evidence.

The failure to repair to battalion headquarters, for which the accused was convicted upon Specification 2 of Charge I, occurred during the period of absence without leave for which he was convicted upon Specification 1 of the same Charge. It does not serve to explain the greater offense, adds little to the case, and constitutes an unwarranted multiplication of charges in the circumstances of this case, contrary to par. 27, MCM 1928, p. 17. However, it did not injuriously affect the substantial rights of the accused.

The fact appears upon the voir dire of a challenged member of the court that the post commander had assembled the members of the court on the day before the trial and delivered some remarks in a general way on court-martial charges and the imposition of sentence commensurate with the offense (R. 3B), but the showing made was not sufficient to justify the exclusion of that member from the court, and the challenge was properly not sustained (R. 3C). Challenge was sustained as to another member who had made statements reflecting unfavorably upon the accused (R. 3D,E). The defense then accepted the court without objection to any other member (R. 3).

6. The accused, in propria personam, has appealed for clemency by letter attached to the record proper. In that letter, he cites his previous service, the absence of previous convictions, and the absence of moral turpitude in the offenses of which he was convicted. He attributes his misconduct to a period of intoxication following an entertainment sponsored by his battalion commander, at which intoxicants were freely used in connection with the dinner. He complains of the atmosphere of his trial, in that the court was assembled on the day before by the post commander, who had selected and recommended the members of the court for appointment, and addressed on the subject of punishment; that one member who was challenged for cause failed to disclose his disqualification on the general question addressed to the court, which made it necessary for the defense to bring out on voir dire, in the presence of the rest of the court, that this officer, a senior member of the court, regarded the accused as a bad influence and undesirable associate for other officers; and in that the trial judge advocate, in argument, urged dismissal in the event of conviction. The accused suggests that the punishment imposed was unduly severe.

7. War Department records disclose that the accused is 25 years of age, and indicate that he is unmarried. In civilian life, he completed a high school education and some night school study. He participated in school football and boxing as active sports, and held a district bantamweight championship in Golden Gloves boxing competition in 1939. He worked as a telephone lineman in the North Carolina State Forestry Service during summer vacations from school and was later employed as a shipping clerk for the Metalizing Engineering Company in New York. He enlisted in the Regular Army 8 November 1940 and served in enlisted status, including five and a half months overseas in the South Pacific Theater of Operations, until he was returned to the United States 26 January 1943 to attend Officer Candidate School. As an enlisted man, he advanced to become Technician, Third Grade. He was commissioned a second lieutenant, Signal Corps, Army of the United States, 26 May 1943, and assigned to duty with a pigeon replacement company, later to construction battalions, with which he did supply and motor duty. Comment in correspondence in his file indicates that he was transferred from one battalion to another as a result of reclassification proceedings. On 9 August 1944, disciplinary punishment under the 104th Article of War was imposed upon him for unbecoming conduct in associating and drinking with enlisted men and using a government vehicle for unofficial purposes. An application made by him for transfer to parachute troops was rejected by reason of an existing surplus of parachute officers.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st Article of War or the 96th Article of War.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

Judge Advocate.

SPJGQ
CM 267587

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 William R. McCormick (0-1647173), Signal Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, to support the sentence and to warrant confirmation of the sentence. By reason of the apparent need for effective punishment, I recommend that the sentence be confirmed, but, in accord with the recommendation of the reviewing authority and by reason of indications of salvage value of the accused as an officer, I recommend that all forfeitures in excess of $50.00 per month for six months be remitted; that, as so modified, the sentence be carried into execution, but that the execution of that portion thereof adjudging dismissal be suspended during good behavior.

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

Myron C. Cramer

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

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

(Sentence confirmed but all forfeitures in excess of $50 per month for six months remitted. Execution of that portion of sentence adjudging dismissal suspended. G.C.M.O. 21, 10 Jan 1945)

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

SPJGH
CM 267639

29 NOV 1944

UNITED STATES	NINTH SERVICE COMMAND ARMY SERVICE FORCES
v.	Trial by G.C.M., convened at Presidio of San Francisco, California, 13 October 1944. Dismissal.
Captain THOMAS M. TRESSLER (0-506664), Corps of Engineers.	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

Specification 5: In that Captain Thomas M. Tressler, Corps of Engineers, did, at San Francisco, California, on or about December 18, 1943, without proper authority wrongfully use on unofficial business of his own an Army pickup truck, property of the United States, furnished and intended for the military service thereof.

Specification 6: In that Captain Thomas M. Tressler, Corps of Engineers, did, at or near San Francisco, California, on or about December 18, 1943, wrongfully accept the sum of $400 in lawful money of the United States as a gift from Mr. W.T. Davis, a person with whom the said Captain Thomas M. Tressler, in pursuance of his duties as Procurement Officer, Lathrop Engineer Depot, Lathrop, California, was then negotiating for the purchase of property for the government of the United States.

Specification 7: (Finding of not guilty).

The accused pleaded not guilty to all Specifications and to the Charge. He was found guilty of the Charge and of Specifications 5 and 6 thereof and not guilty of all other Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to pay a fine of $400. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under Article of War 48.

3. In support of Specifications 5 and 6 of the Charge, the prosecution introduced evidence to show that during the latter part of 1943, accused was engaged in purchasing heavy duty machinery for the Corps of Engineers and one of the individuals with whom he had business relations was Mr. W.T. Davis of Albuquerque, New Mexico, a man of substantial means who owned both the W.T. Davis Construction Company and the Export Equipment Company. Mr. Davis apparently had knowledge, as well as the means and ability of obtaining knowledge, of the location and ownership of second-hand heavy duty machinery throughout the country which he would cover with his personal contract to purchase, if it were for sale and in satisfactory condition, and would thereafter offer for sale to various of the procurement agencies of the Government, including the Corps of Engineers. Mr. Davis first met accused in Salt Lake City, Utah, when he was called there by the Ninth Service Command and asked to assist in locating and acquiring heavy duty machine shovels. Thereafter he submitted to the Corps of Engineers, through accused, various pieces of heavy machinery he had located on and around the west coast of the country which were rejected by accused because they failed to meet specifications or were in unsatisfactory condition (R. 28-30, 42).

Davis eventually located three used machine shovels owned by the Guy F. Atkinson Company, a contracting concern in San Francisco, California. Two of these shovels, both known as Bucyrus model 43-B, were located at Neah Bay, Washington, and the other, a Bucyrus model 50-B, was located in Oakland, California. Davis contracted to purchase the model 50-B machine shovel for $17,500 and one of the model 43-B shovels for $18,750 (R. 18-20, 22, 23, 31-33). Thereafter, during December 1943, accused arranged to purchase two of these machines from Davis for the Corps of Engineers and on 18 December 1943, at San Francisco, California, accused and Davis completed their negotiations, arriving at a price of $24,565 for the 43-B model shovel and $23,000 for the 50-B model shovel. The purchase prices included expenses to be incurred by Davis in rebuilding and repairing the machines according to the agreement of the parties (R. 34-37, 43,48,53). Both of these machines were eventually rejected by the Government in April 1944 and the contracts cancelled (R. 40). It should be noted at this point that of the five Specifications of which accused properly was found not guilty, two of them charged accused with wrongfully and unlawfully recommending the purchase by the United States of these two machine shovels from W.T. Davis Company at the prices negotiated rather than at the prices for which Davis obtained them from the Guy F. Atkinson Company.

On 18 December 1943, after completing their negotiations on these two machine shovels, accused and Davis proceeded to a race track just outside the city of San Francisco in an Army pick-up truck. At the race track Davis placed a bet on one race and won. On succeeding races, Davis selected the horses on which bets were to be placed and accused then placed the bets and collected the winnings. After the first race all subsequent wagers were made from the money previously won. When the races were over Davis divided the winnings with accused giving him something in excess of $300. Davis was not positive whether or not accused contributed any funds to the amount bet on the first race or if he and accused originally agreed to divide any amount they might win. It was customary for Davis, when he attended a race track with other individuals, to have the members of the party pool their betting money and then divide all winnings. Davis testified he had no thought of bribing accused when he divided the track winnings with him. Davis had previously offered to loan accused some money but the latter had declined to accept it (R. 40, 41, 45, 50, 51).

Sometime between 15 June and 15 July 1944, Lieutenant Colonel John H. Amen, Inspector General's Department, conducted an investigation with respect to accused's activities in procuring heavy machinery for the Government. During the investigation and after accused had been fully advised of his rights under Article of War 24, accused stated that a Government pick-up truck, which was used for transportation between San Francisco and accused's station, was employed by accused to transport Davis and himself to the horse races on 18 December 1943 (R. 56, 57). Earlier on this same day while accused was negotiating the purchase of the two machine shovels from Davis, accused remarked that he had been granted leave over the Christmas holidays and was attempting to arrange Army airplane transportation to his home in the east but did not know if he would be successful. When Davis inquired why he did not travel by civilian airplane accused replied that he was unable to afford it. Davis offered to loan accused the necessary funds to obtain such transportation but accused refused to accept the loan. Davis then suggested they attend the horse races and "see what we can do there". At the race track Davis contributed the money to place the first bet and accused contributed nothing. The winnings for the day amounted to about $800 of which Davis gave accused $400 telling him that in turn he owed Davis "two and a half". Accused later determined that Davis meant accused owed him $2.50, one-half of Davis' original bet which had pyramided to $800, and accused paid the amount requested. Accused placed the $400 in a box in his quarters at Lathrop Depot and never deposited it in his bank account or spent any of it because his conscience prevented him from doing so (R. 58, 59).

4. After his rights as a witness had been fully explained to him, accused elected to take the stand and give sworn testimony in his own behalf. He testified that he was 53 years of age and had served about 2 years as a "sergeant first class" in the ambulance corps during the first World War. In civilian life he had been engaged in the machinery and construction business, having been employed as a sales engineer by Lee T. Ward Company from 1924 to 1932 and later similarly employed by Howard W. Read Company,

of Philadelphia, Pennsylvania (R. 62, 99, 100). He entered military service on 19 December 1942 and was assigned to the Procurement Section of the Philadelphia Engineer's Office from then until 7 September 1943. His duties were to locate and inspect used construction cranes and recommend to the Office of Chief of Engineers the purchase of such as were satisfactory (R. 62, 63). While assigned to the Philadelphia Engineer's Office accused was instrumental in the Government's purchase of 19 machines at a total price of $287,000, with only occasional complaints being voiced by the users thereof because of the seller's failure properly to perform agreed upon repairs (R. 63, 64).

On 7 September 1943, accused was transferred to the west coast. In November 1943, the procurement system was reorganized and to the Chief of Engineers was delegated the function of purchasing heavy duty machinery for all branches of the service and for lend-lease. In turn, such machinery was to be requisitioned by the various branches and be apportioned to lend-lease through the Chief of Engineers. Accused was being continually urged by frequent directives to purchase all such machinery as could be found and from September 1943 until the first part of 1944 he located and recommended the Government's purchase of about 28 pieces of machinery of which 24 were bought for a total of some $560,000. During that period he had inspected approximately 100 pieces of heavy machinery (R. 64, 66, 68, 92,).

Accused testified that on Saturday, 18 December 1943, he was in San Francisco negotiating the purchase of machinery from Davis. By 2 or 3 p.m. that day they had completed their negotiations relative to the two machine shovels, Bucyrus models 43-B and 50-B. That left but one other transaction pending between them and accused eventually purchased the machine involved directly from the owner thereof when Davis' deal with the owner failed to materialize (R. 86, 87, 95, 98). During their negotiation on 18 December 1943 Davis remarked that a horse which he had trained at his ranch near Tahoe Lake was racing that day at Bay Meadows track. Accused replied that if they completed their work in time they might attend the races (R. 87). Accused also informed Davis that their negotiations had to be concluded promptly because he had been authorized a ten day leave commencing 22 December 1943 which he hoped to spend with his family if he was successful in obtaining passage by Government airplane. Davis inquired why accused did not use commercial air transportation facilities and the latter replied that he could not afford it. Davis thereupon offered to loan him the requisite funds but accused refused to accept the loan (R. 88).

Accused further testified that after completing their negotiations about 3 p.m. that afternoon, he and Davis sought a taxi cab to transport them to the race track but none could be located. Finally they used an Army pick-up truck to convey them to the track (R. 89). Accused gave no thought to the propriety of such use of a government vehicle and did not learn that it was improper until after the investigation had been commenced in June 1944 (R. 102).

At the race track Davis placed a bet on a race, won and then stated to accused "There is our money to play the rest of the day". Thereafter Davis did the "brain work" and determined the bets to make on the next four races while accused performed the "foot work", inasmuch as Davis suffered from a leg condition, and placed the bets decided upon by Davis and collected the winnings therefrom. As they left the track after the races were over, Davis handed accused $405 saying "Here's yours" (R. 89). Accused pocketed the money but later at the hotel he became doubtful of the propriety of accepting it and informed Davis that it did not "look right". Davis reassured him saying that they had made the bets together and that all accused owed him was "two and a half". That evening when accused asked Davis what he meant by "two and a half" Davis replied that accused owed him $2.50 of the $405 he had given accused in order to adjust the division of the day's proceeds evenly between them. Accused had never before wagered on horse races (R. 90).

Accused admitted that, during the investigation conducted by Colonel Amen, he told the colonel that his conscience bothered him after he accepted this money. However, accused explained he did not mean that he felt he had obtained the money in a questionable manner but that he meant he did not gamble and did not relish spending money so obtained (R. 115, 116).

5. Before commenting on the facts and law of this case certain conduct of the president of the court must receive attention. While questioning the accused on the stand, the president stated to him, without any justification apparent on the face of the record, "I don't want an argument or a speech. If you can't answer say so" (R. 104). Later, when accused, in answer to a question posed by the president, stated that at the race track they placed their bets "on the nose", an expression he learned at the track that day, the president offered the observation, "You learned quite a lot the first day" (R. 113). These remarks by the president were improper although they do not affect the validity of the trial. Members of a court-martial should be dignified. (MCM 1928, par. 38). For a member of a court-martial to belittle an accused while he is exercising his statutory privilege to testify in his own defense hardly comports with the dignity expected of the members of such a court. It is most inappropriate for any member of the court to use such an occasion as an opportunity to offer gratuitous, sarcastic remarks to an accused.

The prosecution's evidence offered under Specification 5 of the Charge, corroborated by the testimony of the accused himself, conclusively demonstrates that accused and Davis used an Army pick-up truck to provide them with transportation to a race track on business admittedly of an unofficial character. It is expressly provided by paragraphs 6a and b, Army Regulations 850-15, 28 August 1943, that Government motor vehicles will only be used for official business and for certain other authorized activities among which is not included transportation to race tracks for purely private purposes. The Army Regulations constitute standing orders to all

military personnel and a violation of such orders is an offense under Article of War 96 (MCM, 1928, par. 152a). The Army Regulations are public military regulations and all military personnel are presumed to have knowledge thereof just as is the case with public civil law. Accused's ignorance of the regulations under consideration, assuming that to be the fact, constitutes no defense to the offense charged. The evidence sustains the finding of guilty of Specification 5 of the Charge.

Undisputed evidence also demonstrates that, while accused was engaged in his official duties of negotiating purchase contracts on behalf of the United States, he accepted a gift of approximately $400 from a civilian with whom he was conducting such negotiations. It was provided by paragraph 2 (e) (2), Army Regulations 600-10, 2 June 1942, the regulation in effect on 18 December 1943, that every member of the military establishment in the performance of military duties shall refrain from participating in all activities "which would tend to interfere with or hamper in any degree his full and proper discharge of such duties or would normally give rise to a reasonable suspicion that such participation would have that effect. Any substantial departure from this underlying principle would constitute conduct punishable under the Articles of War". One of the activities so prohibited is "acceptance by an officer of a substantial loan or gift or any emolument from a person or firm with whom it is the officer's duty as an agent of the Government to carry on negotiations". (Par. 2 (e) (2) (a), AR 600-10, 2 June 1942). This identical regulation is contained in the same paragraph and section of the presently effective Army Regulations dated 8 July 1944. It has been held to be a violation of Article of War 96. for an officer to accept an unsolicited gift, even though not predicated upon any "past or future consideration or favor", from any person with whom he may be transacting public business (21 BR 243, CM 235011, Goodman). From these authorities it is quite apparent that accused's conduct in accepting a gift from Davis under the circumstances here present constituted a violation of Article of War 96. The evidence sustains the findings of guilty of Specification 6 of the Charge.

6. Accused is 52 years of age. From 2 June 1917 to 13 June 1919, he served as a sergeant first class in the United States Army Ambulance Corps. He was commissioned a captain, Army of the United States, directly from civilian life on 7 December 1942, and placed on limited service with the Corps of Engineers to negotiate, purchase and inspect heavy duty machinery for the government. For approximately 16 years of his civilian life accused had been engaged in selling, purchasing, servicing and appraising heavy equipment and machinery. From 1936 to 1942 he was so employed by the Howard Read Corporation, Philadelphia, Pennsylvania, having started with a salary of $2400 per annum which had been increased to $3900 per annum by 1942.

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

Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas N. Jaffy, Judge Advocate.

Adam Cuker, Judge Advocate.

William H. Lamborell, Judge Advocate.

SPJGH
CM 267639 1st Ind.

War Department, J.A.G.O., DEC 5 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 Captain Thomas M. Tressler (0-506664), Corps of Engineers.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. The accused was found guilty of using a Government motor vehicle to provide personal transportation while engaged in unofficial business and guilty of accepting a gift of approximately $400 from a civilian with whom accused, in the performance of his official duties, was negotiating for the purchase of heavy duty machinery for the United States. Accused's conduct in accepting the gift of $400 under such circumstances violated express provisions of the Army Regulations and demonstrates his unfitness longer to remain an officer and to be entrusted with the business of negotiating public purchases. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

3. Consideration has been given to a letter from accused to Major Harold Furst, Trial Judge Advocate, dated 28 October 1944.

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

Myron C. Cramer

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

4 Incls.
Incl 1 - Record of trial,
Incl 2 - Ltr fr accused 28 Oct 44.
Incl 3 - Dft ltr for sig S/W.
Incl 4 - Form of action.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 62, 27 Jan 1945)

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

SPJGN
267651

1 DEC 1944

UNITED STATES v. Technician Fifth Grade DAN BOSWELL (34166892), Company A; Private AMOS THOMAS (38160800), Company B; and Private GEORGE GILL JR. (38160810), Reconnaissance Company, all of the 827th Tank Destroyer Battalion.	)	FOURTH ARMY Trial by G.C.M., convened at Camp Hood, Texas, 29 and 30 September 1944. Each: Death by hanging.

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

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

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

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

Specification: In that Tec 5 Dan Boswell, Company A, 827th Tank Destroyer Battalion, Private Amos Thomas, Company B, 827th Tank Destroyer Battalion and Private George Gill Jr., Reconnaissance Company, 827th Tank Destroyer Battalion, acting jointly, and in pursuance of a common intent, did, at North Camp Hood, Texas, on or about 1 September 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Staff Sergeant Otis Wilson, Company A, 827th Tank Destroyer Battalion, a human being by striking him over the head and neck with a stove grate shaker and cleaver and by cutting him with a butcher knife.

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

Specification: In that Tec 5 Dan Boswell, Company A, 827th Tank Destroyer Battalion, Private Amos Thomas, Company B, 827th Tank Destroyer Battalion, and Private George Gill Jr., Reconnaissance Company, 827th Tank Destroyer Battalion, acting jointly, and in pursuance of a common intent, did, at North Camp Hood, Texas, on or about 1 September 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Staff Sergeant Otis Wilson, Company A, 827th Tank Destroyer Battalion, one thousand six hundred and twenty two and 00/100 ($1622.00) dollars, lawful money of the United States, the property of said Staff Sergeant Otis Wilson.

Each accused pleaded not guilty to and was found guilty of the Charges and Specifications thereunder. Each accused was sentenced to be hanged by the neck until dead. Both the findings of guilty and the imposition of the sentence as to each accused were concurred in by all the members of the court present at the time the vote was taken. Evidence of two previous convictions for military offenses in violation of Article of War 96 were introduced against the accused Boswell, and evidence of one previous conviction for a military offense in violation of Article of War 61 was introduced against accused Thomas. The reviewing authority approved each sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that between the hour of midnight, 31 August 1944, and 0100, 1 September 1944, Staff Sergeant Otis Wilson of Company A, 827th Tank Destroyer Battalion, was heard "hollering or kind of screaming" in the mess hall of his company at North Camp Hood, Texas (R. 10, 15). A few minutes later he was found lying on the floor of Company A's kitchen with a number of deep cuts on the back of his neck and with "blood all over the kitchen" (R. 22, 24; Gov. Exs. B, C, D, F). His body lay in a pool of blood five feet in diameter. Blood was spattered along the wall between the serving table and the stove, under the serving table, and on a shelf. Blood spots formed a colored rectangle on the nearby serving table (R. 50-51).

A medical examination made a short time thereafter revealed that he was dead and that his death had been caused by "violence". He had a deep laceration on the back of his neck at the base of his brain which extended from ear to ear. This wound penetrated inward to the spinal column and apparently had been caused by several blows from a cutting instrument. On the anterior side of his neck there was a laceration which cut the external mastoid muscles. There was also a bruise over his forehead and a

laceration over the occipital region exposing his skull. In addition, there was a V-shaped laceration over the external posterior region of the skull which appears to have been made with a sharp instrument. The medical witness who examined the deceased was of the "impression" that three different instruments had been used to inflict the wounds described (R. 33-34).

An examination of the mess hall revealed a number of red spots, apparently caused by blood, on the sill of the back door of the mess hall and footprints in the soft mud leading from that door (R. 46). These footprints turned "left or south" toward the area of Company B (R. 47). They crossed the wooden duck walk and led to the barracks of Company B about fifty yards distant from the Company A mess hall. Near the steps of one of Company B's barracks there was found a stove grate shaker stained with blood and with human hair adhering to it (R. 47). In the immediate vicinity of "Headquarters" a pair of coveralls with bloodstained sleeves was found (R. 67). Inside the coveralls was the laundry mark "B6892" and in one pocket was an address book bearing the name "Tech Sergeant Dan Boswell, Co. A, 827th TD Bn, APO 185, c/o PM, Los Angeles, Calif". In connection with this discovery the evidence shows that the Army Serial Number assigned to the accused Technician Fifth Grade Ban Boswell was 31166892 and that the last four digits of his serial number was used by him as his laundry mark (R. 67-68, 93, 96; Gov. Ex. I).

Following the above discovery the accused Boswell was placed under arrest and taken to the local guardhouse. There he was searched and $123 was found in his purse. Hidden in one of his socks was also found a roll of bills amounting to $1622, including eight $100 bills. When asked where he had obtained the money concealed in his sock, the accused replied that he had obtained it "from Sergeant Otis Wilson" (R. 70-72, 74).

Later, the accused was taken to the office of the Provost Marshal and after being warned that he did not have to make any statement or answer any questions and that if he did it could be used against him, he made a voluntary confession (R. 80, 81). This was admitted into evidence under the ruling that it could legally be considered only against the accused Boswell and that it could not be considered as evidence against the other accused (R. 80, 85). The confession was worded as follows:

> "Shortly after midnight on the night of 31 August to 1 September 1944, I was standing in the door of my barracks. Two guards were walking down the street. One of them, Pvt. Gill called to me and said, 'Let's go to the Mess Hall and ask Sgt. Wilson for a sandwich.' I said, 'Okay,' and I joined

them in the street, and we three, Pvt. Gill, Pvt. Amos Thomas and myself went up to the window of the Mess Hall. We looked in there and Sgt. Wilson was counting his money. I don't know how much money he had, but we saw a lot of bills. He had been ironing some clothes and the clothes and the iron were on the table. After we had seen the money, Pvt. Gill said to me, 'Let's rob him,' and I said, 'All right.' Thomas didn't say anything. Gill had khakis on. Having just come off guard, and he asked me if I had any fatigues. I said, 'I had a pair lying on my bed.' I went and got the fatigues for him, and he stayed on the outside. After I brought the coveralls back, he slips them on over his khakis. After he puts on the fatigues, we go up to the door and knock on the window. Sgt. Wilson takes up his shirt and puts the money in his shirt pocket. Sgt. Wilson opens the door after he puts the money in his shirt pocket. When we got on the inside we asked him for a cheese sandwich. Then Sgt. Wilson goes to the frigidaire box and gets three pieces of cheese out of the box. After Sgt. Wilson got the cheese, he goes back to the bread box and gets the bread. He was still in the storeroom after he got the bread. After he got the bread he passes by the frigidaire going to the kitchen. After Sgt. Wilson passes by I get the grate shaker off the field range. I went behind him, and the other two men followed, just as he got back to the table in the kitchen near the ranges where he was going to fix the sandwiches I hit him twice on the side of the head with the grate shaker. Then I picked up the shirt and took the money out of the pocket. Then Sgt. Wilson fell to the floor. He screamed when I hit him the first time and as he fell he screamed some more. Gill was standing right by me. He reaches up and gets the cleaver and hits Sgt. Wilson four or five times with the cleaver, and Thomas got two knives, and Thomas was cutting his throat. At that time I went through the dining room carrying the grate shaker and I put the money in my pocket." (Gov. Ex. J).

Private First Class Ben C. Davis testified that he was on guard duty on the night of 31 August 1944. A few minutes before one o'clock that morning, as he was walking along the "walk way", he heard a noise. When he heard the noise a second time he stopped, turned, and looked in the direction of the Company A mess hall. As he looked a man pushed open the screen door and, observing Private Davis, he stepped back and pulled the door closed. Private Davis then entered the "Headquarters latrine" where he could observe the rear door of the Company A mess hall without himself being observed. In a few moments the door of Company A's mess

hall again opened and a man came out and ran in the direction of Company B's mess hall. Private Davis observed that this man kept running until he got into the light. Although Private Davis could not identify the man, he noticed that he wore "fatigues" and that he was "bare-headed". When the man was observed walking in the light, he had nothing in his hands and they were "swinging clear". The ground was wet and the man left mud on the "walk way". Private Davis estimated that he had seen this man at about seventeen minutes to one o'clock (R. 36-42).

Corporal Leander Tatum testified that he served as corporal of the guard on 31 August 1944. At ten minutes to twelve on that night he started out with the guard relief to relieve five sentinels. He first relieved the sentinels on Posts No. 1 and No. 2 in the battalion area. He then relieved the accused Private Gill and the accused Private Thomas from Posts No. 3 and No. 4, which were at the local motor pool. After relieving the sentinel on Post No. 5, Corporal Tatum went to the mess hall of Company A. As he entered the mess hall, the accused Thomas and Gill were coming out with sandwiches in their hands. Mess Sergeant Wilson gave him a sandwich and he stayed there for about five minutes. After leaving Sergeant Wilson he went to the Company A latrine where a crap game was going on. From there he returned to the local guardhouse. He estimated that approximately twenty minutes had elapsed between the time he saw the accused Thomas and Gill at the mess hall and the time he saw them return to the guardhouse. He also estimated that he had been at the guardhouse approximately ten minutes when the two men came in (R. 107-116).

4. After the prosecution had rested, the court explained to the accused Boswell, his rights relative to testifying or remaining silent and he elected to remain silent. Thereafter, after his defense counsel and the court had explained to him that his confession presented no evidence which could be used against either of the other two accused, he stated that he wished to testify. His testimony was in substance a reiteration of the statements presented in his written confession with certain additions.

He explained that the accused Gill had requested coveralls because he did not want to get his khaki clothes "messed up". Boswell also testified that, prior to the attack upon Sergeant Wilson, Gill made the statement that "we will knock him out and you get the money and we will split it tomorrow". Boswell testified that he did not intend to kill Sergeant Wilson and that neither Thomas nor Gill had done him any injury. He denied that he had seen Corporal Tatum on the night of 31 August 1944. He stated that he was wearing a khaki uniform at the time the crime in question was committed, and that he did not remember whether Thomas and Gill were carrying rifles at the time of their entry into the mess hall. He also testified that he did not know Amos Thomas prior to the night of the alleged crime. When asked to estimate the time which had elapsed

between his entry into the mess hall to attack Sergeant Wilson and the time of his departure therefrom, he said he guessed about fourteen minutes. He also explained that after leaving Company A's mess hall he stood on the steps of Company B and watched Thomas and Gill leave the Company A mess hall and that the time which had elapsed while he was there was not over five minutes (R. 131, 132, 136, 137, 140, 141, 155, 157).

Corporal William A. Watts, a witness called by the accused Thomas, testified that he was one of the corporals of the guard on the night of 31 August 1944. Shortly after midnight, he testified, he saw the accused Thomas and Gill return to the guardhouse and engage in playing poker. About ten minutes later, at twenty minutes after twelve o'clock, he observed Corporal Tatum return to the guardhouse. The witness explained that he remembered the exact time because he had looked at his watch and left the guardhouse just as Corporal Tatum came in. After going to his barrack for a field jacket and being absent from the guardhouse for about twenty minutes, he returned and observed Thomas and Gill still playing poker.

5. The Specification, Charge I, alleges that the accused, Technician Fifth Grade Dan Boswell, Private Amos Thomas and Private George Gill Jr.,

> "* * * acting jointly and in pursuance of a common intent, did, at North Camp Hood, Texas, on or about 1 September 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Staff Sergeant Otis Wilson, * * * by striking him over the head with a stove grate shaker and cleaver and by cutting him with a butcher knife."

The Specification, Charge II, alleges that the three accused,

> "* * * acting jointly and in pursuance of a common intent did, * * * on or about 1 September 1944, by force and violence and by putting him in fear feloniously take, steal and carry away from the person of Staff Sergeant Otis Wilson, * * * $1622."

Murder which is obviously the more serious of the two crimes alleged is defined as "* * * the unlawful killing of a human being with malice aforethought". The word unlawful as used in this definition means "* * * without legal justification or excuse" (Par. 148a, MCM, 1928). Malice aforethought has been authoritatively defined, as a technical term,

> "* * * including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden" (Commonwealth v. Webster, 5 Cush. 296; 52 Am Dec. 711).

The Manual for Courts-Martial similarly defines malice aforethought and states that it may be inferred from, among other things, "intent to commit any felony" "preceding or coexisting with the act or ommission by which death is caused" (MCM 1928, par. 148a). One such felony is robbery which is, "the taking with intent to steal, of the personal property of another from his person or in his presence, against his will, by violence or intimidation" (MCM 1928, par. 149f).

The words "deliberately" and "with premeditation" have been held to mean "* * * an intent to kill, simply, executed in furtherance of a formed design to gratify a feeling for revenge, or for the accomplishment of some unlawful act" (Wharton's Criminal Law, vol. 1, sec. 420).

The evidence against each accused must be examined in the light of the above concepts. The evidence against the accused Boswell, shows that, within a short time after the dead and mutilated body of Staff Sergeant Otis Wilson was found on the kitchen floor of the mess hall of Company A, a pair of blood-stained coveralls, definitely identified as belonging to Boswell, were found in the vicinity of Headquarters Company. The evidence also shows that a suspiciously acting individual wearing coveralls was seen leaving the rear door of the mess hall of Company A about seventeen minutes to one o'clock and shortly after Sergeant Wilson had been heard to cry out. Near this individual's tracks and near the steps of a barrack of Company B, a blood-stained stove crank was found with human hair adhering to it. A short time thereafter when Boswell was arrested he was found to have $1,622 concealed in one of his socks which he admitted he had obtained from the deceased. This sum of money was in addition to $123 which was found in his purse. In addition to this incriminating circumstantial proof of his guilt of both the crimes alleged, he confessed to both crimes and thereafter testified that he had entered the kitchen of Company A on the night of 31 August 1944 and had beaten Sergeant Wilson over the head with a stove crank and taken the sum of $1,622 from his shirt pocket. In view of the secrecy in which his acts were committed, more satisfactory or convincing proof of Boswell's

guilt could scarcely be desired.

On the other hand, the evidence against the accused Thomas and Gill, is of an altogether different character. Although they were seen at the kitchen of Company A a short time prior to the murder of Sergeant Wilson, there is no circumstantial proof that they were there for any other purpose than for the lawful one of procuring sandwiches after their tour of guard duty. In fact, the only evidence connecting the accused Thomas and Gill with the crimes alleged arises from the testimony of their alleged accomplice, the accused Boswell.

In discussing the subject of the credibility of witnesses, the Manual for Courts-Martial states that,

> "A conviction may be based on the uncorroborated testimony of an accomplice, but such testimony is of doubtful integrity and is to be considered with great caution" (MCM, 1928, par. 124a).

Colonel Winthrop recognizes the wisdom and justice of applying the above salutary rule in military law by stating that:

> "While the testimony of the accomplice, if believed, may be sufficient, though unsupported, to warrant a conviction, it is agreed by the authorities that, as a general rule, such testimony cannot safely be accepted as adequate for such purpose unless corroborated by reliable evidence" (Winthrop's Military Law & Precedents, 2nd Ed., p. 357).

The above principles are clearly recognized in X BR 219, 222-224. The Federal Courts have been very cautious in the use of an accomplice's testimony. In United States v. Lancaster, 44 Fed. 896, the court stated that:

> "It may be regarded as the settled course of practice not to convict a prisoner in any case of felony upon the sole uncorroborated testimony of an accomplice. The judges do not, in such cases, withdraw the cause from the jury by positive directions to acquit, but only advise them not to give credit to the testimony."

The desirability of following this cautionary practice was recognized by the United States Supreme Court in Holmgren v. United States, 217 U.S. 509, 523, 524, wherein the court stated that:

> "It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to them."

This rule is based upon the manifest tendency of human nature to place one's own life and freedom above that of others. An accomplice may be tempted to give false testimony because of a promise of immunity or a hope of clemency. He may be caught in such a net of incriminating circumstances that he may be driven by fear to seek to exonerate himself from the more diabolical features of his discovered crime by falsely stating that others were primarily responsible therefor. Boswell was caught in just such a net of incriminating circumstances. When he was arrested and confronted with the money which was found in his sock, and had admitted that he had obtained it from Staff Sergeant Wilson, he must have felt hopelessly incriminated in the latter's murder. He must have realized that it was to his interest to attempt to show that he was led into the commission of the crimes by others, that he did not intend to kill Sergeant Wilson, and that others struck the death blows. His testimony against the other two accused must, therefore, be accepted as of "doubtful integrity" and considered with "great caution".

Boswell testified that, when he and the other two accused went to the kitchen of Company A on the night of 31 August 1944, and saw Sergeant Wilson counting his money, that it was Gill who said "let's rob him". Boswell also testified that he did not intend to kill Sergeant Wilson. In describing the attack upon the deceased he depicts himself as having struck him with a blunt instrument and attributed to the other two the bloody work of hacking the deceased with a meat cleaver and stabbing him with a butcher knife. By this testimony Boswell placed the original responsibility of the crimes upon Gill and exonerated himself from the more cruel and brutal phases of the attack.

He then testified to some rather incredible circumstances. Prior to the commission of the crime he asserts that he did not know the accused Thomas. Despite this sudden acquaintanceship, he testified that his two comrades in crime agreed to entrust him with all of the money taken from the deceased although they had no knowledge of the amount which they expected to gain. He further testified that he procured a pair of his coveralls for Gill so that he might keep his uniform clean while participating in the crime. On the other hand, he took no precaution to protect his own uniform. Since his blood-stained coveralls had, however, been found near Headquarters Company, and since an individual had been seen to leave the rear door of Company A's mess hall during the hour in which the crime was committed, it was greatly to his interest to explain that they had been

worn by another person. Only the credulous can accept this evidence as true.

Boswell testified that he passed through the back door of the mess hall of Company A as a guard was passing, that the guard stopped to listen for a time and then passed on. Boswell explained that he then proceeded to the steps of a barrack of Company B where he dropped the grate shaker. In connection with this testimony it must be observed that Private Ben C. Davis testified that he saw a man start to leave the back door of Company A's mess hall, and that this individual went through the same or similar hesitative movements as described by Boswell. Private Davis testified further that this individual was definitely wearing coveralls. The evidence shows that this individual's tracks led to a barrack of Company B where the grate shaker was found. This part of the testimony of Boswell when viewed in the light of the testimony of Private Davis strongly tends to identify Boswell as the individual who left the mess hall wearing coveralls and to weaken all his testimony against the other two accused.

When asked to estimate the time which elapsed between his entry into the mess hall to attack Sergeant Wilson and the time of his departure therefrom, Boswell said that he guessed that time as being about fourteen minutes. He also estimated that he stood on the steps of a barrack of Company B watching Thomas and Gill leave the Company A mess hall for a time not over five minutes. When these two estimates are added together, we have Thomas and Gill engaged for approximately 19 minutes in the murder and robbery of Sergeant Wilson, whereas the testimony of Corporal Tatum shows that they had only about fifteen minutes in which to participate in the crimes alleged. Corporal Watts places Thomas and Gill as returning to the guardhouse and engaging in playing poker at about ten minutes past 12 o'clock which would have allowed them only ten minutes. Although these estimates of time must be regarded as imperfect, they at least tend to establish a substantial alibi for Thomas and Gill and raise a reasonable doubt as to whether they had sufficient time or opportunity to have engaged in the crimes alleged.

Since the accused Boswell's testimony against Thomas and Gill is not only altogether uncorroborated but obviously self-serving in part, incredible in part, and clearly contradicted in part by the testimony of other witnesses, it is manifestly untrustworthy. Furthermore, since the uncontradicted and unimpeached testimony of Tatum and Watts tends to establish a substantial alibi for both of these accused, the evidence obviously completely fails to establish, beyond a reasonable doubt, the guilt of either as required by law. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty as to the accused Thomas and Gill, and legally sufficient to support only so much of the findings of guilty of the Specifications of Charge I and II as involves findings that the accused, Boswell, did, at the time and place alleged, commit the two crimes of murder and robbery as therein described.

6. The charge sheet shows that the accused Gill is approximately 25½ years of age and that he was inducted into the service on 23 April 1942. He has had no prior service.

The charge sheet shows that the accused Thomas is approximately 28½ years of age and that he was inducted into the service on 23 April 1942. He has had no prior service.

The charge sheet shows that the accused Boswell is approximately 26 years of age, and that he was inducted into the service on 1 April 1942. He has had no prior service.

7. The court was legally constituted. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty as to the accused Thomas and Gill and is legally sufficient to support only so much of the findings of guilty of the Specifications of Charges I and II as involves findings that the accused Boswell did at the time and place alleged, commit the crimes of murder and robbery as therein described, legally sufficient to support the findings of guilty of both Charges and legally sufficient to support the sentence as to the accused Boswell, and to warrant confirmation thereof. A sentence of death or imprisonment for life is mandatory upon a conviction of murder, in violation of Article of War 92.

Abner E. Lefkowitz, Judge Advocate.

Robert J. Connor, Judge Advocate.

Gabriel W. Gorr, Judge Advocate.

SPJGN
CM 267651

1st Ind.

War Department, J.A.G.O., DEC 26 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Technician Fifth Grade Dan Boswell (34166892), Company A; Private Amos Thomas (38160800), Company B; and Private George Gill Jr. (38160810), Reconnaissance Company, all of the 827th Tank Destroyer Battalion.

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 as to the accused Thomas and Gill but is legally sufficient to support only so much of the findings of guilty of the Specifications of Charge I and II as involves findings that the accused Boswell did at the time and place alleged commit the crimes of murder and robbery as therein described, legally sufficient to support the findings of guilty of both Charges, and legally sufficient to support the sentence as to the accused Boswell and to warrant confirmation thereof.

3. The evidence shows that about midnight, on 31 August 1944, the accused Boswell entered the mess hall of Company A, 827th Tank Destroyer Battalion, Camp Hood, Texas, and murdered and robbed Staff Sergeant Otis Wilson. The body of Sergeant Wilson was found lying in a pool of blood with bruises over his forehead, cuts on the side of his neck, and deep lacerations at the base of his brain extending from ear to ear. Apparently the wounds were inflicted by three different instruments. When Boswell was arrested, $1,622 was found concealed in his sock. He admitted that he had obtained this sum of money from the deceased. A pair of Boswell's blood-stained coveralls were found discarded near Headquarters Company. He voluntarily confessed to the robbery of Sergeant Wilson but asserted that although he struck him with a stove grate shaker he never intended to kill him. In Boswell's confession and subsequently in his testimony, he placed the primary responsibility for the murder of Sergeant Wilson upon the other two accused. Although his admissions of guilt are strongly corroborated, his testimony against the other two accused is not only entirely uncorroborated but is obviously self-serving in part, incredible in part, and clearly contradicted in part, by the testimony of other witnesses. The uncontradicted and unimpeached testimony of two other witnesses tends to establish a substantial alibi for the other two accused. In view of the above circumstances, I recommend that the findings of guilty and the sentence as to the accused Thomas and Gill be disapproved and that the sentence of death as to the accused Boswell be confirmed and ordered executed.

4. Consideration has been given to a brief submitted by Second Lieutenant William A. Kline, assistant defense counsel, to a brief submitted by Second Lieutenant Knowles M. Tucker, defense counsel for the accused Gill, to letters from the accused Thomas and Gill forwarded by civilian attorney Russell F. Wolters, to three letters from Russell F. Wolters, to statements from Thomas and Gill forwarded through military channels, to character affidavits concerning the accused Thomas from H. L. Rankin and C. E. Coolidge, to similar affidavits concerning the accused Gill from J. H. Synott, Sheriff R. C. Pace, I M. Graham, Dr. J.J. McGrath, Mrs. Son Williams, and O. A. Rowe, to a letter addressed to the President from Ripley E. Woodard, civilian attorney, and to a petition submitted by him signed by eighteen persons, attesting to the law abiding behavior of accused Gill in civilian life.

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

Myron C. Cramer

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

14 Incls.
Incl 1 - Brief submitted by 2nd Lt. Tucker.
Incl 2 - Brief submitted by 2nd Lt. Kline.
Incl 3 - Letter from accused Thomas.
Incl 4 - Letter from accused Gill.
Incl 5 - 3 letters from Russell F. Wolters, attorney.
Incl 6 - Statement from accused Thomas.
Incl 7 - Statement from accused Gill.
Incl 8 - Character affidavits concerning accused Thomas.
Incl 9 - Character affidavits concerning accused Gill.
Incl 10- Letter from Ripley E. Woodard addressed to Pres.
Incl 11- Petition submitted by Ripley E. Woodard.
Incl 12- Record of trial.
Incl 13- Dft. of ltr. for sig. Sec. of War.
Incl 14- Form of Executive action.

(Findings of guilty as to accused Thomas and Gill disapproved. Only so much of findings of guilty of Specifications of Charges I and II approved as involves findings that accused Boswell did at time and place alleged commit the crimes of murder and robbery as therein described. Sentence confirmed. G.C.M.O. 105, 26 Mar 1945)

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

SPJGK
CM 267664

30 NOV 1944

UNITED STATES	)	FIRST AIR FORCE
v.	)	Trial by G.C.M., convened at Army Air Base, Chatham Field, Georgia, 20 October 1944. Dismissal, total forfeitures, and confinement for one year.
Second Lieutenant CHESTER R. HAIRSTON (0-674302), Air 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 I: Violation of the 61st Article of War.

Specification: In that Second Lieutenant CHESTER R. HAIRSTON, Air Corps, Section E, 114th AAF Base Unit, Chatham Field, Georgia, did, without proper leave, absent himself from his proper organization at Chatham Field, Georgia, from about 8 July 1944, to about 28 August 1944.

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

Specification 1: In that Second Lieutenant CHESTER R. HAIRSTON, Air Corps, Section E, 114th AAF Base Unit, Chatham Field, Georgia, did, at Chatham Field, Georgia, on or about 13 June 1944, with intent to defraud, wrongfully and unlawfully make and utter to Chatham Field Officers' Mess, a certain check, in words and figures as follows, to wit:

No. _____ 6 - 13 _____ 1944

Nat'l Bank of Fort Sam Houston
San Antonio, Texas

Pay to the order of Chatham Field Officer's Mess.

Twenty Five ----------00/100 Dollars

$ 25.00 Chester R. Hairston, 2nd Lt. A.C. 0-674302
Section "E"

and by means thereof, did fraudulently obtain from Chatham Field Officers' Mess $25.00, he, the said Second Lieutenant CHESTER R. HAIRSTON, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for payment of said check.

Specification 2: (Finding of not guilty).

NOTE: And 8 additional specifications, each of which is identical in form with Specification 1 with the exception of the dates, amounts, names of persons defrauded - which exceptions are respectively as follows:

Specification	Date	Amount	Person Defrauded
3	25 June 1944	$15.00	Officers' Mess (Chatham Field)
4	31 July 1944	$22.00	Cappel Luggage Store (Dayton, Ohio)
5	31 July 1944	$20.00	Gibbons Hotel (Dayton, Ohio)
6	1 August 1944	$10.74	Hotel Gibbons (Dayton, Ohio)
7	1 August 1944	$25.00	Van Cleve Hotel (Dayton, Ohio)
8	29 July 1944	$10.00	Dayton Biltmore Hotel (Dayton, Ohio)
9	30 July 1944	$20.00	Dayton Biltmore Hotel (Dayton, Ohio)
10	1 August 1944	$30.00	Elder and Johnston Co. (Dayton, Ohio)

Accused pleaded guilty to Charge I and its Specification and not guilty to Charge II and each of its Specifications. He was found guilty of all Charges and Specifications except Specification 2 of Charge II, of which he was found not guilty. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved only so much of the findings of guilty of each of Specifications 4 to 10, inclusive, of Charge II "as include findings that the accused did, on the respective dates and places specified, wrongfully make and utter the checks therein described and by means thereof did obtain the respective sums, services, and merchandise alleged, without having sufficient funds in the bank alleged for the payment of said checks", approved the sentence and forwarded the record of trial for action under Article of War 48.

3. For the prosecution.

a. Charge I, Specification - absence without leave. Supplementing accused's pleas of guilty to this Charge and its Specification, the prosecution

introduced in evidence without objection a duly authenticated extract copy of the morning report of accused's organization (Section E Trainee 114th AAF Base Unit, Army Air Base, Chatham Field, Georgia) for 12 July 1944, upon which accused was carried as from duty to AWOL as of 7:00 p.m. on 8 July 1944 (R. 11, Ex. 1). A duly authenticated extract copy of the morning reports of the Guardhouse, Army Air Forces Overseas Replacement Depot, Kearns, Utah, was also introduced in evidence without objection. It contains an entry showing accused to have been there confined on 29 August 1944 (R. 11, Ex. 2).

b. Charge II and its ten specifications allege, in substance, that accused wrongfully and unlawfully, and with intent to defraud, made and uttered his worthless personal checks in violation of Article of War 96. Accused was found not guilty of Specification 2 of Charge II. The several checks as described in the specifications or photostatic copies of the same, all of which were drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, were properly identified and introduced in evidence without objection (R. 11, Exs. 3, 4, 5; R. 12, Ex. 6 and attachments thereto). It was stipulated that the photostatic copies of checks, where used, could be introduced in evidence in lieu of the originals (R. 12; Ex. 6).

Second Lieutenant James M. Crofwell, the Officers' Mess Officer, 114th AAF Base Unit, Chatham Field, Georgia, testified that accused received cash from the officers' mess in exchange for the two checks described in Specifications 1 and 3 (R. 11). It was stipulated that if named individuals, officers or employees of the various firms to which the checks described in Specifications 4 to 10, inclusive, are alleged to have been negotiated, were present and sworn as witnesses, they would testify regarding the respective checks negotiated with their respective firms that such checks were presented by the accused and that in each instance the accused received in exchange cash, merchandise, or credit on account, and that in each instance the check was deposited for collection and returned by the bank upon which drawn, marked either "Pay check not in" or "insufficient funds" (R. 12; Ex. 6). The aggregate amount of the checks as described in the specifications of which accused was found guilty is $177.74.

It was stipulated that if W. L. Bailey, assistant cashier of the National Bank of Fort Sam Houston, Texas (bank upon which all of the checks in question were drawn), were present and testified under oath, he would testify that accused maintained a checking account with the named bank during the months of June, July, and August 1944, but that accused did not have sufficient money on deposit to pay the respective checks described in Specification 1 and Specifications 3 to 10, inclusive, either at the time such checks were issued or at the time they were presented for payment; that each

of these checks was duly presented to the drawee bank for payment and that the bank in each instance refused to pay the same because accused had insufficient funds on deposit to meet the check (R. 12; Ex. 6).

4. For the defense.

His right to testify under oath, to make an unsworn statement, or to remain silent having been explained to him, the accused at first elected to make an unsworn statement in which he gave a brief history of his military career. He enlisted on 7 February 1942 as a private and was placed in the Air Corps, unassigned. He took an air mechanic's course and was then accepted for aviation cadet's training. He received his commission on 20 March 1943 and thereafter served as a basic flying instructor for 13 months. He then became a pilot on a B-24, was assigned a crew, and sent to Chatham Field, Savannah, Georgia, for overseas training.

With reference to his absence without leave, accused stated that he went to town with friends on Thursday night (6 July) and "had a party". He was to be briefed the following morning at five o'clock but stated that he did not wake up until about 9:30 a.m. Realizing that he had missed his flight, and since he had no other duties for the day, he concluded to stay in town. He resumed drinking and "the first thing I knew, it was Monday morning". Four days had elapsed during which he had not reported to his base. He stated that he returned to Savannah, where he was informed by a friend that military police were looking for him and that it was planned to reduce him to the status of a co-pilot. He was ashamed and did not want to face the fellows with whom he flew, so concluded to leave and remain away until his former associates had departed the field, after which he intended to return. He planned to go home but was ashamed to face his family and "didn't know what to do". He was apprehended at Salt Lake City, Utah (R. 13).

With reference to the bad checks, accused stated that he knew he was scheduled to go overseas between 1 and 15 September, so about 20 July [June] 1944 he wrote his parents requesting that they deposit "some money" to his credit so that he would be able to pay his outstanding debts, which amounted to about $500, and also have travel money for a trip home during an anticipated leave before going overseas. Several days later he received a letter from his mother in which she stated that she would deposit the money to his credit in the bank, and he thereafter assumed that she had done so (R. 13).

It was stipulated that if certain witnesses were present they would testify that on 1 July 1944 accused was indebted to them in sums aggregating $394.93 (R. 14).

Accused stated further that upon being informed, on or about 1 July 1944, by the clerk of the Officers' Club, that two of his (accused's) checks (apparently two of the checks described in Specifications 1, 2 and 3) had been returned because of insufficient funds, he offered to take up both checks by giving a new check, but the clerk insisted that he either pay cash or make different arrangements with Major Wriston. Accused claimed that, after making two unsuccessful efforts to see Major Wriston, he wired his (accused's) mother for $50; that he forwarded $35 of this money to his bank for deposit, in expectation that the two checks would be redeposited for collection; that, after making a third unsuccessful effort to see Major Wriston, he decided to go to town, cash a check, and pay the two checks with cash, and that when he reached town he began his "escapade" and did not return (R. 13-14).

Accused's mother, Mrs. Maud Hairston, testified that shortly before 15 June 1944 accused wrote her a letter and asked if she would deposit $1000 to his credit in the bank in San Antonio, Texas, with which he was doing business, and that she wrote him that she would deposit the money to his credit by 5 July (R. 14, 15, 16). She stated that when she was ready to make the deposit she discovered that she had misplaced the address of the bank and was therefore unable to deposit the money as promised; that she wrote accused two letters, both of which were returned, and sent him a telegram, and also wrote a finance company in Texas which had held notes against accused's car, in an effort to obtain the name of the bank (R. 15). A copy of a letter written by Mrs. Hairston to General Motors Acceptance Corporation, San Antonio, Texas, dated 9 July 1944, requesting information with reference to the bank in San Antonio, in which accused had had notes on his car, was introduced in evidence (R. 15; Def. Ex. A). Another letter, written by Mrs. Hairston to accused's wife under date of 22 August 1944, was also introduced in evidence (R. 15; Def. Ex. B). In it, Mrs. Hairston expressed regret at hearing that accused was "writing checks", stated that the accused maintained a checking account with a bank in San Antonio, Texas, the name of which she professed not to know, and also stated that she and accused's father felt "responsible in a way" for accused's conduct for the reason that they had promised to aid him financially before he went overseas. Mrs. Hairston testified that she had paid all of accused's worthless checks, but added, "I don't know if you would say it was my money or his money. I am receiving bonds from him" (R. 17). She also testified that she did not hear from accused from 22 June until after he was apprehended on 29 August (R. 16).

The accused then elected to testify under oath in his own behalf. He testified that at the time of writing each of the checks in question he believed it to be a good check (R. 17). He based this opinion on the fact that his mother had informed him that she would mail the money (R. 18). He

represented that $100 of his pay was sent direct to the bank by the Finance Office each month and that he occasionally made additional deposits (R. 20, 21). He kept no accurate account of the checks written by him and, due to frequent moves, had not received bank statements regularly (R. 21).

It was stipulated that all of the checks involved in the instant case were paid before trial (R. 12, 17; Ex. 6, Def. Ex. C).

5. a. Charge I, Specification - Absence without leave, in violation of Article of War 61. The documentary evidence as embodied in the duly authenticated extract copy of the morning report of accused's organization, taken in conjunction with accused's pleas of guilty, clearly establishes that accused was absent without leave between the dates alleged in the Specification, a period of one month and 20 days, and amply supports the findings of guilty of this Charge and Specification.

b. Charge II, Specifications 1, and 3 to 10, inclusive. - Negotiation of worthless checks with intent to defraud, in violation of Article of War 96. Under the action of the reviewing authority, the accused stands convicted of wrongfully and unlawfully negotiating the two checks described in Specifications 1 and 3 with intent to defraud, and of wrongfully, but without intent to defraud, negotiating the seven checks described in Specifications 4 to 10, inclusive, without having sufficient funds in the drawee bank to meet said checks, or, in effect, of a wrongful failure to maintain a sufficient bank account to meet these seven last mentioned checks. The evidence clearly shows that the nine checks as described in the several specifications were negotiated by accused, that he received in exchange for the checks cash, merchandise, or credit on account, and that each of said checks was dishonored and returned by the drawee bank because accused did not have sufficient money on deposit to meet it. The only apparent reason for the distinction made by the reviewing authority between Specifications 1 and 3 and Specifications 4 to 10, inclusive, is that the checks described in Specifications 1 and 3 were negotiated before 5 July 1944 (on 13 and 25 June, respectively), while those described in Specifications 4 to 10, inclusive, were negotiated after that date (on and after 29 July), 5 July being the date by which accused's mother testified she had promised him that she and his father would deposit $1000 to his credit in the drawee bank. The accused never received notice from any source that any money had been actually deposited to his credit in the drawee bank by his parents and he knew before going absent without leave, long before he negotiated the checks described in Specifications 4 to 10, inclusive, that his checks were being dishonored because of insufficient funds. Under these circumstances, accused clearly was not in a position to claim that his action in negotiating these seven worthless checks was the result of an honest mistake not caused by his own carelessness or neglect. The record is amply sufficient to sustain the

findings of guilty of Specifications 4 to 10, inclusive, as approved by the reviewing authority (Sec. 454 (67), Bull. JAG, July 1944, pp. 288-290). The evidence is likewise legally sufficient to support the findings of guilty of Specifications 1 and 3. The checks described in these Specifications were, as above stated, negotiated for value and were dishonored by the drawee bank because of insufficient funds. The accused was notified of the dishonor of at least one, and possibly both, of these checks. By his own admission he received $50 from his mother on the strength of having outstanding these bad checks, but failed to apply this money to their redemption. He absented himself without leave, thereby further impairing his ability to pay the checks, and continued to disregard his obligation to pay them. He failed to produce bank statements or other satisfactory evidence showing deposits and withdrawals which might reasonably have accounted for uncertainty on his part as to the amount of his bank balance at the time he negotiated the checks in question. The court was warranted in inferring from these facts that accused knew at the time he negotiated the checks that he did not have sufficient funds on deposit to meet them and that he negotiated them with intent to defraud.

6. War Department records disclose that this officer is 22 years of age and single (the record of trial indicates that he is now married). He completed the eleventh grade in high school but is not a high school graduate. He worked as a rotary helper drilling oil wells before entering the service. He entered the service in February 1942, studied mechanics in the Air Corps for a time, became an aviation cadet, was commissioned a second lieutenant, Army of the United States, on 20 March 1943, and entered on active duty the same date. According to a report of the Bureau of Federal Investigation attached to his 201 file, accused appears to have been arrested by civil authorities on 27 April 1939 for burglary from which he was released upon the order of the juvenile court. The same report indicates that in May 1940 he was fined $10.00 by civil authorities for being drunk.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 12 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 Chester R. Hairston (O-674302), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings, as approved by the reviewing authority, and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution. I further recommend that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 50, 27 Jan 1945)

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

SPJGN
CM 267678

11 JAN 1945

UNITED STATES	)	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND
v.	)	
Lieutenant Colonel HARVEY R. RANKIN (O-182769), Quartermaster Corps.	)	Trial by G.C.M., convened at Las Vegas Army Air Field, Las Vegas, Nevada, 31 August to 8 September 1944. Dismissal and fine of $1,000.

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 83rd Article of War.

Specification 1: In that Harvey R. Rankin, Lieutenant Colonel, QMC, then Base Quartermaster, Las Vegas Army Air Field, Las Vegas, Nevada, did, at Las Vegas Army Air Field, Las Vegas, Nevada, from about 1 June 1943 to about 1 March 1944 at, approximately semi-monthly intervals, wilfully suffer about five (5) whole hams, about five (5) slabs of bacon, about forty (40) pounds of fresh beef, and miscellaneous fruits and produce of a total value of approximately fifty-six dollars and eighty cents ($56.80), military property belonging to the United States to be wrongfully and unlawfully taken by Major (then Captain) Leonard F. Stevens, QMC.

Specification 2: In that Harvey R. Rankin, Lieutenant Colonel, QMC, then Base Quartermaster, Las Vegas Army Air Field, Las Vegas, Nevada, did at Las Vegas Army Air Field, Las Vegas, Nevada, daily from about 1 February 1943 to about 1 March 1944, willfully suffer

meats, produce, dairy products and fruits of a total value of about three hundred fifty dollars ($350.00) military property belonging to the United States, to be wrongfully consumed by the enlisted men and officers at the Cold Storage Warehouse.

Specification 3: Finding of not guilty.

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

Specification 1: In that Harvey R. Rankin, Lieutenant Colonel, QMC, then Base Quartermaster, Las Vegas Army Air Field, Las Vegas, Nevada, for the purpose of aiding Western Heating and Ventilating Company, a partnership, Las Vegas, Nevada, to obtain the allowance and payment of a false claim against the United States by presenting to J. M. Jones, Major, Finance Department, Finance Officer at Las Vegas Army Air Field, Las Vegas, Nevada, an officer of the United States duly authorized to approve, pay, and allow such claims, did, at Las Vegas Army Air Field, Las Vegas, Nevada, on or about 14 February 1944, make a certain paper, to wit, Quartermaster Purchase Order #A986, which as he, the said Harvey R. Rankin, Lieutenant Colonel, QMC, then knew contained a statement setting forth the unit price of Oil, Burner #2 (distillate) in acc. with Fed. Spec. No. VV-O-326 dated 12 Feb. 40, as ordered by the United States, as seven and one-half cents (.075) per gallon, which statement was false in that the price of Oil, Burner #2 (distillate) in acc. with Fed. Spec. No. VV-O-326 dated 12 Feb. 40, ordered by the United States, was six and one-half cents (.065) per gallon, and was then known by the said Harvey R. Rankin, Lieutenant Colonel, QMC, to be false.

Specification 2: In that Harvey R. Rankin, Lieutenant Colonel, QMC, then Base Quartermaster, Las Vegas Army Air Field, Las Vegas, Nevada, for the purpose of aiding Western Heating and Ventilating Company, a partnership, Las Vegas, Nevada, to obtain the allowance and payment of a false claim against the United States by presenting to J. M. Jones, Major, Finance Department, Finance Officer at Las Vegas Army Air Field, Las Vegas, Nevada, an officer of the United States duly authorized to approve, pay, and allow such claims, did, at Las Vegas Army Air Field, Las Vegas, Nevada, on or about 16 February 1944, make a certain paper, to wit, Quartermaster Purchase Order #A979, which as he, the said Harvey R. Rankin, Lieutenant Colonel, QMC, then knew contained a statement setting forth the unit price of Oil, Burner #3 (Distillate) in acc. with Fed. Spec. No.

VV-O-326 dated 12 Feb 40, as ordered by the United States, as seven cents (.07) per gallon, which statement was false in that the price of Oil, Burner #3 (Distiallate in acc. with Fed. Spec. No. VV-O-326 dated 12 Feb 40, ordered by the United States, was six cents (.06) per gallon, and was then known by the said Harvey R. Rankin, Lieutenant Colonel, QMC, to be false.

Specification 3: In that Harvey R. Rankin, Lieutenant Colonel, QMC, then Base Quartermaster, Las Vegas Army Air Field, Las Vegas, Nevada, for the purpose of aiding Western Heating and Ventilating Company, a partnership, Las Vegas, Nevada, to obtain the allowance and payment of a false claim against the United States by presenting to J. M. Jones, Major, Finance Department, Finance Officer at Las Vegas Army Air Field, Las Vegas, Nevada, an officer of the United States duly authorized to approve, pay, and allow such claims, did, at Las Vegas Army Air Field, Las Vegas, Nevada, on or about 21 February 1944, make a certain paper, to wit, Quartermaster Purchase Order #A1012, which, as he, the said Harvey R. Rankin, Lieutenant Colonel, QMC, then knew contained a statement setting forth the unit price of Oil, Burner #3 (distillate) in acc. with Fed. Spec. No. VV-O-326 dated 12 Feb 40, as ordered by the United States, as seven cents (.07) per gallon, which statement was false in that the price of Oil, Burner #3 (distillate) in acc. with Fed. Spec. No. VV-O-326 dated 12 Feb 40, ordered by the United States, was six cents (.06) per gallon, and was then known by the said Harvey R. Rankin, Lieutenant Colonel, QMC, to be false.

Specification 4: In that Harvey R. Rankin, Lieutenant Colonel, QMC, then Base Quartermaster, Las Vegas Army Air Field, Las Vegas, Nevada, for the purpose of aiding Western Heating and Ventilating Company, a partnership, Las Vegas, Nevada, to obtain the allowance and payment of a false claim against the United States, by presenting to J. M. Jones, Major, Finance Department, Finance Officer at Las Vegas Army Air Field, Las Vegas, Nevada, an officer of the United States duly authorized to approve, pay, and allow such claims, did, at Las Vegas Army Air Field, Las Vegas, Nevada, on or about 23 February 1944, make a certain paper, to wit, Quartermaster Purchase Order No. A1018, which, as he, the said Harvey R. Rankin, Lieutenant Colonel, QMC, then knew contained a statement setting forth the unit price of Oil, Burner #3 (distillate) in acc. with Fed. Spec. No. VV-O-326 dated 12 Feb. 40, as ordered by the United States, as seven cents (.07) per gallon, which statement was false in that the price of Oil, Burner #3 (distillate)

in acc. with Fed. Spec. No. VV-O-326 dated 12 Feb. 40, ordered by the United States, was six cents (.06) per gallon, and was then known by the said Harvey R. Rankin, Lieutenant Colonel, QMC, to be false.

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

Specification 1: In that Harvey R. Rankin, Lieutenant Colonel, QMC, did, at Las Vegas Army Air Field, Las Vegas, Nevada, from about 15 May 1943 to about 1 March 1944, at approximately weekly intervals, wrongfully and unlawfully take for personal use about ten (10) slabs of bacon, about ten (10) whole hams, about one hundred twenty (120) pounds of fresh beef, about forty (40) pounds of butter, and miscellaneous fruits and produce, all property of the United States and of a total value of about one hundred forty dollars ($140.00).

Specification 2: In that Harvey R. Rankin, Lieutenant Colonel, QMC, did, at Las Vegas Army Air Field, Las Vegas, Nevada, from about 15 May 1943 to about 1 March 1944, at approximately weekly intervals, wrongfully and unlawfully take for his own use, about one hundred twenty (120) pounds of ham, eighty (80) pounds of bacon, and one hundred twenty (120) pounds of fresh beef, without surrendering the proper ration coupons, in violation of the Emergency Price Control Act of 1942 as amended.

Specification 3: Finding of guilty disapproved by reviewing authority.

Specification 4: Finding of guilty disapproved by reviewing authority.

Specification 5: Finding of not guilty.

Specification 6: In that Harvey R. Rankin, Lieutenant Colonel, QMC, then Base Quartermaster at Las Vegas Army Air Field, Las Vegas, Nevada, did, at Las Vegas Army Air Field, Las Vegas, Nevada, on or about 22 January 1944, wrongfully and unlawfully order Second Lieutenant Edward M. Petrask, QMC, to purchase for the United States in his official capacity as Assistant Purchasing and Contracting Officer, Las Vegas Army Air Field, Las Vegas, Nevada, fuel oil from Western Heating and Ventilating Company at one cent (.01) per gallon in excess of the regular price.

Specification 7: Finding of not guilty.

Specification 8: Finding of guilty disapproved by reviewing authority.

Specification 9: Finding of guilty disapproved by reviewing authority.

The accused pleaded not guilty to all Charges and Specifications and was found not guilty of Specification 3 of Charge I and Specifications 5 and 7 of Charge III; guilty of Specification 2 of Charge I "except the words and figures 'of a total value of about three hundred fifty dollars ($350.00),' substituting therefor the words and figures 'of a value of more than fifty dollars ($50.00)'"; guilty of Specification 1 of Charge III "except the words and figures 'about ten (10) slabs of bacon, about ten (10) whole hams, about one hundred twenty (120) pounds of fresh beef, about forty (40) pounds of butter,' substituting therefor the words 'slabs of bacon, whole hams, fresh beef, butter,' and except the words and figures 'of about one hundred forty dollars ($140.00),' substituting therefor the words and figures 'of more than fifty dollars ($50.00)'"; guilty of Specification 2 of Charge III "except the words and figures 'about one hundred twenty (120) pounds of ham, eighty (80) pounds of bacon, and one hundred twenty (120) pounds of fresh beef,' substituting therefor the words 'quantities of ham, bacon, and fresh beef'"; and guilty of all Charges and all other Specifications thereunder. He was sentenced to be dismissed the service and to pay to the United States a fine of $1000.00. The reviewing authority disapproved the findings of guilty of Specifications 3, 4, 8, and 9 of Charge III, 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 was the Quartermaster at Las Vegas Army Air Field (R. 33). One of the installations under his supervision was a cold storage warehouse in which were deposited meats, butter, vegetables, and other perishables ultimately destined for delivery to various distributing and consuming agencies including the sales store and various mess halls (R. 33-34, 38, 60). Issuance of any of these commodities directly to individual officers or enlisted men was not authorized (R. 34).

Prior to the institution of the rationing program the accused had maintained a private box in the freezer compartment of the cold storage warehouse. In this space he kept for his own consumption butter, bacon, cheese, ham, pork, and "full quarters of beef" (R. 35, 51). All or almost all of these items were purchased through the sales store and were recorded on so-called "tally-out sheets", the last of which was dated 27 March 1943 (R. 51-52, 55-57; Pros. Ex. 2).

Within a few weeks after the institution of rationing the contents of the box were depleted. While in one of the freezing compartments on or about 15 May 1943, the accused discussed the restric-

tions upon the consumption of meat with Sergeant Clifford D. Aaby, the "NCO in charge of Cold Storage Warehouse". In the course of their conversation the accused "made a statement . . . to the effect that rationing was going to be rough on him" (R. 33, 35). To avert the inconvenience which compliance with the new regulatory program would have entailed, he on that day commenced a practice of taking meat, cheese, and butter from the government stores in the cold storage warehouse for his own personal use. The first article appropriated by him was "either a ham or a bacon" (R. 35-36). Thereafter until approximately 1 March 1944 he helped himself to one of each of these items "on an average of once a month" (R. 36-37, 64). Hams ranged in weight from ten to sixteen pounds and bacons from six to twelve pounds (R. 36). The cost to the government of the former was from thirty to thirty-two cents per pound and of the latter from twenty-five to twenty-six cents per pound (R. 36). Beef in the form of roasts, rib-roasts, and steaks was taken by the accused during all but one month of the same period at even more frequent intervals which have been variously estimated as weekly and bi-weekly. During the month referred to he consumed a deer which he had slain. The roasts weighed three to five pounds each and the steaks one to four pounds each (R. 38, 63). They had been purchased by the government at a price of twenty-two to twenty-three cents per pound. Butter would be removed from the warehouse by the accused at the rate of about a pound a week. The total amount of cheese diverted by him to his personal uses over the entire period of nine and a half months was ten pounds (R. 40, 54, 65-68).

Neither Sergeant Aaby nor Private First Class Elroy L. Morgan, who was assigned to the warehouse as a clerk and bookkeeper, ever received cash or ration points for any of these commodities (R. 36-38, 41, 62, 64). No tally-outs were prepared and no other records of "what was missing" were kept (R. 38, 62, 66). Morgan originally accounted for the resulting deficiencies in beef by charging them to a "squadron of dogs" maintained at the post (R. 70). The shortage in ham and bacon was successfully concealed by removing only one of either item from any single box and by rearranging the remainder. Since weights were rarely checked, the depleted crates would be accepted by the consolidated mess halls as full (R. 64, 71).

The accused did not restrict his appropriations to rationed foods. Every week, usually on a Saturday afternoon, he would conduct "an inspection tour" of the fruit and vegetable boxes and would pack a large shopping bag with "a little bit" from each of them (R. 38-41, 50, 61-62, 64-65; Pros. Ex. 1). Since they each thus lost an amount too small to be particularly noticeable, full charge could be and was made for them to the consolidated mess halls (R. 42, 64, 66). The cost to the government of the fruits and vegetables carried away by the accused was approximately one dollar per week (R. 40, 42). As in the case of the meat, they were neither paid for nor tallied out (R. 39-40).

By these depredations upon government stores the accused set an example which was followed by other officers and, in particular, by Major (then Captain) Leonard F. Stevens, the Assistant Quartermaster, who helped himself to some of the produce about every other week (R. 30, 35, 46, 53, 62). Fresh beef, fruits, and vegetables were taken by Major Stevens on each of his visits and a ham and a slab of bacon "every two months or so" (R. 46). Although neither money nor ration points were obtained for these items, and although they were carried away with the knowledge and often in the presence of the accused, he offered no objection whatsoever (R. 46-47, 61). His conduct did not escape the notice of the enlisted personnel employed in and about the warehouse, and they, too, decided to avail themselves of the opportunity presented (R. 70). Several of the married men augmented their family larders with government provisions. Private First Class Morgan, for example, took meat and butter home "once a week" (R. 69). At the warehouse itself he, Sergeant Aaby, Corporal Deanovic, Corporal Fraidenburg, Private Bryant, Private Anderson, and a number of enlisted members of the Veterinary Corps, during the period between January of 1943 and March of 1944, habitually ate lunches comprised of cold storage commodities. Not infrequently they were joined by certain officers including the accused and Major Stevens (R. 42-45, 48, 66). Until April of 1943 the food was consumed cold but in that month Sergeant Aaby obtained a small electric broiler stove which was thenceforward used to prepare steaks, eggs, ham, and "Mulligan stew" (R. 45, 48, 66). Although none of the enlisted men had been authorized to eat at the cold storage warehouse, the accused presented no objections (R. 58, 72). Major Stevens failed to inquire concerning the source of the food consumed (R. 49).

Previously, on 20 November 1942, in response to an informal invitation, Western Heating & Ventilating Company and Consumers Oil Company, as co-partners, had submitted an informal bid for the delivery of fuel oil to, and the construction of four oil storage tanks at, Las Vegas Army Gunnery School, Las Vegas. An "acceptance" on behalf of the government was executed by the accused as Quartermaster on 4 December 1942 (R. 280-281; Pros. Ex. 25). Under the terms of the completed contract Western Heating & Ventilating Company and Consumers Oil Company were to construct the tanks at their own expense but they were to be reimbursed the entire cost of $6500.00 by the addition of $.013 per gallon to the price of the first 500,000 gallons of oil delivered (R. 251, 281). This amortization scheme proved to be based upon an exaggerated estimate of the fuel oil requirements of the post. Realizing that far less than 500,000 gallons would be used, the two companies wrote in part as follows to the accused on 14 March 1943:

> "To and including this date we have delivered a total of 197,406 gallons under this contract; and with the filling of the four 20,000 gallon tanks which are now com-

> pleted it would appear that our total deliveries will approximate only 280,000 gallons. We would like some expression from you as to your issuance of a supplement to re-imburse us for our expenditure of $6500.00, amortized on the basis say of 280,000 gallons delivered".

Having apparently consulted with the Ninth Service Command, the accused in October of 1943 handed the communication to Second Lieutenant Edward M. Petrask, the Purchasing and Contracting Officer, and instructed him to arrange for the full reimbursement of the oil companies (R. 237-238, 249-250, 252, 256; Def. Ex. A).

After familiarizing himself with the details and background of the original contract by conferring with Mr. Charles L. Dimock, the Manager of the Western Heating and Ventilating Company, Lieutenant Petrask drafted Change Order B which provided for a retroactive increase in the price of the oil delivered aggregating $2354.64. This sum represented the difference between the amounts already collected under the amortization program and the total cost of the four storage tanks (R. 188, 250-251, 256, 258, 266, 268, 282; Def. Ex. B). Change Order B was initially opposed by Mr. Dimock because it made no allowance for deliveries to Indian Springs, a substation located some forty-five miles from Las Vegas as compared with a distance from the city of only eight miles in the case of the field proper (R. 256-257, 265). It was his contention that the $.013 added to the price of oil delivered to Indian Springs represented merely extra compensation for the larger haul and was never intended to be included as part of the amortization of the storage tanks (R. 257, 264). Since the original contract was completely silent concerning deliveries to Indian Springs and since no supplemental agreement had been executed settling the question, Lieutenant Petrask informed him that Change Order B would not be modified. The document was thereupon pre-dated 30 March 1943 in accordance with the directions of the Ninth Service Command, and Mr. Dimock affixed his signature on behalf of the Western Heating & Ventilating Company and Consumers Oil Company (R. 257, 262, 265; Def. Ex. B). At no time in the course of his conversations with Lieutenant Petrask was any specific sum claimed as extra compensation for the long haul to Indian Springs (R. 257). In January of 1944 the sum of $2354.64 was paid to the two oil companies and accepted by them (R. 259, 263, 266; Pros. Ex. 24). They were thus finally fully reimbursed for their total construction cost of $6500.00 (R. 260, 268).

When their agreement for the supply of fuel oil had expired on 30 March 1943, it had not been renewed. For a brief period their place was taken by the Wilshire Oil Company but eventually a treasury procurement contract was awarded to Tar and McComb Company. Under the terms of this contract Tar and McComb Company was to keep the storage tanks filled with fuel oil but no provision was made for delivery from them to the individual consuming units on the post (R. 201, 221, 230, 232, 238, 241). Before being supplanted the Wilshire Oil Company had

performed this latter function also and, for compensation of one cent per gallon, had furnished twenty-four hour service with a twenty thousand gallon tank trailer not only to the field proper but to Indian Springs as well (R. 197, 238). In August or September of 1943 the Wilshire Oil Company withdrew its facilities, and the job of delivering oil from the storage tanks to the two hundred odd individual consuming units at both places was delegated to the Western Heating & Ventilating Company upon the same terms or conditions as its predecessor. No written contract was executed during the next three months. In that period under a purely informal arrangement approximately one hundred and twenty-five thousand gallons of oil were transferred to individual tanks both at the post and at Indian Springs for a fixed charge of one cent per gallon (R. 191, 196-197, 203-204, 208, 218, 238-239, 265). All of this hauling was done with a one thousand gallon tank truck (R. 197).

Around "the beginning of November" of 1943 the accused obtained written authority from the Treasury Department to let a contract providing compensation at the rate of one and one half cents per gallon for the delivery of fuel oil from the storage tanks to the individual consuming units at the field and at Indian Springs (R. 239). He immediately directed Lieutenant Petrask to prepare invitations to bid. Lieutenant Petrask complied and in addition drew up a list of qualified haulers including the Arrowhead Freight Lines. Upon being shown a copy of the proposed invitation to bid, the accused ordered that it be mailed only to Western Heating & Ventilating Company because "they were delivering the oil now and they were very satisfactory" (R. 239-240). The instrument was mailed as directed and on 12 November 1943 that concern and the Consumers Oil Company jointly submitted a bid of one and one-half cents per gallon. It was accepted on behalf of the government by Lieutenant Petrask as Purchasing and Contracting Officer on 27 November 1943 (R. 188-189, 240; Pros. Ex. 21). No other bids were of course presented (R. 240). During the ensuing winter season $9, 281.63 was paid to the companies for their delivery services (R. 282). At the time of the trial Western Heating & Ventilating Company and Consumers Oil Company were again delivering oil for one cent per gallon (R. 275). Arrowhead Freight Lines would have been willing to haul at that price in November of 1943 (R. 272).

Paragraph 21 of the executed contract read as follows:

> "The contractor will furnish necessary distribution equipment to adequately supply units listed in Par. 20. Equipment and operating personnel will be available to maintain twenty-four (24) hour per day service. All operating expenses including maintenance and repair will be the obligation of the Contractor" (R. 195; Pros. Ex. 21).

In a letter accompanying the bid Mr. Dimock had represented that:

"We will have a Truck and Trailer of 2500 gallon capacity, equipped with pump, meter, etc., and a driver which will be at your service at all times. This will assure you of the type and kind of service you need and we have every reason to believe that this service will be entirely satisfactory to you" (R. 189; Pros. Ex. 22).

Beginning with 1 December 1943 and throughout the winter of 1943-1944 Western Heating & Ventilating Company and Consumers Oil Company in accordance with their agreement furnished a Ford truck and trailer having a total capacity of 2500 gallons (R. 198). As under the preceding informal arrangement, the services of a civilian driver were also provided (R. 198, 228). Despite, however, the clear language of both paragraph 21 of the contract, and the letter accompanying the bid, the truck was neither equipped with a meter nor ever made available for deliveries beyond the ordinary working day beginning at 9:30 a.m. and ending at 5:00 p.m. (R. 198, 205, 212). The only measuring devices used were two "home-made" calibrated "sticks" (R. 210-211). During the cold weather some of the individual consuming units were on many occasions without fuel, "sometimes" because there was insufficient oil in the storage tanks and as often because the truck was not at the field "long enough" to perform its function (R. 200, 207, 222). Corporal Simmie Hodge, who was assigned to assist the civilian driver, attempted to alleviate the shortage by using a "G.I. truck" (R. 196, 199, 214). Upon learning of this practice the accused directed that it be terminated. Subjected to a constant demand for oil, Hodge disregarded the order (R. 201).

Numerous complaints about the lack of fuel were made to First Lieutenant Peter Evolga, the Assistant Property Officer, and he in turn complained to the accused and to the Western Heating & Ventilating Company. The situation was brought to the accused's attention approximately ten times, but his reply was that he had a contract and that the service being rendered was "satisfactory". Although over one hundred calls, including as many as seven in one day, were made by Lieutenant Evolga to the office of Western Heating & Ventilating Company, they failed to expedite deliveries (R. 219-221, 223, 225-226, 234-235). On several of these occasions he spoke to Mr. Dimock personally (R. 221).

Many of these conversations related to local purchases of fuel oil to supplement the deliveries by Tar and McComb Company who because of shortages in their refineries and unfavorable weather conditions were unable to furnish an adequate supply to the storage tanks (R. 229, 231, 241). At the accused's direction all emergency requirements of fuel oil were to be obtained from the Western Heating & Ventilating Company. One purchase was made from "National Ice", but upon learning of the transaction he instructed Lieutenant Evolga "to buy it from Western Heating," and no other exception was made (R. 229-230).

The price originally charged on these emergency orders was six and one-half cents per gallon for fuel oil number 2 and six cents per gallon for fuel oil number 3 (R. 241, 247-248). In January of 1944 Lieutenant Evolga and Lieutenant Petrask conferred with the accused about the oil shortage. Lieutenant Evolga remarked that "Western Heating and Ventilating Company isn't giving us satisfaction in bringing oil out here, and ... if we had it here they wouldn't be here to deliver it". To this criticism the accused replied that they "had a shortage of some $500.00 to $700.00 to make up with Western Heating and Ventilating" and that it was to be the recipient of all future emergency orders. When Lieutenant Evolga again remonstrated and urged that the oil be obtained "elsewhere", the accused said, "We will buy it from Western Heating and Ventilating .... That is all." Without any further protest Lieutenant Evolga saluted and left the room. To Lieutenant Petrask, who remained, the accused gave the exact amount of the purported shortage which was $762.68 and directed that it be amortized "by adding one penny to the regular price of fuel oil bought from Western Heating and Ventilating ..." (R. 220, 242, 244).

In accordance with these instructions four purchase orders addressed to Western Heating & Ventilating Company and Consumers Oil Company were prepared, all of which were signed by the accused. Their contents may be briefly summarized as follows:

Date	Type of oil	Quantity	Price per gallon
14 February 1944	#2	10,000 gallons	$.075
16 February 1944	#3	15,000 gallons	$.07
21 February 1944	#3	20,000 gallons	$.07
23 February 1944	#3	2,500 gallons	$.07

(R. 76-77; Pros. Exs. 4, 5, 6, 7).

In each instance the sum charged per unit was one cent in excess of the market price (R. 246-248). All of the oil ordered was delivered and paid for in full. A record of the amortization of the purported obligation to Western Heating & Ventilating Company maintained in Lieutenant Evolga's office showed a net balance of $126.43 still due and owing as of 23 February 1944 (R. 243-244; Pros. Ex. 23). No further entries were made after this date because, according to Lieutenant Petrask,

> "* * around that time, approximately the end of February, Colonel Rankin called me into his office and told me that beginning right then we would cease adding one cent on to the regular price of fuel oil and he also told me that we had paid Western Heating and Ventilating Company $25.00 too much on that

shortage — that there had been some mistake made, and Colonel Rankin instructed me to bring the price of fuel oil back to the regular price and on the next shipment of 2400 gallons of fuel oil to deduct one cent per gallon from that price to get the $25.00 back for the Government that was paid over—that was overpaid" (R. 246).

After the payment of $2354.64 under the provisions of Change Order B, the records of the field failed to disclose that any shortage of $762.68 or in any other sum was due to Western Heating & Ventilating Company or to Consumers Oil Company (R. 242, 259-260, 283). During the period of their acquaintance and business dealings the accused was twice entertained socially and twice presented with small Christmas gifts by Mr. Dimock (R. 190, 192-193).

4. The accused, after being apprised of his rights as a witness, took the stand on his own behalf and was examined at great length. His testimony and that of the numerous other witnesses for the defense was extremely voluminous. In the main it conceded that he had been guilty of several irregularities, but sought to justify them as having been committed in good faith.

His record in the military service dated back to 1910. He served overseas in World War I at Verdun, "San Miguel", and the Argonne, was wounded in action, and was discharged in 1919 with the rank of Captain (R. 530-531, 535; Def. Exs. EE, Y, Z). After his return to this country he enlisted in the Kansas National Guard as a first lieutenant and was thereafter twice promoted (R. 532; Def. Ex. CC). He was called to active duty in this war as a major on 22 December 1940 (R. 536). His initial assignments were in Field Artillery but in December of 1941 he was transferred to the Quartermaster Corps (R. 538). Approximately two years later on 8 December 1943 he was promoted to lieutenant colonel (R. 540-541; Def. Ex. NN). Both while a civilian and after his call to active duty in 1940 his reputation for honesty, truth, and veracity was excellent (R. 325; Def. Ex. T).

Subsequent to the institution of the rationing program, whenever ham and bacon were not available at the sales store, he would take some of each item from the cold storage warehouse. Invariably, however, on the same or the following day he would pay the cash price and the requisite "OPA points" to either Corporal David Taylor or Corporal William R. Waters, who were employed at the sales store (R. 470, 472, 474, 478-479, 488, 492, 494, 560, 573-574, 578, 644-645). The accused did not consider the practice "irregular" as long as it was followed only by "somebody in the Quartermaster Corps." In his own words, "anything within your own organization, you might do a little differently than you would if somebody outside of your organization came in to do it" (R. 603, 634). Since the warehouse, the cold storage warehouse, and the sales store

were all inventoried together as a unit, tally-outs from one to either of the others were superfluous and were discontinued early in 1943 at the behest of a Major Neuman, who was the "Inspecting Officer out of the Quartermaster Office at West Coast" (R. 474, 499-500, 514, 602).

About three times a month the accused and Major Stevens would carry away fruits and vegetables without paying for them. The amount varied with the size of the paper bags which "happened to be around at the time" (R. 482-483, 560-561, 645). In "the large sacks there might be a dollar's worth. In the small sacks it couldn't exceed fifty cents" (R. 561). These appropriations were all for "sampling purposes" under Paragraph 5d, Change 11, 26 November 1943, AR 35-6660, 29 August 1942, which reads as follows:

> "d Samples.
>
> (1) Articles withdrawn from shipments for testing purposes in connection with inspection prior to acceptance of the stores on contract or purchase order will be dropped upon the certificate of the sales officer that the stores were withdrawn for testing purposes. If the total value of stores withdrawn for this purpose in any one month exceeds $15.00, the approval of the director of supply or other disinterested officer designated by the commanding officer is required" (R. 521, 561, 603-607, 631, 636-637; Pros. Ex. 26).

The accused sampled the fruits and vegetables by "eating them". In this task he was assisted by his family (R. 603, 637). The accused figured that ". . . /he/ could in that way satisfy my own mind to the effect that we were getting what we should get on the field" (R. 631). He had on occasion found produce that he believed not to be "up to standard" and had so informed the sales officer, but "there was not enough of it to justify a complaint" (R. 637).

Neither Corporal Taylor nor Corporal Waters had ever received money or ration points for beef removed by the accused from cold storage (R. 481-483, 645). The accused himself admitted that he took roasts twice and steaks once without paying cash or points for them (R. 575, 608-610, 629). He explained that

> "on the first occasion, and the same thing applies to all three occasions, I happened into the cold storage and Sergeant Aaby said, 'Colonel, would you like to have a roast?' and, well, just not thinking, I said, 'Why, sure,' or words to that effect, and, 'What have you got?' He said, 'Well, we have got a little

extra piece of meat in here that is the remains of trimming for the dogs' -- police dogs, which we had some on this field and we furnished rations for the dogs at Basic Magnesium. * * * To the best of my judgement in buying meat over the counter, I would say they probably run anywhere from two and one-half to four pounds on the roasts and the steaks would probably be one and one-half or might even run two pounds" (R. 575).

At the time the government was purchasing beef for twenty-two or twenty-three cents per pound (R. 575). The accused was not "trying to steal anything". If he had he "wouldn't have taken it openly before personnel . . . in the warehouse when [he] had a key to the warehouse [himself] and could go in there anytime [he] wanted to and get it" (R. 625).

Upon learning that some enlisted men were eating their lunches at the cold storage warehouse, Major Stevens had immediately asked Sergeant Aaby "what and where he got these provisions", and was told by him "not to worry about it; that he had made arrangements with the mess sergeant" (R. 500, 506-507, 509, 512). The accused made the same inquiry and received the same answer (R. 576-577). He "assumed that it would be all right in view of the fact that ... the men [were required] to work during the noon hour, and ... were not given adequate time to go eat" (R. 511). Both he and Major Stevens took Sergeant Aaby at his word and did not check with the mess sergeant (R. 501). Having themselves partaken of some of the lunches, the accused and Major Stevens were well aware that many of the items consumed came directly from the government stores at the cold storage warehouse (R. 502-503). None of the food was accounted for (R. 506). Its value was estimated by Major Stevens at fifty cents per day (R. 516).

During the months of September, October, and November 1943 Western Heating & Ventilating Company had hauled oil from the storage tanks to the individual consuming units at the field proper and at Indian Springs for only one cent per gallon (R. 336, 394-395, 592-593). Only one or two loads, however, had been delivered to the latter destination (R. 394). The reasons for the increase in price stipulated in the contract accepted 27 November 1943 were twofold. In the first place, although the instrument did not specifically mention Indian Springs, the extra half cent was intended to compensate for the longer and more expensive haul to that installation which received twenty per cent of the total volume of oil purchased (R. 341-342, 593-594). Secondly, there was a greater demand for fuel oil equipment during the winter than during the summer months (R. 595). In arriving at a price for the winter season consideration had to be given to the fact that a tank truck had to be leased and brought from Los Angeles (R. 343, 395). The quotation of the two contracting companies for delivery to the field only was always

one cent per gallon (R. 341, 345). The deliveries at that price at the time of the trial, despite a rise in transportation costs, were explained by the exclusion of Indian Springs (R. 338, 399).

Although Western Heating & Ventilating Company was the only concern to whom an invitation to bid on the hauling contract in November of 1943, the accused had previously contacted five or six of the major oil companies and a trucking company on the telephone (R. 400, 552, 594-595, 641-642). None of them wanted the job (R. 594-595). The accused had not called Arrowhead Freight Lines because he "did not know that they had a single truck. [He had] never seen a truck with the Arrowhead sign on it" (R. 552, 596). His order to Lieutenant Petrask not to send invitations to bid to any company other than Western Heating & Ventilating Company was necessitated by "a very critical condition" (R. 597). As "the winter proceeded and the weather got cooler, naturally, there was more demand for oil" (R. 551). According to him,

> "I was darn near crazy with calls coming in from everybody on the field and the Commanding Officer himself had called me on at least one occasion and asked me if there wasn't something I could possibly do to relieve the oil situation as it then existed on the field, and taking all of that into consideration after having previously called the different companies and could get nobody that was interested I did not think, and I still don't think that it was advisable to waste another two or three weeks trying to get somebody to bid when to the best of my belief nobody would bid . . . I thought it was entirely foolish" (R. 551, 597-598).

Mr. Dimock, who was the "only one in town that had shown the slightest inclination to want to help", had agreed to undertake the hauling as "a personal favor" for one and one-half cents per gallon. No other hauler being available, the accused wired Washington and obtained special permission to enter into a contract at that figure (R. 551-552; Def. Exs. OO-RR). He realized that the limitation of the bidding to one concern was an irregular procedure (R. 599). In the opinion of Mr. Edwin Pyle of the Consumers' Oil Company more money could have been made with the hauling equipment in Los Angeles (R. 326-327, 344).

He had intended to provide twenty-four hour service, if necessary (R. 344, 458-459). Largely because of the lack of oil, however, and partly because Corporal Hodge spent part of each afternoon in the day-room playing pool, the working day usually ended about 4:00 or 4:30 p.m. Mr. Charles Everett, the civilian driver, never personally received a complaint from Hodge about the oil shortage and never was requested at night to make deliveries (R. 455, 457-460, 464, 467). Mr. Dimock received only six or eight calls about deliveries from Lieutenant Evolga. Three were on the same day. Most of them were made "at a time when there

was no oil available in the storage" (R. 402, 429, 435, 438-439). Only two or three complaints were made to the accused, one or two by Hodge and one by Lieutenant Evolga. In the accused's opinion "there was no reason why a truck needed to put in more than five or six hours a day if the oil was available in order to keep all of these tanks full at all times; a truck with 2500 gallon capacity" (R. 557). Unfortunately "there never was a time when [Tar and McComb] delivered enough oil to fill or even closely fill all the tanks on the field" (R. 600). Despite the complaints about the delivery service, the accused had ordered Corporal Hodge to desist from using a government truck to meet part of the demand. In the words of the accused "that was just a natural procedure", for, in diverting gallonage from the truck of the contracting companies "we were in a way breaching our contract" (R. 556, 601).

The vehicle furnished was equipped with a pump, a hose, a meter, and a measuring stick (R. 332). The meter was "not working", and a replacement was "almost unobtainable" (R. 333). Individual deliveries were estimated "within five gallons". After the measuring stick was lost, Mr. Everett and his assistants had "to guess at it" (R. 463).

In adding an extra cent per gallon to the price of the fuel oil covered by the purchase orders of 14, 16, 21, and 23 February 1944 the accused merely intended to facilitate the settlement of the deficit due Western Heating & Ventilating Company and Consumers Oil under the contract accepted on 4 December 1944 and to avoid the long delay which an application for approval to higher authority would have involved. The original agreement made no provisions whatsoever for deliveries to Indian Springs (R. 334, 385, 419, 542, 564-565). Upon discovering this oversight, Mr. Dimock and Mr. Pyle immediately conferred with Major (then Captain) LaFayette E. Tyson, the Post Engineer, and demanded that they be paid one and one half cents additional per gallon for the longer haul. After some discussion Major Tyson, according to Mr. Dimock and Mr. Pyle, proposed that the price be fixed at $.013 per gallon, the same as the amortization figure, and that the sums thus earned not be credited to the construction cost of the four storage tanks (R. 329, 386). Major Tyson, on the other hand, testified that he made no such statement and that it was beyond his authority (R. 566, 571). In any event, some 36,668 gallons of oil were delivered by the two companies to Indian Springs during the period covered by the contract accepted 4 December 1944 (R. 390). Under the alleged oral agreement the compensation for this service would have aggregated $476.69 (R. 393).

Realizing that 500,000 gallons would not be used and that consequently the entire construction cost of $6500.00 would not be amortized, Mr. Pyle "in the forepart of March, 1943", discussed the potential deficiency first with the accused and then with Major Lionell T. Campbell of the Ninth Service Command. When informed of the facts, Major Campbell stated that "they did not want to see any contractor lose money

on a job of that kind" and suggested certain steps requisite to a settlement including the writing of a letter to the accused estimating the total oil consumption of the post (R. 328-331). The accused also spoke to Major Campbell and received a similar assurance from him that "the Government did not want anything for nothing, that they expected to pay for everything that they got, and if there was money due these gentlemen, they expected to pay it" (R. 545). Upon receiving the letter suggested to Mr. Pyle by Major Campbell, the accused turned it over to Lieutenant Petrask "with the instruction to carry out the direction as outlined ... from Ninth Service Command", that is, to effect full reimbursement of the money due on the tanks (R. 545).

Change Order B which was drafted to accomplish this end failed to provide any extra compensation for the deliveries to Indian Springs and included them in the amortization gallonage (R. 335, 347). Mr. Dimock signed Change Order B under the impression that it would pay him additional $.013 per gallon for the longer haul (R. 389, 410). When he learned of his error and expressed a disinclination to accept the settlement, Lieutenant Petrask pointed out that, "This has been back and forth so many times, it has taken almost a year now - ten months ... If we throw it out and start out again we will never know when you are going to get your money" (R. 391, 438). Lieutenant Petrask accordingly proposed that the shortage be remedied by adding one cent to the price of fuel oil purchased in the future. "That sounded to /the accused/ like a very good idea" in view of Major Campbell's assertion that the government did not want anything for nothing (R. 391, 438, 442, 546, 587-589). The accused not only offered no objection to the arrangement but personally signed the four purchase orders dated 14, 16, 21, and 23 February 1944 respectively (R. 427-428, 590). Although only $476.69 was due to Western Heating & Ventilating Company and to Consumers Oil Company, $159.56 over and above that sum was collected as a result of the one cent increase in price. This excess has not been repaid (R. 348-350, 408, 425, 454).

5. Sergeant Aaby and Lieutenant Petrask were recalled as witnesses for the prosecution on rebuttal. The former admitted that he had taken meat and butter for his personal use without paying for them and that he had on occasion informed Corporal Taylor that the accused had removed a ham (R. 665-666). Aaby, however, categorically denied that he ever told the accused or Major Stevens that the mess sergeant had either authorized enlisted men to eat at the cold storage warehouse or had provided the articles consumed (R. 662-663, 668). No arrangement was ever made with the mess sergeant for the feeding of enlisted men (R. 669). Their practice of carrying cold storage food off the post did not commence until after the accused had set the example (R. 666-667). Lieutenant Petrask testified that the one cent increase in the price of oil was ordered by the accused (R. 678).

6. Specification 1 of Charge I alleges that the accused did "from about 1 June 1943 to about 1 March 1944 at, approximately semi-monthly intervals, wilfully suffer" certain meats, fruits, and produce, "of a total value of approximately ... ($56.80), military property belonging to the United States to be wrongfully and unlawfully taken by Major (then Captain) Leonard F. Stevens, QMC". Specification 2 of Charge I, as modified by the court-martial, alleges that the accused did "daily from about 1 February 1943 to about 1 March 1944, wilfully suffer meats, produce, dairy products and fruits of a total value of more than ... $50.00, military property of the United States, to be wrongfully consumed by the enlisted men and officers at the Cold Storage Warehouse". These offenses were laid under Article of War 83. Specification 1 of Charge III, as modified by the court-martial, alleges that the accused did "from about 15 May 1943 to about 1 March 1944, at approximately weekly intervals, wrongfully and unlawfully take for personal use slabs of bacon, whole hams, fresh beef, butter, and miscellaneous fruits and produce, all property of the United States and of a total value of more than ... ($50.00)." Specification 2 of Charge III, as modified by the court-martial, alleges that the accused did "from about 15 May 1943 to about 1 March 1944, at approximately weekly intervals, wrongfully and unlawfully take for his own use quantities of ham, bacon, and fresh beef, without surrendering the proper ration coupons, in violation of the Emergency Price Control Act of 1942 as amended." These acts were set forth as violations of Article of War 96.

The accused has acknowledged that he took fresh beef on three occasions without paying for it or surrendering the requisite ration points. He has also frankly conceded that about three times a month he appropriated fruits and vegetables without giving any cash or other consideration for them. That he in addition converted quantities of ham, bacon, and butter is established by the clear and unequivocal testimony of Aaby and Morgan. Their version of the numerous inroads made by the accused upon the provisions in cold storage warehouse is rendered especially convincing and persuasive by his own admissions of petty peculation. His contention that he used the fruit and vegetables for "sampling purposes" under AR 35-6660 is too preposterous to merit any serious consideration. Suffice it to say, that even if that wholly inapplicable regulation could properly be invoked by him there was no necessity for "sampling" such large quantities nor for obtaining the participation and assistance of his family in the "sampling" process.

His peculations were particularly reprehensible because of the evil example which they set for others; for subordinate officers and enlisted men, observing his conduct, also succumbed to the temptation to supplement their rations and to augment their larders at no expense to themselves. To these depredations by his inferiors the accused

offered no objection. The appropriations of government meats, fruits, and vegetables by Major Stevens for personal use and the eating of unauthorized lunches at the cold-storage warehouse by officers and enlisted men were frequently witnessed and without exception countenanced by the accused. Since his failure to object permitted military property "to be consumed, wasted, or injured by other persons", it was a "willful sufferance" within the meaning of Article of War 83 (Paragraph 143, Manual for Courts-Martial, 1928).

While the evidence adduced with respect to the value of the produce taken by the accused, Major Stevens, other officers, and enlisted men was not as exact as might be desired, the monetary amounts set forth in the Specifications as modified by the court represented minimum estimates. At the very outset of the trial Defense Counsel moved to strike Specifications 1 and 2 of Charge I and Specifications 1 and 2 of Charge III on the ground that each stated a series of individual misappropriations which should have been separately alleged and not combined in one pleading. The principle of pleading relied upon to sustain this proposition is foreign to the problem presented. If each of the Specifications had purported to allege a number of independent and wholly unrelated larcenies or misappropriations, the court would have undoubtedly been under a duty to sustain the motion to strike. The pleadings in this case, however, are of a wholly different nature, for each sets out a continuous course of misconduct over an extended period of time. In charging violations of this character it is impractical and often impossible to specify each of the constituent elements and acts with minute accuracy. It is sufficient to plead the general course of conduct within reasonable delimitations of time. As Winthrop has stated in section 198 of his work on Military Law and Precedents, Second Edition,

> "In some cases the offense committed is of a <u>continuing</u> character, extending over a considerable period of time or exhibiting a general habit or course of conduct. In such cases where distinct acts cannot readily be separated and attributed to different dates, it is allowable to charge the misconduct in form somewhat as follows: 'This during (or in or between) the months of _____,'".

The same author in section 191 quotes with approval as follows from Gould's work on pleading:

> "No greater particularity is required than the nature of the thing pleaded will conveniently admit".

Specifications 1 and 2 of Charge I and Specifications 1 and 2 of Charge III, as modified by the court-martial, have been proved beyond a reasonable doubt.

7. Specifications 1, 2, 3, and 4 of Charge II allege that the accused "for the purpose of aiding Western Heating and Ventilating Company, a partnership, ... to obtain the allowance and payment /of certain false claims/ against the United States by presenting to J. M. Jones, Major, Finance Department, ... an officer of the United States duly authorized to approve, pay, and allow such claims, did "on 14, 16, 21, and 23 February 1944, respectively, make certain purchase orders which, as the accused then knew, contained false statements in that they set forth the unit price of oil ordered by the United States at one cent per gallon in excess of the true price. These offenses were charged under Article of War 94. Specification 6 of Charge III alleges that the accused did "on or about 22 January 1944, wrongfully and unlawfully order Second Lieutenant Edward M. Petrask, QMC, to purchase for the United States in his official capacity as Assistant Purchasing and Contracting Officer ... fuel oil from Western Heating and Ventilating Company at one cent (.01) per gallon in excess of the regular price." This was set forth as a violation of Article of War 96.

Although the accused was found not guilty of Specification 5 of Charge III in which he was represented to have been negligent in not enforcing Paragraph 21 of the delivery contract of 27 November 1943 requiring the furnishing of certain distribution equipment and the maintenance of twenty-four hour service and, although he was also found not guilty of Specification 7 of Charge III which set forth that he had caused the United States to accept and enter into that contract "without using reasonable diligence and care in obtaining the best possible price", his conduct in both instances was typical of his relationship with Western Heating & Ventilating Company and Consumers Oil Company. Throughout the period in which he performed the duties of Quartermaster at Las Vegas Army Air Field he consistently and invariably favored and pampered the two concerns and did everything within his power to divert government business to them. This partiality was not shown to have sprung from any hope of personal profit, but, regardless of its cause, it did unquestionably exist.

One of its most recent manifestations was the execution by him of the four purchase orders dated 14, 16, 21, and 23 February 1944 respectively providing for the addition of one cent per gallon to the market price of the fuel oil covered. Western Heating & Ventilating Company and Consumers Oil Company may have been entitled to further compensation for their deliveries to Indian Springs during the winter season of 1942-1943, all of which were clearly outside the scope of the contract accepted on 4 December 1942, but the accused as Quartermaster must have known that only one legal method for the satisfaction of this claim was available and that was to obtain prior approval from the Ninth Service Command. He was not a novice in the performance of his office and can plead neither ignorance nor error of judgment. That he may have personally derived no advantage from the affixing of his signature to a false claim is immaterial. As is pointed out in paragraph 150 of the Manual for Courts-Martial, 1928,

"It is not necessary that the claim be allowed or paid or that it be made by the person to be benefited by the allowance or payment. 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."

The purchase orders were signed with full knowledge of their false content, and an ordinarily prudent man who had held the position of Quartermaster as long as the accused had could not have failed to grasp the significance of his act. The responsibility which devolved upon him by virtue of his position was affirmatively assumed by him when he affixed his own signature to the four purchase orders, and he cannot shift it or divest himself of it by casting the blame upon Lieutenant Petrask or any other junior officer. Specifications 1, 2, 3, and 4 of Charge II and Specification 6 of Charge III have been sustained beyond a reasonable doubt.

8. The accused, who is married and the father of one daughter, is about 55 years old. He was a member of the Kansas National Guard from 14 April 1910 to 4 August 1917 and saw service on the Mexican Border from 19 June to 12 November 1916. Entering the army on 5 August 1917 as a first lieutenant, he participated in several battles in France, was wounded in action on 30 September 1918, and was honorably discharged with the rank of captain on 24 May 1919. He was appointed a first lieutenant, Field Artillery, in the Officers' Reserve Corps on 29 August 1923, and promoted to captain on 11 November 1924. On 13 October 1933 he was federally recognized as a major, Field Artillery, Kansas National Guard, and his status in the Officers' Reserve Corps automatically terminated. He was appointed a major in the National Guard of the United States on 4 April 1934. The Purple Heart was awarded to him on 15 November 1934 for the wound previously sustained by him in France. In the meantime he was employed as a salesman from 1924 to 1929 and as a district agent from 1929 to 1934 by the Sinclair Refining Company. From 1935 to 1937 he worked for the Western Transit Company as purchasing agent, and from 1937 to 1940 he was a district freight agent for the Santa Fe Trail Transportation Company of Wichita, Kansas. Called to active duty with the permanent grade of major on 23 December 1940, he was promoted to lieutenant colonel on 8 December 1943. He requested relief from active duty on 2 March 1944, and on 1 May 1944 his application was approved by the Secretary of War's Separation Board. No final action was, however, taken.

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 Articles of War 83, 94, or 96.

Abner E. Lipscomb, Judge Advocate.

Robert J. Clamor, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN-CM 267678 1st Ind.

8 MAR 1945

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Lieutenant Colonel Harvey R. Rankin (O-182769), 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 as approved by the reviewing authority and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the fine imposed be remitted and that the sentence as thus modified be ordered executed.

3. Consideration has been given to two letters from Honorable Clifford R. Hope, member of Congress, the last of which inclosed letters or statements from Messrs. Don Shaffer, J. R. Cody, Albert S. Bigelow, H. J. Sloan, H. H. Heaps, and W. M. Ruddick, attesting to the excellent character and reputation of the accused.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

5 Incls
Incl 1 - Record of trial
Incl 2 - Lft. of ltr. for sig. S/W
Incl 3 - Form of Executive action
Incl 4 - Ltr. from Hon. Clifford R. Hope
Incl 5 - Ltr. from Hon. Clifford R. Hope with 6 inclosures

(Sentence confirmed but fine remitted. G.C.M.O. 198, 9 Jun 1945)

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

SPJGH
CM 267685

15 DEC 1944

UNITED STATES	)	ARMY AIR FORCES EASTERN TECHNICAL TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Langley Field, Virginia, 21 October 1944. Dismissal.
Second Lieutenant EDMUND F. McCOY (O-712867), Air Corps.	)	

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: Violation of the 95th Article of War.

Specification: In that Second Lieutenant Edmund F. McCoy, Air Corps, Section H, 3539th Army Air Forces Base Unit (Technical School), Langley Field, Virginia, was on or about 27 September 1944, at Club Casino, County of Elizabeth City, Virginia, and Military Police Headquarters, Hampton Roads Port of Embarkation, and Langley Field, Virginia, grossly drunk and conspicuously disorderly in uniform.

Accused pleaded not guilty to the Charge but guilty of a violation of the 96th Article of War; "guilty" to the Specification except the words "grossly drunk and conspicuously disorderly in uniform", substituting therefor the words "drunk and disorderly in uniform under such circumstances as to bring discredit on the military service", to the excepted words not guilty, to the substituted words guilty. He 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. For the prosecution the testimony was that on the night of 27 September 1944, Linwood H. Bottom, manager of the Club Casino, a night club near Newport News, Virginia, was called from his office by the head waiter to quiet a disturbance on the dance floor where the accused was engaged in an altercation with a civilian (R. 7). There were about 200 people (R. 12) in the club at the time, military and civilians, men and women. When Mr. Bottom got to the scene of the disorder, Hal Turner, another employee of the club, had already separated the accused from a civilian (R. 6). The accused was in a belligerent mood and wanted to fight somebody. Mr. Bottom took hold of him. Accused was very drunk. His speech was slightly thick. He wanted to break away and go back to the civilian's table, but by using force, Mr. Bottom finally got him into the office. Turner came into the office and as he entered accused jumped up and said, "You Jew son-of-a-bitch, you hit me in the mouth". Bottom grabbed him and sat him down. Accused said, "My brother will come here and kill you". He was asked if he would be quiet and go back to his barracks. He replied that he was not going "any damn place", that he was going to stay there. Finally the military police authorities were called. Before they arrived two Air Corps lieutenants tried to get him out of the club but he told them he was not going any "god damn place." Lieutenant Thomas of the military police came in and started to talk to him, when accused "suddenly, out of the clear" said, "You bastards, no lieutenant is going to do something to me." His voice was elevated and rowdy, loud enough to attract the attention of other patrons. At the time accused was in the office there were six persons present. The disturbance in the club was sufficient to attract the attention of many of the patrons (R. 7, 8).

Mr. Turner broke up the fight between accused and the civilian and invited accused to sit at his table with Mrs. Turner, an invitation which accused declined. He insisted that Turner was the "damn Jew" who hit him (R. 14). He wanted to break away but was finally with some difficulty escorted to the office. His speech was coherent to Turner who did not know and did not think other persons heard what he said. He was talking in a quiet tone of voice. Turner did not know whether anybody else heard accused (R. 17).

When Lieutenant Thomas arrived at the club and went over to the accused who was standing with the two other Air Corps lieutenants and told them why he was there, accused said to him, "Well, who in the god damn hell are you?" (R. 19). Lieutenant Thomas told him and then asked him what the trouble was. Accused said, "There's no trouble, why in the hell should you come out here?". He refused to leave the club. He was finally persuaded to do so and was brought to the office of the Provost Marshal, where he refused to give his name and organization. Lieutenant Babbitt, Sergeant Ruhl and some enlisted men were at the station at the time. He called Lieutenant Thomas a "god damn son-of-a-bitch". He was told that if he continued to refuse to give his name it

would be necessary to keep him over night (R. 21). Lieutenant Thomas, Lieutenant Babbitt, Sergeant Ruhl and accused got into a staff car to come over to the cell block in the post office and as they started to drive off accused opened the door and got out. He struck at Lieutenant Thomas but missed him (R. 21, 29). Then they put handcuffs on him and took him back into the station. He again called Lieutenant Thomas a "son-of-a-bitch" and then seeing a colored officer, accused said, "You nigger lovers must have come from the North or something." He was very loud and called Lieutenant Thomas a "son-of-a-bitch" and an unmentionable name. He was finally brought to the guardhouse out at Langley Field where he started cursing and "raising cane" (R. 22). In the presence of several officers, noncommissioned officers and enlisted men he called Lieutenant Thomas and Lieutenant Jackson "sons-of-bitches". He was finally brought to his quarters, still "raising cane" in a loud voice (R. 22, 23).

In the Casino Club he was cursing the other two officers in a very loud voice (R. 23). They were trying to get him outside but he would not go. They were about three-fourths of the way across the room. Lieutenant Thomas, who was 25 or 30 feet away from him, could hear him cursing. There were about 25 or 30 people there then. In the opinion of Lieutenant Jackson accused was "drunk" (R. 24). At the police station accused in a very loud voice said in the presence of several officers, noncommissioned officers and enlisted men, when asked for his identification card, "I don't have to give you sons-of-bitches anything" (R. 28). When he was brought back to his quarters he was very boisterous and noisy, waking up the personnel in the barracks. He was using a hilarious, jubilant tone; very high (R. 33). In the guardhouse he complained that the "god damn bastards hit me and twisted my arm" (R. 33). In the opinion of Sergeant Ruhl accused was "drunk" (R. 34).

4. The accused was the only witness for the defense. He testified under oath that on 27 September 1944 he left Langley Field about 7:30 p.m. and went to Newport News. He had a sandwich and about nine bottles of beer. He struck up an acquaintance with a civilian who had two full pints of whiskey which accused and the civilian consumed. He then drank another bottle of beer and was getting "pretty drunk". He started to go for the bus to go back to camp and did not remember anything after that until he woke the next morning. Since this occurrence accused has taken the pledge not to drink again (R. 38). He admitted that he was "very drunk" and that he was in complete uniform at the time of this occurrence (R. 39, 40).

5. It clearly appears from the uncontradicted testimony of civilian and military witnesses and accused's admissions that on the occasion referred to accused was grossly intoxicated in uniform, in a public place, and in the presence of a large number of persons, civilian and military, male and female, and conducted himself in a boisterous and disorderly

manner to such a degree that it was necessary to send for the military police to remove him from the place. He similarly misbehaved in the Military Police Headquarters, Hampton Roads Port of Embarkation, and at Langley Field. At the Club Casino in Newport News he used vile, profane and obscene language to civilians and other officers and engaged in a fight with civilians. He had consumed a pint of whiskey and about ten bottles of beer before going to the club and, according to his story, was so intoxicated that he did not remember having been there. All efforts on the part of the manager, fellow officers and military police to quiet him were unavailing. He was grossly abusive to all of them and applied vile epithets to them, calling them "bastards" and "sons-of-bitches". At the military police headquarters at Hampton Roads, in the presence of officers, noncommissioned officers and other enlisted men, he refused to give his name and organization and called the officer who requested the information "a god damn son-of-a-bitch". He tried to assault the officer and it was necessary to handcuff him to keep him quiet. When he was finally brought forcibly back to his quarters he was still loud and boisterous and disturbed the personnel there.

He pleaded guilty to a violation of the 96th Article of War and to "being drunk and disorderly in uniform under such circumstances as to bring discredit on the military service."

The Manual for Courts-Martial, 1928 (par. 151) defines conduct unbecoming an officer and a gentleman as follows:

> "The conduct contemplated is action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character and standing as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms. (Winthrop)."

With reference to the nature of the conduct denounced by the 95th Article of War, Winthrop's Military Law and Precedents (Reprint, p. 711) states:

> "Though it 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 disrepute upon the military profession which he represents."

Winthrop (Reprint p. 717) gives as an example of offenses charged under the 61st (95th) Article of War:

> "Drunkenness of a gross character committed in the presence of military inferiors or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused." (Underscoring supplied.)

Whether in a particular instance drunkenness is of such a character as to constitute conduct unbecoming an officer and a gentleman depends not only upon the degree of intoxication but also upon the time, place, occasion, and other attendant circumstances (CM 221591, Brown, 13 B.R. 183).

The accused's conduct disclosed by the record presents a clear case of a violation of the 95th Article of War (1 Bull. JAG 164; 2 Bull. JAG 13, 63).

6. War Department records indicate that accused is 28 years of age and unmarried. The Staff Judge Advocate's review shows him now to be married. He left school when he was in the 11th grade; from 1930 to 1933 he worked as a delivery boy in a drug store, then spent 2 years in the CCC. He then engaged in the moving and hauling business for a few months, worked as a delivery boy in a grocery store for a few months and from May 1937 to February 1943 was employed as an asbestos worker for an insulating company. He is a member of the Asbestos Workers' Union. He became an Aviation Cadet on 21 February 1943, was trained as an aerial navigator and on 26 February 1944 was commissioned a temporary second lieutenant, Air Corps, AUS, on which date he was ordered to active duty and attached unassigned to the 1153rd Navigation Training Squadron.

7. There is attached to the record of trial a clemency petition, signed by all members of the court who tried the case, requesting that the sentence be suspended during good behavior, in view of (1) the accused's efficiency rating of "Excellent", (2) the loss to the Government of "a highly trained and skilled officer" which dismissal would entail, (3) the non-drinking pledge which the accused has taken upon the tenets of the Catholic Church, and (4) the loss which the McCoy family has suffered in the death of accused's brother, Lieutenant Vincent DePaul McCoy, "who was shot down over enemy territory".

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally suffi-

cient 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.

Edmund M. Phillips, Judge Advocate.

[illegible], Judge Advocate.

[illegible], Judge Advocate.

SPJGH
CM 267685

1st Ind.

War Department, J.A.G.O., DEC 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 Second Lieutenant Edmund F. McCoy (0-712867), 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. In view, however, of the clemency petition signed by all members of the court which tried accused, his efficiency rating of excellent and the loss his family has suffered in the death of another son, Lieutenant Vincent DePaul McCoy, I recommend that the sentence be confirmed but that the execution thereof be suspended during good behavior.

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

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 22, 10 Jan 1945)

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

SPJGK
CM 267693

23 NOV 1944

UNITED STATES	FORT LEWIS, WASHINGTON
v.	Trial by G.C.M., convened at Fort Lewis, Washington, 20 October 1944. Dismissal and total forfeitures.
Captain WILLIAM G. McALLISTER (0-281039), Corps of Military Police.	

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 Specification:

CHARGE: Violation of the 85th Article of War.

Specification: In that Captain William G. McAllister, SCU 1907, Fort Lewis, Washington, was, in the vicinity of Wenatchee, Washington, on or about 2 October 1944, found drunk while on duty as Supply Officer for the Prisoner of War Branch camps at Peshastin and Malott, Washington.

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

3. For the prosecution.

On the date of the alleged offense, 2 October 1944, the accused was on a duty status as regular supply officer of the branch prisoner of war camps of Fort Lewis, Washington, located at Peshastin and at Malott, Washington (R. 7,19). He was residing at the Cascadian Hotel in Wenatchee, Washington, which is situated 18 miles east of Peshastin and 90 miles south of Malott (R. 7-8). There were approximately 1200 men, including prisoners of war and American soldiers, at the Peshastin and Malott camps, and it was

accused's duty to see that the camps were supplied with rations for them (R. 8). Rations for 3 October 1944 failed to arrive at these branch camps from Fort Lewis, Washington, according to schedule. They should have been delivered to the Peshastin camp by 9:00 a.m. on 2 October and at the Malott camp later during the same day (R. 8). About noon on 2 October, First Lieutenant Robert E. T. Sisco, commanding officer of the Peshastin camp, notified accused by telephone that the rations had not been delivered (R. 20). He testified that thereafter, about 3:00 p.m., the accused personally visited the camp at Peshastin and was supplied with a list of items deemed necessary for its operation. The accused promised to secure the needed items if it were possible to do so, and then departed (R. 20). Lieutenant Sisco testified that he sat in the car with accused while he was at the camp on this occasion and that accused appeared to him to be normal in all respects. He observed nothing abnormal in either accused's actions or his conversation (R. 20). Accused's commanding officer, Lieutenant Colonel Robert S. Dicey, commanding officer of the Prisoner of War Camp, Fort Lewis, Washington, stated that while traveling toward Peshastin about 2:00 p.m. on 2 October, 1944, he met accused on the highway, hailed him, and engaged him in conversation about the supply situation. (Despite the discrepancies in time, it seems apparent from the record that this conversation took place while accused was returning from the above mentioned visit to the camp at Peshastin.) Colonel Dicey stated that he noticed that the accused's "eyes were bleared and his tongue was very thick" and that he asked accused, "Mac, are you drinking again?", to which accused replied that he was not (R. 8). About 4:00 p.m. of the same day, Colonel Dicey visited accused in the latter's room at the Cascadian Hotel for the purpose of further discussing the supply situation. He testified that at that time accused's "eyes were much more bleared and his tongue much thicker than they had been earlier in the afternoon"; that accused's breath "was very strong of liquor", and that, although "the subject matter" of accused's conversation was reasonable, his choice of words was not normal and he spoke with a "very decided inflection which was not normal to him" (R. 9,12). Before this conversation in the hotel had terminated, a telephone call to Fort Lewis, Washington, yielded the information that the rations could not be delivered from there within the required time, and it was realized that arrangements would have to be made to purchase the necessary rations locally. Colonel Dicey instructed accused to purchase the needed rations locally and before separating from accused he was "given the understanding" that the latter would purchase them in Wenatchee and vicinity and make delivery at Peshastin early in the evening and at Malott later that night (R. 9,10). Colonel Dicey returned to Peshastin to await delivery of the supplies there.

About 6:00 p.m. (2 October), accused called Lieutenant Sisco at Peshastin by telephone and informed him that he had procured the meat rations, which he would deliver within an hour, but that he was unable to obtain the other required items, and directed that Lieutenant Sisco take steps to obtain those (R. 20,24). Accused did not make delivery of the

meat rations within an hour as promised (R. 20). It was between 8:30 and 9:00 p.m. when he finally arrived at the Peshastin camp (R. 10,21), and his command car was then being driven by a member of the Women's Army Corps, Sergeant Kay Thomes, who was not officially assigned as driver of the vehicle (R. 10,15,17,22). In the meantime, Lieutenant Sisco and another lieutenant had succeeded in purchasing, near Peshastin, the necessary additional supplies to supplement the meat ration (R. 10,14,17,24-25).

Sergeant Thomes testified that she joined the accused at the Cascadian Hotel in Wenatchee about 7:00 o'clock on the evening in question to fulfill a dinner engagement made with him during the morning (R. 26,27). She and accused talked for a while and the accused offered her a drink of rum but did not take one himself, stating that he had already had some. The accused mentioned the food supplies which he was supposed to deliver at Peshastin by 7:00 o'clock. It was then after that hour (R. 27). He got up to put out a cigarette and Sergeant Thomes "realized his equilibrium was a little off" (R. 27); he staggered (R. 28). When accused suggested that she accompany him to Peshastin, Sergeant Thomes told him that she did not think he should drive and that she would drive him, driving being her job in the Army. The accused replied that that was one of the reasons he had her there (R. 27). Just before they left the hotel, accused drank about three ounces of rum, straight (R. 28). This was the only drink he took in her presence, but Sergeant Thomes stated that she had already smelled liquor on his breath (R. 28). While crossing the street to the car, Sergeant Thomes noticed accused stagger (R. 31). She did not think at the time that accused was capable of driving an Army vehicle, or any vehicle, and, realizing that accused was engaged on official business and that the supplies had to be delivered, she took it upon herself to drive (R. 29). She estimated that they left Wenatchee shortly after eight o'clock, and stated that accused did most of the talking that was done during their trip to Peshastin; that his speech was rational and "perfectly plain", and that he behaved himself with decorum during the trip (R. 29,31-32). Sergeant Thomes expressed the opinion that accused was intoxicated to such an extent as sensibly to impair the rational and full exercise of his physical faculties but not of his mental faculties (R. 30-31).

Lieutenant Sisco stated that by the manner in which accused dismounted from the automobile upon arriving at Peshastin with Sergeant Thomes and the manner in which he walked immediately after dismounting, accused impressed him as being "under the influence of an intoxicant" (R. 22). Lieutenant Sisco expressed the opinion that accused was intoxicated to a degree sufficient sensibly to impair the rational and full exercise of his physical faculties and should not have operated an automobile (R. 23). He saw accused again 30 to 45 minutes later and at that time accused appeared to walk normally (R. 23).

Colonel Dicey testified that upon arriving at Peshastin, accused "got out of the car and staggered to the middle of the road", whereupon

he (Dicey) walked up close to accused and "smelled more liquor" than he recalled smelling at any previous time that day (R. 11). He said to accused, "Just how drunk are you, Captain?", to which accused replied "in a very, very thick manner" that he was not drunk. The camp medical officer, First Lieutenant James Allen, being nearby, Colonel Dicey directed him to accompany accused to a nearby street light and examine him and render an opinion as to whether accused was drunk. Colonel Dicey stated that while walking down the road with Lieutenant Allen, accused was exerting "a tremendous effort to keep himself straight". "It was a stiff walk -- not his own at all". When accused and Lieutenant Allen returned, the latter (apparently in the presence of the accused) informed Colonel Dicey that, while he would not say accused was drunk, it was his opinion that accused was under the influence of intoxicating liquor (R. 11). Colonel Dicey expressed the opinion that accused was drunk to a degree sufficient sensibly to impair the rational and full exercise of his mental and physical faculties (R. 11). He stated that he did not at the time consider accused in a fit condition to drive an automobile and relieved him of all duties (R. 14,15).

At the time accused was relieved, the supplies for the camp at Malott, 90 miles away, still had to be delivered. They were delivered later that night by Colonel Dicey (R. 15). Colonel Dicey testified that in order properly and fully to have discharged his duties on the day in question, accused should have utilized his full time and efforts to procure the supplies which Lieutenant Sisco finally had to procure and should have completed delivery to the camp at Malott (R. 14,16).

4. For the defense.

Lieutenant Allen testified that when he examined accused on the night of 2 October at the direction of Colonel Dicey he reported back that in his opinion accused was not drunk (R. 34). He stated that accused articulated well, spoke rationally, and, so far as he could see, walked steadily (R. 35,42). Accused was oriented as to time and place (R. 39,42). On cross-examination, the witness testified that accused, at the time in question, had the appearance of a man who had been drinking and admitted to him that he had taken several drinks. Lieutenant Allen expressed the opinion that accused was at the time intoxicated to an extent sufficient sensibly to impair the rational and full exercise of his mental and physical faculties (R. 35). He stated that at the time of rendering his opinion to Colonel Dicey that accused was not drunk he conceived drunkenness to be a very advanced stage of intoxication (R. 43), and admitted that had he been, at the time, judging accused by the standard "that drunkenness is the impairment of full physical and mental abilities", his decision would have been different (R. 38).

The accused, upon being advised of his right to testify under oath, to make an unsworn statement, or to remain silent, elected to remain silent.

5. It is the opinion of the Board of Review that the evidence of record is amply sufficient to establish beyond reasonable doubt that accused was intoxicated to a degree sufficient sensibly to impair the rational and full exercise of his mental and physical faculties both before leaving the Cascadian Hotel to go to Peshastin and at the time of arriving at the Peshastin camp with Sergeant Thomes. He staggered when he walked before leaving the hotel and evidenced his own realization that he was too intoxicated to drive an automobile by remarking to Sergeant Thomes, in effect, that one of his reasons for having her present was in order that she might drive him to Peshastin. Clearly, accused was actually on military duty at the time. As supply officer for the Peshastin and Malott prisoner of war camps, it was his duty to see that they were properly supplied with rations each day, and for the proper execution of this duty he was answerable to superior military authority. His regular round of daily duty was not terminated until he had seen to it that necessary supplies were delivered to those camps insofar as it was within his power to do so. The necessary rations had not been delivered at the time accused became drunk on 2 October. Not only was this fact known to accused before he became drunk, but his commanding officer had further specifically imposed upon him the duty of personally procuring the necessary supplies from local sources and delivering them to the camps. For the proper execution of this duty accused was answerable to his commanding officer. An emergency existed, and time was of the essence, but the accused became drunk before this duty had been completed. The record is legally sufficient to support the findings (MCM, 1928, par. 145).

6. War Department records disclose that this officer is 38 years of age and married. He is a graduate both of a high school and of Norwich University, Northfield, Vermont. Having had Reserve Officers' Training Corps training at the latter institution, he was, on 1 June 1931, appointed a second lieutenant of Cavalry in the Officers' Reserve Corps, Army of the United States. He was promoted to the grade of first lieutenant on 11 October 1934. He was on active duty with the Civilian Conservation Corps for six months in 1933 and from 26 December 1934 to 21 February 1938. He was reappointed a first lieutenant, Army of the United States, as of 11 October 1939. He began his present tour of active duty on 1 March 1942, and was promoted to the grade of captain on 16 January 1943. The Staff Judge Advocate states in his review that accused was reprimanded under Article of War 104 for being drunk on 7 July 1944. The accused was employed by a valve manufacturing company as sales investigator at the time he was called to active duty.

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 mandatory upon conviction of a violation of Article of War 85 when the offense is committed by an officer during time of war.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 12 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain William G. McAllister (0-281039), Corps of Military Police.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. War Department records disclose that the accused was appointed a second lieutenant of Cavalry in the Officers' Reserve Corps on 1 June 1931, and that he was promoted to the grade of first lieutenant 1 October 1944. He was on active duty with the Civilian Conservation Corps for a period of six months in 1933, and he served several tours of active duty with that organization from 26 December 1934 to 21 February 1938. He began his present tour of active duty 1 March 1942 and was promoted to a captaincy 16 January 1943. From 14 March 1942 to 28 July 1942 the accused served as executive officer of a special detail of a secret and confidential nature at Providence, Rhode Island, for which he received a letter of commendation from his commanding officer. The Staff Judge Advocate states in his review of the record of trial that the accused was reprimanded under authority of Article of War 104 for being drunk on 7 July 1944. Despite the previous good record of accused, I feel that his repeated misconduct at a time when he was engaged in the performance of a high and important military service demonstrates that the accused is lacking in appreciation of the duties and responsibilities of a commissioned officer. I therefore recommend that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 53, 27 Jan 1945)

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

SPJGN
CM 267694

17 NOV 1944

UNITED STATES	)	FORT LEWIS, WASHINGTON
v.	)	Trial by G.C.M., convened at Fort Lewis, Washington, 17 October 1944. Dismissal and total forfeitures.
First Lieutenant JAMES M. WOOD (0-450954), Signal Corps.	)	

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

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

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

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

Specification: In that First Lieutenant James M. Wood, Signal Corps, Service Command Unit 1907, was, at Olympia, Washington, on or about 22 September 1944, drunk and disorderly in uniform in a public place, to wit, at State Street and Jefferson Street in Olympia, Washington.

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

Specification: In that First Lieutenant James M. Wood, Signal Corps, Service Command Unit 1907, was, at Olympia, Washington, on or about 30 September 1944, in a public place, to wit: On the Gleason-Carney road in front of the Thurston County Recreation Hall, Thurston County, Washington, drunk and disorderly.

He pleaded not guilty to, and was found guilty of, both Charges and Specifications "except the words 'and disorderly'" in the Specification of Charge II. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused was assigned to the Ninth Service Command Signal Repair Shop at Fort Lewis, Washington, on 21 February 1944 and was appointed Supply Officer. This position rendered

him accountable for millions of dollars of property (R. 7-8). His commanding officer never saw or knew him to drink or to be drunk on duty (R. 10).

On the afternoon of 22 September 1944 the accused drove to the vicinity of State and Jefferson Streets in Olympia, Washington, and brought his car to a stop, diagonally to the curb, in front of the Acme Fuel Company (R. 11-12, 17, 18-19). The usual method of parking was parallelto the curb (R. 13-14). When shortly thereafter Homer Hugh Phillips, a teamster employed by the Acme Fuel Company, also "pulled up" in his truck nearby and "got out", the accused thrust his head out of the window of his car and yelled "A fine son-of-a-bitch you are". Taken aback, Mr. Phillips asked that the remark be repeated. The accused obliged by reiterating the same words (R. 12-13, 16).

Mr. Phillips entered the office of the Acme Fuel Company and had one of the employees call the police (R. 13, 17). Pending their arrival, he came out and undertook to detain the accused by engaging him in conversation (R. 13). Upon being again addressed, the accused, who had commenced blowing his car horn, temporarily suspended his noisy activity (R. 14). Observing a dog in the car, Mr. Phillips "mentioned" it. The accused responded by drawing the animal to himself and saying, "Yes, my dog is bad, quite bad" and, looking out of the window "starey-eyed" [sic] he followed this comment with the words, "I will kill you". This threat "didn't set so good with" Phillips, and he accordingly forthwith retreated to the office (R. 13).

Apparently to entertain his dog the accused began to sound "short honks" on the horn, "like he was trying to get a tune out of it" (R. 14). When the police arrived some two or three minutes later he was still engaged in this pastime (R. 15, 19). When Officer Frank D. Moore requested him to stop honking, he replied, "I ordered a hamburger and coffee and they refused to serve me and I would like you to go in with me and insist that I get service" (R. 19-20). The nearest "eating place" was one block away (R. 21).

The accused's speech was "thick-tongued", his eyes "looked like he had been up all night", and his breath smelled of alcohol (R. 15, 20). In the opinion of both Phillips and Moore he was under the influence of liquor. Officer Westlund, who had "a persuasive manner," induced the accused to relinquish the driver's wheel and proceeded with him to the police station. No resistance or opposition was offered by the accused (R. 21, 29). When he emerged from the car at the station, his gait was "unsteady". After waiting for fifteen minutes, he was asked "for his identification" and told "to sit down again", it being the intention of the civilian police to turn him over to the military police as soon as possible (R.23, 27).

He suddenly became "surly" and referred to the city of Olympia as a "village" and to the police department as "filth" (R. 23). He stated that

"he wrote for a magazine and newspapers and he would see to it that [the] names and character [of the police who were detaining him] would appear in it, and not in a favorable manner". To the Chief of Police who entered while this tirade was being delivered, he said, "Hello, Shorty". He continued to complain that "I am an officer and not subject to this kind of treatment". When no attention was paid to his remarks, he began to address the Chief as "Baldy" (R. 24). The accused was ordered "locked up", and some force was required to remove him to his cell (R. 24, 29).

Eight days later, between 12:15 and 12:30 a.m. on 1 October 1944, his car was parked on the highway about a quarter of a mile from his home and "directly in the middle of the lane without any lights on, where it was a hazard to cars coming in any direction" (R. 30-31, 34). Upon investigating, Deputy Sheriff J. E. Stearns found the accused sleeping "behind the wheel" (R. 30-31). A bottle of sherry wine, approximately two-thirds full, was in the glove compartment (R. 36). The accused was arrested and removed to the county jail. He "put up a verbal argument" but offered no physical resistance (R. 32-33). "His tongue was thick", "he was unsteady on his feet", and he was "obviously" drunk (R. 32, 34).

4. The accused, after being 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. Patrolman Harry E. Westlund, who had driven the accused to the police station on 22 September 1944, had then represented to him that "if he did as he was told and they saw fit after he had sat there for a while, he might be allowed to return in his car" (R. 42). The accused's speech "was more or less mumbling" and he was "under the influence of intoxicating liquor" (R. 43-44).

As the Chief of the Officers' Section and as custodian of its records, Second Lieutenant Beverly H. Warnemunde of the Women's Army Corps was able to identify the accused's AGO Form 66-1 qualification card (R. 45-46; Def. Ex. A). It contained eight ratings of his services for the period between 28 November 1941 and 6 October 1944. Four were excellent, three satisfactory, and one very satisfactory (Def. Ex. A). Two other exhibits tending to show that the accused was about to be honorably relieved from active duty were also identified by Lieutenant Warnemunde, but the court sustained objections to their introduction into evidence.

Private Harold J. Hockett and his wife lived with the accused. The private recalled that on the morning of 30 September 1944 the accused's car had stopped on the highway "and had to be pushed to the side of the road" (R. 50-51). Late that evening at about 9:00 or 9:30 p.m. Private Hockett had had dinner with the accused who appeared to be normal. Only one drink was taken by the accused (R. 52). After dinner he announced that he

was "going hunting". Taking his dog, he entered the car and departed (R. 52-53).

That Sheriff Stearns may have been prejudiced against the accused was indicated by First Lieutenant Lloyd S. Brooke, Chief of the Investigative Branch of the Security and Intelligence Division (R. 54-57). The narrow, one-way road leading from the highway to the accused's home could have been successfully driven over, in the opinion of Lieutenant Brooke, by one who was "moderately intoxicated" (R. 57-58).

It was stipulated between the trial judge advocate and the defense counsel that Mrs. H. G. Ruthe would, if present, testify that she had seen and spoken with the accused several times between 1:30 and 2:30 p.m. on 22 September 1944 and that he then appeared to be normal in his driving, speech, and walk. He had offered to convey her to Fort Lewis, but she had ultimately decided to go with a Mrs. Miller (R. 58-59; Def. Ex. B).

The accused's own account varied materially from that presented by the prosecution. He had twice been reprimanded for excessive use of liquor (R. 79). For some reason which was not explained to him he had been ordered to the hospital for observation on 22 September 1944 and was still a patient on that day (R. 77). Since his wife, who had been ill, was about to return home, he received a four hour pass "to attend to personal matters" (R. 64). Without pausing to have lunch, he went on several errands, busied himself about the house, consumed two glasses of sherry wine equivalent to about a half a pint, and drove to Olympia to order some wood (R. 65-66, 74, 81). What happened in town at the Acme Fuel Company has been related by him as follows:

> "* * * I was on a fast schedule and had to get back to the hospital by 4:00 or as near thereafter as possible so I decided to run in quickly to the curb and place my order even from the car. The dog was with me because I intended to leave her off at the veterinary which was on the road back to camp. And I didn't want to leave the car to go into the Acme Fuel Company for another reason and that is that the door to the car window was jammed and I thought she might jump out and run away and get run over. As I pulled over, I saw an Acme Fuel truck and driver also over to the curb * * *.
>
> "The truck driver came up in a rather surly manner at my call and honking and demanded to know what in hell I was honking the horn for, calling him there, and I said I wanted to get some wood, to place an order for some wood and would he please do it for me and he said, 'No, that's not my job,' and then I asked him to inform someone in the office to come out and take it. I don't think he did that because no one came out — he came back a little later

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and said something very insulting against my dog which struck fire with me and, in my anxiety, I flared at him and cursed him. He said if I respected my dog I would get her a collar and license tag and I wouldn't have to be worried about her jumping out of the car. * * *" (R. 66-68).

The word "bitch" was used only in referring to the dog (R. 68, 74). The only mention of food was in the course of the following conversation:

"The truck driver, in a sneering way, said, 'What you need is a hamburger.' I said, 'Maybe. Will you get me one?' Later, I said, 'If you won't get me one, get me some wood so I can fry my own hamburger,' - or words to that effect. We were angry, both very angry." (R. 74-75).

Desiring to remain eligible for a pass the following day, the accused was "very worried" that he would be late (R. 67). In addition he had some other "old and continuing [financial and 'character'] worries" (R. 73). The wine he had consumed increased his anxiety but he was not intoxicated (R. 68). Because of his mental state he had "flared up" up at the truck driver and later at the Chief of Police (R. 68, 81). He was sorry (R. 68, 82, 90). To Officer Westlund his complaint had not been that he had not been provided with a hamburger but rather that the truck driver "would not even get me any wood so I would fry my own hamburgers" (R. 82). The conversation on the ride to the police station was summarized by the accused as follows:

"I told Officer Westlund I had a lot of things on my mind; my wife had just lost my baby. * * * [And] he felt sorry and he told me that and that he was going to give me a break if I would follow his directions and take it easy for awhile." (R. 89).

The word "filth" was not employed by the accused in referring to the police officers but only to the "racketeering end of the Police Department" (R. 84). He might have called Olympia a "village", but he placed in that category "all cities . . . which do not have a symphony orchestra or opera" (R. 85). He did address the Chief of Police as "Baldy" and "Shorty" (R. 90).

On Thursday, 28 September 1944, the accused was released from the hospital. That afternoon he was returned to full duty by Major General Patch who had investigated his case (R. 69). He was at his work all day on 30 September 1944. After eating dinner at his home sometime after 8:30 p.m. and after "an annoying verbal tilt with his wife," he took a hike through

the woods for the purpose of giving his dog some additional training in retrieving (R. 70, 90). Later he drove in his car with the dog to "the other side of the lake" where there was some brush country and "a lot of quail and partridge" (R. 70). On the return trip the battery failed for the second time that day and the automobile came to a stop. A number of high school boys in a roadster helped him start, but the battery again refused to function further down the road. While waiting for someone to come along who would help him, he "dozed off" (R. 70-71, 79, 87). He was physically incapable of pushing the car off the road by himself and he was "afraid" to because "of a ditch on one side and a little siding" (R. 79, 87-88). The car, when stalled, was facing away from his home because he intended to drive around the lake once more to "build up the battery a little bit" (R. 85-86).

Over a period of approximately two hours he had consumed three or four glasses of wine and a bottle of beer (R. 71-72, 75-76, 88). Although he and his wife had individual liquor permits issued by the State of Washington, he was not in the habit of drinking hard liquor (R. 77, 88, 90-91; Def. Exs. D, E).

5. Deputy Sheriff J. E. Stearns was recalled as a witness by the court. When he found the accused on the night of 30 September 1944, there was a red Irish setter in the stalled car (R. 92). The accused's first remark upon being awaked was, "Help me, I'm trying to get to . . .". The sentence was not completed (R. 93). There was no deep gully along the road (R. 94). When Stearns and an Officer Bryan pushed the car to the side, the accused assisted. One person could not have done the job (R. 92-93). The succeeding Monday the accused stated that he did not remember where he was arrested (R. 92).

Patrolman Harry E. Westlund was also recalled as a witness by the court. He had observed an unopened quart of liquor of an undetermined nature and several bottles of beer in the accused's car on 22 September 1944 (R. 95-96). Westlund had assured the accused that if he did as he was told and sat at the station for a while, no charge would be placed against him (R. 96-97). This promise was not observed because Westlund had to leave the station (R. 97). The accused, by his speech, revealed himself to be under the influence of intoxicating liquor (R. 97-98).

6. The Specification of Charge I alleges that the accused was "on or about 22 September 1944, drunk and disorderly in uniform in a public place . . .". This offense was laid under Article of War 95. The Specification of Charge II alleges that the accused was, "on or about 30 September 1944, in a public place . . . drunk . . .". This was set forth as a violation of Article of War 96.

The appearance and conduct of the accused on the afternoon of 22 September 1944 was distinguished by several unmistakable indicia of drunkenness. He was "starry-eyed", his breath reeked of alcohol, his speech was thick, his walk was "unsteady", and his remarks to an utter stranger who offered no provocation were offensive, insulting, and in a sense even menacing. His subsequent derogatory comments and epithets at the police station also had their origin in a mind clouded by alcohol. In referring to Mr. Phillips as a "son-of-a-bitch" and in addressing the words "I will kill you" to him the accused not only betrayed intoxication but committed a disorder. Despite his threat, however, the accused made no hostile movement and offered no resistance to the police officers who had been summoned. There is nothing in the record to show that Mr. Phillips accepted the accused's words at face value and was put in mortal fear by them. While the accused was unquestionably drunk and disorderly, his conduct was not so gross, conspicuous, and disgraceful as to be in contravention of Article of War 95. The evidence is legally sufficient to sustain so much of the findings of guilty of the Specification of Charge I and Charge I as involve findings of guilty in violation of Article of War 96.

The accused's condition, when arrested on the morning of 1 October 1944, was also obviously the result of excessive drinking. He was not only incoherent in his speech and unsteady on his feet as on the previous occasion but he was asleep at the wheel of a car parked on a highway in a manner which seriously endangered other motorists. The three or four glasses of wine and the bottle of beer which he admitted drinking and the bottle of sherry wine only two-thirds full resting in the glove compartment easily explain his strange behavior. The evidence sustains the court's findings that he was guilty beyond a reasonable doubt of the Specification of Charge II and Charge II.

7. The accused is about 39 years old. After graduating from high school in 1920, he attended Hall's War College in 1921, the United States Naval Academy from 1922 to 1923, the University of North Carolina in 1929, and the University of Southern California in 1932. His resignation from the Naval Academy was accepted on 25 July 1923 for "Gonococcus infection of urethra". From 1921 to 1937 he was variously employed as a newspaper reporter and editor, an investigator for the Los Angeles County Supervisors, and manager of a country general store. In this last year he was fined $50.00 for managing a beer parlor without a proper license. He had enlisted service in the Army from October 1937 to 30 September 1941 when he was commissioned a Second Lieutenant. On 10 April 1942 he was reprimanded and ordered to pay a forfeiture of $35.00 under Article of War 104 for attempting to drive his car while under the influence of liquor. After his promotion to First Lieutenant on 10 August 1943, he was frequently drunk. He was admitted to the Hammond General Hospital on 17 November 1943 for a mental and physical examination as a basis for reclassification. He was found to be fit

and restored to duty. During the ninety days preceding 25 October 1944 he was twice hospitalized for acute alcoholism. On the first occasion, which occurred on 13 August 1944, he had to be forcibly removed from his quarters after creating a public disturbance. A neuro-psychiatric report shows him to be a constitutional psychopath, "excitable personality type with chronic alcoholism."

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

Abner E. Lipscomb, Judge Advocate.

Robert J. Clamor, Judge Advocate.

Gabriel H. Goldin, Judge Advocate.

SPJGN
CM 267694

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 First Lieutenant James M. Wood (0-450954), Signal Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification of Charge I and Charge I as involve findings of guilty in violation of Article of War 96, and legally sufficient to support the other findings and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be ordered executed.

3. Consideration has been given to a communication dated 7 November 1944 from the Honorable Sheridan Downey, member of the United States Senate, transmitting a letter from accused with 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 into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Communication from Hon. Downey with inclosures.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence approved but forfeitures remitted. G.C.M.O. 28, 13 Jan 1945)

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

SPJGH
CM 267696

4 DEC 1944

UNITED STATES v. Second Lieutenants BROOKS W. WHITTIER (0-776168) and LYLE H. SWEETEN (0-776118), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Carlsbad Army Air Field, Carlsbad, New Mexico, 17 October 1944. Each: Dismissal.

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

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

2. The accused, Second Lieutenant Brooks W. Whittier, was tried upon the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant BROOKS W. WHITTIER, Air Corps, did at or near Carlsbad, New Mexico 22 September 44 wrongfully pilot an AT-11 Army airplane at an altitude of approximately 200 feet above an open-air assembly of persons; to wit, a football attendance, in violation of AAF Regulation 60-16, par. 16 a (1) (c).

The accused, Second Lieutenant Lyle H. Sweeten, was tried upon the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant LYLE H. SWEETEN, Air Corps, did at or near Carlsbad, New Mexico 22 September 44 wrongfully pilot an AT-11 Army aircraft at an altitude of approximately 200 feet above an open-air assembly of persons; to wit, a football attendance, in violation of AAF Regulation 60-16, par. 16 a (1) (c).

Each accused pleaded guilty to, and was found guilty of, the respective Charge and Specification involving him. No evidence of previous convictions was introduced as to either accused. Each accused was sentenced to dismissal. The reviewing authority approved the sentence of each accused in separate actions and forwarded the record of trial for action under Article of War 48.

3. The prosecution rested each of its cases upon the plea of guilty entered by each accused, after reading in evidence paragraph 16 a (1) (c), Army Air Forces Regulations No. 60-16, which provides as follows (R. 7, 8):

"a. Except during take-off and landing, aircraft will not be operated:

(1) Below the following altitudes:

* * * *

(c) 1,000 feet above any open air assembly of persons."

4. The defense introduced numerous character witnesses among whom were several bombardier instructors who had flown on cadet training missions with both accused. They all were of the opinion that both accused bore fine reputations and were most capable pilots (R. 9-20).

After their rights as witnesses had been explained to them, each accused elected to take the stand and give sworn testimony in his own behalf.

Accused Sweeten testified that he was 20 years of age, was born in Twin Falls, Idaho, and ceased attending high school in 1940 to assist in the support of his family (R. 20, 21, 23). He then was employed by the Federal Government as an aircraft electrician until 5 February 1943 when he entered on active military duty, having enlisted 31 October 1942. Thereafter he received his pilot's training (R. 21). He had three older brothers serving in the armed forces, one being an Army pilot while the other two were commissioned officers in the Navy (R. 22). Although he was conversant with the Army Air Forces Regulations, he testified that he deviated several miles from his line of flight after completion of a training mission for bombardier cadets and, with several cadets aboard, flew his plane over a football field at Carlsbad, New Mexico, where he knew a night game was in progress. His explanation of the flight over the game was that he saw the lights of the football field, had an impulse to descend and fly over the field and "went down and made one pass over it" without performing any acrobatics. He offered no excuse for his conduct (R. 22-25).

Accused Whittier testified that he was 22 years of age, was born in Morgan, Utah, and graduated from high school and the Latter Day Saints Seminary, his father being a bishop of that church. He worked on his father's farm until 7 December 1941 when he was employed by the Federal Government as an aircraft mechanic. He enlisted in the military service on 31 October 1942 and thereafter received his pilot's training. Although he knew the Army Air Forces Regulations, he testified that while a night game was in progress he flew his plane over a football field at Carlsbad, New Mexico, at an altitude of about 300 feet, in level flight and without performing any acrobatics, having a bombardier instructor and three bombardier cadets aboard at the time. On cross-examination he admitted that he told the investigating officer that as he flew over the field he "made a dip and pulled the nose up". He described the incident as "just one of those things that happen; one of those things you do without thinking". He did not realize that accused Sweeten had also flown over the football game until after he had returned to his air base (R. 25-29).

5. The first indorsements on both charge sheets referred both cases for trial in the same proceedings "under the authority to order common trial contained in Section 395 (33), Dig. Ops. JAG, 1912-1940". Neither accused objected to a common trial and each was accorded his right to a peremptory challenge. Where separate offenders have committed offenses of the same character, in the same place, provable by the same witnesses, they may be tried in a common trial if the convening authority so directs and no objection is raised by any of the accused (Dig. Op. JAG, 1912-40, supra). Accordingly, this common trial of both accused was proper.

The evidence offered by the defense does not indicate that the pleas of guilty were improvidently entered by either of the accused. Although it is better practice, after pleas of guilty have been entered, for the prosecution to introduce evidence establishing a prima facie case, it is not legally necessary. The prosecution may rest its case upon a plea of guilty and initially refrain from the introduction of any evidence. That the operation of an Army aircraft in violation of the provisions of the Army Air Forces Regulations here involved constitutes a violation of Article of War 96 is so well established that no citation of authority is necessary. The record of trial sustains the court's findings of guilty as to each of the accused.

6. Accused Whittier is 22 years of age. He was a private in the Enlisted Reserve Corps from 31 October 1942 to 10 February 1943 and entered upon active duty on the latter date. From 29 July 1943 until 15 April 1944, he served as an air cadet in the Air Corps and on the latter date he was commissioned a second lieutenant and was assigned to duty with the Air Corps. In civilian life from January 1941 to February 1943 he was employed by the United States as an aircraft engine mechanic.

Accused Sweeten is 20 years of age. He was a private in the Enlisted Reserve Corps from 31 October 1942 to 10 February 1943 and entered upon active duty on the latter date. From 29 July 1943 until 15 April 1944, he served as an air cadet in the Air Corps and on the latter date he was commissioned a second lieutenant and was assigned to duty with the Air Corps. In civilian life from December 1941 until November 1942, he was employed by the United States as a junior aircraft electrician.

7. The court was legally constituted and had jurisdiction of the persons and the offenses. No errors injuriously affecting the substantial rights of either of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and each sentence and to warrant confirmation of each sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas N. Jaffy, Judge Advocate.

[illegible], Judge Advocate.

William H. Bandrell, Judge Advocate.

SPJGH
CM 267696

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 Second Lieutenant Brooks W. Whittier (0-776168), Air Corps, and Second Lieutenant Lyle H. Sweeten (0-776118), 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 each sentence and to warrant confirmation of each sentence. There is attached to the record a Memorandum for The Judge Advocate General, dated 24 November 1944, from General H. H. Arnold, Commanding General, Army Air Forces, in which General Arnold recommends that the sentence as to each accused be commuted to a forfeiture of pay in the amount of $100 per month for ten months. I concur in the recommendation of General Arnold and recommend that each of the sentences be confirmed but commuted to a forfeiture of pay in the amount of $100 per month for ten months.

3. Consideration has been given to the letter of Mrs. Lila Sweeten, mother of accused Sweeten, and the letter of Mrs. Herbert Whittier, mother of accused Whittier, both of which were addressed to the President, and to a copy of a letter from Senator Elbert D. Thomas, addressed to the Secretary of War requesting clemency. These letters are transmitted herewith.

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.

7 Incls.
Incl 1 - Record of trial.
Incl 2 - Memo fr Gen Arnold, 24 Nov 44.
Incl 3 - Ltr fr Mrs Sweeten.
Incl 4 - Ltr fr Mrs Whittier.
Incl 5 - Cpy of ltr fr Sen. Thomas.
Incl 6 - Dft ltr for sig S/W.
Incl 7 - Form of action.

(Sentence as to each confirmed but commuted to forfeiture of $100 per month for ten months. G.C.M.O. 36, 19 Jan 1945)

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

(113)

SPJGK
CM 267760

6 DEC 1944

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at MacDill Field, Florida, 7 October, 1944. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.
Private JAMES A. LAWRENCE (38197024), Section CG, 316th AAF Base Unit (EAUTC), MacDill Field, Tampa, Florida.	

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

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

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

CHARGE I and Specification: (Finding of not guilty under paragraph 71d, MCM, 1928.)

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

Specification 1: In that Private James A. Lawrence, Section CG, 316th Army Air Force Base Unit (EAUTC), MacDill Field, Florida, did, at MacDill Field, Florida, on or about 20 May 1944, behave with disrespect towards 2nd Lt. Gordon C. Herrick, his superior officer, by saying to him, "You don't give a damn how you treat me; you treat me like a god-damn dog," or words to that effect.

Specification 2: (Finding of not guilty under paragraph 71d, MCM, 1928).

CHARGE III: Violation of the 65th Article of War.

Specification: In that Private James A. Lawrence, * * *, did at MacDill Field, Florida, on or about 20 May 1944, use the following threatening language towards Sgt. Leon Simmons, who was then in the execution of his office, "If you don't stop fucking with me, I'll break your mother-fucking head," or words to that effect.

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

Specification: In that Private James A. Lawrence, * * *, did, without proper leave, absent himself from his organization at MacDill Field, Florida, from about 3 July 1944, till apprehended, on or about 24 August 1944.

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

Specification: In that Private James A. Lawrence, * * *, having been duly placed in arrest in quarters on or about 23 June 1944, did, at MacDill Field, Florida, on or about 3 July 1944, break his said arrest before he was set at liberty by proper authority.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications, except Charge I and its Specification and Specification 2 of Charge II, of which he was found not guilty on motion of defense counsel under the provisions of paragraph 71d, Manual for Courts-Martial, 1928. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50½.

3. The record of trial is legally sufficient to support all findings of guilty, except those of Specification 1 of Charge II and Charge II, and legally sufficient to support the sentence. The Board of Review, however, is of the opinion that the record of trial is not legally sufficient to support the conviction of accused of disrespectful conduct towards his superior officer, Second Lieutenant Gordon C. Herrick, as charged in Specification 1 of Charge II. The sole evidence to establish this specification is found in the following testimony of Sergeant Leon Simmons (R. 21,22):

"Q. Sergeant, I'll ask you if you were present when a conversation took place between the defendant and Lt. Herrick?
A. I was present when one conversation took place.
Q. Will you please state what was said by the defendant to the Lieutenant, Lieutenant Herrick, at that time?
A. Well, he said to Lt. Herrick, say, 'Seems you don't give a damn,' I think, 'How you treat we colored people down here,' and that's about all that was said in my presence at the time.
Q. Did you hear the word, 'dog' used?
A. I wouldn't be positive whether I heard the word, dog, or not.
Q. Where did this take place?
A. At that particular time, we were in Lt. Nelson's office.
Q. Who else was in the room?
A. Lt. Nelson and First Sergeant John Williams."

We strongly suspect that the accused is guilty, but the Board of Review

is under the duty of safeguarding the basic principle of criminal law that in order to have a legal conviction an accused must not only be guilty but must be proved guilty. In the present case there is an absolute absence of evidence as to the circumstances under which this remark was made, the occasion for the remark, and the tone of voice, attitude, and conduct of the accused. For all that appears in the record the statement imputed to accused may have been in the course of an unofficial personal conversation, and may have been in response to a direct question asked by Lieutenant Herrick which required such a reply. The date of this incident is not given. There is no testimony that Lieutenant Herrick caused accused to appear before him, and the language which the sole witness thinks was used differs considerably from that attributed in the Specification to accused. The Board is of the opinion, therefore, that no disrespect has been proved nor have any facts been established from which the trial court was justified in inferring disrespect.

As was held in the case of CM 212505, Tipton:

"The Board of Review, in scrutinizing proof and the bases of inferences does not weigh evidence or usurp the functions of courts and reviewing authorities in determining controverted questions of fact. In its capacity of an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty (A.W. 50½). If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for that inference. (CM 150828, Robles; CM 150100, Bruch; CM 150298, Johnson; CM 151502, Gage; CM 132797, Viens; CM 154854, Wilson; CM 156009, Green; CM 206322, Young; CM 207591, Nash, et al.)".

The following has been quoted with approval by the Board of Review:

"While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence, which under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of defendant's guilt. 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 dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens" (Buntain v. State, 15 Texas, App. 490; CM 207591, Nash).

4. Of the ten officers detailed for the court, four held commissions

in the Corps of Engineers. One of the four was peremptorily challenged by the prosecution. Accused then objected to being tried by any "Engineering Officers" on the grounds that "Engineering Officers" had caused him "all the trouble he has had in the Army", and challenged the remaining three officers of the Corps of Engineers as a group for cause. Upon denial of the challenge by the law member on the grounds that it was too general, defense counsel then proceeded to challenge each of the three separately. After interrogating these three officers defense counsel stated that there was nothing in their answers which disqualified any of the three, but that accused still objected to being tried by an "Engineering Officer" and that, therefore, he challenged each of the three for cause. Without any reference to the court two of the challenges were denied by the president and one by the law member. While they acted erroneously in that it is solely within the province of the court to pass upon the validity of a challenge (MCM, 1928, par. 58, p. 44), there was in fact no valid basis for a challenge, as admitted by the defense counsel, and the proferred reason was so clearly frivolous that in reality there was no basis for designating the several motions as challenges for cause. As observed by Colonel Winthrop (Military Law and Precedents, 2d Ed., p. 209), "the court may properly decline to entertain a challenge clearly frivolous". Under the circumstances, it is the opinion of the Board that the substantial rights of accused were not injuriously affected by the failure to refer the challenges to the court (CM 243215, Owen, 27 B.R. 305).

5. During the course of the trial, accused objected to the jurisdiction of the court on the grounds that he had been previously arraigned on Charges I, II and III before a different court. In view of the failure of defense to establish its contentions on this score by competent evidence, the court was fully justified in overruling the objection.

6. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specification 1 of Charge II and Charge II, and legally sufficient to support all other findings of guilty and the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

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

TO: The Commanding General, DEC 8 1944
Third Air Force,
Tampa, Florida.

1. In the case of Private James A. Lawrence (38197024), Section CG, 316th AAF Base Unit (EAUTC), MacDill Field, Tampa, Florida, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specification 1 of Charge II and Charge II, and legally sufficient to support all other findings of guilty and the sentence, which holding is hereby approved. Upon disapproval of the findings of guilty of Specification 1 of Charge II, and Charge II, 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 267760).

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 267777

22 NOV 1944

UNITED STATES	)	INFANTRY REPLACEMENT TRAINING CENTER
v.	)	Trial by G.C.M., convened at Camp Joseph T. Robinson, Arkansas, 26 October 1944. Dismissal, total forfeitures and confinement for five (5) years.
Second Lieutenant JOHN E. GARTRELL (0-321827), Infantry.	)	

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. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant John E. Gartrell, Company A, 117th Infantry Training Battalion, 80th Infantry Training Regiment, Infantry Replacement Training Center, Camp Joseph T. Robinson, Arkansas, having been restricted to the limits of his regimental area, did at Camp Joseph T. Robinson, Arkansas, on or about 6 October 1944, break said restriction by going beyond the limits of his regiment.

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

Specification: In that Second Lieutenant John E. Gartrell, Company A, 117th Infantry Training Battalion, 80th Infantry Training Regiment, Infantry Replacement Training Center, Camp Joseph T. Robinson, Arkansas, did, without proper leave, absent himself from his station at Camp Joseph T. Robinson, Arkansas, from about 6 October 1944 to about 13 October 1944.

He pleaded guilty to and was found guilty of the Charges and their respective Specifications. Evidence was introduced of one previous conviction on 7 September 1944 by a general court-martial for absence without leave for seven days in violation of Article of War 61 for which he was sentenced to be restricted to the limits of his regimental area for 3 months and to forfeit $100 of his pay per month for three months. In the instant case he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for a period of five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused during the occurrence complained of and at the time of trial was a second lieutenant of Infantry in the military service of the United States attached to Company "A", 117th Battalion, 80th Infantry Training Regiment, I.R.T.C. at Camp Joseph T. Robinson, Arkansas (R. 6-7). On 6 October 1944 at a time when the accused was restricted to his regimental area by the terms of General Courts-Martial Order No. 14 (R. 10) he disappeared from that area and could not be found (R. 7). On the night of 13 October 1944 he reappeared in his quarters and was placed in arrest (R. 7). He had no authority to be absent during this period of time nor to leave the limits of the regimental area (R. 8). Duly authenticated extract copies of the morning report of the accused's organization showing the accused absent without leave from 6 October 1944 to 13 October 1944 were admitted in evidence without objection (R. 8, 9; Pros. Ex. 1 and 2).

4. The accused having been fully advised of his right to remain silent, to testify under oath, or to make an unsworn statement elected to make an unsworn statement to the court (R. 11). In substance he averred that on 5 October he was authorized by his company commander to go "to town" to make some purchases. Among other things he purchased a bottle of whiskey and had a "few" drinks. He returned to the regimental area and had two or three drinks at the Regimental Officers' Club. From there he went to the main Officers' Club, but finding it crowded, he went to a road house and then back "to town" where he kept up his drinking for 3 or 4 days. Realizing he had to return he got himself in shape and returned. He attributed his drinking to a letter he received from home which upset him and made him "jittery and nervous" (R. 12).

5. The evidence for the prosecution, the unsworn statement of the accused, and his plea of guilty to the Charges and their Specifications conclusively show that the accused, restricted by a General Court-Martial Order to his regimental area, broke this restriction on or about 6 October 1944 and absented himself without proper leave from his station from that date until he returned on 13 October 1944 - all as averred in the Specifications of the Charges.

6. War Department records show the accused to be 32 years of age and married. He is the father of a 3 year old son. He graduated from high school and engaged in the masonry construction business for 6 years. He was a member of the Enlisted Reserve Corps from 28 July 1934 until 3 October 1934 when he was commissioned a second lieutenant, Infantry, Reserve Corps. He was reappointed 29 August 1939. During this period of time he served four periods of duty in C.M.T.C. Service. He also served in an administrative capacity in CCC Service for 2 years and 6 months. He entered Extended Active Duty 12 March 1942. Because of his unsatisfactory service he was recommended by his commanding officer for reclassification 20 November 1942.

> "A Reclassification Board met December 21, 1942, at Fort Benning, Georgia. The Camp Commander in Form A, alleged that Lieutenant Gartrell failed utterly on the three jobs given him at this camp; that he lacks interest, initiative and intelligence to do his work; that he was relieved as Detachment Commander for inefficiency and failure to enforce sanitary regulations; that he was given another chance as police officer of the Post Exchanges and was relieved because of indifferent and inefficient performance of duty and that after months of observation of Lieutenant Gartrell and his work did not believe he would ever develop into officer material."

The Board recommended that he be assigned to an Engineer Service Unit. The A.G. recommended that he be assigned to duty with an Infantry Replacement Training Center and was so assigned. On 7 September 1944 he was convicted by a general court-martial of being absent without proper leave from his organization for a period of seven days in violation of Article of War 61 for which offense he was sentenced to forfeit $100 of his pay per month for 3 months and to be restricted to the limits of his Regimental Area for 3 months.

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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st Article of War or the 96th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, 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 Second Lieutenant John E. Gartrell (0-321827), 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. On 7 September 1944 the accused was found guilty by general court-martial of absence without leave of 7 days in violation of Article of War 61. The approved sentence in that case involved forfeiture of $100 of his pay per month and restriction to the limits of his regimental area for a period of three months. Charge I and its specification in the case now under consideration is the result of a violation of the restriction imposed by the sentence in the former trial. In this case the approved sentence involves dismissal, total forfeitures, and confinement at hard labor for five years. It is evident that the accused has no proper appreciation of the duties and responsibilities of a commissioned officer. I, therefore, recommend that the sentence be confirmed but that the forfeiture and the confinement imposed in excess of one year be remitted, that the sentence as thus modified be carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Consideration has been given to a letter from the accused's mother addressed to the President of the United States. The letter is attached to the record of trial.

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

Myron C. Cramer

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. fr. acc'd mother to Pres.

(Sentence confirmed but forfeitures and confinement in excess of one year remitted. G.C.M.O. 6, 5 Jan 1945)

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

SPJGN
CM 267788

13 NOV 1944

UNITED STATES	CHARLESTON PORT OF EMBARKATION
v.	Trial by G.C.M., convened at Charleston Port of Embarkation, Charleston, South Carolina, 27 October 1944 and 2 November 1944. Dismissal, total forfeitures and confinement for five (5) years. Disciplinary Barracks.
Second Lieutenant FREDRIC G. HALLAM (0-1546785), Medical Administrative Corps.	

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

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

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

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

Specification 1: In that Second Lieutenant Fredric G. Hallam, Medical Administrative Corps, 200th Hospital Ship Complement, Section B, Staging Area, Charleston Port of Embarkation, Charleston, South Carolina, did, at Officers Mess, Section B, Staging Area, Charleston Port of Embarkation, Charleston, South Carolina, on or about 17 September 1944, unlawfully enter the Officers Mess Building, with intent to commit a criminal offense, to wit: Larceny therein.

Specification 2: In that Second Lieutenant Fredric G. Hallam, Medical Administrative Corps, 200th Hospital Ship Complement, Section B, Staging Area, Charleston Port of Embarkation, Charleston, South Carolina, did, at Officers Mess, Section B, Staging Area, Charleston Port of Embarkation, Charleston, South Carolina, on or about 17 September 1944, feloniously take, steal, and carry away about $20.00, lawful money of the United States, the property of the Officers Mess, Section B, Staging Area, Charleston Port of Embarkation, Charleston, South Carolina.

Specification 3: In that Second Lieutenant Fredric G. Hallam, Medical Administrative Corps, 200th Hospital Ship Complement, Section B, Staging Area, Charleston Port of Embarkation, Charleston, South Carolina, did, at Charleston, South Carolina, on or about 6 October 1944, feloniously take, steal and carry away, one toilet shaving bag, value about $7.00, two pair of printed pajamas value about $8.50, five sets of underwear value about $6.00, one Westclox Big Ben alarm clock value about $3.50, one pair Nun Bush shoes value about $10.50, one pair shoe trees value about $1.25, six pairs of socks value about $4.25, one bathrobe value about $5.00, one pink gabardine uniform value about $19.00, one pair of chino pants value about $3.00, one cashmere sleeveless sweater value about $12.50, one small handbag value about $1.25, two rolls of 35 mm. film value about $2.10, one pair of bedroom slippers value about $0.80, the property of Second Lieutenant Richard Gentry Caldwell, Air Corps.

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

Specification: In that Second Lieutenant Fredric G. Hallam, Medical Administrative Corps, 200th Hospital Ship Complement, Section B, Staging Area, Charleston Port of Embarkation, Charleston, South Carolina, did, at Charleston, South Carolina, on or about 6 October 1944, feloniously take, steal, and carry away, a B-4 type flier's clothing suitcase bag of the value of about $12.32, property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to and was found guilty of all Charges and Specifications except the figures "$20.00" in Specification 2, Charge I, of which he was found not guilty, substituting therefor the figures "$12.00", of which he was found guilty. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for five (5) years. The reviewing authority approved only so much of Specification 3, Charge I, as involves a finding of guilty of the larceny of the property, as alleged, of some substantial value, 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. During the night of 16-17 September 1944, The Officers' Mess, Section B, Charleston Port of Embarkation, Charleston, South Carolina, was broken into and the nickles in the "jackpots" of four slot machines were forcibly removed (R. 7,8,10,11,14). The value of the coins was not in excess of $20 (R. 13).

On the night of 6 October 1944 an automobile belonging to Lieutenant Richard G. Caldwell was parked on a street in Charleston, South Carolina. It was broken into and a B-4 type "Val-Pac" was re-

moved. The bag, which had been issued to Lieutenant Caldwell, was valued at $12.30 and contained property belonging to him as alleged in Specification 3, Charge I (R. 23-26). The bag and its contents were recovered as hereinafter related and its contents were identified as the property of Lieutenant Caldwell and admitted into evidence (R. 24-25; Ex. A-N). Lieutenant Caldwell, without being qualified as having knowledge of the market value of the articles, attributed to the contents of the bag the values as alleged in the Specification (R. 27).

On 11 October 1944 the accused arranged for an interview with Captain Harvey T. Leet, T.C., Provost Marshal's Division, Charleston Port of Embarkation, Charleston, South Carolina (R. 16). Captain Leet was readily recognizable as a military police officer and attempted to explain to the accused the provisions of Article of War 24 but such attempted explanations were brushed aside by the accused who stated that he realized his right not to incriminate himself (R. 17). Thereupon, the accused voluntarily related in detail how he had taken the Val-Pac from the car and had broken into the Officers' Mess. He had spent the coins from the slot machines but the bag and its contents were at his quarters where they were subsequently recovered. He had been drinking on both occasions but attributed his actions to his seizure by an impulse and requested assistance to prevent his performance of other similar acts (R. 18-20, 21-22). The accused on this occasion was sober (R. 23). On 12 October 1944 the accused, after full explanation of his right to speak or remain silent, repeated his story to the investigating officer and added that the coins taken from the slot machines amounted to $12 or $14 (R. 27-29).

4. The accused, after acknowledging his understanding of his rights as a witness, made an unsworn statement in which he admitted at length his commission of the offenses alleged (R. 29-30).

5. The court continued the case pending ascertainment by the prosecution whether the accused had been examined by a psychiatrist and, if so, the production of the psychiatrist as a witness (R. 31). Upon reconvening on 2 November 1944, the prosecution offered Captain Gerard Cote, M.C., who had previously examined the accused, as an expert in psychiatry (R. 32). According to this witness the accused is not "psychotic" but has a "psychopathic personality" and is "mentally" and "morally responsible for his acts". The witness had not seen the accused on the dates of the offenses and was unable to state whether at such times the accused was or was not "capable of exercising that degree of mental freedom which would give him the power to overcome an impulse to do right or wrong" (R. 33, 34, 35). On examination by the court the witness was of the opinion that accused even after a drink or two could resist such impulse.

6. Specifications 1 and 2, Charge I, respectively allege that the accused at a named time and place committed the offense of housebreaking by unlawfully entering a described building with the intent of committing larceny therein and the offense of larceny by feloniously taking, stealing and carrying away about $20, the property of others, from such building.

The former offense is defined as "unlawfully entering another's building with intent to commit a criminal offense therein" (M.C.M., 1928, par. 149e) and the latter is defined as "the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the intent to deprive such owner permanently of his property therein. (Clark)" (Id. par. 149g). Both offenses are violative of Article of War 93 (Id. Supra).

Specification 3, Charge I, and the Specification, Charge II, similarly allege that the accused at another time and place committed the offense of larceny by feloniously taking, stealing and carrying away certain described personal property of alleged values belonging to another along with a Val-Pac of an alleged value belonging to the United States and furnished and intended for the military service thereof. Because of the difference in ownership of the articles of personal property Specification 3, Charge I, is alleged in violation of Article of War 93 and the Specification, Charge II, in violation of Article of War 94.

The evidence for the prosecution conclusively establishes the corpus delicti of the offenses as alleged except as to the value of the coins taken from the Officers' Mess and the value of the personal property belonging to Lieutenant Caldwell. The Court by appropriate exception and substitution found the value of the former to be $12 as admitted by the accused and the reviewing authority appropriately approved the value of the latter as substantial. Since the accused is an officer insofar as punishment is concerned the question of the value of the coins and Lieutenant Caldwell's articles of personal property is immaterial. The accused's guilt is conclusively established by his original voluntary admission thereof, his confession to the investigating officer and the admissions contained in his unsworn statement. (M.C.M., 1928, par. 76). Although the accused presented no evidence raising the issue of his irresponsibility because of insanity or inability to adhere to the right when confronted with a strong impulse to do wrong, the court required expert testimony relative thereto which persuasively shows that the accused is both mentally and morally responsible for his acts within the degree required by law to render him amenable for his derelictions. The evidence, therefore, beyond a reasonable doubt establishes the accused's guilt of the offenses as approved by the reviewing authority and amply supports the findings of guilty of all Charges and Specifications as so approved.

7. The accused is about 26 years old. The War Department records show that he is a high school graduate and is single. From 1939 until 1942 he was employed as a tire salesman and as a coach repairman for a railroad company. He has had prior enlisted service from 28 February 1943 until 12 May 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.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications, as approved by the reviewing authority, and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93 or Article of War 94.

Abner E. Lipscomb, Judge Advocate.

Robert Plumer, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 267788

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 Second Lieutenant Fredric G. Hallam (O-1546785), Medical Administrative Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the period of confinement be reduced to three years, that the sentence as thus modified be ordered executed, and that the Federal Reformatory, Chillicothe, Ohio, be designated as the place of confinement.

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

Myron C. Cramer

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

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

(Sentence confirmed but confinement reduced to three years. G.C.M.O. 18, 10 Jan 1945)

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

SPJGH
CM 267843

15 DEC 1944

UNITED STATES	INFANTRY REPLACEMENT TRAINING CENTER CAMP BLANDING, FLORIDA
v.	Trial by G.C.M., convened at Camp Blanding, Florida, 17-18 October 1944. Dismissal.
Captain ROBERT W. BONAR (0-1285535), 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 I: Violation of the 61st Article of War.
(Withdrawn by direction of appointing authority, R. 64).

Specification: (Withdrawn by direction of appointing authority, R. 64).

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

Specification 1: In that Captain Robert W. Bonar, then of Company "C", 210th Infantry Training Battalion, 65th Infantry Training Regiment, Camp Blanding, Florida, now of Headquarters, Infantry Replacement Training Center, Camp Blanding, Florida, did at Camp Blanding, Florida on or about 7 July 1944, feloniously embezzle by fraudulently converting to his own use the sum of twenty-five dollars ($25.00) entrusted to him by his subordinates, enlisted personnel of Company "C", 210th Infantry Training Battalion and held by him in a fund commonly known as "Ticket Fund, Company "C", 210th Infantry Training Battalion".

Specification 2: In that Captain Robert W. Bonar, * * *, did at Camp Blanding, Florida on or about 10 July 1944, feloniously embezzle by fraudulently converting to his own use the sum of fifty-one dollars and ninety-seven cents ($51.97) entrusted to him by Privates Bartalo J. Martello, Joe M. Bowers and Harlan S. Roberts, all of Company "C", 210th Infantry Training Battalion, his subordinates, and held by him in a fund commonly known as "Ticket Fund, Company "C", 210th Infantry Training Battalion".

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

Specification 1: In that Captain Robert W. Bonar, * * *, did at Camp Blanding, Florida on or about 7 July 1944, feloniously embezzle by fraudulently converting to his own use the sum of twenty-five dollars ($25.00) entrusted to him by his subordinates, enlisted personnel of Company "C", 210th Infantry Training Battalion and held by him in a fund commonly known as "Ticket Fund, Company "C", 210th Infantry Training Battalion".

Specification 2: In that Captain Robert W. Bonar, * * *, did at Camp Blanding, Florida on or about 10 July 1944, feloniously embezzle by fraudulently converting to his own use the sum of fifty-one dollars and ninety-seven cents ($51.97) entrusted to him by Privates Bartalo J. Martello, Joe M. Bowers and Harlan S. Roberts, all of Company "C", 210th Infantry Training Battalion, his subordinates, and held by him in a fund commonly known as "Ticket Fund, Company "C", 210th Infantry Training Battalion".

Specification 3: (Withdrawn by direction of appointing authority, R. 64).

Specification 4: (Withdrawn by direction of appointing authority, R. 64).

Specification 5: In that Captain Robert W. Bonar, * * *, did at Camp Blanding, Florida on or about 25 July 1944 with intent to injure wrongfully and unlawfully make and utter to the Camp Blanding Exchange, Camp Blanding, Florida a certain check in words and figures as follows, to-wit:

NO._____ Columbus, Ohio, July 25 19 44

HIGH-TOWN OFFICE
THE OHIO NATIONAL BANK 25-1
OF COLUMBUS

PAY TO THE
ORDER OF Camp Blanding Exchange $25.00

Twenty five and ---------- 00/100 DOLLARS

SAFE DEPOSIT BOXES FOR RENT

Robert W. Bonar
Capt. Inf.

and by means thereof, did fraudulently obtain from said Camp Blanding Exchange twenty-five dollars ($25.00), he the said Captain Robert W. Bonar, then well knowing that he did not have and not intending that he should have sufficient funds in the Ohio National Bank of Columbus, High-Town Office, Columbus, Ohio, for the payment of said check.

Specification 6: In that Captain Robert W. Bonar, * * *, did at Camp Blanding, Florida, on or about 16 July 1944 with intent to deceive and injure wrongfully and unlawfully make and utter to 1st Sergeant William G. Guillow, Company "C", 210th Infantry Training Battalion, Camp Blanding, Florida, his military subordinate, a certain check, in words and figures as follows, to-wit:

Columbus, Ohio
~~Camp-Blanding,-Fla.~~ July 16 19 44 No. ____

~~CAMP-BLANDING-FACILITY-OFFICE-63-546~~
~~THE-ATLANTIC-NATIONAL-BANK-OF-JACKSONVILLE~~

THE OHIO NATIONAL BANK
HIGH-TOWN OFFICE

PAY TO THE
ORDER OF Cash ---------- $ 10.00

Ten & no ---------- 00/100 DOLLARS

Robert W. Bonar
Capt. Inf.

and by means thereof, did fraudulently obtain from said 1st Sergeant William G. Guillow ten dollars ($10.00), he the said Captain Robert W. Bonar, then well knowing that he did not have and not intending that he should have sufficient funds in the Ohio National Bank of Columbus, High-Town Office, Columbus, Ohio, for the payment of said check.

Specification 7: In that Captain Robert W. Bonar, * * *, did at Camp Blanding, Florida, between 14 July 1944 and 27 July 1944, wrongfully and dishonorably make and utter to 1st Sergeant William G. Guillow, Company "C", 210th Infantry Training Battalion, his military subordinate, five certain checks in words and figures as follows, to-wit:

NO. ____ Columbus Ohio, July 27 19 44

HIGH-TOWN OFFICE
THE OHIO NATIONAL BANK 25-1
OF COLUMBUS

PAY TO THE
ORDER OF Cash ---------- $10.00
00
Ten & no ---------- 100 DOLLARS

SAFE DEPOSIT BOXES FOR RENT

Robert W. Bonar
Capt. Inf.

Columbus, Ohio
~~Camp-Blanding,-Fla.~~, July 18 19 44 No. ___

~~CAMP-BLANDING-FACILITY-OFFICE~~ 63-546
~~THE-ATLANTIC-NATIONAL-BANK-OF-JACKSONVILLE~~
THE OHIO NATIONAL BANK
HIGH-TOWN OFFICE

PAY TO THE ORDER
OF Cash ---------- $10.00
00
Ten & no ---------- 100 DOLLARS

Robert W. Bonar
Capt. Inf.

~~Camp-Blanding,-Fla.~~ July 16 19 44 No. ____

~~CAMP-BLANDING-FACILITY-OFFICE~~ 63-546
~~THE-ATLANTIC-NATIONAL-BANK-OF-JACKSONVILLE~~
The Ohio National Bank
High-Town Office

PAY TO THE
ORDER OF Cash ---------- $10.00
00
Ten & no ---------- 100 DOLLARS

Robert W. Bonar
Capt. Inf.

No. ____ Columbus, Ohio July 14 1944

HIGH-TOWN OFFICE
THE OHIO NATIONAL BANK 25-1
OF COLUMBUS

PAY TO THE
ORDER OF Cash ----------$ 10.00
00
Ten & no ---------- 100 DOLLARS

SAFE DEPOSIT BOXES FOR RENT Robert W. Bonar
Capt. Inf.

No. ___ Columbus, Ohio July 22 1944

HIGH-TOWN OFFICE
THE OHIO NATIONAL BANK 25-1
OF COLUMBUS

PAY TO THE
ORDER OF Cash ----------$ 20.00
00
Twenty & no ---------- 100 DOLLARS

SAFE DEPOSIT BOXES FOR RENT Robert W. Bonar
Capt. Inf.

and by means thereof, did dishonorably obtain from said 1st Sergeant William G. Guillow the sum of sixty dollars ($60.00), the said Captain Robert W. Bonar, then well knowing that he did not have sufficient funds in the Ohio National Bank of Columbus, High-Town Office, Columbus, Ohio, for the payment of all of said checks.

CHARGE IV: Violation of the 96th Article of War.
(Withdrawn by direction of appointing authority, R. 64).

Specification: (Withdrawn by direction of appointing authority, R. 64).

ADDITIONAL CHARGE I: Violation of the 95th Article of War.
(Withdrawn by direction of the appointing authority, R. 64).

Specification 1: (Withdrawn by direction of appointing authority, R. 64).

Specification 2: (Withdrawn by direction of appointing authority, R. 64).

Specification 3: (Stricken by court on motion of defense before plea entered, R. 12).

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

Specification: In that Captain Robert W. Bonar, of Headquarters, Infantry Replacement Training Center, Camp Blanding, Florida, did, at Camp Blanding, Florida, on or about 5 June 1944, with intent to injure wrongfully and unlawfully make to Private Steve Nichols, Company "C", 210th Infantry Training Battalion and utter to a special fund known as a Ticket Fund, Company "C", 210th Infantry Training Battalion, a certain check in words and figures as follows, to-wit:

NO.___ Columbus, Ohio, June 5 1944

HIGH-TOWN OFFICE
THE OHIO NATIONAL BANK 25-1
OF COLUMBUS

PAY TO THE
ORDER OF Pvt. Steve Nichols $25.00
00
Twenty five and no----------100 DOLLARS

SAFE DEPOSIT BOXES FOR RENT Robert W. Bonar
Capt. Inf.

Reverse side:

Pvt. Steve Nichols

Clifton F. Seltenright
2nd Lt. Inf.

and by means thereof, did fraudulently obtain from a special fund known as "Ticket Fund, Company "C", 210th Infantry Training Battalion", twenty-five dollars ($25.00), he the said Captain Robert W. Bonar, then well knowing that he did not have and not intending that he should have sufficient funds in the Ohio National Bank of Columbus, High-Town Office, Columbus, Ohio, for the payment of said check.

The accused pleaded not guilty to all Charges and Specifications, was found guilty of the Specification of the Second Additional Charge, except the words "with intent to injure" and of the excepted words not guilty, and guilty of all other Charges and Specifications upon which he was tried. No evidence of previous convictions was introduced. He was sentenced to dismissal. The reviewing authority approved only so much of the finding of guilty of the Second Additional Charge as involves a finding of guilty of a violation of Article of War 96, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence introduced by the prosecution is hereafter summarized under appropriate headings indicating the Charges and Specifications to which it refers.

a. Charge II, Specifications 1 and 2, and Charge III, Specifications 1 and 2:

During May, June and the first part of July 1944, accused was company commander of Company C, 210th Infantry Battalion, 65th Infantry Training Regiment, Camp Blanding, Florida. A cycle of training for the recruits in accused's organization was to be completed in June 1944, following an undetermined period of time to be spent on bivouac, and thereafter the recruits were to be transferred from accused's organization receiving a delay en route to their new station. In order to assist the men to save the necessary funds to purchase railroad tickets for their delay en route, accused permitted all enlisted men to deposit cash with him to be held in a fund known as the Ticket Fund, Company C. Approximately $4,000 was turned in by the enlisted men and each depositor received an appropriate receipt (R. 21, 30, 31). The fund was kept on deposit in a bank until 7 June 1944 and then the account was closed and the money removed to the safe in the orderly room of Company C. Accused was responsible for the fund (R. 22, 23, 35, 44). Besides accused, First Sergeant William G. Guillow and Second Lieutenant Clifton L. Seltenright had access to the orderly room safe but neither of them, according to his testimony, occasioned any shortage in the fund (R. 25, 26, 57, 58, 60). When accused was relieved as company commander on 10 July 1944, he did not turn over the fund to his successor but continued to administer it as his responsibility through Sergeant Guillow (R. 26).

During June and July 1944, accused was accustomed to withdraw cash from this fund and deposit his personal check in exchange therefor. By the middle of July 1944, there were a number of accused's checks held with this fund in the company safe (R. 24, 25). In addition to using this fund to cash his personal checks, on or about 15 July 1944 accused withdrew $25 in cash from the fund (R. 41, 42). Around 11 August 1944, Sergeant Guillow asked accused if he had repaid the $25 to the fund and accused replied that he felt sure he had done so. On 15 or 16 August 1944, accused did repay the $25, giving it to Sergeant Guillow (R. 24, 40, 42).

First Lieutenant John L. Flock succeeded accused as company commander in July 1944, and the following month the ticket fund was audited and a shortage of $51.76 was found to exist. At that time there were only three trainees, Privates Joseph Bowers, Bartalo Martello and Harlan Roberts, who had not been repaid their deposits. The audit demonstrated that the fund was insufficient by $51.76 to pay these three men the total amount to which they were entitled (R. 25, 27, 33; Pros. Ex. 6). On or about 18 or 19 August 1944, accused was informed of the shortage and he paid the amount thereof to Sergeant Guillow, stating that he held himself responsible for the fund. Thereafter these three enlisted men were paid the amounts to which they were entitled thus closing out the fund (R. 25, 32, 36, 38, 40, 46, 47, 50, 51).

b. Charge III, Specification 5:

Sometime shortly after 25 July 1944, a check drawn by accused to cash on the Ohio National Bank of Columbus, Ohio, in the amount of $25, dated 25 July 1944, and indorsed by the Camp Blanding Exchange, was cashed by the Camp Blanding Facility Office of the Atlantic National Bank, Jacksonville, Florida, and after having been forwarded for collection it was returned by the drawee bank and eventually charged back against the account of the indorser by the forwarding bank (R. 16, 17, 61, 62; Pros. Ex. 1g). When asked why this check had been returned by the drawee bank, the cashier of the Camp Blanding Exchange Office replied "Our records show insufficient funds" (R. 64). On 23 July 1944, accused had a balance of $11.15 on deposit with the drawee bank which was reduced to $10.23 on 26 July and so remained until, on 1 August 1944, a deposit of $311.80 increased accused's balance to $322.03 (Pros. Ex. 2). When accused was advised that this check had been returned he informed the indorser that there must have been some error and suggested the check be redeposited. It was redeposited on 3 August 1944 and was paid by the drawee bank when presented to it the second time (R. 63, 64).

c. Charge III, Specifications 6 and 7:

On or about the dates they bore, accused made five checks totaling $60 which, at his request, Sergeant Guillow cashed from his personal funds (R. 28, 34). These checks are more fully described as follows, viz (Pros. Exs. 1a-1e incl.):

Exhibit No.	Date of Check	Amount of Check	Drawee Bank
1d	14 July 1944	$10	The Ohio National Bank of Columbus, Ohio.
1a	16 July 1944	$10	"
1b	18 July 1944	$10	"
1c	22 July 1944	$20	"
1e	27 July 1944	$10	"

When Sergeant Guillow cashed these checks for accused, the latter asked him to refrain from depositing several of them for a few days. About 11 August 1944, accused informed the sergeant that he could deposit them at any time thereafter and on 14 August 1944 the sergeant tendered them to a bank, presumably the Camp Blanding Facility Office of the Atlantic National Bank. However, the cashier refused to accept them, stating that they had received orders not to cash any of accused's checks until further notice (R. 29, 33, 39). Finally, on 18 August 1944, the checks were accepted from Sergeant Guillow by the Camp Blanding Office of the Atlantic National Bank, were forwarded through banking channels for collection and all but one (Pros. Ex. 1a), the check for $10, dated 16 July 1944, were paid by the drawee bank on 23 August 1944. The balance in accused's account on 23 August 1944, after payment of four of these checks, was $2.49. On 13 July 1944 the balance in accused's account had been $146.90, it fell to $10.23 by 26 July 1944, and on 1 August 1944, a deposit increased it to $322.03 (Pros. Ex. 2). The accused had not redeemed the dishonored check for $10 by the time of trial (R. 17-20, 30, 35; Pros. Ex. 2). This dishonored check is the same check described in Specification 6.

d. Second Additional Charge and Specification:

On or about 5 June 1944, Technician Fifth Grade Steve Nichols was scheduled to leave for New York on a troop train. In order to loan him money for the trip, accused drew a check for $25 on the Ohio National Bank of Columbus, payable to Steve Nichols and dated 5 June 1944. He requested Sergeant Guillow to cash it from the currency in the ticket fund and this the sergeant did, giving the $25 to Nichols. About a week later Nichols repaid accused for the loan (R. 23, 36, 53, 54). On 14 July 1944, Sergeant Guillow gave this check, along with several other checks, to Lieutenant Seltenright and asked him to cash them at the bank so as to put the Ticket Fund in a liquid position to repay the enlisted men the amounts they had deposited therein (R. 25, 55, 56). The lieutenant obtained cash for all of these checks at the Camp Blanding Facility Office of the Atlantic National Bank.. However, after the Nichols check had been forwarded through banking channels for collection, it was returned unpaid (R. 16, 56). On 5 June 1944, accused had a balance of $531.53 in his account at the Ohio National Bank of Columbus which was gradually reduced to a balance of $47 on 30 June 1944. A deposit on 3 July 1944, increased the balance to $332.40 and on 20 July 1944 it was reduced below $25 for the first time since the Nichols check had been issued (Pros. Ex. 2).

4. After his rights as a witness had been explained to him, accused elected to take the stand and he gave the following sworn testimony in his own behalf.

a. Charge II, Specifications 1 and 2, and Charge III, Specifications 1 and 2:

Accused testified that he voluntarily set up the ticket fund arrangement for the benefit of the trainees in his company and kept the fund on deposit in a bank until the last week of training for these men when he withdrew it and deposited it in the company safe. It totaled about $4200 (R. 66). He admitted he was accustomed to cash checks by withdrawing currency from the ticket fund which he replaced with his personal check. He also admitted he took $25 from the fund but stated that the same afternoon he gave Sergeant Guillow his check for $75 and received another $50 from the fund, thus balancing his account with it. He so used the fund because the pressure of his work made it difficult for him to visit the bank (R. 67).

He testified that on 14 August 1944, the regimental commander informed him of a shortage of some $70 in the fund. Accused denied any knowledge of the shortage or of how it had occurred and denied that he removed any money from the fund and converted it to his own use. He stated that he made up the shortage from his own funds but only because he considered himself solely responsible for the ticket fund. He did not turn this fund over to the officer who succeeded him as company commander because he considered it his sole responsibility and also because he didn't even think about it at the time the change in command occurred. He also testified that Privates Martello, Bowers and Roberts were repaid in full the amount they had deposited in the fund (R. 67-69, 72).

b. Charge III, Specification 5:

Accused testified that when he issued the check for $25, dated 25 July 1944, to the Camp Blanding Exchange he fully believed that he had sufficient funds in his bank account to cover it. Apparently, however, it was dishonored because of insufficient funds and, as soon as accused was advised it had been returned unpaid, he redeemed it for cash from the Exchange (R. 70, 71). He had maintained an account in the drawee bank, The Ohio National Bank of Columbus, continuously since October 1943 (R. 78).

c. Charge III, Specifications 6 and 7:

Accused testified that on the date he wrote the check for $10, dated 16 July 1944, he had a balance of $71.90 in his account and that if this check had been presented to the drawee bank for payment within a reasonable time it would have been honored (R. 69).

d. Second Additional Charge and Specification:

Accused admitted that the check for $25, payable to Steve Nichols was placed with the cash of the ticket fund and $25 taken therefrom in exchange therefor. This money was loaned by accused to Nichols, who was

going to New York as a member of the cadre to escort trainees back to camp, to permit him to "see some of the sights of New York" (R. 70, 71).

5. The evidence introduced under Specification 1 of Charge II and Specification 1 of Charge III demonstrates that on or about 15 July 1944 accused withdrew $25 from a fund of money with which he had been temporarily entrusted by enlisted men of his command, did not use it for purposes for which the fund was established and finally repaid it on or about 15 or 16 August 1944. When a person having the care and control of money for others makes an unauthorized use of the funds, even though it be under the guise of borrowing and with the intent that the use be but temporary, he has committed the offense of embezzlement (CM ETO 1302, 3 Bull. JAG 189; CM 254947, Daily, 3 Bull. JAG 344).

The proof also shows that when there remained three enlisted men who had not been repaid their deposit in the ticket fund, the fund lacked $51.76 of the amount necessary to pay them in full (Spec. 2 of Ch. II and Spec. 2 of Ch. III). Accused was accustomed to dip into this fund and use it to cash his personal checks. On one known occasion he borrowed from the fund without leaving any record of his unauthorized act. Under such circumstances accused's failure to account in full for the money entrusted to him justifies the logical conclusion that he misappropriated an amount equal to the amount of the shortage (CM 234153, Shirley, 20 B.R. 259, 2 Bull. JAG 341).

These two separate offenses of embezzlement not only constituted civil offenses but also military offenses. Clearly, an officer is required to exercise the highest degree of good faith when acting as a custodian of funds of enlisted men in his command. To fail so to do and for the officer to appropriate this money for his own personal use is disgraceful and dishonorable in violation of Article of War 95. It is not error to charge the same offense under different Articles of War when one of the charges is based on the civil aspect of the offense and the other is based on its military aspect although accused may properly be punished for his acts only in their more important aspect (CM 241597, Fahey, 26 BR 305, 3 Bull. JAG 10).

Accordingly, the record of trial sustains the findings of guilty of Specifications 1 and 2 of Charge II and Specifications 1 and 2 of Charge III.

Under Specification 5 of Charge III, accused is charged with fraudulently obtaining $25 by uttering a check for that amount on 25 July 1944, then well knowing that he did not have, and not intending to have, sufficient funds on deposit to pay it. From 23 July 1944 until 1 August 1944, accused's balance in the drawee bank did not exceed $11.15. On 1 August 1944 a deposit increased his balance to $322.03. Accused's bank

statement shows that during the months of May, June, July and August 1944 he deposited several hundred dollars a month in his bank account. His testimony, not controverted by the prosecution, indicates that he opened his account in the drawee bank in October 1943 and maintained it thereafter. The instant check was honored when forwarded the second time through banking channels for collection. From this evidence it cannot reasonably be concluded that accused intended to defraud when he issued this check and that he did not intend to have sufficient funds on deposit to pay it. The evidence establishes accused's guilt only of the lesser included offense of failing to maintain a sufficient bank balance to pay an outstanding check in violation of Article of War 96.

Specification 6 of Charge III also alleges that accused fraudulently obtained $10 by uttering a check for that amount on 16 July 1944, then well knowing that he did not have, and not intending to have, sufficient funds on deposit to pay it. However, the proof shows that on 13 July 1944 and until at least 1 August 1944, accused had sufficient funds on deposit to pay this check. Furthermore, there is no proof that prior to issuing this check accused had issued sufficient checks to deplete his account to such an extent as to render it insufficient to pay this check when presented in due course. Accordingly, the proof fails to establish fraud or the issuance of this check at a time when accused knew he had insufficient funds on deposit. It establishes his guilt only of the lesser included offense of failing to maintain a sufficient bank balance to pay an outstanding check in violation of Article of War 96.

Specification 7 of Charge III alleges that from 14 July 1944 to 27 July 1944 accused made and issued five checks totaling $60, one of which was the $10 check issued on 16 July 1944 and covered by Specification 6, Charge III, which was considered in the preceding subparagraph of this paragraph 5, then well knowing that he did not have sufficient funds on deposit "for the payment of all of said checks". The proof shows that four of the five checks were paid when presented for payment and that only the $10 check issued on 16 July 1944 was not paid. Thus, it is apparent that accused's only offense involved the failure of his bank account to have sufficient funds to pay that $10 check. However, accused has already been found guilty of that offense under Specification 6 of this Charge. He could be found guilty of no greater or other offense under this Specification 7. No citation of authority is required to buttress the proposition that an accused may not be found guilty more than once of the same offense under the same Article of War. Accordingly, the evidence does not sustain the finding of guilty of this Specification.

Under the Specification of the Second Additional Charge accused was found guilty by the court of fraudulently obtaining $25 by issuing a

check for that amount on or about 5 June 1944 without having and not intending to have sufficient funds on deposit to pay it. The reviewing authority approved only so much of the findings of guilty as involves a finding of guilty of a violation of Article of War 96. The evidence demonstrates that the check was not cashed until about 14 July 1944, over a month after it was issued. On the date it was issued accused had a balance of $531.53 in his account and his balance did not thereafter fall below $25 until 20 July 1944. It is quite apparent that the proof utterly fails to establish the intent to defraud or that accused had insufficient funds on deposit when he made this check. However, it was incumbent upon him to maintain a sufficient bank balance to pay this outstanding check when presented for payment at any time before it became outlawed as an obligation, or to make other arrangements to discharge it. Accordingly, the proof establishes accused's guilt of failing to maintain a sufficient bank balance to pay an outstanding check, in violation of Article of War 96.

6. The accused is 25 years of age. After graduation from high school he studied for 1½ years at Ohio State University apparently discontinuing his studies to enter the Army. He enlisted in the military service on 27 February 1940 and on 18 June 1942, was commissioned a second lieutenant, after completion of Officer Candidate School, and assigned to duty with the Corps of Military Police. On 1 October 1942 he was promoted to first lieutenant. On 8 June 1943 he was eliminated from pilot training in officer grade at the Army Air Forces Pre-Flight School, San Antonio, Texas, and was assigned to the Infantry at his own request. On 9 August 1943 he was promoted to captain.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the finding of guilty of Specification 7 of Charge III; legally sufficient to support so much of the findings of guilty of Specifications 5 and 6 of Charge III as involves violations of Article of War 96; legally sufficient to support the findings of guilty of all other Charges and Specifications 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 convictions of violations of Articles of War 93 and 96.

Thomas N. Jaffy, Judge Advocate.

[illegible], Judge Advocate.

William H. Gambrell, Judge Advocate.

SPJGH
CM 267843

1st Ind.

War Department, J.A.G.O., DEC 28 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 Captain Robert W. Bonar (0-1285535), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 7 of Charge III; legally sufficient to support only so much of the findings of guilty of Specifications 5 and 6 of Charge III as involves violations of Article of War 96; legally sufficient to support the findings of guilty of all other Charges and Specifications as approved by the reviewing authority, and to support the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 42, 27 Jan 1945)

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

SPJGK
CM 267877

4 DEC 1944

UNITED STATES V. Private LLOYD L. WILLIAMS (32584203), Section F, 3010th Army Air Forces Base Unit.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Yuma Army Air Field, Yuma, Arizona, 10 and 11 October 1944. Dishonorable discharge and confinement for life. Penitentiary.

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

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

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

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

Specification: In that Private Lloyd L. Williams, Section F, 3010th AAF Base Unit, did, at Williams Field, Chandler, Arizona, on or about 22 September 1944, forcibly and feloniously against her will, have carnal knowledge of Shirley Myrle Neal.

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

Specification: In that Private Lloyd L. Williams, Section F, 3010th AAF Base Unit, did, at Williams Field, Chandler, Arizona, on or about 22 September 1944, with intent to do him bodily harm, commit an assault upon Pvt. Herman H. Martin, Jr., by willfully and feloniously striking the said Pvt. Herman H. Martin, Jr., on the head with his fist.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence was introduced of one previous conviction by summary court-martial of exceeding the speed limit in the operation of a motor vehicle in violation of the 96th Article of War. In the instant case he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and

forwarded the record of trial for action under Article of War 50½.

3. Evidence.

a. For the prosecution: Miss Shirley Myrle Neal, age 19 (R. 76), a civilian employee at Williams Field, at 2100 on 22 September 1944, went to a party given by Section A of the 3010th Army Air Forces Base Unit, which was held at its swimming pool (R. 47). At the party she met for the first time Private Herman H. Martin, Jr. (R. 29,48,59), danced with him several times, and had four or five bottles of beer with him (R. 30,48). At about 2400 she and Private Martin started walking back to the trailer in which she lived on the Field, and went by way of the ball park and the grandstand, where they stopped, sat on the bottom row of seats and "petted" for a while (R. 18-19, 49-50,60). A colored soldier walked by with a flashlight and flashed it in their faces (R. 19). Shortly thereafter, Miss Neal and Private Martin moved to the top row seat of the grandstand where it was very dark (R. 19). There they voluntarily engaged in an act of sexual intercourse (R. 34,51).

After they had finished this act, and while Private Martin was sitting on the top row seat of the grandstand alongside of Miss Neal, without either his slacks or shorts on, two persons approached with a flashlight. Martin grasped the light and flashed it on the face of one of them. He recognized him as being the accused, called him "Bobo" (the accused's nickname), and asked what he was doing there (R. 23,37,63). The accused, who is a professional boxer (R. 108-109), made no reply but struck Martin on the jaw and knocked him three or four rows of seats down the bleachers (R. 23,38,53). The prosecutrix did not recognize the accused but could see that he was a colored soldier. The same individual who struck Martin grabbed her, and she held on to a rafter (R. 53).

Martin returned, and the same colored soldier hit him again (R. 24). This time Martin fell all the way to the bottom of the bleachers (R. 53). Martin was in a daze and could not recall clearly what he did during the next hour except that he wandered about the post. Finally when he regained his faculties he went to the guardhouse, and reported the incident to the Officer of the Day. Martin, the officer of the day, and the sergeant of the guard, then went to the grandstand and from there to the living quarters of Miss Neal. On arriving Miss Neal told "what had happened to her that evening" (R. 24-25,58).

After knocking Martin down the second time the colored soldier again grabbed Miss Neal. She struck him and kicked at him and pushed him. He fell three or four rows down in the bleachers. She started to run. He caught her and threw her down on her back on one of the seats of the bleachers, and fell on top of her. One of his hands was on her leg under her dress and the other on her shoulder. She managed to slide her body under the seat and fall to the ground below (R. 54-56, 67-68). She fell

about fifteen feet (Pros. Ex. 4). When she struck the ground she hurt her feet and lay there a minute. As she arose she heard "this fellow" coming around the end of the bleachers. He pushed her down on the ground. She was yelling and screaming. He then hit her on the jaw and on the mouth. She was dazed or partially unconscious as a result of the blows, and the next thing she remembers was that he was on top of her having sexual intercourse with her (R. 57,70-73,75). When the act was completed, he pulled her to her feet and walked around the corner of the grandstand with her. There was a truck coming, and "another colored person yelled 'Bobo', and the fellow ran and jumped the fence." (R.75) She could not say who the person was who attacked her - "niggers all look alike to me" (R. 74).

About 0315 she was given a careful examination by Captain Armond F. Schick, Medical Corps. Captain Schick stated that Miss Neal had a swollen left ankle and foot, superficial abrasions on both knees, and right wrist. Her left jaw was tender and there was a small bruise on the back of her head. An examination of her genital organs disclosed no unusual condition other than the presence of a small amount of spermatozoa. The hymen had been broken, but there was no evidence of recent tears. The doctor was of the opinion that her loss of virginity was not of recent origin. Miss Neal remained in the hospital from 22 September to 9 October (R. 91.94). Private Martin also was examined by Captain Schick. Martin had a swollen left jaw, a small abrasion of the left side of his forehead, of the elbow and upper arm (R. 92).

The accused was told by the investigating officer that he had the privilege of making a statement in any form, subject to the risk of having this statement used against him. The 24th Article of War was read and explained to him. Whereupon the accused said he desired to and did voluntarily make a statement in writing (R. 78-79, 83, 89; Pros. Ex. 7), in which he stated that after he left the squadron party where he had been drinking beer he went to the grandstand in the ball park and hid in back of it. He then went up into the grandstand and saw Private Martin and "this girl". It continues:

> "* * * so I hit Martin twice and when he got up I gave him his pants to put on and then he left the grandstand. The girl and I were on the top step struggling and she kicked me down on the stand and I got green paint on my pants and she said 'leave me alone, Bobo' and we came down a couple of stairs with her in my arms and she got away and she jumped to the ground and I jumped off too. She said she hurt her leg and I got down on the ground and she was leaning on a post and I put my arm around her waist and I moved her out from the post and she gave away like her legs were hurting, so I got down on the ground and she grabbed my privates and tried to pull it and then we had intercourse and then she told me her legs were hurting so I grabbed her around the waist and she had her arm around my neck and I helped her as far

as the motor pool office and I then let her go by herself and I said I ought to turn you and this boy over to the O.D. and I went into the motor pool." (Pros. Ex. 7)

b. For the defense: The accused having been advised as to his right to remain silent, testify under oath, or make an unsworn statement, elected to make an unsworn statement through his counsel, the substance of which was that accused was born in Florida in 1921 and his schooling consisted of the first to the ninth grades. When he was eight years of age, his father left his mother. The family then moved to Rochester, New York, where they have since lived. Accused used to act as a caddy and sell papers to help the family. He has one brother in service in England and a married sister living in Rochester with his mother. When accused was about sixteen or seventeen, he became interested in boxing and pursued it for a livelihood until his entry into the Army. In 1941 he won the Golden Gloves Senior Championship at Madison Square Garden. He gave a substantial amount of money to his mother and had been making an allotment to her since his entry into the Army. Continuing the unsworn statement defense counsel stated that accused had worked in the motor pool at Williams Field and had been guilty of some small infractions which required punishment under Article of War 104, but in the past year accused "has been convicted of only one and that was stealing; for that he received a slight punishment, a small term in the Guardhouse". Accused was never convicted of any crime in civilian life. On the night in question he had been drinking beer quite heavily and had had, as he remembers it, about ten bottles. Just what happened or where he went, he is not certain, but he was arrested asleep in a car in the motor compound (R. 108-109).

4. Discussion. a. Charge I, Rape.

Manual for Courts-Martial, 1928, paragraph 148b, page 165, provides:

"Rape is the unlawful carnal knowledge of a woman by force and without her consent.

"Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

"The offense may be committed on a female of any age.

"Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

"Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent.

"It has been said of this offense that 'it is true that rape is a most detestable crime * * *; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent.'

* * * * *

"Proof.--(a) That the accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent."

In Mills v. United States, 164 United States 644, the court held:

"The force that must be shown is a force that is overwhelming in its nature and beyond her power to resist. It must be a force greater than that incident to the commission of the act, except in those cases where the women's will or her resistance has been overcome by threats or fright, or she has become helpless or unconscious."

Upon applying these principles to the facts in the case under discussion, it clearly appears that the accused committed rape upon Miss Neal at the time and place averred in the Specification of Charge I. The accused admitted in his voluntary statement that he had intercourse with Miss Neal. In the same written statement he admitted that he attacked the girl and her soldier companion without giving any reason for his conduct. The only reasonable inference that can be drawn from his vicious attack is that his intent was to have carnal knowledge of the girl. Having disposed of Miss Neal's companion by viciously assaulting him accused then grasped Miss Neal and pushed her down on her back on one of the seats. Miss Neal resisted his efforts and managed to elude him temporarily by sliding under the seat and dropping to the ground 15 feet below. Unmindful of her resulting painful injuries accused pursued her below the grandstand and there, after administering blows to her jaw, rendering her partially unconscious, raped her. If the testimony is to be believed (and there appears to be no reason to reject it), it is difficult to conceive of a clearer case of rape. That Miss Neal did not consent was clearly evidenced by her conduct in kicking and hitting her assailant, thereby pushing him down three or four rows in the bleachers, by evading his grasp, and by deliberately jumping or dropping 15 feet to the ground. When the accused followed up his attack and struck her in the jaw and in the mouth she was naturally stunned. Her powers of further resistance were gone. She became helpless and semiconscious. Then it was that accused consummated his carnal purpose. In the opinion of the Board of Review every element of the crime was clearly proved beyond any reasonable doubt.

b. Charge II - Assault with intent to do bodily harm.

Manual for Courts-Martial, 1928, paragraph 149n, page 180, provides:

"Discussion.-- This is an assault aggravated by the specific present

intent to do bodily harm to the person assaulted by means of the force employed. It is not necessary that any battery actually ensue, or, if bodily harm is actually inflicted, that it be of the kind intended. Where the accused acts in reckless disregard of the safety of others it is not a defense that he did not have in mind the particular person injured.

"Proof.--(a) That the accused assaulted a certain person, as alleged; and (b) the facts and circumstances of the case indicating the concurrent intent thereby to do bodily harm to such person."

The evidence of record clearly showed that the accused attacked Martin for the purpose of knocking him unconscious or of rendering him physically unable to interfere with his principal desire to rape his girl companion. The accused was a heavy weight boxer. Martin was standing near the top seat of the grandstand. Accused struck him in such a way as to knock him down several rows. When Martin returned accused again struck him. This time the blow was of sufficient force to knock him all the way - 30 feet - down the grandstand and so dazed him as to render him semi-conscious for over an hour. It was a fair and reasonable inference for the court to draw from this evidence that accused intended to do Martin bodily harm by means of the force employed. Ordinarily a blow on the jaw with one's fist would not constitute a violation of the 93rd Article of War, but where, as here, the person who delivers the blow is a heavy weight skillful boxer and the victim is standing thirty feet above ground, and the blow is delivered with such force as to cause the victim to fall that distance, there are circumstances which permit the inference that the assault was committed with intent to do bodily harm.

5. The Charge Sheet discloses that the accused is 23 years of age and, without prior military service, was inducted into the service at Rochester, New York, on 24 November 1942.

6. The court was legally constituted and had jurisdiction over 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 of guilty and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Title 22, paragraph 2801, of the District of Columbia Code.

Terry G. Eom, Judge Advocate.

Earle G. Stephens, Judge Advocate.

Herman Mayer, Judge Advocate.

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

SPJGQ
CM 267878

23 JAN 1945

UNITED STATES v. Private JAMES L. LUMPKINS (35733211), Company B, 96th Battalion; Private IKE A. EDWARDS (34252490), Private WEST HOPSON, JR. (42007314), and Private EX BASS, JR. (34555404), Headquarters and Service Company; Private JOSEPH WARREN (34629711) and Private JOSEPH N. WRIGHT (34542192), Company A, 95th Battalion; Private WILLIAM B. BELL (39591892), Company A, 97th Battalion; Private A. C. PAIGE (34942455), Company B, 95th Battalion, all of 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, 12 October 1944. Lumpkins and Edwards: Dishonorable discharge and confinement for thirty (30) years. Penitentiary. Wright: Dishonorable discharge and confinement for twenty-five (25) years. Penitentiary. Paige, Warren and Bell: Dishonorable discharge and confinement for ten (10) years. Federal Reformatory, El Reno, Oklahoma. Hopson and Bass: Dishonorable discharge and confinement for five (5) years. Federal Reformatory, El Reno, Oklahoma.

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 which are identical as to each accused except as noted:

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

Specification: In that (here are set forth the rank, name, organization and station of the individual accused, in the respective specification) did, at Camp Claiborne,

Louisiana, on or about 2 September 1944, voluntarily join in a mutiny which had begun in Camp Claiborne, Louisiana, against the lawful military authority of Major Virgil E. McDaniel, 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.

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

Specification: In that (here are set forth the rank, name, organization and station of the individual accused in the respective Specification) and more than two other persons whose names are unknown, being in Camp, did, at Camp Claiborne, Louisiana, on or about 2 September 1944, commit a riot, in that they, together with certain other persons to the number of about forty, whose names are unknown, did 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 Sergeant James T. Buckley by hitting him on the body with a bottle, to the terror and disturbance of the said Sergeant James T. Buckley.

The appointing authority directed a common trial for all of the accused and they were so tried without objection. Each was accorded separate rights of challenge and each separately indicated satisfaction with the court as constituted and sworn. Each was separately arraigned and severally pleaded not guilty to and, by separate findings, was found guilty of the Charges and Specifications. Evidence of one previous conviction of Lumpkins by special court-martial for larceny of $51.50 from an enlisted man; of two previous convictions of Edwards, (1) by summary court for absence without leave and (2) by special court-martial for (a) absence without leave (b) drunkenness in uniform and (c) assaulting a military policeman; and two previous convictions of Warren (1) by summary court for wrongfully wearing staff sergeant's chevrons and (2) by special court-martial for (a) breach of restriction and (b) giving a false name, was introduced at the trial. Each 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 respectively designated as follows: Lumpkins, 30 years; Edwards, 30 years; Warren, 25 years; Wright, 25 years; Hopson, 20 years; Bass, 20 years; Paige, 10 years; and Bell, 10 years. The reviewing authority, by separate actions, approved each sentence but reduced the periods of confinement of certain accused as follows: Warren, to 10 years; Hopson, to 5 years; and Bass, to 5 years. The United States Penitentiary, Leavenworth, Kansas, was designated as the place of confinement for Lumpkins, Edwards and Wright; and the Federal Reformatory, El Reno, Oklahoma, as the place of confinement for Warren, Bell, Hopson, Bass

and Paige, and the record of trial was forwarded for action under Article of War 50½.

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

The recreational hall and Post Exchange building of the 20th Group, 3860th Unit, are located adjacent to one another on the same side of Baton Rouge Street in Camp Claiborne, Louisiana (R. 15, 21, 52).

On the night of 2 September 1944, while attending a U.S.O. show in the recreational hall, Corporal Bruce Walker, Headquarters and Service Company, 20th Group, who was a corporal of the guard at the time, received a report from one of the guards about a fight going on in the post exchange. He went over to the exchange and found a crowd of about 50 or 75 men inside "talking loud and raising sand." One man who had been injured was being carried out of the front door (R. 72, 73).

At about the same time Second Lieutenant Pedro De Castro, Company D, 96th Battalion, 20th Group, duty officer of his company, and Second Lieutenant LeRoy O. Gillette, 2705th Engineer Dump Truck Company, who were also attending the performance in the recreational hall, were likewise informed of the disturbance by one of the guards (R. 15, 16, 86). This was at approximately 9 p.m. (R. 20, 87). They repaired to the post exchange where they saw the crowd of soldiers congregated around the door to the manager's office before which stood two guards with carbines. The men shouted and were excited and disorderly because of a report that the post exchange manager had hit one of the soldiers on the head with a hammer (R. 16, 72, 87). Lieutenant De Castro then ordered the guards to clear the post exchange of all soldiers and this was done and all the doors were closed (R. 16, 87).

The officers then proceeded to the manager's office and upon demand, the door, which had been barricaded on the inside, was opened by the exchange manager who, upon being questioned, admitted that he had hit a soldier over the head with a hammer. He was too excited and afraid to explain how or why he had done so (R. 16, 73, 87), although it appeared to have happened in a transaction involving the changing of a $20 bill (R. 29).

Meanwhile Second Lieutenant Leonard J. Salzberg, Company A, 96th Battalion, officer of the day for the 20th Group, arrived on the scene. He also tried to quiet the enlisted men who, by this time, were very much disturbed and excited by the news of the assault made by the post exchange manager upon the soldier (R. 29). Various other officers came and went in the ensuing 15 minutes during which Lieutenant Gillette heard "something hitting the sides of the wall from the outside" and the noise of a crowd gathering out of doors (R. 87).

When the officer of the day arrived, Lieutenant De Castro went outside where he saw that the soldiers who had attended the show in the recreational hall had left that building and were mingling with the crowd of soldiers who had been turned out of the post exchange until the exchange was surrounded (R. 17). Their attitude was menacing and they did not want the exchange manager to leave the building (R. 19). There were cries of "get the guards", "we don't want him to get away" (R. 17) and "we want justice done; don't let the man get away." (R. 18). A cordon of guards was thereupon thrown in front of the exchange to prevent the men from going into the building to get the manager (R. 73, 118) who, however, apparently got away somehow (R. 73).

At this point Major Virgil E. McDaniel, Commanding Officer of the 20th Group, who had been informed of the disturbance, arrived and tried to quell the disorder. At first he attempted to persuade the crowd by reasoning with them but when this failed he gave them direct orders to disperse and go to their quarters (R. 45, 55, 58, 59, 116, 123). He spoke in a voice loud enough for all to hear, telling them to break up and go to their company-areas as there was nothing they could do about the matter. He promised them that justice would be done as he would personally handle the matter and he invited anyone who had anything to say to come to his office in the morning and state it (R. 17, 18, 100, 116).

The crowd, at this time, numbered approximately 200 (R. 38, 44, 53, 76, 78). From time to time thereafter, various officers, numbering from about 5 or 6 at first (R. 21, 33) to 15 or 20 later (R. 25) assisted in an attempt to restore order and discipline. (Lieutenant De Castro R. 17, 24; Lieutenant Salzberg, R. 29, 30, 32; Lieutenant Gillette, R. 88, 89; Lieutenant Nateman, R. 99-101; Lieutenant Kunzig, R. 110; Lieutenant Esmonde, R. 115, 118, 119). Of these officers the record discloses that the following were in uniform and wearing the insignia of their respective ranks; Major McDaniel (R. 55); First Lieutenants Esmonde (R. 122) and Rachel (R. 139); Second Lieutenants Gillette (R. 91), Nateman (R. 103), De Castro (R. 24) and Salzberg (R. 34), and they were easily distinguishable as officers (R. 55, 92, 122, 139).

According to Lieutenant De Castro not more than 5 men obeyed Major McDaniel's order to go to quarters at first (R. 20), but when it became apparent that the men would not disperse, efforts were made to compel them to cross the street to the side opposite the post exchange (R. 29) and, under compulsion and by the assistance of the guards, they were finally driven clear of the exchange and across the street, at which time the crowd had been reduced to about 100 men (R. 17, 23, 29, 65, 166).

At least 5 or 6 different officers had exercised their authority and ordered the men to quiet down and go to their barracks (R. 33, 39, 99, 125). Major McDaniel had repeated his order at least a dozen times during the time he was on the scene (R. 55, 61, 99) and he knew of no reason why he could not have been heard by all the men as he was "hoarse after the whole deal was over" (R. 59).

Those who remained not only refused to disperse but became menacing and violent, "just cursing and going on, gathered up bottles and sticks" and threatened the guards (R. 65), which then numbered 8, telling them "you won't have your carbines always" and what would be done if they ever caught the guards without their weapons (R. 66, 68, 166). Someone urged: "They don't have no ammunition noways, let's rush them" and another shouted "I know everyone of those mother fuckers ... I am going to take care of them" (R. 66, 122, 167, 168).

By this time the mob had dwindled to about 40 or 50 men (R. 30, 44, 47, 53, 56, 61, 77). These were highly disorderly "shouting, throwing stones, bottles and anything they could get hold of" (R. 47). Lieutenant Nateman saw a rock weighing two pounds taken away from one of the men who was advancing toward the post exchange (R. 101). He heard one of the men say "I know where we can get rifles" proposing to go to some regiment for them (R. 101, 117). Others made the remarks: "You can't get justice in Louisiana" and "Let's do the manager as they do to our soldiers down there, take him out and string him up" (R. 101). Several men kept saying "Nothing will be done about this" and another said "I have been in Camp Claiborne for 6 months and there has been a colored soldier killed every month and there was never anything done about it" and these remarks incited the rest of the men (R. 119) until there were shouts of "Why should we wait", "Let's go in now and do it and get it over with" (R. 53) and "Let's kill these mother-fucking bastards" (R. 117).

The mob again crossed the street milling about and throwing bottles and stones some of which hit the exchange building and one of which struck Sergeant Buckley, one of the guards, on the leg (R. 20, 66, 67, 70, 73, 167, 171). About 12 or 15 bottles were thrown at the guards (R. 78). In an effort to cause the men to disperse about five shots were then fired in the air by two of the guards, Sergeant Buckley and Corporal Holmes (R. 54, 66, 170) and thereupon some of the men turned around and others stopped where they were (R. 66).

At this point one of the trucks waiting to take away the band which had been playing at the recreational hall started to pull out and a stone thrown by someone in the crowd hit the vehicle which was stopped and searched (R. 19, 20, 74). Thereafter every vehicle which passed was stopped and "if driven by anybody but a friend of theirs" the mob would immediately throw bottles, rocks, or other objects at them (R. 32). Thus a command car which crossed the street was stoned (R. 134); a weapons carrier had a windshield broken by a thrown bottle and

one of the occupants was injured (R. 54, 67, 70, 73, 90, 118, 167); a private sedan, or coupe, occupied by a man and a woman was nearly run into a ditch because of objects hurled at it (R. 70, 134, 167); and a bus carrying civilian passengers had windows and the windshield broken by bottles or stones thrown by members of the mob (R. 54, 67, 70, 71, 73, 74, 90, 118, 134, 167).

This riotous disorder continued from about 9 p.m. until approximately 11:15 or 11:30 p.m. at which time a group of officers, which then numbered about 30, surrounded the 45 men who still remained until military police, under orders from Major McDaniel, came to arrest them and take them to the stockade (R. 33, 38, 91, 110).

All of the accused were recognized and identified by Major McDaniel and Lieutenants Nateman and Rachel as having been present at the scene of the disorder, off and on, between the time it commenced and the time it ended with the arrest of 45 men who still remained there (R. 52, 98, 103-105, 132, 133, 145); and each of the accused was among those who were arrested and taken to the stockade (R. 103).

Some of the accused were particularly identified as overt participants in various episodes throughout the period of about 2 hours during which the disorders continued. Lumpkins, Warren and Wright were designated by Major McDaniel as "active participators" (R. 54, 61) who were "shouting and hollering" (R. 54) and "doing quite a lot of talking" (R. 55) and each of the three specifically stated "they didn't have to do anything" when Major McDaniel gave the orders to disperse (R. 59).

Lumpkins, according to Lieutenant Rachel, was "back in the center of the crowd and he was making loud exclamations and approving of everything I disapproved of" (R. 136). Major McDaniel testified that someone in the crowd called him a "grey-headed son-of-a-bitch" (R. 53, 56) and Private Aaron Jones identified Lumpkins as the one who had made the remark (R. 81, 84). Corporal Acie Holmes, one of the guards at the post exchange, recognized Lumpkins in the forefront of the mob that moved back across the street and was advancing on the exchange, threatening the guards and throwing bottles and stones and he heard him "shooting off his mouth" and "cursing" (R. 66, 67). Sergeant Buckley, who was hit by a bottle, saw Lumpkins in the crowd and heard him threaten the guards saying: "You won't have (your) pistol every day; (I) will get (you) when (you) are off guard" (R. 168). Corporal Bruce Walker said that Lumpkins was "among the leaders" and "raising quite a bit of disturbance", (R. 73, 74) and Lieutenant Salzberg saw Lumpkins in the crowd at about 11 p.m. when some one made the remark "Let's call it off, let's go back to bed" (R. 37).

Edwards was first seen and recognized by Lieutenant Gillette who knew him. Upon being questioned as to the reason for his presence and his knowledge of what was going on he said he knew nothing about it as he had merely been passing by and stopped to see what was going on (R. 88). However, shortly thereafter he attempted to drive a truck away from the post exchange but was stopped by the mob so the vehicle could be searched (R. 89). Thereafter, when ordered by Lieutenant Nateman to get into the truck and drive it away to the motor pool where it belonged, Edwards walked away and later when again ordered to do so stuck out his chest, giving "the impression of a rooster" and said "Lieutenant, this ain't the time to be driving a truck" (R. 102). Lieutenant Salzberg saw Edwards with bottles in his pockets at the time and place when and where bottles were being thrown at vehicles and the post exchange (R. 33, 36). "Later on in the evening" Lieutenant Nateman saw Edwards "in front of the crowd there, wherever the noise was the thickest" (R. 102). Edwards was further positively identified as present in the mob by Lieutenants Salzberg (R. 50) and Esmonde (R. 114, 115).

Wright, in addition to being an "active participator", doing a lot of talking, and "shouting and hollering", was present with the group of about 50 which remained after the greater portion of the crowd had left. While the officer of the day, Lieutenant Salzberg, was reasoning with the men in an effort to explain that riotous actions would accomplish nothing in the army, Wright approached him, swinging a piece of 2 x 4 in a menacing and threatening manner and dared him to draw his weapon (R. 30). When Major McDaniel gave the orders to disperse, Wright was standing quite close to him (R. 60) and answered that "they didn't have to do anything" (R. 59). That he had a piece of 2 x 4 at the scene of the disturbance was corroborated by testimony of Private Jones who specifically identified Wright because of a gold tooth in the front of his mouth (R. 81, 82) and by testimony of Lieutenant Esmonde who, while not positive, said he saw Wright carrying the 2 x 4 and that he "was very prominent" in the disturbance (R. 119). Lieutenant Rachel was, however, positive in his recognition of Wright who, armed with a piece of 2 x 4, at a time when the officer was trying to reason with the insubordinate soldiers, "caused ... quite a bit of trouble by making all sorts of rebuttals and asking why this and why that, instead of obeying (the) command to disperse" (R. 135). His "questions and exclamations ... agitated the crowd quite a bit" (R.136). Corporal Acie Holmes also saw a man carrying a piece of 2 x 4 but could not say it was Wright (R. 68, 69).

Paige was present while Major McDaniel was trying to subdue the disorder and when the Major promised that an investigation would be made and that justice would be done he yelled "Talk, talk, talk; what good is talk" (R. 100, 102). These words he repeated later when Lieutenant Kunzig had a crowd of men around him trying to persuade them to go to their quarters (R. 100). Lieutenant Kunzig likewise identified Paige as one who was in the "center of the group" saying something about

"talk, talk, talk, that is all we hear is talk, let's get going" or similar words (R. 109, 111).

In addition to identification by Major McDaniel, and Lieutenants Nateman and Rachel, Bell was also recognized in the crowd and heard shouting by Lieutenant De Castro (R. 19, 22).

William E. Sharp, special agent with the Security and Intelligence Division, Headquarters Eighth Service Command, after proper warnings as to their rights under the 24th Article of War took statements from the accused Lumpkins on 3 September 1944; from Edwards on 6 September 1944; from Paige on 7 September 1944; and from Bell and Hopson on 8 September 1944. These were admitted in evidence without objection by the defense although without any cautioning of the court that none of them were to be considered as evidence against any other than the accused who made the statement (R. 127-130; Exs. H to L, inclusive). By stipulation it was agreed that Edward M. Shaner, agent of the Security and Intelligence Division, if present in court, would testify that on 7 September 1944, after advising the accused Bass of his rights under Article of War 24 he took a statement from Bass which was likewise admitted in evidence without objection or proper advice to the court as to its use (R. 131; Ex. M). The statements of Paige, Edwards and Bass included references to others of the accused but these had been lined out although not obliterated (Exs. K, L, M).

In substance these statements set forth the following:

As to Lumpkins: He admitted being in the post exchange when the soldiers were ordered out by the officers. Thereafter a crowd formed, yelling, cursing and threatening to get the manager. Major McDaniel arrived and ordered the crowd to "break it up and go to bed", but neither he, nor many others obeyed although they heard the order. He saw an officer take a bottle away from one of the men. He stated that if the manager of the exchange had done what was rumored "they ought to kill the son-of-a-bitch" and argued with some of the officers about "sending us down south". He saw an object thrown at the guard. The only reason they did not go after the manager was because the guard was armed. Others in the crowd were cursing and yelling "just like (he) was". He admitted saying "Let's go" but explained that he meant "going back to our huts" and he did later go into a "huddle" with others around a lieutenant. He was in the group that was surrounded by the military police and taken to the stockade (Ex. H).

As to Bell: Hearing some shots fired in the direction of the recreational hall he went, out of curiosity, from his barracks to the hall. There he saw a crowd of colored soldiers huddled in the center of the street between the hall and the post ex-

change and heard the rumor about the exchange manager striking a soldier. He saw officers and heard them ordering the crowd to disperse in loud voices. Though he stayed around from then until the military police arrested the group, himself included, he heard no cursing, saw no guards, no bottles or rocks thrown, no vehicles stopped and could not give the name of a single individual present (Ex. I).

As to Hopson: He was with the crowd which left the recreational hall and mingled with soldiers who had gathered between the recreational hall and the post exchange. He was with the group that was moved across the street by the guards and remained there until the group was encircled by the military police. Although everybody was yelling and hollering, he heard no threats made against the guards and saw nothing thrown at them although he heard the shots fired. He also heard the officers order the men to disperse and knew "they were doing their best to do their duty on this occasion". He did see soldiers stop a truck and a bus and heard shattering glass when the bus was hit. He also was unable to identify any person who was present during this time (Ex. J).

As to Paige: He left the recreational hall after the show and saw the crowd gathered near the post exchange. They were cursing and shouting that "they wanted to get the manager". He thought he "heard Major McDaniel tell the boys that justice would be done and to break it up and go to bed", and remembered hearing the first sergeant say the same thing. After staying around a while he went on to his company area but returned to the post exchange area after hearing several shots fired. The men in the crowd were still shouting and cursing and he heard other officers urging the men to "go on back to bed and leave it up to the officers". He was with the group on one side of the street when the guards were on the other and he heard soldiers threatening to get the guards when they did not have their guns and upbraiding them because "they were going against their own color". However, though these men were near him he could not say who they were; nor could he identify by name or description any other person involved in the disturbance (Ex. K).

As to Edwards: Having driven a band to the officers' club he returned to the recreational hall where he found a large group of colored soldiers in the street. He drove the truck between the recreational hall and the post exchange but when he tried to turn around and drive off, the crowd stopped him and searched the truck. Lieutenant Nateman ordered him to get in and drive off and he answered: "Lieutenant, this isn't any time to be leaving in the truck." He claimed he was afraid of the crowd, members of which were "doing loud talking

and threatening to hurt (him)". He heard Major McDaniel say several times: "Break it up and go to bed. I'll see that justice is done". Some of the men present refused to quiet down when the Major spoke but yelled instead. One man said: "Talk, talk, talk won't get you anywhere" and others shouted "Let's go. Let's go." He talked with Lieutenant Salzberg and then sat on the steps of a mess hall until the military police came. He did not have a bottle in his hand or in his pocket; nor did he throw any bottles or rocks nor yell or curse at any of the officers.

As to Bass: After the show at the recreational hall he walked over to the group of men standing in front of the post exchange. He went into the center of a group surrounding Lieutenant Nateman who asked him to help quiet the men. He did not feel capable of doing so since the lieutenant apparently could accomplish nothing and the men would not listen to him (Bass) but said that he could not tell them what to do. The officer of the day was also talking to the men trying to quiet them and get them to "break it up". He saw a soldier with a piece of 2 x 4 threatening the officer of the day (Lieutenant Salzberg) and telling him to draw his pistol. He then started toward his quarters but stopped at the mess hall and was there when the military police "picked (him) up". He had also seen the crowd stop a car, a bus and a truck but he saw nothing thrown at them. He realized he was disobeying orders when he stopped at the mess hall because he had heard the officers tell the men to return to their barracks (Ex. M).

Each of the accused was in the military service on 2 September 1944 and at the time of his trial (R. 26; Exs. A to G, inclusive).

4. The accused Bass, Warren, Hopson, Bell and Edwards, having had their rights explained to them, elected to remain silent (R. 164).

Under similar explanation, however, Paige, Lumpkins and Wright elected to testify (R. 146, 150, 157).

Paige stated, in substance, what he had said in his extra judicial statement but the burden of his defense was that, although he heard the orders of the officers, he "didn't receive no order directed to (him)" and he "didn't understand the exact words" (R. 147). They were saying "something" like telling the men to go back to their barracks and go back to bed but, though he heard them, he "didn't understand the language" (R. 148). He did, however, realize that the officers were trying to disperse the crowd (R. 149). He did no cursing and threw no bottles or rocks nor did he have any bottles on his person (R. 147).

Lumpkins stated that he heard Major McDaniel tell the men to go to bed and promise that justice would be done (R. 151, 152). Lumpkins said nothing, threw no bottles or stones, saw none thrown, and committed no violent acts (R. 151). He did however stay at the scene and knew of the rumor about the exchange manager killing the soldier with a hammer (R.152, 153). He talked with Lieutenants Salzberg and Nateman and believed that when he had gone to the mess hall, near the post exchange and actually within his company area, he was obeying the orders given by the officers (R. 153, 154). He denied saying that, if the exchange manager had done what he was accused of having done "they ought to kill the son-of-a-bitch" (R. 154, 155); but, he admitted hearing somebody else say it (R. 155). He is unable to read and therefore his extra judicial statement was read to him but "so fast (he) couldn't quite understand it" (R. 155). He was in the middle of the street surrounded by a crowd of about 50 or 60 when the shots were fired by the guards (R. 156).

Wright testified that he was at the show in the recreational hall and when it was over stood outside talking to one of the show girls until she became frightened and went indoors. Some fellows were "hollering and cussing" and the guard had ordered "move out". Wright thereupon ran across the street and went to his barracks (R. 157, 158). When he later heard a shot fired he returned and stood in the street a while. When he tried to go back to his barracks he was prevented from doing so by "officers all out there with carbines and stuff" and he consequently stayed there until arrested by the military police (R. 158, 162). He did not have a 2 x 4 in his hand, threw no stones or bottles and saw none thrown; nor did he see Major McDaniel or Lieutenant Salzberg at any time (R. 158, 160, 161, 162) but saw other officers (R. 160), among whom was "a little, old, short major" (R. 163). He exhibited his gold tooth to the court but stated that he could "pick out over 200 got gold teeth in them, about my size". He named a man of about his own size who was carrying a "board" at the time of the disturbance and characterized him as "a mighty rough fellow" who had been a prisoner (R. 159), but admitted that this man had no gold tooth (R. 161). He saw no vehicles while he was there, heard no breaking of glass and specifically denied threatening Lieutenant Salzberg with a 2 x 4 (R. 161, 162). No other evidence was proffered by the defense.

5. Each of the accused stood charged with (a) joining in a mutiny in violation of Article of War 66 and (b) committing a riot in violation of Article of War 89, and it is apparent that both offenses were contemporaneous, arose out of the same circumstances and transpired at the same place.

Mutiny 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 (Winthrop, Military Law and Precedents, 2d Edition (Rep. 1920) p. 578). It imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority. The concert of insubordination contemplated 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 (M.C.M., 1928, par. 156a; Winthrop, supra, page 581).

The intent may be openly declared in words, or it may be implied from the act or acts done or it may be gathered from a variety of circumstances no one of which perhaps would of itself alone have justified the inference. (MCM 1928, par. 136a; Winthrop, supra, p. 580). 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. 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, pages 580, 581).

There can be no actual mutiny or sedition 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. 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 support a charge of joining therein (MCM, 1928, par. 136b).

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 (Winthrop, supra, p. 583).

The proof required to support Charge I and the Specification, as to each accused 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).

Article of War 89, in pertinent part, is as follows:

"All persons subject to military law are to behave themselves orderly in quarters, garrison, camp and on the march; and any person subject to military law who commits ...any kind of depredation or riot, shall be punished as a court-martial may direct."

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" (MCM, 1928, par. 147c).

"Riot is essentially an offense against the public peace and good order, and looks to this rather than an infraction of the personal rights of any particular individual as such. It involves the execution of an agreement, express or implied, between three or more persons to commit an assault or battery or a breach of the peace ... " (54 C.J. sec. 3, p. 830).

"It is not necessary that the riotous violence should have been premeditated by the assembled perpetrators; therefore the original assembly may have been by accident or for a lawful purpose ... " (idem, sec. 6, p. 832).

"All concerned in an unlawful assembly are equally guilty of the subsequent acts done by any of them in furtherance of the common object of the assembly, and all who are present at the commission of any riotous act and actively engage therein by act, sign or word are principal rioters ..." (idem, sec. 15, p. 834).

"In riotous and tumultuous assemblies, all persons who are present and not actually assisting in their suppression may, where their presence is intentional, and when it tends to the encouragement of the rioters, be prima facie inferred to be participants; and the obligation is cast upon a person so circumstanced, in his defense, to prove his actual non-interference. Eminently is this the case when the sheriff of a county, the mayor of a city, or any other known public conservator of the peace, has repaired, in the discharge of his duty, to the scene of tumult, and there commands the dispersion of the unlawful riotous assembly, and demands the assistance of those present to aid in its suppression. After such proclamation there can be, so far as concerns persons voluntarily

and deliberately remaining, no neutrals..." (Wharton's Criminal Law, 12th Edition, Vol. II, Sec. 1865).

Although at common law and generally a riot contemplates a breach of the public peace and involves the terrorizing of individuals who compose the public, "a riot is a riot even though the rioters are soldiers and it takes place in a military camp" (39 T.L.R. 7; 54 C.J. p. 830, note 25).

The proof required to support Charge II and the Specification as to each accused is that the accused being within a certain command in quarters, camp, garrison, or on the march, committed certain acts of rioting as alleged (MCM 1928, par. 147c).

From the evidence hereinbefore summarized it is clearly apparent that there was both a riotous assembly and a mutiny in the vicinity of the post exchange in the area of the 20th Group, 3860th Unit, at Camp Claiborne, Louisiana, on the night of 2 September 1944.

However lawful it may have been for comrades in arms to display a massed anxiety regarding a colored soldier who had been hit over the head with a hammer by a white, civilian, manager of the Army Post Exchange, and to indicate volubly their joint concern about what should be done to insure justice in the matter, the circumstances could not and did not lawfully justify their determination personally to seek redress or the violent and insubordinate manner in which they proceeded to execute it.

It is clearly established that the original group which was in the post exchange shortly after the assault was committed upon the soldier were greatly agitated and had made attempts to get the manager; for he was found barricaded in his office while guards at the door thereto, armed with carbines, held off the crowd until officers arrived and ordered all to leave the building.

This original group, evidently still brooding over the matter, gathered around the exchange thereafter and was increased in number to about 200 when a performance in the adjacent recreational hall was over. A mob spirit soon pervaded the congregated soldiers and they loudly manifested their intention to prevent the manager from getting away and of rushing into the building to get him.

From the beginning, sundry officers, including the officer of the day, attempted to subdue the disorder without success and they were joined by others, from time to time, including the commanding officer of the 20th Group. All of these officers attempted, by reasoning with the men, to persuade them to quiet down and submit to order and discipline. Most, if not all of the officers, gave direct and repeated

orders for the crowd to disperse and for the soldiers to go to their barracks and all but about 40 or 50, among which were the accused, obeyed. Their attitude in defiantly remaining there when they were ordered to leave constituted the concert of insubordination to superior military authority which is the gravamen of mutiny. It is not reasonable to believe that any one present at the time when the group was finally surrounded and taken into custody almost two hours after the disturbance originated could have failed, at some time or other during this extensive period of time, to have heard the orders to disperse, issued again and again by at least six officers, or, having heard, could have misunderstood the import of what the officers were trying to accomplish.

It was the duty of these officers to suppress the disorder and their efforts were not only lawful but obligatory upon them under the 67th Article of War as soon as they became aware of the concert of insubordination. It follows, therefore, that the accused, each of whom is shown to have been present during the time when the crowd persisted in concerted disobedience and none of whom was engaged in quelling the disorder though they all remained on the scene until their arrest, are guilty of joining in the mutiny. Much evidence which, under other circumstances, would have been inadmissible, was properly received. 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. p. 583).

With respect to the riot which each of the accused is charged with committing, it is likewise clearly shown by competent evidence that, when the crowd had dwindled to the defiant 40 or 50, some of those who remained on the scene indulged in tumultuous conduct and violent acts so that the turbulent scene turned into a riot.

The officers had successfully forced the crowd from the vicinity of the exchange to the opposite side of the street and a cordon of guards was thrown between them and the building to prevent any attempt to storm the place and seize the manager who was believed to be in it. Notwithstanding, the mob again surged into the street and began to throw bottles and rocks at the exchange, at the guards and at passing vehicles, some of which were occupied by civilian passengers. One of the guards was hit and injured; a soldier occupant of a weapon carrier was hit; and the windows and windshields of some of the vehicles were broken by objects which had been hurled at them by members of the mob.

Every essential element of a riot was shown to have existed. This conduct was clearly a tumultuous disturbance of the peace by three or more who were assembled of their own authority. Their behavior showed an intent mutually to assist one another against the earnest opposition of their superior officers who sought to frustrate them in their enterprise of capturing and privately dealing with the exchange manager; and they were engaged in the execution of their enterprise in a turbulent manner to the terror of all who were innocently subjected to their violent acts.

Each of the accused was present in the group responsible for this misbehavior. True, the evidence discloses that some of them took active parts in what transpired while others appear to have been merely passive bystanders. However that may be, each must be held to have committed the riot. Ample time had been given for every man present at the scene to obey orders and disperse. Officers of the army are conservators of the peace under military law and when any officer, in the performance of such duty, has attempted to suppress a riotous assemblage of soldiers in the military service by ordering those composing it to disperse, those who deliberately remain on the scene without lending their assistance in the suppression, will be presumed to do so in order to lend their sanction and aid to the rioters, and will be deemed prima facie to be participants therein.

Nothing advanced by any of the accused has disturbed this inference. None offered any plausible explanation for his admitted presence while the rioting was going on and in the absence of any reasonable excuse each must bear his fair share of the burden of guilt. That some of the accused were less active than the others and contributed little more than their presence to the occasion is no defense. Such matters may appropriately be urged in extenuation or mitigation when punishment is imposed.

At the conclusion of the prosecution's case the defense made a motion for a finding of not guilty of Charge II and its Specification as to each accused for the reason that "there has been no proof that any of the accused at any time had a bottle in their possession or threw any bottle which hit the said Sergeant Buckley, nor has there been any proof that he was injured to his terror and disturbance", as alleged in the Specification of Charge II as to each accused. The prosecution thereupon called Sergeant Buckley as a witness and elicited testimony from him to the effect that he had been hit and injured by a bottle thrown from the riotous group during the disorder.

It certainly was unnecessary to charge each of the accused with some particular act of violence which tended to inspire terror in the public. It has been held that the constituent elements of a riot are (1) an unlawful assembly consisting of three or more persons, (2) an intent to mutually assist one another against lawful authority, and (3) acts of violence. (MCM 1928, par. 147c; 54 C.J. 830; 2 Wharton's

Criminal Law, 12th Ed., sec. 1869). A specification alleging these three elements states facts constituting an offense. Allegations describing the acts of violence are essential averments inasmuch as it is from them that terror of the populace is inferred, but they may be general allegations (idem). It is unnecessary to set forth the particularized acts of each rioter, and if the same are contained therein they are descriptive merely (Commonwealth of Massachusetts v. Frishmen, 235 Mass. 449, 126 N.E., 839, 9 ALR 549). (CM ETO 895 (1944); Bull JAG, April 1944, p. 144).

The Specification of Charge II in this case as to each accused sufficiently charges the offense of committing a riot and no objection was made thereto. Inasmuch as presence at the scene of the riot, under the circumstances portrayed and in the light of the principles hereinbefore discussed, constituted each of the accused a principal in the commission of the offense charged, it was unnecessary to prove that any one of them hurled the bottle which injured Sergeant Buckley or that any of them personally committed a specific and overt act of violence. Moreover, the additional testimony of Sergeant Buckley was not indispensable. At the time when the motion for a finding of not guilty on Charge II and its Specification was made there was evidence in the record to the effect that a number of passing vehicles containing military and civilian passengers had been hit by missiles hurled by some members of the mob. This was amply sufficient to justify a reasonable inference that the passengers were terrorized by such unexpected and dangerous violence and under these and other facts clearly apparent in the evidence for the prosecution the denial of the motion by the court was proper (MCM 1928, 71d).

As above stated, the riot and the mutiny were contemporaneous, and although no point was made of it by the defense, it might be urged that, because of the coincidental circumstances surrounding both offenses, the Charges and Specifications as to each accused are objectionable as an unreasonable multiplication of charges against one person arising out of one transaction, or what is substantially one transaction (MCM 1928, par. 27). Such, however, is not the case. As to each accused, the Specification of Charge I (joining in a mutiny) and the Specification of Charge II (committing a riot) allege separate and distinct offenses each of which is of grave character. Each, as has been shown, contains elements not embraced within the other. Proof of the offense of committing a riot would not necessarily disclose proof of the elements constituting a mutiny; and the converse is equally true. Riot implies a tumultuous disorder which terrorizes the populace whereas mutiny may exist when there is merely a passive and otherwise orderly, but concerted refusal to obey superior military authority. A mutiny may be maintained by two persons in military service but a riot requires three. Common prudence in pleading required that these different criminal phases of the misconduct in which the accused indulged on the occasion specified should be laid under separate charges. "There are times when sufficient doubt as to the facts or law exists to warrant making one transaction the basis for charging two or more offenses" (MCM, 1928, par. 27). However, even though such pleading resulted in findings of guilt as to two offenses constituting different aspects of the same act or omission,

no harm has resulted to any of the accused. Under such circumstances, punishment should be imposed only with reference to the act or omission in its most important aspect (MCM, 1928, par. 80). "A sentence of death or such other punishment as a court martial may direct" is authorized upon a conviction of joining in a mutiny (AW 66). Whoever is convicted of committing a riot (AW 89) "shall be punished as a court martial may direct". The sentences imposed by the court are authorized for the offense of joining in a mutiny when considered alone and the record does not disclose that any substantial right of any of the accused was injured by charging the two offenses. (CM 265399, McGary (1944))

From an examination of the evidence and exhibits attached thereto it is apparent that the extra-judicial statements of some of the accused contained inculpatory remarks involving several of the other accused and there is no indication that the court was in anywise cautioned regarding the manner in which such statements could be considered by them. While it is true that where several persons join with a common design in committing an offense, all acts and statements of each made in furtherance of the common design are admissible against all of them, the acts and statements of a conspirator, however done or made after the common design is accomplished are not admissible against the others, except acts and statements in furtherance of an escape (MCM, 1928, 114c).

There appears to have been some attempt made to exclude the objectionable portions of the statements prior to their introduction in evidence by lining out the remarks and making the notation "omit" at the margins thereof, although this did not accomplish complete obliteration and the matter can be plainly observed. While this action indicates an intention to observe the necessary precautions and raises an inference that the court may have been cautioned, the record does not disclose any such instruction as is deemed requisite.

"Since confessions are not admissible against third persons (ante. ss. 1076, 1079), the names of other co-indictees, mentioned in the confession used and read against the party making it, were by most English judges ordered to be omitted. But by other judges the names were ordered read and the jury instructed not to use the confession against them. In Canada and the United States the latter practice is favored" (Wigmore on Evidence, 2nd Ed., sec. 2102d).

"The recognized practice in such a situation is to admit the act or declaration against the actor or declarant, but the court must instruct the jury that such act or declaration is not admissible against the other defendant or defendants, and is not to be considered in determining their guilt" (Wharton's Criminal Evidence, 11th Ed., sec. 700).

While the practice followed in this matter during the trial of this case is to be condemned, it cannot be said that it resulted in any violation of substantial rights of any of the accused. Three of the statements were devoid of incrimination of others of the accused and could not, therefore, constitute any hearsay testimony against others.

In each of these statements the accused admitted his presence at the scene of the crime charged, and Lumpkins, Wright and Paige further admitted their presence there in testimony under oath at the trial. There is, likewise, ample evidence independent of any of the statements, to compel belief in the presence of each of the accused at the scene of the offenses alleged under such circumstances as to justify the inference that each participated therein. Consequently there was no harmful error in omitting to give the proper instructions to the court when the statements were admitted in evidence (CM 206090, Koehler, 8 B.R. 249; CM 237711, Fleischer, 24 B.R. 89; CM 242082 Reid, 26 B.R. 391).

6. The record of trial discloses the following regarding the accused:

Name	Age	Inducted	Alottment to Dependents
Lumpkins	19	27 September 1943	$22.00 per month
Edwards	25	27 February 1942	$22.00 per month
Warren	25	8 May 1942	$22.00 per month
Bell	24	28 July 1944	$27.00 per month
Hopson	20	31 July 1943	$27.00 per month
Bass	22	14 November 1942	$22.00 per month
Paige	20	15 May 1944	$22.00 per month
Wright	22	2 February 1943	$25.00 per month

None has had any prior service.

7. The court was legally constituted and had jurisdiction of the persons and the subject matter. 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 and the sentences imposed. The sentences imposed are authorized upon conviction of a violation of Article of War 66. Confinement in a penitentiary is authorized by Articles 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.

(169)

SPJGK
CM 267881

15 DEC 1944

UNITED STATES	THE INFANTRY SCHOOL
v.	Trial by G.C.M., convened at Fort Benning, Georgia, 27 October 1944. Dismissal and total forfeitures.
Second Lieutenant WILLIAM M. LANE (O-1181936), 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 96th Article of War.

Specification 1: In that Second Lieutenant William M. Lane, Officers' Replacement Pool, The Infantry School, attached to 3rd Company, First Student Training Regiment, The Infantry School, did at Fort Benning, Georgia, on or about 28 July 1944, willfully and wrongfully disobey and fail to comply with instructions applying to students in Officers' Special Basic Course Number 32 to the effect that an officer not living with his wife or parents will occupy quarters on the post; in that the said Second Lieutenant William M. Lane was a student in Officers' Special Basic Course Number 32 and did occupy a room in Columbus, Georgia, with a woman not his wife or parent.

Specification 2: In that Second Lieutenant William M. Lane, * * *, was at Columbus, Georgia, on or about 22 September 1944, drunk and disorderly in uniform in a public place, to wit, Columbus Police Station.

Specification 3: In that Second Lieutenant William M. Lane, * * *, did at Fort Benning, Georgia, on or about 16 August 1944, wrongfully and unlawfully make and utter to Second Lieutenant Raymond B. Miller, attached to 3rd Company, First Student Training Regiment, The Infantry School, a certain check in substantially the following words and figures:

San Pedro, Calif.
~~DODGE CITY, KANSAS~~ August 16 1944 No

~~FIDELITY STATE BANK~~ 83-173

BANK OF AMERICA, 10th & Pacific Branch
San Pedro, California

PAY TO THE
ORDER OF Raymond B. Miller $60 00/100

Sixty & no/00 DOLLARS

Not sufficient funds

/s/ William M. Lane 0-1181936
2d Lt, 3rd Co, 1st STR, Ft Benning

Indorsed on the back thereof:

/s/ Raymond B. Miller
01121684
3d Co. 1st STR
Ft Benning, Ga.

and other unintelligible indorsements,

in payment of a cash loan, the said Second Lieutenant William M. Lane, then wrongfully failing to maintain sufficient funds in the Bank of America, 10th and Pacific Branch, San Pedro, California, for the payment of said check.

Specification 4: This Specification is identical in form with Specification 3. It alleges that a check, drawn on the same bank, dated 23 August 1944, payable to the order of Mrs. G. W. Burke, in the amount of $10, was made and uttered by accused to Mrs. G. W. Burke for rent.

Specification 5: (Finding of guilty disapproved by reviewing authority.)

Specification 6: (Finding of guilty disapproved by reviewing authority.)

He pleaded guilty to Specification 1 and the Charge, and not guilty to all other specifications, and was found guilty of the Charge and each of its specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the findings of guilty of Specifications 5 and 6, 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, the accused was in the military service (R. 7).

Specification 1. Accused was, from 27 July 1944 to 23 September 1944, a member of Officers' Special Basic Course No. 32, 3rd Company, First Student Training Regiment, The Infantry School, Fort Benning, Georgia (R. 7, 25). On 27 July the class, accused being present, was verbally instructed by the company commander, Captain Joseph H. Martin, that no student officer would be permitted to live off the post unless he was maintaining quarters with his wife or parents (R. 7,8). These instructions were also posted on the company bulletin board (R. 9). The accused, as though eligible, recorded his election to maintain quarters at 1645 17th Avenue, Columbus, Georgia, by signing the proper register in the company orderly room (R. 10, 11). During the last week of July and for about six weeks thereafter he and a woman, represented to be Mrs. Lane, occupied a room in the home of Mrs. Alice Homer Burke at the above address (R. 14,15). Accused spent the nights and week-ends there. It was stipulated that the accused was not married at the time and that the woman with whom he was living was not a member of his family (R. 16). A written statement, voluntarily made, subscribed and sworn to by accused before the investigating officer after having been advised of his rights in the premises, was introduced in evidence without objection (R. 38-39, Ex. 7). Accused admitted in it that he heard and understood Captain Martin's instructions, but stated that he felt it to be his personal business and that he was doing nothing wrong as far as the Army was concerned by maintaining quarters in town so long as he did not withdraw from the mess fund or "draw quarters" (Ex. 7).

Specifications 3 and 4.

At the time of entering Officers' Basic Course No. 32 on 27 July 1944, accused was indebted to another member of the course, Second Lieutenant Raymond B. Miller, in the amount of $80. Lieutenant Miller had loaned this amount to accused in Atlanta, Georgia, between 21 and 27 July for accused's personal use and to enable him to pay his hotel bill. After their arrival at Fort Benning, Lieutenant Miller requested payment of the debt. Accused told him that he would pay him as soon as he himself was paid. Accused paid Lieutenant Miller $20 in cash on 3 August and on 16 August gave his personal check in the amount of $60 to Lieutenant Miller in payment of the balance of the debt (R. 17, Ex. 1). This check, which was introduced in evidence, was drawn on the Bank of America, 10th and Pacific Branch, San Pedro, California, and was otherwise in conformity with the copy contained in Specification 3 (Ex. 1). Lieutenant Miller deposited the check in a Dodge City, Kansas, bank, and on or about 16 September 1944 it was returned to

him marked, "Insufficient funds". The check was presented at the drawee bank for payment on 26 August and was held by it until 29 August. The check was not honored because at the time the accused's account had a balance of only $17.73 (R. 21, Ex. 2). Upon the return of the dishonored check, Lieutenant Miller contacted accused and was requested by him to hold the check, accused stating that he was having $200 deposited to his account and that the check would then be paid (Ex. 1, p. 3). On 19 September Lieutenant Miller told accused that he was going to redeposit the check and accused told him to go ahead and do so. The check was not redeposited. On 22 September Lieutenant Miller received a telegram from the drawee bank advising him that accused did not have sufficient funds on deposit to meet it. This telegram was introduced in evidence for the limited purpose of showing why Lieutenant Miller did not redeposit the check. Lieutenant Miller stated in his deposition, which was taken on 18 October, that he had not been paid any part of the indebtedness represented by the check.

On 23 August 1944, the accused gave his personal check in the amount of $10 to Mrs. Burke in payment of one week's rent (R. 18). This check was likewise drawn on the Bank of America, 10th and Pacific Branch, San Pedro, California, and was in conformity with the copy thereof contained in Specification 4. Accused had previously paid his rent by checks. At the time of giving this check to Mrs. Burke, accused told her that it might not be honored by the drawee bank, explaining that he maintained a joint account with his mother; that he had not received a bank statement for some time and did not know the exact status of his account. He stated that he felt sure a deposit had been made to the credit of the account, and promised to redeem the check if it was not paid upon presentation (R.19). Mrs. Burke deposited the check in a Columbus, Georgia, bank and it was presented to the drawee bank for payment on 28 August 1944. It was not honored because at that time accused's account had a balance of only $7.23 (R. 21, Ex. 2). When first informed by Mrs. Burke that the check had been dishonored, accused told her that he would wire or write his bank and find out about his account. When, two or three days later, Mrs. Burke again accosted him about the check, accused told her, "I don't have the money". The woman representing herself to be Mrs. Lane thereupon paid Mrs. Burke $10 and the latter redeemed accused's check at the bank with the same money (R. 20,21).

The accused maintained a joint account in the bank upon which the checks were drawn, in the name of "William M. or Catherine Lane". The sum of $75 was deposited to the credit of the account on 10 July 1944, but at the end of the month the account was overdrawn 27 cents. On 7 August the sums of $100 and $75, respectively, were deposited to the credit of the account. The balance thus created had been reduced to $73.73 on 16 August (date of the Miller $60 check) by frequent withdrawals, ranging in amount from $6 to $50, and by service charges, and was further reduced on 22 August to the amount of $17.73 by then being debited with five checks. The balance to the credit of the account on 23 August (date of Burke $10

check) was $17.73, but it was reduced the following day to $7.73 by payment of a $10 check. Withdrawals during August aggregated $154. The account was credited with a further sum of $75 on 8 September 1944, and the balance had been reduced to $8.57 by 14 September (R. 21, Ex. 2; R. 42, Def. Ex. D).

In his pre-trial statement, above referred to, accused stated that at the time of giving the checks in question he believed he had sufficient money on deposit to meet them. He received a letter from his mother about the middle of August in which she stated that she was depositing $100 to the credit of their account, and it was then that he issued the $60 check to Lieutenant Miller. After this check was returned, unpaid, he told Lieutenant Miller to redeposit it and thought that he had done so until Lieutenant Miller demanded cash for the check on 22 September. Accused stated that he sent a telegram that night (22 September) for money with which to pay the check but did not receive the money until 29 September, at which time he sent Lieutenant Miller a postal money order for $60. Accused kept no physical record, only a mental record, of the checks which he wrote (Ex. 7).

Specification 2. About 10:30 p.m. on 22 September 1944 accused was taken into custody by military police in Phenix City, Alabama, and carried to the police station in Columbus, Georgia, where he was locked up during the remainder of the night (R. 31,32). This action was taken by and under the direction of Captain Clifford B. Shaw, Assistant Provost Marshal, Fort Benning, Georgia. Captain Shaw stated that at Military Police headquarters in Phenix City while he was endeavoring to arbitrate a dispute between another officer and a civilian, the accused insisted on injecting himself into the dispute and was loud and profane, and it was because of this that he ordered two sergeants to remove accused and place him in a Military Police vehicle. He stated that during all of the trip to the Columbus police station accused was cursing loudly, had to be assisted from the vehicle upon arrival, was very unsteady on his feet, and was very loud and boisterous. Accused told Captain Shaw that he had no right to treat him in the manner that he was, and that he (accused) would "try every God-damned man" Captain Shaw had in his company (R. 31). At the police station accused was loud and profane and devoted himself principally to cursing the military police on duty in Phenix City. Captain Shaw stated that the police station was a public place, and that accused was in uniform, wearing the insignia of his rank, and was, in his opinion, drunk (R. 34). He declined to release accused the following morning at five o'clock because he considered him still too drunk to be released (R. 33). He did not see any rough handling of accused by the military police when they removed him from Military Police headquarters in Phenix City (R. 35).

In his pre-trial statement to the investigating officer, accused stated that he had drunk possibly nine bottles of beer between 5:00 p.m.

and 11:30 p.m. on the day in question but was not drunk and was not staggering. In Phenix City, he was angry because a night club had rendered him and his companions a bill that was not theirs. At the Phenix City Military Police headquarters, a sergeant ordered, rather than requested, him to get off his desk. The sergeant then refused to give his name and serial number. When Captain (then Lieutenant) Shaw arrived, accused requested the name and serial number of the sergeant, and Captain Shaw asked if accused also wanted his (Shaw's) name and serial number. Accused stated that the next thing he knew two military policemen seized him and ushered him out to the car with such force that his wallet fell out of a back pocket. He was locked up in Columbus without being informed of the reason. Later, after accused had been asleep for a time, Captain Shaw returned and asked him his "story". When accused started to tell his "story", Captain Shaw "again flared up", whereupon accused asked him "if he wanted to hear my story or not" and was returned to his cell.

4. For the defense.

Upon being advised of his right to testify under oath, to make an unsworn statement, or to remain silent, the accused elected to testify under oath. He identified a letter which was dated 29 September 1944 from the Bank of America, 10th and Pacific Branch, San Pedro, California. This letter was introduced in evidence. The bank advised accused that the monthly statements had been mailed to Camp Phillips or to his mother's address and that it was inclosing a copy of his account from 24 June to 25 September 1944 (R. 42, Def. Ex. C). This copy was introduced in evidence (R. 42, Def. Ex.D), and reflects the information already detailed relative to accused's account. Accused stated that on 29 September 1944 he mailed a $60 postal money order to Lieutenant Miller in a registered letter addressed to him at the Henry Grady Hotel, Atlanta, Georgia (R. 41-43). There was introduced in evidence the remitter's receipt for a $60 postal money order dated 29 September, a copy of accused's letter to Lieutenant Miller, a postal receipt dated 29 September for registered article No. 55278, and the addressee's return receipt, signed by someone as Lieutenant Miller's agent, postmarked, "Atlanta, Georgia", acknowledging receipt of registered article No. 55278 on 2 October 1944 (R. 42, Def. Ex. B). Accused stated that he made all of the withdrawals shown on the bank statement (R. 43).

5. Specification 1 - living off the post. In addition to accused's pleas of guilty, evidence was introduced which was amply sufficient to support the findings of guilty of this specification and the Charge. Under the rules laid down and the instructions given him by superior military authority, accused was not eligible to live off the post, and when he did so in violation of those rules and instructions, they being legal and proper, he committed an act to the prejudice of good order and military discipline and violated Article of War 96.

Specification 2 - drunk and disorderly in public. Captain Shaw expressed the opinion that accused was drunk when they reached the police station in Columbus, Georgia, and his description of accused and his conduct justify that opinion. Accused had, by his own admissions, been drinking during the evening. The police station was a public place, accused was in uniform, and his loud and continued use of profanity constituted disorderly conduct. Each element of the offense alleged being clearly established by competent evidence, the record is legally sufficient to support the findings of guilty.

Specifications 3 and 4 - bad checks. In each of these specifications it is merely alleged that accused wrongfully and unlawfully made and uttered the check involved and then wrongfully failed to maintain sufficient funds in the drawee bank for the check's payment. An intent on the part of accused finally to defraud by use of the checks was neither alleged nor proved. The specifications, however, are laid under Article of War 96, and an intent to defraud is not essential to render the giving of worthless checks a violation of this Article of War; nor does it matter that both checks in question were given in payment of pre-existing debts (CM 249006 (1944), III Bull, JAG, July 1944, p. 290). A wrongful failure on the part of one in the military service to have sufficient funds on deposit to meet a check given by him, resulting in the check's dishonor and return, is a violation of Article of War 96 (CM 202027, McElroy, 5 B.R. 347). The conclusion is inescapable in the instant case that accused was culpably at fault in failing to have sufficient funds on deposit to meet the checks in question upon presentation and that his failure in this respect was therefore wrongful within contemplation of military law. About the time he gave these checks, accused issued other checks which, in their aggregate, together with the two checks in question, considerably exceeded his bank balance in amount, and he thereby created a situation whereby the payment of the respective checks depended upon the order in which they were presented for payment. The evidence of record is convincing that accused either knew he was doing this, i.e., issuing checks in excess of the amount of his bank balance, or, if not, that his failure to know or realize such fact was due to his own indifference or negligence, in either of which events, his conduct was wrongful and unlawful (CM 208870, Moore, 9 B.R. 31, at 42). Between 21 and 27 July, accused was unquestionably aware that his checking account was exhausted because he was then borrowing money with which to pay his ordinary living expenses. He alone wrote checks against the $175 that was deposited on 8 August, and within a few days after this deposit had given checks in excess of that amount. Under these circumstances, it taxes credulity to believe that he did not know that he was overdrawing his account. If he did not, clearly his failure to do so resulted from his indifferent or careless failure to keep track of the checks which he had written. Accused appears to have had a regular allotment of $75 deposited to his account each month. It is reasonably apparent from the record that the extra $100 deposited on 8 August was the deposit about which he claimed his mother wrote him during August. If not, and he expected another deposit

to be made, he was negligent in drawing checks against such contemplated deposit before being assured that it had been made. Each of the checks involved in this case was presented for payment within a reasonable time after it was received by the payee and, as above concluded, accused's failure to have funds on deposit to meet them was wrongful.

The evidence justifies the inference that the accused issued his check to Mrs. Burke as a deceitful ruse whereby to gain temporary respite from payment of a just debt, and that his representations to her that he did not know the status of his bank account but was sure that a deposit had been made from which the check would be paid were knowingly false and made as a part of this ruse. Several days previous to issuing this check, accused issued a number of other checks, including the $60 check to Lieutenant Miller, which in their aggregate far exceeded his bank balance, and it was only because payment was refused on the Miller $60 check that any balance at all remained to the credit of accused's account at the time the check given Mrs. Burke was presented for payment. Accused knew that he himself had not made any deposits in addition to those hereinabove mentioned and there is no evidence of record corroborative of his testimony from which to conclude that he had grounds to believe that any other person had done so. When Mrs. Burke informed accused that the check had been dishonored and returned, he sought to gain further time by telling her that he would contact his bank, which he never did. When reapproached about the matter a few days later accused was compelled to admit that he did not have the money, and his companion paid Mrs. Burke the ten dollars. It is reasonable to assume that Mrs. Burke must have concluded that accused had given her the check as a stratagem to conceal his inability to pay the week's rent which he owed and that accused's representations to her had been false, and it must be concluded that under such circumstances accused and the military service were discredited in her eyes despite the fact that she had accepted the check after being advised that it might not be honored. It was wrongful and unlawful for accused to issue the check under the circumstances and to then fail to have sufficient funds on deposit to meet it (CM 208870, Moore, supra).

6. War Department records disclose that this officer is 24 years of age and single. He is a high school graduate. Immediately before entering the service he was employed in a clerical capacity by North American Aviation, Inglewood, California, and before that as a clerk in a store. He entered the service as an enlisted man on 21 July 1942, served as a Battery Clerk in the Field Artillery, and attained the grade of Technician Fifth Grade. Upon graduation from Officers' Candidate School, he was appointed a Second Lieutenant, Army of the United States, Field Artillery, on 13 May 1943 and reported for active duty the same day.

7. The court was legally constituted and had jurisdiction of the accused and 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 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., DEC 22 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William M. Lane (0-1181936), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and sentence and to warrant confirmation of the sentence. Dismissal is, in my opinion justified under the circumstances, but the forfeitures appear to be unnecessary. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 67, 27 Jan 1945)

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

SPJGN
CM 267937

29 NOV 1944

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Barksdale Field, Louisiana, 14 October 1944. Dismissal.
Second Lieutenant EDWARD A. MILLER (0-826479), Air Corps.	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Edward A. Miller, Section "S", Key Field CCTS (TR), did, on or about 19 September 1944, at or near Vicksburg, Mississippi, wrongfully violate paragraph 3 b, III Tactical Air Command Regulation 62-8, dated 3 August 1944, by flying a P-40N military airplane at an altitude of less than two hundred (200) feet above the water.

Specification 2: In that Second Lieutenant Edward A. Miller, Section "S", Key Field, CCTS (TR), did, on or about 19 September 1944, at or near Vicksburg, Mississippi, wrongfully violate paragraph 1 a, Army Air Forces Regulation 60-16A, dated 15 April 1944, by flying a P-40N military airplane in a reckless and careless manner, to wit: under a bridge at or near Vicksburg, Mississippi, so as to endanger persons and property on the ground.

The accused pleaded guilty to Specification 1 "except the word, to wit: 'wrongfully'", not guilty to Specification 2, and guilty to the Charge, and was found guilty of the Charge and both Specifications. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 19 September 1944 the accused and two other aviation students were each sent out in a P-40 on a low level navigation mission from "Key Field to Brookhaven to Vicksburg and return" (Pros. Exs. D, E, F). The minimum altitude prescribed for their flight was two hundred feet (Pros. Ex. C). Shortly after their departure Second Lieutenant Hubert Maurice France, their instructor, took off in a P-51 to check on their navigation. Near Vicksburg he saw the accused fly his P-40 under a bridge which was only one hundred eight feet "above the surface of the water" (R. 5; Pros. Exs. D, E, F).

4. The accused, having been apprised of his rights relative to testifying or remaining silent, took the stand on his own behalf. When he first observed a P-51 overhead, he "didn't know who was in the ship or where the ship was from" (R. 6). He immediately jumped to the conclusion that a simulated attack was about to be made on him (R. 6-7). His reactions were described by him as follows:

> "* * * Well we were already 200 feet and I knew I couldn't climb with the P-51. I knew he could outrun me, so I figured the best thing to do was just to stay down, and if anything, get lower. To my estimation, I do not think a P-51 would stay with a 40 on the deck. I swerved on down perhaps a hundred feet and I stayed there. Lieutenant Knight came down, since I was leading the flight formation. I saw the P-51, and also Lieutenant Wallace cross over his wing to my position. That was at 200 miles per hour. By the time I collected my senses and knew what was going on, we were so close to the bridge that I didn't feel that it would be safe to either chandell to the left, — we were fairly low — chandell to the right, or pull up. I know definitely I was too close to pull clear up to the top without mushing into it. I thought I would chandell to the left, but I didn't think Lieutenant Knight had seen the P-51. He didn't appear to have seen it, and he wouldn't expect me to chandell to the left, and I would have hit the superstructure of the bridge." (R. 7).

There were no wires under the bridge itself, but there "was a high-tension electric line on the other side" about one hundred feet away. Although it was not "common practice for anyone to attack a plane that low", the accused "had always been told by instructors and supervisors that the best thing to do when . . . attacked that low, was to head it down there and stay there" (R. 7). As he passed under the bridge, he was only seventy-five feet above the surface of the Mississippi River (R. 6, 8).

The testimony given by the accused at the trial was in all essential respects the same as that given by him at the pre-trial investigation (Def. Ex. 1). Captain Jacob R. Hamilton considered him to be "my best student

as a pilot and officer", one whose "character was above reproach" (Def. Ex. 2).

5. Specification 1 of the Charge alleges that the accused "did, on or about 19 September 1944, . . . wrongfully violate paragraph 3b, III Tactical Air Command Regulation 62-8, dated 3 August 1944, by flying a P-40 N military airplane at an altitude of less than two hundred . . . feet above the water". Specification 2 alleges that the accused "did, on or about 19 September 1944, . . . wrongfully violate paragraph 1a Army Air Forces Regulation 60-16A, dated 15 April 1944, by flying a P-40N military airplane in a reckless and careless manner, to wit: Under a bridge at or near Vicksburg, Mississippi, so as to endanger persons and property on the ground". Both offenses were laid under Article of War 96.

Paragraph 3b of III Tactical Air Command Regulation 62-8, dated 3 August 1944, states that, "Aircraft will not be flown at an altitude below two hundred (200) feet above the ground or water except" in certain instances not pertinent to the facts herein involved. Paragraph 1a of Army Air Forces Regulation 60-16, dated 15 April 1944, reads as follows:

> "a. Reckless Operation. An AAF pilot will not operate aircraft in a reckless or careless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, persons, or property on the ground".

In piloting a P-40 under a bridge only one hundred and eight feet above the Mississippi River, the accused flagrantly violated both of the foregoing provisions. Although no damage was done, the slightest mishandling of the plane might have resulted in loss of life and substantial damage to property. The evidence beyond a reasonable doubt sustains both Specifications.

6. The accused, who is single and about 20 years old, attended high school for three years but was not graduated. He had enlisted service from 2 March 1943 to 11 March 1944. On 12 March 1944 he was commissioned a second lieutenant. Since this last date he has been on active duty as an officer.

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

Abner E. Lipscomb, Judge Advocate.

Robert J. Glamor, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN
CM 267937

1st Ind.
DEC 4 1944

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Edward A, Miller (0-826479), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but commuted to a forfeiture of pay of $75 per month for nine months and that the sentence as thus modified be ordered executed.

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

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

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Memo from Commanding General, AAF.

(Sentence confirmed but commuted to forfeiture of $75 per month for nine months. G.C.M.O. 9, 5 Jan 1945)

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

SPJGH
CM 267967

15 MAY 1945

UNITED STATES	ANTIAIRCRAFT ARTILLERY TRAINING CENTER
v.	Trial by G.C.M., convened at Fort Bliss, Texas, 23 October 1944. Dismissal.
Lieutenant Colonel WILLARD L. WRIGHT (O-16114), Coast Artillery Corps.	

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

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

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

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

Specification 1: In that Lieutenant Colonel Willard L. Wright, Antiaircraft Artillery Officers Replacement Pool, Fort Bliss, Texas, did, in the Hilton Hotel, El Paso, Texas, on or about 13 September 1944, use orally and publicly, the following contemptuous and disrespectful words against the personnel and administration of Antiaircraft Artillery of the United States Army, to wit: "Antiaircraft is the worst branch of the service and not doing a thing in the war; the only thing Antiaircraft would be fit for would be to dig foxholes for the Infantry; Antiaircraft Generals, including the present general here at the Antiaircraft Artillery Training Center, are the dregs of the Army and should be done away with", or words to that effect.

Specification 2: In that Lieutenant Colonel Willard L. Wright, * * *, did, at the Knox Hotel, El Paso, Texas, on or about 1 April 1944, wrongfully make unnatural advances upon the

person of Corporal Clifford A. Bean, a male, freely with his hands and kissing said Corporal Clifford A. Bean on the mouth.

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

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

Specification 1: In that Lieutenant Colonel Willard L. Wright, * * *, did, at the Knox Hotel, El Paso, Texas, on or about 1 April 1944, wrongfully drink intoxicating liquor in the company of enlisted men.

Specification 2: (Finding of not guilty).

Specification 3: In that Lieutenant Colonel Willard L. Wright, * * *, having taken an oath in an official investigation before Major Charles W. Berry, Jr., Inspector General's Department, a competent person, that he would testify truly, did, at Fort Bliss, Texas, on or about 21 September 1944, willfully, corruptly, and contrary to such oath, testify in substance, that he had not been recently in the Dog-House, a public room in the Cortez Hotel, El Paso, Texas; that he had never invited any of the soldiers up to his room, which testimony was a material matter and which he did not then believe to be true.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge II and its two Specifications, not guilty of Specification 2 of Charge III and guilty of all other Charges and Specifications, except that in the case of Specification 3 of Charge III he was found not guilty of the words "that he had not been recently in the Dog-House, a public room in the Cortez Hotel, El Paso, Texas." 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. Evidence for the prosecution relating to the offenses of which accused was convicted:

a. Specification 1 of Charge I

Sergeant Harold F. Bussjaeger, Headquarters and Headquarters Battery, Antiaircraft Artillery Training Center, Fort Bliss, Texas,

testified that at about 5 p.m. 13 September 1944 he was drinking a bottle of beer in the Continental Bar of the Hilton Hotel, El Paso, Texas. He was seated at the bar. The accused came in and sat down on a stool to the right of the sergeant and approximately two feet from him. The next three stools to the right of the accused were occupied by a civilian and two Air Corps enlisted men respectively (R. 10, 12, 16). The accused ordered a bottle of beer and commenced a conversation with the sergeant, asking him if he had been to Juarez lately. The sergeant replied that he was going that night. Further conversation was related by the sergeant as follows (R. 10, 11):

> "* * * He asked me what the percentage allowed to go to Juarez was, and I said one percent, and then he asked me if I knew what the Biggs Field percentage was and I said I didn't know, and then he asked me what my station was and where I was located, and I said AAATC Headquarters. He asked me how long I have been here, and I told him about two years. He said 'How do you stand it?', and he said he had been in the AAAORP for quite some time and hadn't accomplished a thing over there, and then began talking about the Army I believe, and he said that the Army was terrible and it was a good Army back in the Thirties--1932 I believe he said, and he began talking about Antiaircraft and said that AA wasn't doing a thing in the War and the only thing it was good for was to dig foxholes for the Infantry and he said all he wanted to do was to get the AA Patch off his sleeve and then he said that Antiaircraft Generals, including the present general at the Antiaircraft Artillery Training Center were the dregs of the Army and should be done away with. I told him I thought he had a rather harsh attitude towards the army, and he said they brought it on him, as he had tried to transfer about ten times and nothing had happened. Then he asked me if I have ever tried to transfer and I said I have a couple of times but never did make it, so he said that he didn't think a person was any good unless he tried to transfer. Then I believe we had a couple more bottles of beer and he said he had to leave and wash for dinner, and that he was going to come back later on to the Continental Room."

The conversation lasted about 20 minutes, during which time the accused drank three bottles of beer (R. 12, 17, 18). He was not drunk (R. 16). The room was "very quiet" (R. 18) and the accused talked in a "loud voice" (R. 13). In addition to the sergeant, those present at the time the accused uttered his critical remarks, related above, included the civilian and the two Air Corps enlisted men who were seated to the right of the accused, the bartender, who was "within two feet" of the sergeant, and the accused, and there might have been two persons on the sergeant's left (R. 12, 15, 16). The accused, while talking, turned his head a number of times so as to face those about him (R. 14). On the following day, 14 September 1944, the sergeant reported the incident to Major Robert A. Klockau, the S-2 at Headquarters Antiaircraft Artillery Training Center (R. 17).

b. Specification 2 of Charge I and Specification 1 of Charge III

Corporal Clifford A. Bean, 582d Antiaircraft Automatic Weapons Battalion, Fort Bliss, Texas, testified that on 1 April 1944 he attended a party held in a room on the second or third floor of the Knox Hotel, El Paso, Texas (R. 21). He arrived at the party at approximately 6 p.m. and remained until midnight. The accused was already there when Bean arrived and he remained at the party until after Bean left, near midnight. Four other persons were also present at the party, namely, Corporal [Earl] Jackson, Corporal Evert L. Gish, and two civilians whose names Bean did not know. Three quarts of rum were consumed at the party throughout the evening. Bean saw the accused take several drinks of rum during the course of the evening. No other officer was present. All of the military personnel present were in uniform. The room in which the party was held was a "large room" and "was either a double room or two adjoining rooms" (R. 21-24). Bean had seen the accused "on several occasions" prior to 1 April 1944 (R. 25). Bean's testimony continues, in part, as follows (R. 25):

"Q During the course of that evening, did anything rather unusual occur regarding yourself and Colonel Wright?

A Yes, sir, the Colonel became very affectionate.

Q Will you relate to the court the circumstances of that occurrence?

A Well, sir, he kissed me about three times on the mouth and at the same time fondled my penis.

Q Have you testified that he kissed you?

A Yes, sir.

Q And he kissed you where did you say?

A On the mouth, sir.

Q Did he kiss you on the mouth once or more than once?

A About three or four times.

Q At the time he kissed you did he do anything else rather unusual?

A Yes, sir, he fondled my penis.

Q With what did he fondle your penis?

A His hand, sir.

Q Do you recall, did he use one hand or both hands?

A Just one hand, sir, he had one hand around my back.

Q In what period of time did those incidents take place?

A During the evening, sir, later in the party, towards the end of the party just before I left, in the latter part of the evening."

All of the soldiers and civilians mentioned above were present at the party throughout the time that Bean was there (R. 25). Bean saw the accused a number of times after 1 April, and on these occasions he spoke

to the accused and the accused spoke to him (R. 26). On cross-examination Bean testified, in part, as follows (R. 29, 30):

"Corporal, you have testified that the Colonel made unnatural advances toward you, is that right?
A That's right, sir.
Q Did you attempt to stop him?
A I had been drinking, sir.
Q I want a definite answer, yes or no?
A No, sir, I didn't.
Q In the second instance, did you make any attempt to stop him?
A No, sir.
Q In the third instance?
A No, sir.
Q In the fourth instance?
A I don't recall if there was a fourth instance.
Q Do you recall definitely that there was not a fourth instance?
A I am sure of three.
Q But you are not positive that there were more than three?
A I am not positive, I believe there were, sir."

He also testified that he is referred to by his friends as "Cliff" and by no other name (R. 33).

Private First Class (formerly Corporal) Evert L. Gish, 1852d Service Unit, Fort Bliss, Texas, testified by deposition that he attended a party in a room in the Knox Hotel on or about 1 April 1944 (R. 34; Pros. Ex. A). There were present at the party Corporal Jackson, Corporal Bean, the accused "and, I'm not sure, but I believe Sgt. Tudor and Sgt. Gill" (Pros. Ex. A, first page). Those at the party were drinking rum, and Gish saw the accused drink "at least half a dozen drinks" (Pros. Ex. A, second page). The accused "was being rather affectionate toward everybody there. I saw him kiss Bean and play with him, but he did about the same thing with the others. * * * I saw Lt. Col. Wright kiss Bean on the face and on the mouth." When asked how many times he saw the accused kiss Bean, Gish replied: "I don't recall exactly, but it must have been at least two or three different times. * * * I saw Lt. Col. Wright putting his hands on Bean and patting him in the region of the crotch. * * * I can't say positively that Lt. Col. Wright did fondle the genitals of Cpl. Bean, but it surely looked like he did." These activities continued "about two hours or more" and did not seem to Gish to be "very unusual" (Pros. Ex. A, second page). When asked on how many different occasions he saw kissing and fondling, Gish replied: "Every time Lt. Col. Wright would kiss anybody he would fondle them at the same time." Gish was never invited to the accused's room. "He never seemed to go for me." The room in which the party was held was signed for by Gish and Corporal Jackson

jointly, the former using the name "Ed Lewis" (Pros. Ex. A, third page). The defense interposed no objection to the introduction of Gish's deposition (R. 34).

g. Specification 3 of Charge III (portion thereof of which the accused was found guilty)

The prosecution introduced into evidence, without objection, a transcript of the testimony given by the accused under oath, on 21 September 1944, in an official investigation of the accused conducted by Major Charles W. Berry, Jr., Inspector General at Headquarters, Antiaircraft Replacement Training Center, Fort Bliss, Texas (R. 59, 60; Pros. Ex. G). Major Berry had been duly designated to conduct the investigation and the oath taken by the accused was duly administered by Major Berry (R. 59). At the time of the investigation the accused was fully advised as to his rights as a witness, and the testimony which he gave in the investigation was freely and voluntarily given (R. 60). In the course of such investigation the accused denied that he had ever been acquainted with "Sergeant Clifford Bean", "Private William Gish", "Corporal Harvey O. Therriault" or "a man by the name of 'Cliff'". Further, he was asked: "You have never invited any of the soldiers up to your room?" to which he replied: "That's right, I never have" (Pros. Ex. G).

Corporal Harvey J. Therriault, Battery B, 147th Antiaircraft Artillery Gun Battalion, Fort Bliss, Texas, testified that "sometime in May" 1944 he met the accused in a public room, known as the "Dog House", in the Cortez Hotel, El Paso, Texas (R. 61). He had seen the accused previously but had not met him (R. 62). On the occasion when he met the accused, the two of them conversed about matters pertaining to their "own outfits" until closing time at the Dog House, which was 10:30 p.m. At that time the accused invited Therriault "to have a drink in his hotel room with him". The accused said, "Why don't you come over to my hotel room and have a drink with me before you go out?" to which Therriault replied, "Sorry, sir, but I have to get in before curfew hours." Accused renewed the invitation, saying, "You could have a fast one with me, it isn't too late." Therriault again declined, and left. He has seen the accused since that evening "rather frequently" (R. 62). On cross-examination Therriault was asked whether he had seen the accused "recently, since he came back to Fort Bliss" and he replied in the affirmative. It was then shown that on 26 August 1944, while testifying under oath in an official investigation, he had answered, "No, sir" to the same question. Asked if he could explain this contradiction, Therriault replied, "No, sir, I can't" (R. 63, 64).

Roy Elliott, Assistant Manager of the Cortez Hotel, testified that the accused registered at the hotel on 11 August 1944 and was assigned Room No. 640. Later, on 14 August, accused was transferred to Room No. 812, which he occupied until 11 October (R. 67, 68). Several enlisted men inquired for the accused at the hotel. "Some of them"

would ask for the accused's room number, "and also some of them would ask if he was in his room." Those who inquired if he were in his room "were referred to the house 'phone, and the ones that asked what his room number was were given the room number." After making their inquiries "they would go to the elevator" (R. 69).

Technician Fourth Grade Jay H. W. Pursel, School for Medical Technicians, William Beaumont General Hospital, El Paso, Texas, testified that he was inducted into the Army 1 July 1943. He has known the accused since February 1944, during which time his acquaintance with the accused "centered primarily about the Continental Room of the Hilton Hotel and the Dog House of the Cortez Hotel." He "drank beer" with the accused "on several occasions", and the accused invited him to dinner "several times" but he declined the dinner invitations. The accused left Fort Bliss about the middle of May 1944 and returned about 11 August (R. 36). On or about 11 August 1944 Pursel received a note from the accused, written in pencil, reading as follows (R. 36, 56; Pros. Ex. F):

"Dear Jay: C-640

Am back at Bliss after a sojourn in Colorado. Will be at the Cortez for time being. Look me up.

Bill"

On or about the same day, 11 August 1944, Pursel went to the Dog House "not to look up Colonel Wright, but just to have a few beers." The accused came in and greeted Pursel, and the two of them "had a beer or two together." The accused then invited Pursel "to come to his room for a drink of liquor." Pursel accepted and accompanied the accused to his room, which was Room 640 in the Cortez Hotel (R. 37). In the room each of them had three mixed drinks of whiskey and ginger ale. Pursel was a Technician Fifth Grade at that time and was in uniform (R. 38). Upon leaving the accused's room, the two of them dined together at the Hotel Paso (R. 39). On the following evening, 12 August, Pursel and the accused dined together again at the Hotel Paso, following which they went to the accused's room in the Cortez Hotel where they had "several drinks" of whiskey and ginger ale. This was the same room they had been in on the previous evening, Room 640 (R. 40, 41). Again, on 26 August, the accused invited Pursel to his room in the Cortez Hotel and Pursel went with the accused to the room. On this occasion accused was occupying Room 812 (R. 43).

4. Evidence for the defense:

The accused, conversant with his rights as a witness, was sworn as a witness in his own behalf. His testimony relative to the various Specifications of which he was convicted will be summarized under the respective titles of such Specifications.

a. Specification 1 of Charge I

He has no recollection of being in El Paso on 13 September 1944, which was a Wednesday. He did not "go to town very often weekdays." He does remember being in the Hilton Hotel on the particular day to which he thinks Specification 1 of Charge I has reference. On that occasion he had a conversation with an enlisted man at the place alleged. He does not know whether the enlisted man was Sergeant Bussjaeger, because the man "didn't make an impression" on him. Some reference was made to the progress of the war and to the German generals. He at the time made the statement that he "did not think the generals were worth a damn." "There was no intention of applying these remarks to any of the officers of the Antiaircraft Artillery." He has never publicly criticized the leaders of the Army. He has a high regard for the Commanding General of the Antiaircraft Artillery Training Center. He did make the comment that "there was not much chance for action in the Antiaircraft" since "they were breaking up outfits right and left" (R. 78).

b. Specification 2 of Charge I and Specification 1 of Charge III

"The allegations made in Specification 2 to Charge I are pure fiction. I have never known Corporal Clifford Bean; I have never known Private Gish; I have never been in the Knox Hotel; I do not know where it is. I have never made unnatural advances upon anyone." The accused further testified that he did not drink intoxicating liquor with enlisted men on 1 April 1944 (R. 77).

c. Specification 3 of Charge III (portion thereof of which accused was found guilty)

He admitted writing the note (Pros. Ex. F) to Pursel, except the letter and figures "C-640" which he stated were not in his handwriting, but he "did not consider that an invitation to come up to my room" (R. 79, 80). He first met Pursel in the Continental Room of the Hilton Hotel in March 1944. Pursel introduced himself to the accused and asked if he could talk with him. In the conversation it developed that Pursel had spent a long time in New York and had had a part in the play "Life With Father." This "reminded me of my interest in the stage too." Also, Pursel had attended LaFayette College, which is located near the accused's home town. It was found that they "had a good deal in common to talk about." The accused had no reason to believe that Pursel "was anything but a pleasant, clean, upstanding young man." He did not see Pursel again until the first part of May. On that occasion the accused was sitting at a table in the Continental Room of the Hilton Hotel when Pursel came up and commenced a conversation. After a few minutes Pursel left, saying that he had an engagement. Before leaving, he wished the accused luck on his expected transfer and requested the accused to look

him up if the accused ever came back to Fort Bliss. Accused did not see Pursel again "until sometime in August 1944." He returned to El Paso from Colorado late in the afternoon of 11 August, and did not see Pursel on either the 11th or the 12th of August. On the 13th of August an enlisted man spoke to him in the Continental Room, stating that he was a friend of Pursel and that he had heard Pursel speak of the accused. He thereupon wrote the note to Pursel (Pros. Ex. F) and handed it to the enlisted man for delivery to Pursel (R. 72-75). Accused "did not actually see Pursel until towards the end of August." They met by chance in the Continental Room, had a drink together and the accused took Pursel to dinner. After dinner Pursel asked the accused for a ride back to camp. Accused agreed to take him but stated that he would have to go by his hotel and change his clothes. When they reached the Cortez Hotel accused told Pursel "he would have to wait." Pursel then asked permission to use the bathroom facilities in accused's room, which was granted. Accused changed his clothes and they went directly back to Fort Bliss in accused's car (R. 75).

It was stipulated that if Brigadier Generals James R. Townsend, Lester D. Floury, Edward Barber and John W. Weckerling and Colonel Ernest B. Thompson were present in court each of them would testify that he has served with the accused, that in his opinion the character and reputation of the accused are excellent and that he knows of no immoral or homosexual tendencies on the part of the accused (R. 70; Def. Exs. 2, 3, 4, 5, 6).

The defense introduced, without objection, a deposition of Colonel Lawrence McIlroy Guyer, General Staff Corps (R. 71; Def. Ex. 9). Colonel Guyer and the accused were in the same regiment at Fort Totten, New York, from 1932 until 1935. Throughout this period he had close personal contact with the accused and observed him daily in the performance of military duties; also, the accused often visited in his home. He regards the "accused to be of the highest character and the most scrupulous and irreproachable personal habits." The accused "was particularly insistent that enlisted men rigidly observe the rules of military courtesy" and the witness does not recall "a single occasion on which he [the accused] would permit familiarity, disrespect, or cheap conduct on the part of any enlisted man in his presence." Among the friends and associates of the witness "the accused stands out as an officer who was particularly and most markedly aloof and distant from enlisted men."

The defense also introduced, without objection, depositions of Brigadier General John B. Maynard, Brigadier General Evans R. Crowell, Colonel James F. Howell, Lieutenant Colonel Edward E. Farnsworth and Captain Richard S. Campbell (R. 71; Def. Exs. 7, 8, 10, 11, 12). These individuals vouched generally for accused's reputation for good character.

5. The testimony of the accused, in sum, amounts to a general denial of all charges against him, unsupported by any corroborative

evidence. Except for the testimony of the accused, the evidence adduced by the prosecution relative to each offense of which the accused was convicted is uncontroverted. In these circumstances, it was the function and duty of the court to consider all of the competent evidence introduced at the trial and to accord to it that weight and credence which in the judgment of the court it was entitled to receive, rejecting such portions as it believed to be unworthy of credence or otherwise untrustworthy (MCM, 1928, par. 124; CM 128252, Heppberger). It is evident from the findings of guilty of the offenses charged in Specifications 1 and 2 of Charge I and Specifications 1 and 3 of Charge III that the court disbelieved the testimony of the accused relative to those Specifications. This it was entitled to do.

6. With respect to Specification 1 of Charge I, the evidence shows that at the time and place alleged the accused, in the presence of at least three enlisted men and two civilians, declared in a loud voice that the Antiaircraft "wasn't doing a thing in the War and the only thing it was good for was to dig foxholes for the Infantry" and that the "Antiaircraft Generals, including the present general at the Antiaircraft Artillery Training Center, were the dregs of the Army and should be done away with" (R. 11). This Specification is laid under the 95th Article of War. The Manual for Courts-Martial, 1928, cites, as examples of violations of this Article, "using insulting or defamatory language to another officer in his presence, or about him to other military persons" (par. 151). Similarly, Winthrop's Military Law and Precedents, Second Edition, cites, as an example of a violation of this Article, "Making false or calumnious reports or statements in regard to a commanding, (or other), officer" (Reprint, p. 713).

The accused, in characterizing the Commanding General of the Antiaircraft Artillery Training Center as one of the "dregs" of the Army, was attacking his own commanding officer, since he himself was a member of that command. The term "dregs" carries with it not only a connotation of incompetence, but also one of moral impeachment. Webster defines it as "the vilest and most worthless part of anything", citing Dryden, "The dregs and rubbish of mankind" (Webster's International Dictionary, Second Edition).

In using the language which the evidence shows he used, in a public place and in the presence of both military personnel and civilians, the accused clearly exceeded the tolerance of criticism permitted to a commissioned officer and was guilty of conduct unbecoming an officer and a gentleman in violation of Article of War 95. The offense is aggravated by the fact that the enlisted man, to whom his remarks were primarily addressed, was himself a member of the same command.

7. With respect to Specification 2 of Charge I and Specification 1 of Charge III, the evidence presents the revolting picture of the accused, a lieutenant colonel, attending and participating in a drunken debauch, in

company with at least three enlisted men and two civilians, in a room of the Knox Hotel, El Paso, Texas, from about 6 p.m. until about midnight on 1 April 1944. Three quarts of rum were consumed during the evening, with the accused drinking a generous portion of it. The accused made numerous unnatural advances toward Corporal Bean and others present, and kissed Bean on the face and mouth at least two or three times, fondling his genitals on each occasion. The evidence thus fully supports the allegations of both Specifications.

Specification 2 of Charge I, alleging unnatural advances toward Corporal Bean, is laid under the 95th Article of War. The Manual for Courts-Martial, 1928, in describing the conduct denounced by this Article, provides, in part, "The conduct contemplated is * * * action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms" (par. 151). Regarding this Article, Winthrop's Military Law and Precedents, Second Edition, states, in part (Reprint, p. 711):

> " * * * As the Article now stands, it is no longer essential, to expose an officer to dismissal, that his conduct as charged should be <u>infamous</u> either in the legal or the colloquial sense; nor is it absolutely necessary, (though this will often be its effect,) that it <u>scandalize</u> the military service or the community. It is only required that it should be 'unbecoming'--a comprehensive term including not only all that is conveyed by the words 'scandalous' and 'infamous' but more."

It could hardly be denied that the conduct of the accused in making unnatural advances toward Corporal Bean, as alleged in the Specification and under the circumstances established by the proof, was not only "unbecoming" but was grossly "scandalous" in character. In the opinion of the Board of Review it constituted a flagrant violation of the 95th Article of War.

Specification 1 of Charge III, alleging drinking with enlisted men, is laid under the 96th Article of War. Accused's guilt of the offense alleged is clearly established by the evidence. The drinking of intoxicating liquor by a commissioned officer with enlisted men has uniformly been held to constitute a violation of the 96th Article of War (CM 234558, <u>Field</u>, 21 B.R. 41, 52; CM 236555, <u>Johnston</u>, 23 B.R. 57).

8. With respect to Specification 3 of Charge III, the evidence shows that the accused testified under oath, in an official investigation conducted by an officer of the Inspector General's Department, on 21 September 1944, that he had never invited any soldiers up to his room,

whereas in fact he had invited Corporal Harvey J. Therriault to his room on at least one occasion in May 1944, and had invited T/4 Jay H. W. Pursel to his room on at least three separate occasions in August 1944.

Section 125 of the Federal Penal Code of 1910 (18 U.S.C. 231) provides:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years."

Section 183, Revised Statutes, as amended (5 U.S.C. 93) provides:

> "Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud, the Government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army, Navy, Marine Corps, or Coast Guard, detailed to conduct an investigation, and the recorder, and if there be none the presiding officer, of any military, naval, or Coast Guard board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation."

It appears from the record of trial that the investigation referred to in the Specification was for the purpose of looking into the possible misconduct of an officer or agent of the United States. The officer detailed to conduct the investigation had authority to administer an oath to any witness attending to testify in the course of such investigation. The investigation constituted a case in which a law of the United States authorized an oath to be administered and a false statement of a material matter made by a witness under oath in the course of such investigation amounted to perjury within the purview of Section 125, Federal Penal Code of 1910, supra. Such perjury is embraced in those crimes, not capital and not made punishable by another Article of War, which are denounced by the 96th Article of War (CM 201765, Scrieber, 5 B.R. 297). Accused's false statement that he had never invited any soldiers up to his room patently related to a material matter in the investigation. In the opinion of the Board of Review the evidence fully establishes accused's guilt of the offense alleged.

9. The records of the War Department show the accused to be 45 years of age and single. He was a cadet at the United States Military Academy from 1 July 1921 until 12 June 1925, when he was commissioned a second lieutenant of Field Artillery. He was promoted in the Regular Army to first lieutenant on 1 November 1930; to captain on 1 August 1935; and to major on 12 June 1942. He was transferred to the Air Corps on 1 November 1927, and to the Coast Artillery Corps on 30 June 1932. He was commissioned a major in the Army of the United States on 31 January 1941; and was promoted to lieutenant colonel, Army of the United States, on 9 September 1942. From 1930 through 1943 he received three annual efficiency ratings of superior, seven of excellent, three of very satisfactory, and one of satisfactory, his annual ratings for the last three years being as follows: 1941, very satisfactory; 1942, excellent; and 1943, excellent. His efficiency reports contain remarks attesting to his placid, unassuming manner and to his thoroughness, his industry and his forcefulness as an officer.

10. In accordance with accused's request, he was represented at the trial by Lieutenant Colonel William J. Cleary, C.A.C., with the regularly appointed defense counsel and assistant defense counsel acting as associate defense counsel.

11. On 30 December 1944 the Board of Review heard oral arguments of Messrs. Samuel T. Ansell and Roger Robb, of the firm of Ansell & Ansell, Tower Building, Washington, D. C., special counsel for the accused. Also, the Board has considered, in so far as they relate to the legal sufficiency of the record of trial, a brief filed in this case by the firm of Ansell & Ansell prior to the oral arguments and a further brief, entitled "INFORMAL MEMORANDUM FOR BOARD OF REVIEW NO. 1", filed by the same firm subsequently to the oral arguments. The affidavits appended to the original brief and the assertions of fact set out in both briefs and not contained in the record of trial have not been considered by the Board of Review, since consideration of those matters would be outside of the province and authority of the Board.

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

Thomas M. Jaffe, Judge Advocate.

William H. Lambrecht, Judge Advocate.

Robert C. Crenshaw, Judge Advocate.

SPJGH-CM 267967 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 4 JUN 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Lieutenant Colonel Willard L. Wright (0-16114), Coast Artillery Corps.

2. Upon trial by general court-martial this officer was found guilty of (a) using contemptuous and disrespectful language against his commanding officer and the personnel and administration of the Antiaircraft Artillery of the United States Army in violation of the 95th Article of War (Spec. 1, Chg. I); (b) wrongfully making unnatural advances upon an enlisted man in violation of the 95th Article of War (Spec. 2, Chg. I); (c) wrongfully drinking intoxicating liquor, in the company of enlisted men in violation of the 96th Article of War (Spec. 1, Chg. III); and (d) statutory perjury in violation of the 96th Article of War (Spec. 3, Chg. III). 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. To prove the offense alleged in Specification 1 of Charge I the prosecution introduced one Sergeant Harold F. Bussjaeger as a witness who testified in net effect that on 13 September 1944, accused, in a public bar in the Hilton Hotel, El Paso, Texas, loudly declared in the presence of at least three enlisted men and two civilians that Antiaircraft "wasn't doing a thing in the War and the only thing it was good for was to dig foxholes for the Infantry" and that Antiaircraft Generals, including accused's commanding general, were "the dregs of the Army and should be done away with." To prove the offenses alleged in Specification 2 of Charge I and Specification 1 of Charge III the prosecution introduced into evidence the deposition of one Private First Class Evert L. Gish and also the testimony of one Corporal Clifford A. Bean which collectively demonstrated that on the evening of 1 April 1944, the accused attended a drinking party in a private room of the Knox Hotel, El Paso, Texas, at which two civilians and two enlisted men were also present. From 6 p.m. until midnight accused was present at the party where he freely participated with the two civilians and the two enlisted men in consuming three quarts of rum. During that time accused also affectionately kissed Corporal Bean on the face and mouth at least three different times, fondling Bean's privates on each occasion. To prove the offense alleged in Specification 3 of Charge III, the prosecution established that on 21 September 1944, accused testified under oath,

in an official investigation conducted by an officer of the Inspector General's Department, that he "never invited any of the soldiers up to his room" and then the prosecution introduced as witnesses Corporal Harvey J. Therriault, Technician Fourth Grade Jay H. W. Pursel and Roy Elliott who severally testified in net effect that accused had invited Corporal Therriault to his room on at least one occasion in May 1944, and had invited Technician Fourth Grade Pursel to his room on at least three separate occasions in August 1944.

Subsequent to his trial and conviction accused retained the law firm of Ansell & Ansell, Washington, D. C., as special counsel. Representatives of that firm appeared before the Board of Review on 30 December 1944 and made oral argument on behalf of the accused. Along with several briefs subsequently filed from time to time by special counsel, there was also submitted (a) an affidavit of Evert L. Gish (formerly Pfc. Evert L. Gish) executed six weeks after the trial in which he repudiated his deposition introduced at the trial, and stated that he gave it under threats and coercion and that in fact he had no recollection or knowledge of accused's presence at the drinking party or of any homosexual activity on accused's part at any time or place; (b) an affidavit of Harvey J. Therriault (formerly Corporal Harvey J. Therriault), executed eight weeks after the trial in which he repudiated his testimony given at the trial and stated that accused had not invited him to his hotel room for a drink but that he had been compelled falsely to testify to the contrary because of threats made by one of the investigating officers; and (c) an affidavit of Clifford A. Bean (formerly Corporal Clifford A. Bean) taken on 22 March 1945, in which he repudiated his testimony given at the trial and stated that he so testified only because of threats made and coercion exercised by one of the investigating officers, that in fact he had no recollection of accused being present at the party at the Knox Hotel and that accused had never kissed or fondled him at any time or place.

To confuse further this entire situation, on 11 April 1945, Clifford A. Bean made a second affidavit in which he stated that at the time he testified at accused's trial it was his recollection that accused was present at the drinking party with enlisted men at the Knox Hotel and that "towards the end of the evening, there was some kissing and fondling in which Col. Wright participated." It appears from other papers filed in this case that Gish, Therriault, Bean and Pursel are each homosexuals who have been, or are to be, administratively discharged from the military service.

4. Although the Board of Review is of the opinion that the record of trial proper is legally sufficient to support the findings of guilty and the sentence, nevertheless, a majority of the Board is further of the opinion that, in view of the serious doubt cast by the affidavits on the truth of a substantial portion of the prosecution's evidence relative to

the most serious offenses of which accused was convicted, this case can only be properly disposed of by disapproval of the findings and sentence and by authorizing a new trial to permit of full examination of all witnesses before a new court.

I concur in the opinion of the Board of Review and I recommend that the sentence be disapproved and a rehearing be authorized before another court.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence disapproved and rehearing authorized by order of the Acting Secretary of War, 8 Jun 1945)

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

SPJGK
CM 267999

6 DEC 1944

UNITED STATES	)	XXXVI CORPS
v.	)	Trial by G.C.M., convened at Fort Leonard Wood, Missouri, 25 October 1944. Dismissal, total forfeitures and confinement for five (5) years.
First Lieutenant HARRY M. DAVIDSON (0-1289701), Infantry.	)	

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 Charge and Specification:

CHARGE: Violation of the 64th Article of War.

Specification: In that 1st Lieutenant Harry Melvin Davidson, 207th Field Artillery Group, having received a lawful command from Lieutenant Colonel Gilbert A. Goldspinner, 207th Field Artillery Group, his superior officer, to lay out a physical fitness course, did at Fort Leonard Wood, Missouri, on or about 2 October 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. For the prosecution.

On 2 October 1944, Lieutenant Colonel Gilbert A. Goldspinner, whose order accused is alleged to have disobeyed, was commanding officer of the 207th Field Artillery Group, and accused was an officer of that command, being assistant S-3 (R. 7). On the date mentioned, orders were received at Group Headquarters from Headquarters XXXVI Corps that physical fitness tests be given certain units of the 207th Field Artillery Group and that a testing course be prepared for that purpose (R. 7, 8, 10).

The first tests were to be given on or about 10 October (R. 11, 17, 29). The letter from Corps Headquarters embodying the mentioned orders and prescribing the nature of the testing course was passed along the same day to Captain Robert Rush, Group S-3, with instructions that he notify the personnel involved and have the testing course prepared without delay (R.8). Captain Rush in turn, on the same day, delivered the letter to accused and directed him to lay out the course and see that it was properly prepared (R. 21). Accused was to be assisted by another officer and a detail of enlisted men (R. 21). Upon being given this assignment, the accused went to Colonel Goldspinner and protested that he could not do the job because it would interfere with the work he was doing as orientation and education officer and as athletic and recreation officer. Colonel Goldspinner testified that he first explained to accused that "laying out" the course would take only one or two hours and was work that had customarily been done by the athletic and recreation officer, and stated that he finally concluded discussion of the matter by telling accused "You will put in this course" (R. 9). After discussing some other topics, accused left. (Colonel Goldspinner stated that this first conversation took place during the morning of 2 October, apparently about 9:00 a.m. (R. 8,9,10), but the record as a whole is convincing that it occurred about 1:30 p.m. of that day (R. 24,28).) Later during the same day, accused returned to Colonel Goldspinner's office, and it was during this second visit that the matters transpired which gave rise to this prosecution. (Colonel Goldspinner stated that this second visit was made about 1:30 p.m. (R. 7,8,9,10), but the record as a whole is convincing that it was made between 3:30 and 4:00 p.m. (R. 19,23,24,28,30).) Upon being granted an audience by Colonel Goldspinner on this second visit, accused tossed the letter with regard to the physical fitness tests on the latter's desk and said, "Sir, after due consideration, I can't bring myself to do this assignment" (R. 7,11,30). Colonel Goldspinner stated that he thereupon asked accused if he understood what he was doing and if he refused to obey the order of his commanding officer, to which accused replied, "I do" (R. 7). Colonel Goldspinner then counselled with accused, asked him if he realized that charges would be preferred against him for willful disobedience of an order if he persisted in his refusal, and explained to him the possible consequences of his course of conduct. The accused replied that he understood, and upon being asked if he still persisted in his refusal, answered, "I do" (R. 7). Colonel Goldspinner thereupon called Captains Robert Rush and Woodrow W. Potter and Lieutenant Robert E. Quinn into his office, picked up the above mentioned letter and said to accused, "Lieutenant Davidson, as your commanding officer, I order that you lay out the physical fitness course as directed in this letter by XXXVI Corps Headquarters". Thereupon accused said, "I refuse" (R. 8,13). Colonel Goldspinner again warned accused of the possible consequences of his refusal, advised him of the maximum penalty for willful disobedience of a lawful order of his superior officer during time of war, and again asked if he persisted in his refusal to carry out the assignment, and, upon receiving an affirmative reply, ordered accused into arrest in quarters (R. 8).

Captains Rush and Potter testified substantially the same as Colonel Goldspinner with regard to what transpired between Colonel Goldspinner and accused after they were called into the office (R. 19,22-23). Captain Rush was uncertain as to whether Colonel Goldspinner gave accused an order to lay out the course or merely asked accused if he still refused to carry out an order, which had already been given him (R. 19-21).

At the time of this occurrence, accused was group orientation officer and was also performing the duties of athletic and recreation officer, assignments that were ordinarily given to two officers separately (R. 15,16). Colonel Goldspinner stated that it was his intention at the time of ordering accused to lay out the testing course that accused should perform that assignment in addition to his other duties and not that accused should be relieved from performance of the duties incident to his regular assignments (R. 17).

4. For the Defense.

Second Lieutenant Lennie Sweat testified that about 1:00 p.m. on 2 October 1944 he was present when Captain Rush assigned accused the duty of preparing the testing course and was assigned to assist accused (R. 24). He stated that Captain Rush told accused, "When you get ready, Lieutenant Sweat will give you any advice you may need". Lieutenant Sweat told accused that he would be available and would furnish the enlisted men when accused was ready to do the work but gave accused no advice. He was not available that afternoon, his presence being required elsewhere (R. 24). He had never prepared a physical fitness testing course (R. 24-25).

Upon being advised of his right to testify under oath, to make an unsworn statement, or to remain silent, accused elected to testify under oath. He entered the service as an enlisted man on 31 March 1941, was sent to Hawaii in December 1941 and served there until May 1942, at which time he returned to the United States to attend Officers' Candidate School. Upon being commissioned a second lieutenant on 11 August 1942, he was assigned to the 301st Infantry; became its Special Service Officer in July 1943; attended Special Service School during September 1943; after graduating, rejoined his organization in October while it was on maneuvers; and was made Regimental Orientation Officer in November 1943. He was called to the War Department Special Service Replacement Pool in January 1944; was assigned to a touring soldiers' show team; was put in charge of a similar team in May 1944 and continued with it until he was assigned to the 207th Field Artillery Group in August. He reported to this latter organization on 21 August; was immediately made Athletic and Recreation Officer, and was then granted an emergency leave. He reported back from leave on or about 6 September, and about two or three weeks later was made Orientation Officer, but continued also to discharge the duties of Athletic and Recreation Officer. He did not have a commissioned officer to assist him, and part of the time had no assistant at all. The unit Table of Organization made provision for two officers to do the work which he was doing alone.

In his opinion he was unable to do justice to either job while trying to manage both together. About 1:15 p.m. on 2 October, Captain Rush gave him the additional assignment of laying out the physical fitness testing course. No definite time was set for performance or completion of the task (R. 29). Accused knew in his own mind that the first tests would be given about 12 October (R. 29). He knew the nature of the assignment and estimated that it would take about a day or a little more to complete the job (R. 32). He was later informed by the lieutenant who installed the course that a day and a half were required for completion of the task (R. 33). After thinking the matter over, accused went to see Colonel Goldspinner.

Accused's version of what transpired between him and Colonel Goldspinner during each of his two visits is in substantial accord with the versions thereof given by Colonel Goldspinner and the other witnesses (R. 29, 30). He admitted that there was no doubt or question in his mind about his having received a direct order from Colonel Goldspinner during his second visit to the latter's office to accomplish the laying out of the testing course (R. 33). Accused stated that Colonel Goldspinner did not indicate that performance of his order had to be immediate; that he was never given a definite time in which to carry out the assignment, and that "as far as I (accused) was concerned", the order could have been performed the following day (R. 31). His reason for refusing to carry out the assignment was that it was outside the realm of his principal duties and he did not believe that he would have time to lay out the course and still perform his other duties (R. 32). He was to report as duty officer on 2 October (R. 33). The duty officer normally reported for duty at 11:00 a.m., but he had not assumed discharge of those duties at the time of his second visit to Colonel Goldspinner's office because Colonel Goldspinner had been absent at the regular reporting hour. The primary function of a duty officer was to take care of matters arising between five o'clock in the evening and eight o'clock the following morning, and being duty officer did not relieve one from performance of his ordinary duties (R. 34). Accused made no effort of any kind toward laying out the testing course or in preparation to do so between his two conversations with Colonel Goldspinner (R. 31-32).

5. Defense counsel urged at the trial, and urges in a brief filed with the record, that the order given accused by Colonel Goldspinner was one to be performed in the future; that accused did no more than express his intention of disobeying it, and that, therefore, under the provisions of paragraph 134 b, MCM, 1928, a violation of Article of War 64 has not been established. In support of this contention, counsel cites CM 256598, III Bull. JAG, August 1944, p. 340. The cited case is distinguishable on its facts from the instant case. The order there involved was one given before noon that a soldier report at a designated place at 1:00 p.m. The time for performance was fixed, and by its very nature the order could not be obeyed until that time arrived. Upon the soldier's stating that he was not going to report as ordered, he was immediately placed in confinement. In the instant case the order did not fix the time for performance in the future. While it may have been contemplated by all concerned at the time accused was originally given the

assignment that he would suit his own convenience, within reasonable limits, in laying out the testing course, the situation was altered by Colonel Goldspinner's order. The order was, in form, one to be obeyed immediately and was one the performance of which accused could have begun immediately. It was a direct, lawful order given accused by his superior officer, and accused's refusal to obey it was studied, willful, and without justification. The record of trial is legally sufficient to support the findings of guilty.

6. War Department records disclose that this officer is 29 years of age and married. He is a graduate of both a high school and the University of California. He states that he can speak and translate both Spanish and French. In civil life he was an actor and director with a stock company. He was inducted into the service on 31 March 1941. He served in Hawaii from 27 December 1941 until May 1942, at which time he was returned to the United States to attend Officers' Candidate School (Infantry). He was appointed and commissioned a second lieutenant, Infantry, Army of the United States on 11 August 1942, reported for active duty the same day, and was promoted to the grade of first lieutenant on 14 October 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 sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 64.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JAN 1 - 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 First Lieutenant Harry M. Davidson (0-1289701), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. War Department records disclose that accused was inducted into the military service 31 March 1941. He served as an enlisted man in an Anti-Tank Company, 161st Infantry, Fort Shafter, T.H., from 27 September 1941 until May 1942, at which time he had become a corporal. He was then transferred to the Infantry School, Fort Benning, Georgia, from which he was commissioned as a second lieutenant 11 August 1942. He was promoted to the grade of a first lieutenant 14 October 1943. Before his assignment to the organization with which he was serving at the time of the commission of the offense here involved, the accused had established a superior record. Between 8 August 1942 and 19 August 1944 he had received seven efficiency ratings of excellent. His 201 file discloses that he rendered outstanding service in Hawaii as an enlisted man. The accused has committed a serious military offense, but, in view of his previous good record and under all the circumstances in this case, it is believed that some form of punishment other than confinement or dismissal would meet the ends of justice. I, therefore, recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $50 of his pay per month for a period of three months, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to the attached letter from Lieutenant Colonel Marvin Young, Infantry, dated 8 December 1944.

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

Myron C. Cramer

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. Lt.Col.Marvin Young, 8 Dec. 44.

(Sentence confirmed but commuted to reprimand and forfeiture of $50 per month for three months. G.C.M.O. 82, 21 Mar 1945)

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

SPJGK
CM 268007

4 DEC 1944

UNITED STATES v. Private CLAUDE A. McKINNEY (6929293), Section G, 115th Army Air Forces Base Unit (Bombardment) (Medium), Army Air Base, Godman Field, Kentucky.	FIRST AIR FORCE Trial by G.C.M., convened at Godman Field, Kentucky, 21 October 1944. Dishonorable discharge and confinement for two and one-half (2-1/2) years. Disciplinary Barracks.

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

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

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

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

Specification 1: In that Private Claude A. McKinney, Section G, 115th Army Air Forces Base Unit (Bombardment) (M), Godman Field, Kentucky, did, at or near Fort Knox, Kentucky, on or about 19 September 1944, with intent to do him bodily harm, commit an assault upon Private Willie J. Hunter, by kicking him in the testicles with the heavy service shoe covering his foot.

Specification 2: In that Private Claude A. McKinney, * * *, did, at or near Fort Knox, Kentucky, on or about 19 September 1944, feloniously take, steal and carry away one radio, value of about $15.00, the property of Private Jack B. Applegate, one hand satchel, value of about $2.50, one carton of cigarettes, value of about $1.30, one cigarette lighter, value of about $2.00, six sets of cotton underwear, value of about $4.20, one leather toilet kit, value of about $10.00, and one Conklin pen-pencil set, value of about $6.00, the property of Private First Class Clarence D. Krotzer.

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

Specification: In that Private Claude A. McKinney, * * *, was at Fort Knox, Kentucky, on or about 19 September 1944,

drunk and disorderly in railroad station.

He pleaded guilty to Charge II and its Specification and not guilty to Charge I and its Specifications. He was found guilty of all Charges and Specifications. He was sentenced to dishonorable discharge, total forfeitures, and to be confined at hard labor for three years. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for 2-1/2 years and forwarded the record of trial for action under Article of War 50½.

3. The evidence is legally sufficient to support the findings of guilty of Specification 1 of Charge I, Charge I, and Charge II and its Specification. The conviction of these offenses is sufficient under the Table of Maximum Punishments (M.C.M., 1928, par. 104c) to support a total sentence of one year and six months. The only question requiring consideration is the sufficiency of the evidence to support a finding that the articles proved to have been stolen by the accused under Specification 2 of Charge I had a total value in excess of $20 in order to support the balance of the sentence as approved by the reviewing authority of one year.

4. Specification 2 of Charge I alleges the value of the various stolen articles to be as follows:

1 radio	about	$15.00
1 hand satchel	"	2.50
1 carton of cigarettes	"	1.30
1 cigarette lighter	"	2.00
6 sets of cotton underwear	"	4.20
1 toilet kit	"	10.00
1 pen-pencil set	"	6.00
Total -		$41.00

All of the above articles, with the exception of the carton of cigarettes, were admitted in evidence and subject to the inspection of the court (R. 18). The value of the radio was proved by an expert properly qualified to be $5 (R. 25). The only evidence of the value of the remaining articles was that given by the owner of the articles in the following manner:

"Q. What value do you place on them? [carton of cigarettes].
A. They cost me $1.30 at the PX" (R. 18).

"Q. Can you tell the court what value you place on this zipper bag?
A. If I recall clearly $2.50.
Q. Do you place that value on it at the present time?
A. Something like that.

Q. The pen and pencil set - what value do you place on that?
A. I think that it would sell for about $5.00 or $6.00.
Q. The six sets of underwear - what value do you place on that?
A. I usually pay around $.35 a piece for that.
Q. This shaving kit - what value do you place on that?
A. $10.00 when it was new.
Q. What value do you place on it at the present time?
A. Just as much" (R. 19).

It is apparent that the foregoing answers were not responsive to the questions in order to base a finding that the articles were of the value alleged in the specification at the time they were stolen. No attempt was made to prove the value of the other articles, nor to qualify the witness as having any special knowledge on the subject of the value of the articles concerning which he was permitted to testify. It has been uniformly held by the Board of Review that the testimony of the owner of stolen personal property as to its value is not competent unless he is an expert or has special knowledge on the subject (CM 192911 (1930); CM 195212 (1931); CM 208002 (1937); CM 213952 (1940); CM 214103 (1940); CM 214367 (1940); CM 216316 (1941); CM 217429 (1941); CM 228742 (1942); CM 237091 (1943)). It is immaterial that the articles themselves have been offered in evidence. To permit the court on its inspection alone to find definite market values of articles "would be to attribute to the members of the court technical and expert trade knowledge which it cannot legally be assumed they possessed" (CM 208481, Ragsdale; CM 209131, Jacobs; CM 208002, Gilbert).

It necessarily follows that the findings of the value of the various articles by the court cannot be sustained by the evidence. The evidence supports only a finding that the articles had some value and therefore can support only a sentence not in excess of 6 months, according to the Table of Maximum Punishments.

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 Specification 1 thereof, Charge II and its Specification, legally sufficient to support only so much of the finding of guilty of Specification 2 of Charge I as involves a finding of guilty of larceny of the property described at the time and place alleged, of the ownership averred, of some value not in excess of $20, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures, and confinement at hard labor for two years.

Guy E. Eggers, Judge Advocate.
Earle Hepburn, Judge Advocate.
William Mayer, Judge Advocate.

1st Ind.

War Department, J.A.G.O.; DEC 13 1944 - To the Commanding General, First Air Force, Mitchel Field, New York.

1. In the case of Private Claude A. McKinney (6929293), Section G, 115th Army Air Forces Base Unit (Bombardment) (Medium), Army Air Base, Codman Field, Kentucky, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that only so much of the finding of guilty of Specification 2 of Charge I be approved as involves a finding of guilty of larceny by accused of the specified property at the time and place and of the ownership alleged of some substantial value not in excess of $20, and that only so much of the sentence be approved as involves dishonorable discharge, total forfeitures and confinement at hard labor for two years. Upon compliance with the foregoing holding and 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 268007).

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 268040

8 DEC 1944

UNITED STATES	)	SIXTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
Private DAVID H. JONES (35242035), Company E, 1332nd Engineer General Service Regiment.	)	Trial by G.C.M., convened at Camp Ellis, Illinois, 30 August 1944. Dishonorable discharge and confinement for thirty (30) years. Penitentiary.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private David H. Jones, Company E, 1332nd Engineer General Service Regiment, did, at Camp Ellis, Illinois, on or about 10 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Thelma Mae Hill.

The accused pleaded not guilty to, and was found guilty of, both the Charge and the Specification 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 life. The reviewing authority approved the sentence but reduced the period of confinement to thirty years, designated the United States Penitentiary at Terre Haute, Indiana, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The evidence for the prosecution shows that an M-1 rifle was issued on 8 June 1944 to the accused, who was a member of Company E, 1332nd Engineer General Service Regiment, Camp Ellis, Illinois (R. 45, 50, 54-55). Having neglected to care for the weapon properly, he was ordered to carry it "at all formations" and was taught, outside of regular training hours, how to clean it (R. 50). The last formation each day was the evening meal which was served at 5:30 p.m. (R. 52). Immediately thereafter the rifle was required to be locked in a rack (R. 51, 53). This obligation was ignored by the accused.

Wives of soldiers were frequent visitors at the camp. Some obtained private accommodations; others stayed in so-called "Guest Houses" provided by the Army. Among those who availed themselves of the latter facilities was the wife of Private Burney A. Davis of the 4208th Quartermaster Service Company (R. 20, 22). Between 9:00 and 9:30 p.m. on 6 June 1944 she and her husband were sitting on a bench behind Service Club No. 2 (R. 20-22, 31). The accused, accompanied by another soldier, approached them, represented himself to be the Sergeant of the Guard, and demanded to know what they were doing. After some conversation, the accused said to Davis, "Well, you go back to your barracks. We will take your wife here over to the Guest House". Davis' reply was, "You or nobody going to take my wife to the Guest House. I will take her back myself" (R. 22). Suiting his action to his words, he escorted his wife to the building in which she was staying. He was followed all the way by the accused's companion (R. 23).

The following night Davis and his wife, while near Service Club No. 2, were again approached by the accused, who this time had two men with him (R. 23-24, 31). One of them, a "little brown-skin soldier", was armed with a rifle to which a bayonet was affixed (R. 24). As before, the accused demanded to know, "What are you all doing out here?" After reiterating that he was Sergeant of the Guard, he ordered Mrs. Davis to "Come here. I want to talk to you". Private Davis countered by directing her to "stand right here". Observing another married couple named Etsofannie nearby, the accused said to the "little brown-skin soldier", "You hold these two here while I talk to this other soldier * * *" (R. 25, 27, 32). While the bayonet was "pressed close to [Davis'] chest", the accused compelled Etsofannie to leave and began walking off across the field with Mrs. Etsofannie. Davis "hollered" to her, "Come back here, girl. You don't know where you are going. You don't know nothing about this fellow" (R. 26, 31). She immediately left the accused and came to Davis' side and said, weeping, "I don't know what this is all about" (R. 27). By this time her husband had reconsidered and returned. The two couples grouped themselves together for protection and marched off, unmolested, to the Guest House (R. 28). Private Davis was "pretty sure" that he could identify the short man with the bayonet by his voice (R. 31-32).

Between 10:00 and 10:30 p.m., on 6 June 1944, Private First Class Harry M. Wilson and his wife were also "in the rear" of Service Club No. 2 (R. 12-13). The accused and from six to eight other men, including "a short fellow", approached and asked for a match. Addressing Mrs. Wilson, he began calling her "pet names" such as "sweet bitch" and urged her to "Come on, let's have fun". Meanwhile the "short fellow" was caressing her on the buttocks (R. 15-17). Wilson broke a beer bottle and, menacingly displaying the crude weapon formed by the jagged remains, said to the accused, "If you don't leave here in a few seconds, I will see that you go by force, if necessary". Although the accused continued to talk, his short companion remarked, "Come on, man, let's go. Probably it is his wife or something" (R. 17). Seeing Wilson advance, the accused made his departure (R. 18). Although he could not identify the short man by "looking at him", Wilson would be able to recognize his voice (R. 19).

Miss Thelma Mae Hill, age eighteen years, weight one hundred and sixty-five pounds, and a resident of Detroit, Michigan, arrived at Camp Ellis on 9 June 1944 to visit Corporal Walter Hayes whom she had never met but with whom she had been corresponding for about ten or eleven months with a view to matrimony (R. 57-59, 90, 110). After registering at Guest House No. 2 as "Thelma Walter Hayes", she saw Corporal Hayes at the Service Club /but conceived a dislike for him and "left him" (R. 59, 91, 93). While watching a parade on the afternoon of the next day, she became acquainted with Private Robert Crayton, a married man (R. 60, 91, 117, 131, 134). At about 5:30 p.m. she parted from him temporarily and returned to the Guest House to "change clothes" (R. 60-61). That night she was with him at the Service Club from about 8:00 to 9:50 p.m. (R. 61, 92, 132). Just before closing time, they went outside and seated themselves on a bench under a tree some fifty yards from the building (R. 61-62, 118, 133). Nearby were Private First Class James E. Austin and his wife (R. 37, 62, 66, 96, 119).

Within a few minutes Crayton and Miss Hill were approached by the accused and several other soldiers. The accused, who wore a green fatigue jacket and a cartridge belt, had an M-1 rifle slung across his shoulder (R 35, 43-44, 63, 97, 119). Holding himself out as a guard, he stated to Crayton that, "You don't have any business out here * * *. It is * * * against the rules * * *. You will get yourself into a lot of trouble". When Crayton attempted to remonstrate, the accused repeated the threat of "a lot of trouble" and added, "I am going to take you to the guardhouse" (R. 120). When Crayton defied him, the accused ordered him to "Go on back to your company". To Crayton's demand that Miss Hill be allowed to accompany him, the accused replied that she "is not going back to the Guest House. She is going to the guardhouse" (R. 97, 121). The two men continued to bicker until one of the group who had come with the accused called out to him, "Hey, Sergeant, here is another couple over here"

(R. 35, 42, 65, 121-122, 141). Turning to Miss Hill, he warned her "to tell this other soldier [that is, Crayton] to go back about his business if he did not want to get into trouble". This remark was heard by Austin as he and his wife started toward the accused (R. 36, 41-43, 65, 122).

Austin had his marriage certificate with him, and his wife was from the home town of the man with the queer voice. Upon being apprised of these facts the accused directed that the couple be released (R. 65-67, 96, 122). They forthwith headed back to the Service Club (R. 22). Resuming his questioning of Miss Hill, he asked whether she was married to Crayton. When she "told him no", the accused ordered Crayton to "go on back". Crayton persisted in his defiance. Bringing his rifle to "high port", the accused pointed it at Crayton, showed him some live ammunition, and opened and closed the bolt (R. 68, 122, 135, 139). Miss Hill screamed and said, "Don't kill him. I will go to the guardhouse with you" (R. 68, 122). Frightened by the rifle and by the threatening demeanor of several of the other soldiers, Crayton hastily departed and caught up with Austin and his wife (R. 123). Since the accused had been referred to by members of his group as "Sergeant" and had "mentioned going to the guardhouse", Crayton had at first "put two and two together" and had believed him to be a guard. When the accused claimed that all of his followers were also guards, although none of them carried rifles or wore cartridge belts, Crayton's suspicions were aroused. Now, convinced that the accused was a fraud, Crayton called the military police (R. 124, 141-142).

In the meantime the accused ordered two soldiers to escort Miss Hill "up a little further". They complied but, when she wept and pleaded, they promised to help her and told her "to run across the field" (R. 69, 101). Since the accused had a rifle, she was "scared to" follow this suggestion (R. 70, 101). He "came up" to her and warned her that "the more [she] cried the harder it would be". He added that, "Just last week we gave another girl six months * * * I am giving you twenty years in the guardhouse" (R. 70, 102). Seizing her by her right wrist, he began leading her across an open field followed by several other soldiers. To reassure her he said, "Don't be worried, don't cry. I am going to try to help you out". He explained that it was "his duty to pick up people who was in the area at that time" (R. 70-71). In from five to ten minutes he and Miss Hill arrived at a building known as Castle Hill (R. 71, 101-102). Pausing briefly at the top of a series of steps descending into the basement, he instructed a couple of soldiers to summon "a Sergeant" (R. 72). He ordered the other soldiers "to go outside" and informed them that he would personally take Miss Hill down (R. 73). Up to this point she "did not holler, because [she] thought [the accused] and his other guys were maybe guards, MPs * * * [She] didn't know that they wasn't" (R. 99-102). Still holding her by her wrist, he guided her down into the basement, through a little hallway, and to a cot on which he directed her to seat herself. "It was

dark in there" (R. 73, 108).

After momentarily assuming a position beside her, he arose, removed his rifle, and "laid /it/ down" (R. 73, 109). When he seated himself beside her again, she inquired where the light was. He answered, "There isn't no light in here because we have ammunition and somebody would steal the ammunition if they had light". He whispered to her, "Is nobody here but you and I" (R. 74, 109). When she "couldn't understand", he tried to kiss her. She "jumped up", and, as he pushed her against the wall, she screamed two or three times (R. 74, 78-79, 102, 109). Grabbing her by the throat with both his thumbs at her adam's apple, he choked her, forced her back onto the cot, and got on top of her (R. 74-75, 79, 113). Several other soldiers came running to the room. Two of them pulled and held her legs apart, and two pinned her arms down (R. 75-76, 102-104). While she was in this utterly helpless condition, the accused had sexual intercourse with her (R. 76-77). When he was done, four or five other soldiers in succession followed his example (R. 79). She suffered "considerable pains" (R. 80).

A noise outside the building startled the men and sent them dashing out of the building (R. 80-81). Feeling "weak and tired", she made her way to the stairs. Before she could escape, one of the soldiers returned, pushed her down the steps with such violence that she broke one of her shoe heels, thrust her up against a wall, and attempted to have intercourse with her in a standing position. Deciding that she was "too god-damn short", he forced her back onto the couch and consummated his purpose there (R. 81, 82). She lacked sufficient strength to offer any effective resistance (R. 82).

Shortly after her last assailant had departed, the accused returned. Purporting to have been attracted by her screams, he asked her what she was doing in the basement and twice repeated that question (R. 83, 115). Her answer each time was "Nothing"; for, despite the fact that he no longer wore his green jacket and hat, she recognized him and feared that any revelation on her part that she was aware of his identity might result in her being beaten and left in the basement (R. 83-84, 104½). He escorted her out of the building, and, upon being requested to take her to the Guest House, he proceeded with her in another direction. Her shoe having come off, she remarked, "Oh, they broke my shoe heel". When he inquired "Who is they", she replied, "Oh, nobody. I did it myself" (R. 84). A little later she commented that, "I wouldn't do a darn dog that way, the way they did me". His answer was, "Lady, you are supposed to be a lady. Ladies are not supposed to use bad words" (R. 85).

Upon meeting a guard the accused asked that Miss Hill be taken

to the Guest House and offered the information that he had heard her screams and had gone to her aid. While the accused was repeating this request and story to another soldier, Crayton and several military police arrived (R. 85, 107, 115). She went to Crayton, placed her head on his shoulder, began weeping, and made complaint to him of the manner in which she had been "used" (R. 85-86, 89, 104½-106, 126-127, 137-138). The accused, who was still carrying his rifle and wearing a cartridge belt, was forthwith deprived of both items of equipment (R. 127, 145-146, 150-151).

Miss Hill was taken to the hospital for examination (R. 86-87). Major Roscoe F. Millet of the Medical Corps testified as follows with respect to her condition then:

> "I found that Miss Hill was in an excited and agitated state. It was impossible to get a very coherent story from her. Upon examination we found that her underclothing was blood stained, that her stockings were torn and muddy. Was unable to find any evidence of any bruises or cuts or lacerations on her body. On pelvic examination it was found that she had some blood in the vagina. Some superficial laceration in the mucosa of the vagina. This blood was mixed with grayish mucoid material, and some of the vaginal content was placed on a slide, subsequently examined microscopically."

The slide contained pus cells and spermatozoa. Scrapings from her panties also revealed the presence of spermatozoa in various stages of decomposition (R. 192). Pus cells and spermatozoa were also discovered on slides taken from the accused (R. 182, 185, 192).

The morning after the attacks upon her Miss Hill was conveyed to Castle Hill by the military police. On the ground near the stairs to the basement she found a pair of black gloves and some earrings which she had lost the preceding evening. Upon entering the building she recognized the cot and the pillow upon which she had been held (R. 87-89, 152-153). Later in the day she positively identified the accused as the man who had "used" her (R. 89). She had no scars or marks but her throat "was sore", her back pained her, and she "was hurting in [her] privates" (R. 89, 103).

After being confined in the stockade, the accused stated to Austin that "he was the soldier with the rifle" on the night of 10 June 1944 (R. 41, 44). To Crayton the accused admitted that he had "trimmed" Miss Hill. This word in the common parlance of the men at the camp meant sexual intercourse (R. 130-131).

In a pre-trial statement Private Nathan Holt represented that

on the night of 10 June 1944 Miss Hill had willingly engaged in sexual intercourse with him for and in consideration of the sum of five dollars (R. 159-160, 166-167, 175, 177). At the trial he represented that this aspersion upon her chastity and character had been forced from him by the numerous threats of the accused with whom he was a fellow prisoner (R. 157, 162, 178). The truth was that he had never seen Miss Hill until the day before the trial (R. 167-168). In Holt's own words, he had falsified to "save my life * * * I thought I was going to be kill [sic] in the stockade" (R. 162, 168). The accused would not have personally carried out his menaces but would have employed "friends" (R. 168). The reason for his attempt to involve Holt was that "two can take the rap better than one" (R. 156).

Ever since he had been on a flood detail in March of 1944 Holt had had trouble with his voice. On 10 June 1944 he was unable to speak above a whisper (R. 168-170). By the date of the trial his voice was improved (R. 170).

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 presented by the defense was Private First Class James E. Austin who had previously testified for the prosecution. He again described the voice of one of the men who had accompanied the accused on the night of 10 June 1944 as "kind of peculiar", "like a whisper" (R. 197-198). After listening to Holt speak, Austin positively stated that it was "the same voice, but it seem like he got a different enunciation than the night he was talking to me out there. * * * It is a little higher pitch. * * * He talked a little louder. It seemed today he had a different enunciation. He did not talk with that sort of brogue" (R. 202-203, 206-207). Upon confronting Holt, Austin identified him as one of the group who had been with the accused on the night of 10 June 1944 (R. 205).

In his own testimony the accused did not deny that he had engaged in sexual intercourse with Miss Hill but insisted that it was a purely monetary transaction. When he and Holt had first seen her sitting on a bench with Crayton, her dress was about seven inches above her knees (R. 211-213). He had "heard that the girls were coming out here on the post, getting rich off of soldiers. [He] had a little spending change. [He] could not get no pass so [he] went to buy * * * some" (R. 223). In his estimation, "you can tell who she was when you see it" (R. 221-222). "Now, natural, you notice if a woman got her dresses up, you are going to talk to her" (R. 250).

He had induced her to leave Crayton and had "propositioned her". Upon the accused inquiring as to the price, she had fixed it at "$15 standing; and $20 laying". He had chosen "$15, standing" (R. 214). To bind the bargain he had given her five dollars, promising to pay her the

balance of ten dollars later. Having arrived at this understanding they had sexual intercourse with one another (R. 215). He "stayed with her" only about three minutes and "just gave away $5" (R. 249). Holt wanted "to buy a little bit too" and did (R. 215). Returning to the accused, she demanded the balance of ten dollars due from him. He refused to pay because even "$5 was too steep" for him (R. 215, 243). After calling him a "dirty son-of-a-bitch", she asked to be shown the way to Guest House No. 2. While escorting her in pursuance to her request, "the MPs rolled up /and/ she hollered 'Rape'". He "was surprised at her" (R. 216, 232).

He was unable to explain why her clothes were dirty and her stockings torn (R. 218-219). When he had first talked to her, he had detected liquor on her breath (R. 221). He himself "drank enough", and he had taken Miss Hill away from Crayton because "a person is capable of doing practically anything when they * * * get high * * *" (R. 224, 227). At no time had he ever accosted Wilson, Davis, and their wives (R. 228-230, 253). Later, Wilson and Crayton had attacked the accused and broken his nose (R. 230-231). The reason the accused was carrying a rifle when he met Miss Hill was that he had been ordered to take it "every place he went and not merely to company formations (R. 233-234). He even slept with it (R. 234). He had not pointed it at Crayton, and no bayonet had ever been affixed to it (R. 235, 245).

5. Private Malvin Zachery was called on rebuttal as a witness for the prosecution. He lived in the same barracks with Holt and had seen him in bed on 10 June 1944 between the hours of 9:00 and 11:00 p.m. (R. 254-256). They had conversed with one another "the last time" between 10:30 and 11:00 p.m. (R. 259).

Miss Hill was also called as a witness for the prosecution on rebuttal. She branded as "untrue" the accused's testimony that she had voluntarily submitted to sexual intercourse and had accepted a payment of five dollars therefor (R. 263-264).

6. The Specification of the Charge alleges that the accused did, "on or about 10 June 1944, forcibly and feloniously, against her will have carnal knowledge of Thelma Mae Hill". This offense was laid under Article of War 92.

The accused has admitted that he had sexual intercourse with the prosecutrix but has attempted to avert a finding of rape by asserting that he purchased her consent. The court rejected this defense as spurious, and the record precludes any other disposition. The testimony of Davis, Wilson, and Austin depicts a definite modus operandi which was finally used successfully against the unfortunate prosecutrix. Armed with an M-1 rifle and actively supported by a gang of ruffians, the accused falsely pretended that he was a guard and, by a swaggering display of his usurped authority,

sought to terrorize a number of women into following him to the secluded spot which he had selected for the consummation of his criminal purposes. Until his encounter with the prosecutrix he was in each instance thwarted by the courageous action of the husbands concerned. Using overwhelming force against Crayton, he and his accessories were at last able to seize a victim. Their ravishment of her was worthy only of brutes. The condition of her clothes and her private parts was the obvious result of violence and inconsistent with consent.

Considerable evidence was adduced both to prove and to refute the proposition that Private Nathan Holt was one of the accused's accessories. This question is not material to the issue before this Board of Review and need be adjudicated only if and when Holt is also charged with raping the prosecutrix.

7. The record shows that the accused is about twenty-two years old; that he was inducted on 26 January 1944 at Fort Benjamin Harrison, Indiana, for the duration and six months; 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 sentence and to warrant confirmation thereof. Confinement in a penitentiary is authorized upon conviction of a violation of Article of War 92.

Abner E. Lipscomb, Judge Advocate.

Robert J. O'Connor, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

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

SPJGN
CM 268073

UNITED STATES	)	21 NOV 1944 CAMP CAMPBELL
v.	)	Trial by G.C.M., convened at Camp Campbell, Kentucky, 20 October 1944. Dishonorable discharge and confinement for ten (10) years. Federal Penitentiary, Terre Haute, Indiana.
Private RAYMOND B. POFF (35423308), Headquarters Section, 1580th Service Unit.	)	

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

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

2. The only question requiring discussion arises from the error in incorrectly alleging in Specification 2, Charge I, the value of the theatre tickets embezzled by the accused. Specification 2, Charge I, alleges that the accused did,

> "* * * feloniously embezzle, by fraudulently converting to his own use, approximately 300 United States Army Motion Picture Service theatre tickets, V.P. Series, of the value of $123.60, adult tickets at 15 cents each* * *".

Since 300 tickets of a value of fifteen cents each equals a total value of only $45, the alleging that their value was $123.60 was obviously a mathematical error and the true value of the tickets alleged to have been embezzled was $45.

3. The court was legally constituted. For the reasons stated the Board of Review holds that the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 2, Charge I,

as involves a finding that the accused feloniously embezzled approximately 300 United States Army Motion Picture Service theatre tickets of the value of $45, legally sufficient to support all the other findings and the sentence.

Abner E. Lipscomb, Judge Advocate.

Robert J. O'Connor, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

1st Ind.

War Department, J.A.G.O., NOV 21 1944 - To the Commanding Officer, Camp Campbell, Kentucky.

1. In the case of Private Raymond B. Poff (35423308), Headquarters Section, 1580th Service Unit, I concur in the foregoing holding by the Board of Review, and for the reasons therein stated, recommend that only so much of the finding of guilty of Specification 2, Charge I, be approved as involves a finding that the accused feloniously embezzled approximately 300 United States Army Motion Picture Service theatre tickets of the value of $45, and that the other findings and the sentence be approved. Upon compliance with this recommendation you will have authority to order the execution of the sentence.

2. In view of all the circumstances, including the evidence showing that only a small amount of money was actually embezzled by the accused, the sentence imposed seems to be excessive. It is recommended, therefore, that the period of confinement be reduced to five years.

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 268073).

NOV 24 '44 AM

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.

SPJGQ
CM 268074

UNITED STATES v. Private ELMER J. WOOTTON (6677326), Headquarters Section, 1539th Service Unit, Camp Campbell, Kentucky.	)	CAMP CAMPBELL Trial by G.C.M., convened at Camp Campbell, Kentucky, 27 October 1944. Dishonorable discharge and confinement for fifteen (15) years. Disciplinary Barracks.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: This alleged an attempt to commit sodomy per os.

Specification 2: This alleged an attempt to commit sodomy per os in violation of a section of the Code of Tennessee.

(This Charge and the Specifications were withdrawn by the appointing authority.)

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

Specification: In that Private Elmer J. Wootton, Headquarters Section 1539th Service Unit, did, at Inglewood, Tennessee, on or about 23 September 1944, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with Gilbert Vincent, a minor of the age of fourteen years.

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

Specification: In that Private Elmer J. Wootton, Headquarters Section, 1539th Service Unit, did, at Inglewood, Tennessee, on or about 23 September 1944, commit a

> crime against nature by feloniously and against the order of nature by having carnal connection per os with Gilbert Vincent, a minor of the age of fourteen years, this being in violation of the law of the State of Tennessee.

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 such place as the reviewing authority may direct for fifteen (15) years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks at Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. There is no question arising on the sufficiency of the evidence to support the findings. While there is a confession of the accused, there was clear proof of the corpus delicti which made its introduction in evidence proper.

The only matter requiring discussion is the legality of the period of confinement imposed as a part of the sentence.

From the evidence of the pathic in this case, it might be deemed that several acts of sodomy were committed at the time and place alleged. The Board is, however, of the opinion in the light of all the circumstances, that the acts of the accused constituted but one offense.

It has been held that where the accused was charged with the same act of sodomy as a violation of Article of War 93 as well as a separate violation of Article of War 96, it was not error because one of the Charges is based on the civil aspect of the offense and the other on its military aspect (C.M. 241597 Fahey, 26 BR 305).

However, even though such a practice has been justified, it clearly results in a duplication of charges arising out of what is substantially the same transaction.

In keeping with the policy of the Manual, viz, that if 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, we are obliged to consider whether, if at all, either of the Charges upon which the accused was found guilty alleges a graver aspect of the offense than the other, and we are unable to conclude that the offense in this case is any more important, or has

any other aspect, when laid under Article of War 93 than when laid under Article of War 96.

Consequently, since the authorized maximum punishment for sodomy is five years, the period of confinement imposed which is in excess of that period is illegal.

4. For the reasons stated the Board of Review holds that the record of trial is legally sufficient to support the findings and only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for a period of five (5) years.

(on leave), Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

1st Ind.

NOV 28 1944

War Department, J.A.G.O., — To the Commanding Officer,
Camp Campbell, Kentucky.

1. In the case of Private Elmer J. Wootton (6677326), Headquarters Section, 1539th Service Unit, Camp Campbell, Kentucky, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that only so much of the sentence be approved as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for a period of five (5) years. Upon compliance with this recommendation, under the provisions of Article of War 50½ you will have authority to order the execution of the sentence.

2. According to the provisions of paragraph 5d, AR 600-375, 17 May 1943, the United States Penitentiary, Atlanta, Georgia, should be designated as the place of confinement in lieu of the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

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 268074).

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 268176

29 NOV 1944

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened
	)	at Barksdale Field, Shreve-
Second Lieutenant ALAN E.	)	port, Louisiana, 23 October
KELT (O-767270), Air Corps.	)	1944. Dismissal.

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 on the following Charges and Specifications:

CHARGE I: Violation of 96th Article of War.

Specification: In that Second Lieutenant Alan E. Kelt, 399th Fighter Squadron, 369th Fighter Group, did, at or near Jennings, Louisiana, on or about 27 September 1944, wrongfully violate paragraph 16a (1) (d), Army Air Forces Regulation No. 60-16, dated 6 March 1944, by flying a military airplane at an altitude of less than 500 feet above the ground.

CHARGE II: Violation of the 83rd Article of War.

Specification: In that Second Lieutenant Alan D. Kelt, 399th Fighter Squadron, 369th Fighter Group, did, at or near Jennings, Louisiana, on or about 27 September 1944, through neglect suffer a BT-13B type airplane of the value of approximately $24,426.00, military property belonging to the United States, to be damaged by striking a telephone wire while said airplane was in flight.

The accused pleaded guilty to, and was found guilty of, both Charges and the Specifications thereunder. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused, at about 11:25 a.m. on 23 September 1944, took off in a type BT-13B airplane from DeRidder Army Air Base, DeRidder, Louisiana. His mission was to "pick up" some mooring rods at LeGros Memorial Airport and to return (R. 4; Pros. Exs. B, C, D, E). The first half of the trip was completed satisfactorily and uneventfully. On the return flight the accused headed directly for DeRidder Army Air Base and for some time maintained an altitude of five hundred feet. Seeing a large field below him in the vicinity of Jennings, Louisiana, he decided to drop down to about fifteen to twenty feet above the ground. While at this height, he flew near some telephone wires and struck one of them with "the prop and right wing" of the plane. The only immediate evidence of the collision observed by Technical Sergeant Edwin B. Fore, Jr., who was a passenger, was a "popping sensation" (R. 5-6; Pros. Exs. B, C, D, E). Upon landing at DeRidder Army Air Base, the plane, which was valued at $24,426.00, was found to have sustained damage in the sum of $91.23 (R. 6-7). The accused "was acquainted with and knew Army Air Forces Regulations, in particular, Army Air Forces Regulation No. 60-16, and also was acquainted with the policy of the Third Air Force and Army Air Forces relative thereto, for violations of these regulations" (R. 7).

4. After being apprised of his rights relative to testifying or remaining silent, accused took the stand on his own behalf. His account of the events of 27 September 1944 did not materially vary from that contained in his pre-trial statement. In his own words,

> "When I was at 500 feet, I saw a large field right in front of me, so I just dropped down and flew low over this field. I hit the telephone wire as I was pulling up to go over them" (R. 8).

The only explanation offered by him for his conduct was that:

> "Several times, higher ranking superior officers fly low, and nothing had ever happened to them about that, although we all knew the probable outcome. I was just flying along, and kind of unhappy, I guess, - the whole outfit is scheduled to go off overseas, and I wasn't scheduled to go, - and I just dropped down, and before I knew it, the incident happened" (R. 8).

The accused did not "as a general rule" indulge in low flying (R. 8). His squadron had held "flight safety meetings" at which low flying and

the regulations pertinent thereto had been discussed and he had read the sentences imposed for that offense (R. 9). It was stipulated that his Commanding Officer would, if present at the trial, testify "that the accused is very highly regarded as a soldier, and as an officer in the Army" (R. 7).

5. The Specification of Charge I alleges that the accused did, "on or about 27 September 1944, wrongfully violate paragraph 16a (1) (d), Army Air Forces Regulation 60-16, dated 6 March 1944, by flying a military airplane at an altitude of less than 500 feet above the ground". This offense was laid under Article of War 96. The Specification of Charge II alleges that the accused did on the same day "through neglect suffer a BT-13B type airplane of the value of approximately $24,426.00, military property belonging to the United States, to be damaged by striking a telephone wire while said airplane was in flight". This was set forth as a violation of Article of War 83.

Paragraph 16a of the regulation referred to reads as follows:

"Except during take-off and landing, aircraft will not be operated:

(1) Below the following altitudes:

(a) 1,000 feet above any building, house, boat, vehicle, or other obstructions to flight.

(b) At an altitude above the congested sections of cities, towns, or settlements to permit an emergency landing outside of such sections in the event of complete power failure.

(c) 1,000 feet above any open air assembly of persons.

(d) <u>500 feet above the ground elsewhere than as specified above</u>.

(2) Within 500 feet of any obstruction to flight" (Exhibit A; underscoring supplied).

The accused in his pre-trial statement, in his testimony at the trial, and by his plea of guilty has admitted that he flew at an altitude of less than 500 feet above the earth's surface. Since he was familiar with the terms of the regulation quoted, his violation of it was wholly inexcusable. The Specification of Charge I has been established beyond a reasonable doubt.

With respect to Article of War 83 paragraph 143 of the Manual for Courts-Martial, 1928, states that:

> "A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a probable loss, damage, etc.
>
> "The willful or neglectful sufferance specified by the article may consist in a deliberate violation or positive disregard of some specific injunction of law, regulations, or orders . . .".

The damage sustained by the accused's plane was directly attributable to his "deliberate violation" of Army Air Forces Regulation, 60-16. It was precisely such a "neglectful sufferance" as is proscribed by Article of War 83.

6. The accused, who is single, is about 20 years old. After being graduated from high school, he attended the University of California for six months. From July to September of 1942 he was employed by a paint manufacturer as a labler and helper and from September 1942 to April 1943 he worked for a Shell Oil Company service station as a salesman and auto mechanic. He had enlisted service from 29 April 1943 to 8 February 1944 when he was commissioned a second lieutenant. Since this last date he has been on active duty as an officer.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 83 or Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Robert J. Glamon, Judge Advocate.

Gabriel A. Goldberg, Judge Advocate.

SPJGN
CM 268176

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Alan E. Kelt (O-767270), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but commuted to a forfeiture of pay of $75 per month for six months and that the sentence as thus modified be ordered executed.

3. Consideration has been given to letters dated 4 October and 9 October 1944 from Vice Admiral J. W. Greenslade and Lt. General Barney M. Giles, respectively.

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

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

5 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. ltr. for sig. S/W.
Incl 3 - Form of action.
Incl 4 - Ltr. fr. Vice Admiral J. W. Greenslade.
Incl 5 - Ltr. fr. Lt. General Barney M. Giles.

(Sentence confirmed but commuted to forfeiture of $75 per month for six months. G.C.M.O. 20, 10 Jan 1945)

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

SPJGK
CM 268217

27 NOV 1944

UNITED STATES	CENTRAL PACIFIC BASE COMMAND
v.	Trial by G.C.M., convened at APO 958, 11 October 1944. Dishonorable discharge and confinement for five (5) years. Penitentiary.
Private WYLIE DUNCAN (34140484), Company A, 724th Military Police Battalion.	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Wylie Duncan, Company A, 724th Military Police Battalion, did, at Honolulu, Territory of Hawaii, on or about 8 July 1944, willfully maim himself in the right foot by shooting himself with a rifle, thereby unfitting himself for the full performance of military service.

He pleaded not guilty to and was found guilty of the Charge and its Specification and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence is legally sufficient to support the findings of guilty and the sentence. The only question requiring consideration is the propriety of designating a Federal penitentiary as the place of confinement.

4. Article of War 42 provides in part -

"* * * no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, * * *

or by the law of the District of Columbia, * * *".

The accused in the case under discussion has in substance been convicted of willfully maiming himself and thereby unfitting himself for the full performance of military service in violation of Article of War 96. The offense of self-maiming should not be confused with that of mayhem in violation of Article of War 93 (CM ETO 1161, Waters). The gravamen of the offense with which he was charged and of which he was found guilty is the willful unfitting of oneself for the full performance of military duty.

While the crime of mayhem is an offense of a civil nature punishable by penitentiary confinement for a maximum of ten years under the provisions of Section 506, Title 22, of the Code of the District of Columbia, and while one may commit mayhem on oneself the accused in the case under discussion was not charged with nor did he commit mayhem. Mayhem is described in the Manual for Courts-Martial, 1928, paragraph 149b, page 167, as -

> "*** a hurt of any part of a man's body whereby he is rendered less able, in fighting, either to defend himself or to annoy his adversary. (Bishop.)
>
> "Thus it is mayhem to put out a man's eye, to cut off his hand, or his foot or finger, or even to knock out a front tooth, as these are members which he may use in fighting; but it is otherwise if either the ear or nose is cut off or a back tooth knocked off, as these injuries merely disfigure him. (Clark.)
>
> "*** A person inflicting such a hurt upon himself is guilty of this offense; ***".

The nature or extent of the injury the accused inflicted upon himself is more closely related to those injuries described in 18 United States Code 462 than to mayhem. Section 462, Title 18, United States Code, provides:

> "Maiming. Whoever, with intent to maim or disfigure, shall cut, bite, or clip, the nose, ear or lip, or cut or disable the tongue, or put out or destroy an eye, or cut off or disable a limb or any member of another person; or whoever, with like intent, shall throw or pour upon another person, any scalding hot water, vitriol, or other corrosive acid or substance whatever, shall be fined not more than $1000, or imprisoned not more than seven years, or both". (See Specification Forms 163 and 164, MCM, 1928, p. 257.)

This statute, however, does not apply for the purposes of penitentiary confinement in the case under discussion because the injuries described must be inflicted "upon another person" and may not be self-inflicted.

The Board of Review is therefore of the opinion that the offense of which the accused was found guilty is not made a crime by any statute

of the United States of general application or by the Code of the District of Columbia. The offense is purely a military offense. It is therefore improper and contrary to the provisions of Article of War 42 quoted above to designate a penitentiary as the place of confinement (CM 220483, Johnson, 13 B.R. 3).

5. 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 five years in a place other than a penitentiary, Federal reformatory or other correctional institution.

, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 2 1944

TO: Commanding General,
Central Pacific Base Command,
APO 958,
c/o Postmaster, San Francisco, California.

1. In the case of Private Wylie Duncan (34140484), Company A, 724th Military Police Battalion, 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 five years in a place other than a penitentiary, Federal reformatory or other correctional institution. Upon the designation of a place of confinement other than a penitentiary, Federal reformatory or other 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 268217).

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 268240

30 NOV 1944

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Drew Field, Tampa, Florida, 3 October 1944. Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center, Fourth Service Command, Fort Jackson, South Carolina.
Corporal ROBERT E. CLOSSON (35620269), Squadron N, 327th Army Air Forces Base Unit (RTU HB), Drew Field, Tampa, Florida.	)	

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

- - - - - - - - - -

1. The record of trial in the case of the above named soldier, having been examined in the Office of The Judge Advocate General and there found legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves the lesser included offense of absence without leave, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Corporal Robert E. Closson, Squadron "N", 327th AAF Base Unit (RTU HB), Drew Field, Tampa, Florida, did, at Drew Field, Tampa, Florida, on or about 22 July 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to shirk important service, to-wit, ultimate transfer overseas, and did remain absent in desertion until he was returned to military control at Fort Hayes, Ohio, on or about 31 July 1944.

He pleaded, to the Specification, guilty with exceptions and substitutions to reduce the offense to absence without leave, and to the Charge, not guilty but guilty of a violation of the 61st Article of

War. He was found guilty of the Specification and of the Charge. Evidence was introduced of one previous conviction, by summary court-martial, of 36 days' absence without leave. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for five years. The reviewing authority approved the sentence, ordered its execution, except that the dishonorable discharge was suspended, and designated the Rehabilitation Center, Fourth Service Command, Fort Jackson, South Carolina, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 765, Headquarters Third Air Force, Tampa, Florida, 30 October 1944.

3. Competent evidence introduced by the prosecution established the following state of facts.

The squadron morning report for 24 July 1944 showed the accused from 10 days furlough to AWOL as of 22 July 1944 (R. 4; Ex. A). The morning report of the Detachment of Prisoners, 1520th Service Unit, Fort Hayes, Ohio, showed him attached in confinement 31 July 1944, enroute to return to his station 11 August 1944 (R. 4; Ex. B).

The accused was a member of a combat crew. With many others, he was granted ten days furlough, effective 12 July 1944, by paragraph 2, Special Orders No. 72, Headquarters Drew Field Replacement Training Unit (HB), 11 July 1944 (R. 5; Ex. C). These orders stated expressly that the furloughs were "prior to overseas shipment", and that the men would report for duty not later than 2400 o'clock 22 July 1944. The first sergeant testified that notice was posted approximately two days before the men left on furlough, advising that 26 July would be the approximate date of shipment on their return (R. 5, 6). This notice was in a formal memorandum posted on the priority bulletin board, which it was the duty of all members of the command, by order, to read twice a day, and which showed only the information that the priority crews were the next crews to leave (R. 8). There were two bulletin boards, and it was possible that the accused did not see the notice, but "it was negligence if he did not." (R. 9) Approximately fifty members of the organization did ship on 26 July 1944 (R. 6, 9). The accused was named in Special Orders No. 206, 24 July 1944 (R. 6; Ex. D), with his crew, among other crews, and directed to proceed to a Staging Wing at Hunter Field, Savannah, Georgia, to report 27 July 1944 for assignment to "Project 3AF JY-25". Not having returned at the end of his furlough, the accused was taken off the list for the shipment and another man was substituted for him, by Special Orders No. 208, 26 July 1944 (R. 7; Ex. E).

4. The accused, duly advised, was sworn and testified (R. 11). He denied that there was a statement on the priority bulletin board to the effect that he was shipping out overseas on 26 July

1944. He read a notice on that bulletin board that enlisted men had to have fifty dollars before going overseas (R. 11). He thought the men on the shipment would be "here" over pay day and leave about the second or third of August (R. 12). He went on his furlough to his home at Columbus, Ohio. There his "buddie's" car, containing the accused's bag and clothing, was stolen the day he was going to take the accused "back to the station". The accused reported the theft to the police and arranged by telephone with the Red Cross to wire his station, giving them his name and all information. He was trying to get money from his sister to release the car, which the police had recovered and were holding for storage charges, when the Federal Bureau of Investigation arrested him at his sister's home (R. 12, 16). In the week before his arrest, he was keeping in touch with the police to get the car so he could get his clothes and come back (R. 17). He made no inquiries to find out what the Red Cross had done about his request to notify his station or whether they got an answer (R. 16, 17). He knew that he was due back the 22nd of July (R. 12), but thought he had a grace period until the end of the 23rd (R. 19-21). He had a copy of his furlough orders (R. 19). He knew when he left on furlough that he was going to a staging area (R. 13). He understood that it would be about seven days "before we got cleared up out of this base" (R. 14). He heard the 28th Article of War read (R. 15). He knew he would be AWOL when his clothes were stolen and thought he probably would be broken and sent on with a crew. He did not know about the crew already leaving (R. 15). He was an assistant radio operator on his crew, liked his crew and assignment, and still wants to go overseas (R. 12, 16). The car was stolen about midnight (R. 16) or between one and six o'clock on the morning of the 22nd (R. 19). He was in Columbus, Ohio, then (R. 16), and it was a thirty to thirty-two hour trip to get there from Drew Field by train (R. 17). He had a round-trip train ticket and used it on his return (R. 20).

The defense introduced in evidence as its Exhibit 1 (R. 17), a copy of a letter from Defense Counsel to the Red Cross at Columbus, Ohio, dated 26 September 1944, requesting immediate action (on a letter) sent them about 9 September 1944, concerning the accused.

Recalled for rebuttal, the first sergeant testified that the furlough orders given the accused, effective 12 July, to return 22 July, included his day of grace (R. 21). He was given a copy of the furlough orders and not the usual furlough papers (R. 21). Around five hundred officers and men went on furlough 12 July. The sergeant could not recall whether or not a telegram was received (R. 22).

5. The contention of the accused that he relied upon the Red Cross at Columbus, Ohio, to advise his organization by telegram that he was detained there, while without further indication of concern about his status he spent over a week trying to recover his

clothing and his friend's stolen car, after the expiration of his furlough and until his apprehension, was disposed of by the court's findings and may be disregarded here.

The orders, of 24 July 1944, for the accused to proceed to Hunter Field and report to the Staging Wing, as well as those of 26 July substituting another in his place, were not communicated to the accused, as they were published in his absence. The accused knew that his furlough was given him "prior to overseas shipment", and further knew that he was going to a staging area preparatory for that shipment. He knew that certain processing ordinarily is done in the staging area before shipment overseas actually occurs. The others involved in the transfer orders in question did proceed to the staging area. It does not appear when or whether they or any of them did move on overseas. At that stage of events, the accused cannot be deemed to know or expect what is not established in fact: that his shipment overseas is imminent and that his absence will avoid it. Absence without leave at that point will not support an inference of intent to avoid "ultimate" transfer overseas, because it is too remote and permits the intervention of other reasonable hypotheses. For the reason that such movements are essentially preparatory, shipment overseas being contemplated by, but ordinarily not directly or immediately consequent upon them, movements to staging areas per se are not regarded as "important service" within the meaning of the 28th Article of War (C.M. 265447, Hodge; C.M. 226441, Mugan; C.M. 264237, Pattillo; C.M. 262347, Moore; C.M. 230826, McGrath, 18 BR 53; C.M. 227459, Wicklund, 15 BR 299).

It follows that the proof falls short of establishing the specific intent alleged, and accordingly fails to prove desertion. It is ample to support conviction for absence without leave.

The Staff Judge Advocate's office, by amendment on the charge sheet, duly initialled, raised the Charge and Specification from absence without leave to desertion without referring the graver charge for reverification by the accuser. This was objectionable in practice, but not fatal to the sufficiency of the record (C.M. 229477, Floyd, 17 BR 149).

6. The accused is 22 years of age. He was inducted at Columbus, Ohio, on 30 December 1942.

7. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves absence without leave by the accused at the

time and place specified, terminated by return to military control at the time and place alleged, in violation of Article of War 61, and legally sufficient to support the sentence.

(on leave), Judge Advocate.

Herbert B. Fredricks, Judge Advocate.

[illegible], Judge Advocate.

1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Corporal Robert E. Closson (35620269), Squadron 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 therein stated recommend that so much of the findings of guilty be vacated as involves findings of guilty of an offense by the accused other than absence without leave at the time and place alleged, terminated by return to military control at the time and place alleged, in violation of Article of War 61, and that all rights, privileges and property of which the accused has been deprived by virtue of the findings so vacated be restored.

3. The sentence is sustained and is appropriate.

4. Inclosed is a form of action suitable to carry into effect these recommendations, 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 - Form of action.

(So much of finding of guilty of Charge and Specification vacated as involves findings of guilty of an offense other than absence without leave in violation of Article of War 61. G.C.M.O. 670, 20 Dec 1944)

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

SPJGQ - CM 268259

16 FEB 1945

UNITED STATES v. Major LEONARD F. STEVENS (0-351144), Quartermaster Corps, 3021st Army Air Force Base Unit	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G. C. M. convened at Las Vegas, Nevada, 12 September 1944. Dismissal and fine of $250.00.

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.

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

CHARGE I: Violation of the 83rd Article of War.
(Finding of Not Guilty)

Specification 1: (Finding of Not Guilty).

Specification 2: (Finding of Not Guilty).

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

Specification 1: In that Major, (then Captain) Leonard F. Stevens, QMC, 3021st Base Unit, (FGS) Las Vegas Army Air Field, Las Vegas, Nevada, did at Las Vegas Army Air Field, Las Vegas, Nevada, from about 1 June 1943 to about 1 March 1944, at approximately semi-monthly intervals, wrongfully and unlawfully take for personal use about five (5) whole hams, about five (5) slabs of bacon, about forty (40) pounds of fresh beef, and miscellaneous fruits and produce, property of the United States and of a total value of about fifty-six dollars and eighty cents ($56.80).

Specification 2: In that Major, (then Captain) Leonard F. Stevens, QMC, 3021st Base Unit, (FGS) Las Vegas Army Air Field, Las Vegas, Nevada, did, at Las Vegas Army Air Field, Las Vegas, Nevada, from about 1 June 1943 to about 1 March 1944, at approximately semi-monthly intervals, wrongfully and unlawfully take for his own

use about sixty (60) pounds of ham, about forty (40) pounds of bacon, and about forty (40) pounds of fresh beef, without surrendering the proper ration coupons in violation of the Emergency Price Control Act of 1942 as amended.

The accused pleaded not guilty to all Charges and Specifications and was found not guilty of the Specifications of Charge I and of Charge I; guilty of Specification 1 of Charge II except the words and figures "about five whole hams, about five slabs of bacon, about forty pounds of fresh beef," and "Of a total value of about $56.80"; substituting therefor, respectively, the words and figures, "About three whole hams, about three slabs of bacon, about eighteen pounds of fresh beef," and "Of a total value of about $21.50."; guilty of Specification 2 of Charge II except the words and figures "About sixty pounds of ham, about forty pounds of bacon and about forty pounds of fresh beef"; substituting therefor, respectively, the words and figures, "About thirty-six pounds of ham, about twenty-four pounds of bacon, and about eighteen pounds of fresh beef."; and guilty of Charge II. He was sentenced "to be dismissed the service and to pay to the United States a fine of two hundred and fifty ($250) dollars". 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 established the following state of facts:

For some months prior to 1 July 1943, the accused, then a Captain, was Sales Officer in charge of the sales commissary and cold storage facilities at Las Vegas Army Air Field. Thereafter, he was Property Officer. (R. 12-16). Lieutenant Colonel Rankin was Base Quartermaster. Sergeant, then Corporal, Aaby, was the noncommissioned officer in charge of cold storage. (R. 12.) All perishable foods were stored in the cold storage warehouse (R. 12) and issued on "tally-outs" to the various messes and without tally-outs to the sales commissary. Issues directly to individuals were not authorized. (R. 13.)

Sergeant Aaby testified that about 15 May 1943 Lieutenant Colonel Rankin began taking stores from cold storage, starting with a ham or bacon. (R. 14.) He did not offer payment or ration points to Sergeant Aaby. No bookkeeping entry was made at that time. (R. 14.) Thereafter until about 1 May 1944 Colonel Rankin visited cold storage about once a week and took hams, bacon, fresh beef, butter, cheese, fruits and produce in the same manner. On some occasions he was accompanied by the accused, who also took food items. (R. 15.) Lieutenant Colonel Rankin took an average of one ham and one (slab of) bacon a month and about four or five pounds of beef roasts or steaks a week, all without mention of payment or ration points and without any record being kept (R. 18-19). The accused started coming with Lieutenant Colonel Rankin about 1 June 1943 and also taking food items, and continued to do so until about 1 March 1944. He took ham, bacon, beef,

fruit and vegetables. Sergeant Aaby kept no account of them, but every two or three months the accused would get a ham and bacon (R. 19) and six or eight times he got a small beef roast or steaks. "He wasn't the meat eater Colonel Rankin was." All of these withdrawals were without mention of payment or ration points and no tally-outs were made. The price of ham to the Government was 30 cents to 31 cents a pound, and of bacon, 25 cents, and 26 cents a pound. (R. 20.) Beef cost the Government 25 cents, 26 cents, 22 cents and 23 cents a pound. The hams varied from ten to fourteen pounds and the "bacons" from six to ten or twelve pounds. (R. 21.) The accused removed stores only in the company of Lieutenant Colonel Rankin (R. 21). The two would usually come in late on Saturday afternoons, (R. 21-22) Lieutenant Colonel Rankin "on an average of approximately once a week" (R. 15) and the accused about twice a month (R. 23). Lieutenant Colonel Rankin would look over the items and help himself, and at times had Sergeant Aaby "make him up a bag and one for Captain Stevens". (R. 21.) They would load, or have the Sergeant load, paper bags of various sizes with fruit and vegetables. (R. 22.) The accused accompanied Lieutenant Colonel Rankin about twice a month and took fruits and vegetables which cost the Government about a dollar "per visit", as a "fair estimate". (R. 23.) There was no mention of payment and no tally-outs were made. (R. 23.)

During this period, the enlisted men on duty at the warehouse were eating their lunches out of the commodities stored. At first they ate cold food, then in April, 1943, they started making hot lunches. This continued until March, 1944. (R. 25.) At first they ducked when they saw an officer coming, but later the officers knew about it and permitted the practice, occasionally joining the men for a sandwich. The accused did so while he was Sales Officer. The practice was not authorized by any Mess Officer or mess personnel. (R. 26-27.)

No records were kept on items taken by Lieutenant Colonel Rankin and Major Stevens. Fruits and vegetables were taken a little out of each box, so the shortage was not noticeable. Beef was procured by cutting the loins out of front quarters designed to be fed to the dogs at the station. All shortages were covered by an allowable three-tenths of one per cent variation. (R. 27.)

The messes received short weights as a result of these practices. Box weights were accepted by the messes without allowance for the items withdrawn. The mess sergeants never checked the weights. (R. 28.)

Lieutenant Stone, who succeeded the accused as Sales Officer, and Major Van Sant, the veterinarian, also took food stores from the warehouse and ate some there. (R. 13-28.)

On cross-examination, Sergeant Aaby testified that the men lunched at the warehouse because they were quite a distance from the mess hall and because they had to unload trucks through the regular

lunch hour (R. 29), and that their food included a number of items which they bought and paid for at the sales store, also items turned in from troop trains, which they were not allowed to issue (R. 29-31). The accused "called" them on the matter of the lunches in April, 1943, when they started using a little stove which the sergeant brought back from furlough. The accused said that he would talk with Lieutenant Colonel Rankin about it, but the sergeant never heard any more of it. Sergeant Aaby told the accused that the men were using food they had bought and food that they were getting off of troop trains, that could not be issued because it was condemned as unfit for troop consumption or in such small lots that it would not pay to issue it (R. 30-32). It was common knowledge around the field that the men had "a little lunch counter" there at cold storage, and the post paper commented on it. They did not hide it (R. 32-33).

On 27 March 1943, just before rationing started, Lieutenant Colonel Rankin bought half a quarter of beef, weighing about 63 pounds, two hams, two bacons and some cheese, which was tallied out to him, and put it with some butter in his private box in the cold storage warehouse (R. 33-34). There was something already in the box then. He got items from this supply before he started removing stores, about 15 May. It was along in the fall before the private box ceased to be used (R. 34-37). The accused also had a private box, with supplies of his own in it (R. 39). The six or eight times that meat was cut for the accused were at Lieutenant Colonel Rankin's direction, off of meat intended for the dogs (R. 39-41). It was felt that the dogs did not require the special cuts (R. 46). One rib was all that was cut at a time for the accused; usually two for Lieutenant Colonel Rankin (R. 47). The sergeant and other enlisted men there also occasionally took meats, butter, vegetables and fruits home with them (R. 42). The sergeant knew of it and was somewhat apprehensive of trouble about it (R. 43). The men did not take stores until after they saw the officers doing so (R. 45-46).

Sergeant Aaby did not know whether the officers paid anyone other than himself for items taken. They did not pay him (R. 43-44).

Ration Order 16 of the Office of Price Administration, effective 29 March 1943, recited a scarcity of supply of meats, and provided that thereafter consumers might purchase meats only by giving up ration points as provided by regulations of that agency (R. 47, Ex. 1).

Private First Class Morgan (R. 48), Receiving and Issuing Clerk at the cold storage warehouse, substantially corroborated Sergeant Aaby (R. 48-65). From July 1943 to about the first of the year, 1944, the accused, with Lieutenant Colonel Rankin, took food items from the storage. After that, "the practice sort of discontinued" (R. 50). The food taken consisted of fresh meats, including beef about every two weeks, generally roasts of three or four pounds, also fresh pork, also hams and bacon, and vegetables. As a rule, Private Morgan cut the meat. The accused or Sergeant Aaby sacked the vegetables. The accused would take a ham about every two months and bacon about the same (R. 50-52). He

payment was made to Morgan nor were ration points delivered to him (R. 52). They had no cash register nor other facilities there for receiving payments or ration points and were not authorized to receive either. Sales clerks at the commissary sales store were authorized to receive them, and payments, when made, were made there. The sales officer had charge of both the cold storage warehouse and the commissary (R. 54). Morgan went to work at the cold storage warehouse on 7 July 1943 (R. 55). When one of the officers took a ham out of a box of hams, Sergeant Aaby would tell Morgan to be sure to issue that box to the consolidated mess (R. 58). The witness also had taken food items home from the cold storage, to the value of one to two dollars a week, without paying or giving any ration points for them (R. 64).

4. The defense introduced in evidence the special orders relieving the accused as Base Sales Officer, dated 1 July 1943 (R. 66; Ex. A).

Corporal Taylor (R. 67) who worked at the cash register at the sales store during the period in question, testified that both Lieutenant Colonel Rankin and the accused came in and paid for items that each said he had gotten at cold storage when the sales store was closed or did not have such items, and surrendered the ration points accordingly (R. 69-70). Each of these two officers bought a quarter of beef just before rationing started, weighing a hundred odd pounds (R. 69). Thereafter, sometimes Major Stevens would get something from cold storage and pay for it at the store the next day (R. 70-71). This occurred less frequently in the case of the accused than in that of Lieutenant Colonel Rankin: "I think once or twice, not too much". On one occasion he got a crate of oranges, and he got a ham, butter and some items the store was out of or did not handle (R. 70). In the case of officers not connected with the Quartermaster organization, Sergeant Aaby would call up and say that the officer had bought something there and was coming over to pay for it, or would send a tally-out along with the officer, and the witness would compute the price and complete the sale through the cash register (R. 70), but when Lieutenant Colonel Rankin or the accused bought something, the store took his word for it (R. 71). On cross-examination, the witness did not know whether either officer came in and paid every time he took anything from cold storage. The accused did not so pay the witness for any fresh beef or bags of produce, or give rationing points for beef. On 27 March 1943, before rationing started, the amount of beef the accused actually received was 22 pounds (R. 72). Questioned by the court, the witness thought that the accused had so purchased oranges, hams and bacon both before and after rationing started, more than two or three times. He could not say exactly how often. Through most of the time, the store did not handle fresh fruits and vegetables (R. 74).

Corporal Waters (R. 74), who worked at the sales store and assisted Corporal Taylor at the cash register from March to October, 1943, remembered the accused paying for a case of oranges, but had never so taken payment from him for ham, bacon or fresh meat (R. 76), or bags of produce (R. 77).

Mr. West (R. 78), Civilian Chief Clerk at the Quartermaster Office, testified that the sales store and the cold storage warehouse were operated as a unit. Tally-outs between them were discontinued about February, 1943, on the instructions of a Quartermaster inspector from West Coast headquarters (R. 79). The witness believed it was customary for officers who got supplies from the warehouse to pay for them first (R. 80).

Mr. Adams, grocer to the Stevens family, (R. 80) testified that he had regularly supplied the family of the accused with provisions in an amount normally used by a family of that size, two adults and two children (R. 82).

Staff Sergeant Palsrok (R. 83), Station Veterinary Detachment, had regularly been about the cold storage warehouse in the course of his duties. The practice of the men eating lunch there arose from necessity. There was a trucking shortage. The trucks arrived from 11:00 on, loaded with perishable commodities, and the necessity of unloading them promptly interfered with the regular lunch time. The men would work through the noon hour and then make sandwiches. The provisions were bought at the sales store; sometimes items from troop trains, rejected for issue, were used; "very few, if any" Government foods were eaten (R. 84-85). Since lunching at the warehouse was discontinued, the trucks sit and wait. (R. 85.)

Jack L. Price (R. 87), chairman of the local rationing board, testified to the "100% truthful and honest" reputation of the accused, and that the accused had been "very cooperative" with the rationing board (R. 88).

Majors Hoover, Rogers and Sampson, supply officers in frequent contact with the accused, testified, by stipulation, to his excellent reputation for truth and veracity. (R. 88; Ex. B). Major Barrett, Engineer (R. 89) and Major Spoonamore (R. 90), Administrative Inspector, so testified at the trial.

The accused testified (R. 91). He is 32 years old, a graduate Civil Engineer from the South Dakota School of Mines. He worked for the State of South Dakota in highway construction. He was commissioned a second lieutenant, Infantry, at the University of South Dakota in 1937 (R. 92). On 21 March 1941, he was activated as a reserve constructing quartermaster in the grade of first lieutenant. He came to Las Vegas in May of 1941 and left as a Captain in March, 1944. He received his majority 27 June 1944. (Commissions and Certificates, R. 110; Ex. C through K.) When he reported at Las Vegas, the field was in course of construction and he was the only quartermaster officer there. He served as Base Quartermaster and Motor Transportation Officer, with no previous training except as a reserve officer on duty with the Civilian Conservation Corps, and later as purchasing and contracting officer and, from 1 July 1942 to 1 July 1943, as sales officer, then as Property Officer and

Ration Officer and then, from September, 1943, as Assistant Base Quartermaster (R. 94-95). From August, 1942, Lieutenant Colonel, then Major, Rankin was his superior officer, the Base Quartermaster and responsible for all quartermaster activities at the station (R. 95). Accused served under Lieutenant Colonel Rankin, as his subordinate, at all times until accused left the station (R. 96).

While accused was sales officer, the cold storage warehouse was at first in the same building with the commissary sales store. In January, 1943, it was moved to a separate building. It was all one account and the two buildings were inventoried together. Prior to February, 1943, tally-outs were used from cold storage to the sales store, but that was discontinued in early February, 1943, when a West Coast inspector, making an official visit, pointed out that it was useless to keep account of transactions between cold storage and the sales store because it was all one account (R. 96-97).

In February or March of 1943, the accused learned that the men at the cold storage warehouse were eating their lunches there (R. 98). Sergeant Aaby told him that they were buying the food from the sales store, and he saw items, such as peanut butter, jam, mayonnaise and bread, that they could get only at the sales store. Accused thought that he was justified in letting them eat there, as they had to work through lunch hour to get the trucks unloaded (R. 99). In April, Sergeant Aaby asked permission to bring in a small electric stove. Accused received Lieutenant Colonel Rankin's approval for that project, and from early May the men had hot lunches. A stew was prepared in Lieutenant Colonel Rankin's presence, of some vegetables and meat. Accused thought that there was nothing he could do about it as it was approved by his superior officer, who was in charge (R. 100-101). Sergeant Aaby told the accused several times that he was making arrangements with the mess sergeants in the matter. The meat and vegetables used were identical with those being used in the messes (R. 102).

The accused occasionally, maybe three times a month, had a cup of coffee and a sandwich there as a snack during the day (R. 102).

On 2 occasions that he recalled, the accused took hams for his own use from cold storage, in July and in November of 1943, but he took them over to the sales store and paid for them and surrendered ration points to the cashier, whoever he was, on duty at the time (R. 103). On one occasion he took a slab of bacon over to the sales store, sliced some off, paid for it, gave the points, and returned the balance of the slab of bacon to cold storage. He had no use for a whole slab of bacon, as his refrigerator would not hold it (R. 104).

Payments and ration point collections were all handled at the sales store. There was no cashier at cold storage. Sergeant Aaby never had authority to receive money or points (R. 104).

Accused took a few vegetables occasionally, when, as he was riding home with Lieutenant Colonel Rankin, the latter would ask him to sample them and compare them with produce purchased locally. Accused took such fruit and vegetables home, compared them with what his family had, and discussed them with Lieutenant Colonel Rankin (R. 104-106). The value per sack would be 20¢ to 25¢; over the whole period the total value would be about five or six dollars. Only once or twice after Christmas of 1943 did accused take any vegetables. (R. 106). Lieutenant Colonel Rankin was with him on every occasion (R. 107).

Accused never took any fresh meat from cold storage, except some of his own that he stored there, before and after rationing began (R. 107). Lieutenant Colonel Rankin took out various commodities of his own and from the stock, but the accused thought he paid for whatever he took. He took the same, or a little more, fruit and vegetables as did the accused, as samples (R. 108-109). Produce was taken six or eight times (R. 110).

The family of the accused consists of himself, his wife and two daughters aged five and nine years (R. 114).

The discrepancies on monthly inventories were well within the allowable three-tenths of one percent. The account ran around $200,000, and shortages or overages ran from nine to fifteen dollars, except an overage of more than $200 one month. There were minor variances, as items missed on inventory one month would be picked up the next (R. 117). Compliance with AR 35-6660 as to certificates by the sales officer to cover items withdrawn for sampling was omitted as unnecessary, since the account always balanced out without such certificate (R. 118), and it was not felt that the time necessary to make certificates would be justified for what little value was involved (R. 119).

5. The evidence for the prosecution established, and the accused conceded, that the accused received for his personal use food items from the government stores on a series of occasions beginning about 1 June 1943. Of the two witnesses for the prosecution, one, Sergeant Aaby, testified that the practice continued until about 1 March 1944. The other, Private First Class Morgan, who came there 7 July 1943, though he responded to questions phrased generally to cover the period up to 1 March 1944, testified that the practice "sort of discontinued" after the first of the year 1944. No record was kept of the items received by the accused, and questions of time, amounts and kind of commodities taken are left for answer to the following evidence, summarized:

Fresh beef: (Aaby) Six or eight times. Small beef roasts and steaks (R. 20). About six times, not over eight (R. 40-41). (Morgan): About once every two weeks. Generally a roast weighing about three or four pounds (R. 51).

Fruits and produce: (Aaby): About twice a month, fruits and vegetables worth about one dollar "per visit" (R. 23). (Morgan): About twice a month from July to the first of the year, value one to two dollars (R. 50-51). A bag a week at first, then about every two weeks, then probably once a month, "an approximate guess". Value might not be over one dollar; Sergeant Aaby should know more about it (R. 56-57).

Hams and bacon: (Aaby): "Every two or three months, why, he would get a ham and bacon" (R. 19). "I would say a ham every two months and a bacon every two or three months" (R. 38). (Morgan): Hams, "I would say about one every two months", and bacon, "it would be about the same, sir" (R. 52).

Morgan never saw the accused take a ham, but testified: "Generally, when Sergeant Aaby would give him a ham he would either tell me that one of the officers took a ham out of such and such a box so that I would know, be sure and issue that box to the consolidated mess" (R. 58). That being patent hearsay, the case as to hams rests upon Aaby's testimony alone. Neither did Morgan ever see the accused take bacon, but he did testify that bacon was loaded in sacks there and later taken out by the accused (R. 58), referring to an eight to ten pound slab on two different occasions. On other occasions the accused got sliced bacon (R. 59).

The cold storage warehouse was operated as a unit with the sales commissary, though in a separate building, and supplied the sales store directly, without recording items sent there for sale. The warehouse also supplied the consolidated mess and various unit messes on the post, and record of the provisions furnished to the messes was kept by a system of "tally-outs". No provision was made for completing sales at the warehouse; no cash register nor sales record facilities were provided there and the men in charge were not authorized to receive, and did not receive, payment for items sold to purchasers. Occasional sales were made to persons who came to the warehouse to get items not then available at the sales store. The practice in such cases was that the custodian at the warehouse would deliver the item to the purchaser and telephone the cashier at the sales store to advise him of the sale, and the purchaser would go to the sales store and pay for the item. However, in the case of Quartermaster officers, themselves responsible in some measure for the operation of the warehouse, the warehouse custodian did not call the sales cashier, and if payment was made, such officers themselves notified the cashier of the sale and made the payment. The latter practice was extended to the accused, who had been Sales Officer in charge of the warehouse and commissary, though he was relieved as such at the beginning of the period here in question. The accused held no official position

concerned with the warehouse at least from 1 July 1943 to sometime in September 1943, when he became Assistant Base Quartermaster and Executive, and may have had something to do with the commissary or may not, depending upon his particular assignment of duties. As that is not shown, it is assumed that he still was not in any defined official relation to the commissary or warehouse. Such preferment or privilege as he was accorded in receiving provisions from the warehouse presumably arose in some part from his former position as Sales Officer and his acquaintance with the men in charge, but chiefly it arose from the fact, clearly in evidence, that on each occasion when the accused received any of the items in question, he came there in company with his superior officer, Lieutenant Colonel Rankin, who was Base Quartermaster and in charge of the warehouse as of all quartermaster activities on the post, and the provisions received by the accused were delivered to him in each instance at the direction of Lieutenant Colonel Rankin.

In his defense, the accused testified, as to hams, that he took two, one in July and one in November, but paid for them to the cashier at the sales store, and surrendered the appropriate ration point stamps. As to bacon, he testified that on one occasion he took a slab of bacon to the sales store, had some sliced off, paid for it, gave the ration stamps, and returned the balance of the slab to cold storage; that he had no use for a whole slab of bacon, as his refrigerator would not hold it. As to beef, he testified that he never took any fresh meat from cold storage except some of his own that he had stored there. As to fruit and vegetables, he testified that he took some at six or eight times, each time at the request of Lieutenant Colonel Rankin to sample them and compare them with locally available produce, which he did and discussed his observations with Lieutenant Colonel Rankin. Except for such "sampled" produce, his position was that he paid for whatever he took.

In support of that position, the sales store cashier testified that the accused had come in and paid for items from cold storage on various occasions and surrendered ration points; that he had paid for oranges, hams and bacon that way more than two or three times, though, quite naturally, he could not say exactly how often or for what. The accused did not so pay for any fresh beef or bags of produce. The assistant cashier remembered receiving payment from the accused in that manner for a case of oranges, but not for hams, bacon, meat or sacks of produce. The testimony of the first cashier corroborates the accused on payment for all the hams the accused says he got, and for more bacon than he says he got. The testimony of both cashiers corroborates him as to the fact that some payments in that manner were made by him for commodities from cold storage.

Apparently the court believed the cashier as to payment at least twice for hams and at least twice for bacon, since by its findings it reduced the specified "about five" to "about three" as to each of these

items. One "every two or three months" for nine months would be either four and a half or three. However, since the cashier's testimony was that the accused paid for hams and bacon more than two or three times, the basis for such definiteness eludes us. True, the accused testified that he so paid for two hams, but only once, that he recalled, for bacon, and then for some part of a slab only.

Applied to the fresh beef, the basis for specific reduction is even more illusory. The specification charged the taking of about forty pounds; the finding was about eighteen pounds. The accused said that he took none. The evidence for the prosecution was that he took small roasts and steaks (Aaby), of about three or four pounds (Morgan), six or eight times (Aaby), or about once every two weeks (Morgan). Three pounds six times would be eighteen pounds, and this divination, drawn partly from each witness, accords with the court's findings as to beef. However, if the accused took beef six times in nine months and Morgan thought he did so about once every two weeks, which would be over nineteen times, then Morgan's estimates of frequency are shown to be very unreliable, and cease to be any foundation at all for the determination of quantities.

The truth is that estimates of frequency such as appear in this case are not intended to establish definite quantities or measures, and are quite incapable of doing so. "About twice a month", "about every two weeks" or "about every two or three months" are not meant to fix intervals as a basis for measurement of quantities with any such accuracy as the subject here demands. They are generalizations only, indicating by rough approximation the relation of incidents as to time.

The irresistible conclusion from all the evidence is that, while quasi-definite quantities were specified, entirely indefinite quantities were proved, and proof of indefinite quantities paid for was regarded as offsetting, in part only, the proof that some quantities were taken. On that basis the court reached findings which are essentially speculative so far as amounts are concerned. They are likewise speculative as to any amount of hams or bacon, as to which the evidence is that the accused got an indefinite amount and paid for an indefinite amount, and the case fails as to those items.

Concerning beef and miscellaneous fruits and produce, a different evidentiary situation appears.

As to beef, the accused testified that he got none, except from his and Lieutenant Colonel Rankin's private locker supplies, so he paid for none received from the commissary supply. The prosecution witnesses testified that these locker supplies soon were exhausted and that several times the accused got cuts of beef taken from beeves allotted to the dogs on the post, as veterinary supplies, which cost the government from 22¢ to 26¢ a pound. The evidence clearly establishes that four officers -

the Quartermaster, Lieutenant Colonel Rankin, the Sales Officer, Lieutenant Stone, the veterinarian, Major Van Sant, and the accused - and some enlisted men, were enjoying privileged access to various supplies in the cold storage warehouse, and this circumstance suggests that the accused may not have preserved the individuality in the minds of the warehouse custodians as to particular items that would otherwise have been the case. However, the accused was well known to the warehouse custodians from having been Sales Officer, and they also knew private locker beef from dog beef. It was within the province of the court to believe the evidence that the accused received some beef, of some value, during the period in question.

As to fruits and vegetables, the evidence is undisputed that the accused received some, of some value, and did not pay for them, as he contended that he took them on Lieutenant Colonel Rankin's direction to report on them as samples. The accused said that he did so six or eight times, only once or twice after Christmas, 1943. Sergeant Aaby made it about twice a month, Morgan about twice a month from July to the first of the year. All of these are indefinite general estimates. The sample theory evidently was rejected by the court as not in good faith, under all the circumstances of the case, including the character and extent of the abstractions in evidence. The prosecution's contention that Army Regulations 35-6660 were not complied with, in that the sampling took place after acceptance and in that there were no certificates covering withdrawals for sampling, could not have been very persuasive, in view of the undisputed fact that the total shortages were well within the allowable three-tenths of one percent of inventory, rendering such finely detailed accounting superfluous.

The case boils down to the taking by the accused for his personal use, over a period of nine months time, in the presence and at the direction of his superior officer, of some beef furnished and intended for consumption by Army dogs and of some fruit and vegetables furnished and intended for the alternative use of mess supply or commissary sale, all property of the United States, of some value which must be assumed to be less than $20.

6. It is first to be observed that, although the accused was convicted of a series of wrongful takings for his personal use, most of the evidence had to do with what someone else took. That evidence pertained to the Charge and Specifications of which the accused was acquitted; that, as Sales Officer, he wilfully suffered Lieutenant Colonel Rankin and the enlisted men wrongfully to take and consume stores in violation of Article of War 83. It does not appear that the court was instructed not to consider that evidence on the Charge and Specifications of which the accused was convicted, but the court appears, from the nature of its findings, to have made the necessary differentiations.

The principal question presented by the case is that of the propriety of charging a series of wrongful takings in one specification, extending over a period of nine months time. This question was properly raised by motion to strike on the ground of duplicity, which the court denied (R. 9). Accordingly, precedents upholding trial on duplicitous specifications in the absence of objection are not persuasive. It is familiar law that duplicity or misjoinder is matter to be raised by appropriate motion before pleading to the general issue (42 CJS 1340, CM 246884, Bruggeman, 30 BR 189; CM 218876, Wyrick, 12 BR 157). In the procedure of courts-martial, the motion to strike performs the office of all preliminary objections to the form or sufficiency of the specification (Winthrop's Military Law and Precedents, Second Edition, 1920 Reprint, page 374).

In general, one specification should not allege more than one offense (MCM 1928, par. 29b), and if it does so, it is "bad", for duplicity (Winthrop, op. cit, p. 143; 31 CJ 758), a vice against which we are warned as "a not uncommon fault in our service, and has been repeatedly condemned in Orders" (Winthrop, op. cit, page 144).

However, there are recognized limitations upon that rule. There are offenses having the quality of duration, where ordinary rules do not apply as to specific designation of time. Such may be the continued nonpayment of a debt, charged as dishonorable conduct under Article of War 95 (Winthrop, op. cit., page 139), unlawful cohabitation (CM 211260, Grochowick, 10 BR 43), or the neglect or malfeasance of a continuing duty (CM 238266, Campbell, 24 BR 215). Such cases do not raise the question of duplicity, as there is a single offense, "continuing" in a true and absolute sense. There are other cases where repetition, or succession of events, lends a continuing quality to a course of conduct otherwise composed of separate acts. There duplicity is a real factor, if the separate acts constitute offenses, and such is the instant case, but certain exceptions are recognized.

Speaking of particularity in specifying time, Colonel Winthrop said:

> "In some cases the offense committed is of a continuing character, extending over a considerable period of time or exhibiting a general habit or course of conduct. In such cases where distinct acts cannot readily be separated and attributed to particular dates, it is allowable to charge the misconduct ..." (specifying the period). (Winthrop, op. cit., page 139).

Speaking of duplicity, the same authority says:

> "This rule, however, does not apply to the stating together, in the same count, of several distinct criminal acts, provided the same all form parts of the same transaction, and substantially completes a single occasion of

offence. Thus it has been held that assault and battery and false imprisonment, when committed together or in immediate sequence, may be laid in the same count without duplicity, since 'collectively they constitute but one offense'. So it is held not double pleading to allege in the same count the larceny of several distinct articles appropriated at the same time and place" (Winthrop, op. cit., page 143).

That time, or singleness of occasion, is not the only unifying factor in considering a succession of acts as a course of conduct is well recognized, even in cases of larcenous character. Thus, asportations over a period of time have been dealt with collectively not only in such cases as tapping a gas line, where the asportation was constant over a stated period, but also in cases of working a coal vein, cutting timber from the land of another over successive days, and otherwise where successive takings were all pursuant to a single sustained guilty impulse and in the execution of a general scheme or design (Wharton's Criminal Law, 12th Ed. Sec. 1171; 36 CJ 798). It is no far cry from those cases to successive invasions of the same cold storage warehouse as a source of food supply.

How much unity of purpose, singleness of transaction, or adherence to scheme, plan or design must be established to justify the collective specification of a series of wrongful acts must depend upon the facts and circumstances of the case.

In military law, though the framing of specifications is based upon practice in criminal indictments, more latitude is permissible, by reason of the exceptional authority of courts-martial to correct errors of specification by exceptions and substitutions (Winthrop, op. cit., page 134-135). The remedial powers vested in the reviewing authority and exercised in the course of review also permit some deviations from exactness that might be unwarranted in criminal practice. Finally, the scope of offenses under the 96th Article of War considerably broadens the horizons familiar in criminal pleading.

Primarily, sustaining a motion to strike is discretionary with the court (Winthrop, op. cit., page 251). However, no discretion extends so far as to preclude review where its erroneous exercise has resulted in an improper trial, injurious to the substantial rights of the accused, and the denial of a motion to strike may constitute reversible error (CM 257469, Mackay).

The real test is whether, on the whole record, it appears that any error has resulted in injury to the substantial rights of the accused.

"A.W. 37 vests a sound legal discretion in the reviewing authority to the end that substantial justice may be done. The effect of a particular error within the purview of A.W. 37

should be weighed by him in the light of all the facts as shown by the record, and, unless it appears to him that the substantial rights of the accused were injuriously affected, he should disregard the error as a basis for holding the proceedings invalid, or for disapproving a finding or the sentence. 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, page 74).

The application of that rule resolves conflicts otherwise apparent in the precedents.

In CM 219135, Stryker, 12 BR 225, conviction was sustained, over a motion to strike, on a specification, laid under the 96th Article of War, alleging that the accused

"did first at Camp Murray, Washington, and thereafter at... Fort Lewis, Washington, on divers, many and sundry occasions between the dates of October 1, 1940, and May 1, 1941, more specific dates of which are to the accuser unknown, knowingly, willfully and wrongfully take, carry away and convert to his own use certain Government subsistence stores and gasoline of the value of about $400.00, the same being the property of the United States intended for the military service thereof, all to the prejudice of good order and military discipline".

The Board said in its opinion:

"The Specification clearly alleges an offense cognizable under the 96th Article of War. The accused was fully able to, and did in fact, address his defense to the offense intended to be charged".

In CM 264296, Simms, decided 29 November 1944, conviction was sustained under the 96th Article of War for the wrongful signing and uttering of eight separate bank checks, separately described in one specification, each on a different specified day, from 5 June to 5 July 1944, without maintaining sufficient funds in bank to cover them when presented. The Board held that a motion to strike the specification as embracing eight separate offenses was correctly denied, on the ground that the specification alleged a course of conduct discreditable to the military service, an offense in itself under the 96th Article of War, and that the accused was not prejudiced nor misled.

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On the other hand, in CM 257469, Mackay, decided 10 July 1944, a specification under the 96th Article of War was held fatally defective which alleged that the accused

> "did, at Honolulu, Territory of Hawaii, during the period from about 12 July 1943, conduct himself to the prejudice of good order and military discipline, when, for his own personal gain and benefit, he, on numerous occasions during the said period, wrongfully ordered and caused to be used motor vehicles of the United States, furnished and intended for the military service thereof, in hauling persons and materials from Army installations and from places of business in Honolulu, ... to his ... home at Monterey and Lanipili Streets, Honolulu ...".

That specification was there held duplicitous and too ambiguous and indefinite to enable the accused to plead advisedly or to prepare his defense. However, it should be noted that the Board was impressed by the lack of identification or description of the various government vehicles concerned; also that the accused was convicted in the same case on fourteen other specifications, mostly of misapplications, which were sustained, including one which alleged that, over substantially the same period, he wrongfully ordered and caused certain named enlisted men and others whose names were unknown, all of the same company, to work on his private home.

The opinion in the Mackay case made no reference to the Stryker case. The opinion in the Simms case did not refer to either Stryker or Mackay.

We do not follow some of the reasoning in the Stryker and Simms opinions. The Stryker opinion drew an analogy from embezzlement cases, which we consider inapplicable to cases of larcenous nature. The rule in embezzlement cases rests soundly upon the logical proposition that a person entrusted with property at the beginning of a period and unable to produce it at the end is in the best position of anyone to show when and how it disappeared. It has no validity unless the fiduciary custody of the property by the accused is established. The Simms opinion drew an analogy from continuing conduct amounting to fraud, under the 95th Article of War. The introduction of the element of fraud raises foreign questions. Where the perpetration of a particular fraud is the gist of the case, clearly all the facts constituting the fraudulent deception are a part of the offense. Regardless of fraud, a course of dishonorable conduct may be charged under Article of War 95 without regard to duplicity, but the analogy to discreditable conduct under Article of War 96 is imperfect. Article of War 95 imposes dismissal only. Article of War 96 invokes a wide range of penal consequences. Under Article of War 95, it is established law that the same act may be a criminal offense under a particular article and the military offense condemned by Article of War 95, and the accused may be prosecuted for

both, in their different aspects (MCM 1928, par. 151; CM 218924, Foster, 12 BR 173, 182). Article of War 96, however, lies only where the specific offense is not made punishable by another article (MCM 1928, par. 152a, b, and c, pages 187-188; MCM 1921, par. 446; Winthrop, op. cit., p. 719, 725; CM 264831, Turner, 3 Bull JAG 514, December, 1944, sec. 451 (27)), though that important distinction has sometimes been overlooked. (Eg. CM 227239, Wyatt, 15 BR 217, 256, citing a misconstruction of Carter v. McLaughry, 183 US 397, which actually held merely that error, if any, by a court-martial in failing to restrict Article of War 96 to cases not condemned by another article would not invalidate the sentence for attack by habeas corpus, and also that the offense there involved was not one so condemned). By reason of the implications of the distinctions here noted, we feel impelled to limit our reliance upon Stryker and Simms, supra, to their effects as authorities for the proposition that such duplicity as here appears may be harmless, without accepting the analogies propounded in those decisions.

In the Mackay case, supra, not only duplicity, but the additional objectionable element of uncertainty appears. The Board felt that the specification failed to give the accused notice of the offense with which he was charged, and that failure, together with duplicity, was held fatal to the specification. In the Stryker case, the indefinite description of the property involved was held not prejudicial on the facts of the case. In the Simms case, each item was clearly particularized.

In the instant case, it is noteworthy that no objection was made on the ground of indefiniteness or uncertainty, but only on the ground of duplicity. To meet required standards of certainty,

> "no greater particularity is required than the nature of the thing pleaded will conveniently admit",

and also:

> "where the offence cannot be stated with complete certainty, it is sufficient to state it with such certainty as it is capable of" (Winthrop, op. cit., page 134).

The best assurance that the accused was not misled by the indefiniteness of the specifications is found in the fact that he presented defenses addressed to all of the matters alleged, some of which defenses convinced the court, as reflected in its findings. The best assurance that his substantial rights were not impaired or violated is found in the fact that, upon the conclusion herein reached, he is not convicted of anything that could have been avoided by greater particularization. He is not prejudiced by having to defend eighteen asportations in one specification instead of in eighteen specifications where his defense is that he took none at all, as to beef, or that he took only some for samples, as to produce, and he is convicted only of taking some unknown quantity of each.

Rather, he has received the full benefit of every doubt arising from the uncertainties inherent in the case, and has suffered no injury to his substantial rights by reason of either duplicity or uncertainty.

The question of possible double jeopardy could be settled judicially only by its proper presentation in another case involving some of the same wrongful takings, which it is most unlikely that any prosecuting authority would institute. In such a case, this Board would not hesitate to hold that the accused has been tried for all takings within the bounds of the collective specification, and that further prosecution of any is barred.

We conclude that the record of trial is legally sufficient to sustain the findings of guilty of Specification 1 of the Charge as herein modified. That conclusion is further fortified by a like decision by another Board of Review in the companion case, CM 267678, Rankin, although we recognize that the succession of takings there shown was much more readily recognizable as a continuing course of conduct, the takings being greater in frequency, regularity and amounts involved, and somewhat further unified by the circumstance of the accused's control of the source of supply in that case, due to his official position, not exercised by the accused in this case.

The facts proved would have established all elements of the offense of misapplication of military property in violation of the 94th Article of War, but, as military property was not alleged in the specification and that issue was not tendered, the offense specified was properly laid under the 96th Article of War.

The fact that the accused was emulating his superior officer, and acting in his presence and at his instigation, is no defense. Had the takings been at the direct order of the superior, such order would have been a nullity, as plainly unlawful, unauthorized, irrelevant to military duty, and directed solely to private ends, and would not have required obedience nor excused unlawful conduct committed in obedience thereto (MCM 1928, par. 134b, p. 148; CM 118423 (1918), Dig. Op. JAG 1912-40, Sec. 454 (10); Winthrop, op. cit., p. 296). A fortiori, the mere permission and approval of the superior does not excuse such conduct. It may be considered for whatever it is worth in extenuation.

Specification 2 of the Charge is not sustained. The prosecution's own evidence clearly established the undisputed fact that the fresh beef involved was beef appropriated and allotted to the feeding of Army dogs at the post. Such beef was not a rationed commodity. By their nature and import, the public rationing regulations apply to commodities designed for human consumption, where excessive supply to one consumer will reduce the supply available to others generally, resulting in undue privilege to the one and deprivation to others. Though the diversion to unauthorized personal use of such allotted canine provender was military misconduct, the vice of it did not lie in the failure to surrender ration coupons for

portions of the Army's dog meat, the distribution of which was not a part of the system represented by such coupons. The evidence failed as to hams and bacon. The fruit and vegetables were not rationed commodities and not mentioned in Specification 2.

7. All of the members of the court present at the trial and the Assistant Trial Judge Advocate signed a written recommendation for clemency, attached to the record of trial, recommending remission of the sentence. This recommendation cites the very excellent military record of the accused and states the court's belief that his delinquency was due in part to the example of like misconduct set by his superior officer.

8. The accused officer is 33 years of age. He is married and has two children. He attended the University of South Dakota and the South Dakota State School of Mines, being graduated from the latter institution with the degree of Bachelor of Science in Civil Engineering. In civil life he was employed as an engineer in field survey and inspection for the South Dakota State Highway Commission, instructor in Engineering at the University of South Dakota, and building engineer and inspector for the Public Works Administration. Immediately prior to entry on active military duty, he was second in command at a Civilian Conservation Camp. As a reserve officer, he was commissioned second lieutenant, Infantry, at the University of South Dakota 6 July 1937, activated as first lieutenant 21 March 1941, as constructing quartermaster, promoted to the grade of captain from 1 February 1942 and to that of major 27 June 1944. He has served as Purchasing and Contracting Officer and Assistant Post Quartermaster, with Superior ratings.

9. The court was legally constituted and had jurisdiction of the person and subject matter. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Specification 2 of Charge II, legally sufficient to support only so much of the findings of guilty of Specification 1 of Charge II as involves findings that the accused did, during the period and at the place and approximate intervals alleged, wrongfully and unlawfully take for personal use quantities of fresh beef and miscellaneous fruits and produce, property of the United States, as alleged, of a total value less than $20, and legally sufficient to support the findings of guilty of Charge II and to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Fredericks, Judge Advocate.

[illegible], Judge Advocate.

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SPJGQ - CM 268259

1st Ind
MAR 1 1945

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Major Leonard F. Stevens (0-351144), Quartermaster Corps, 3021st Army Air Force Base Unit.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specification 2 of Charge II, legally sufficient to support only so much of the findings of guilty of Specification 1 of Charge II as involves findings that the accused did, during the period and at the place and approximate intervals alleged, wrongfully and unlawfully take for personal use quantities of fresh beef and miscellaneous fruits and produce, property of the United States, as alleged, of a total value less than $20.00, and legally sufficient to support the findings of guilty of Charge II and to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed, but that the fine imposed be reduced to $100.00; that, as so modified, the sentence be carried into execution, but that the execution of that portion thereof adjudging dismissal be suspended during good behavior. The recommended action is regarded as consistent with the proposed disposition of the companion case, CM 267678, Rankin, wherein additional and more serious misconduct appeared.

3. Clemency is recommended by all of the members of the court who sat at the trial and by the Assistant Trial Judge Advocate, citing as a basis therefor the very excellent military record of the accused and the belief of the court that his delinquency was due in part to the example of like misconduct set by his superior officer. This recommendation specifically requests remission of the sentence, but it is not reflected in the action of the reviewing authority.

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

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but fine reduced to $100. Execution of that portion of sentence adjudging dismissal suspended. G.C.M.O. 200, 9 Jun 1945)

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

SPJGK
CM 268280

8 DEC 1944

UNITED STATES v. Private LEE R. DAVIS (38501612), Company D, 1324th Engineer General Service Regiment, Camp Claiborne, Louisiana.	ARMY SERVICE FORCES EIGHTH SERVICE COMMAND Trial by G.C.M., convened at Camp Claiborne, Louisiana, 28-29 October 1944. To be hanged by the neck until dead.

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

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

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

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

Specification 1: In that Private Lee R. Davis, Company D, 1324th Engineer General Service Regiment, Camp Claiborne, Louisiana, did, in Rapides Parish, Louisiana, at or about 1050 CWT, 8 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Gertrude C. Mayeux.

Specification 2: In that Private Lee R. Davis, * * *, did, in Rapides Parish, Louisiana, at or about 1100 CWT, 8 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Gertrude C. Mayeux.

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

Specification 1: In that Private Lee R. Davis, * * *, did, in Rapides Parish, Louisiana, on or about 14 August 1944, with intent to commit a felony, viz, rape, commit an assault upon Mrs. Rosa Chevalier, by willfully and feloniously grasping and holding her body with his hands and arms.

Specification 2: Nolle prosequi entered by order of the appointing authority prior to arraignment.

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

Specification 1: In that Private Lee R. Davis, * * *, did, without proper leave, absent himself from his station at a bivouac area approximately 7 miles north of Oakdale, Louisiana, from about 2 August 1944 to about 4 September 1944.

Specification 2: In that Private Lee R. Davis, * * *, did, without proper leave, absent himself from his station at a bivouac area approximately 7 miles north of Oakdale, Louisiana, from about 5 September 1944 to about 23 September 1944.

He pleaded guilty to Charge III and its Specifications and not guilty to the remaining Charges and Specifications. He was found guilty of all of the Charges and Specifications upon which he was arraigned, all of the members of the court present at the time the vote was taken concurring in each finding of guilty. Evidence was introduced of one previous conviction by a summary court-martial for a violation of Article of War 93 in a manner not disclosed. He was sentenced to be hanged by the neck until dead, all of the members of the court present at the time the vote was taken concurring. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the Prosecution.

Accused was in the military service at the time of the alleged offenses, and at the time of the trial (Pros. Ex. A; R. 44). On 2 August 1944, he absented himself from his station at 1324th Engineer General Service Regiment bivouac area at Camp Claiborne, Louisiana (Pros. Ex. A,B). On 4 September 1944, he was picked up by military authorities at the jail in Alexandria, Louisiana, and returned to military control (R. 10). On 5 September 1944, he again absented himself without authority (Pros. Ex. A,B), and on 22 September 1944, was picked up by military authority at the city jail in Ville Platte, Louisiana (R. 11).

On the morning of 8 August 1944, Mrs. Gertrude Mayeux, who then lived about four miles southwest of Camp Claiborne, Louisiana, was doing the laundry in the yard and had some clothes boiling on a big fire she had built. Her year-old baby was in a "Taylor-Tot" close by. At about 10:30 a.m. she discovered accused standing at the yard gate, looking at her. Asked what he wanted, accused said his stomach hurt, and asked for a dose of baking soda. She told him not to come in the yard, as she had a bad dog, and went in the house for the soda, prepared it for him, and started to take it to him at the gate, when he began opening it. She screamed, threw the glass into the air and ran as fast as she could. Accused caught her, threw her down, jumped on her, pinned her hands to the ground back over her head, and began choking her with his arm. She was

screaming all the time begging him not to kill her, saying she had a husband and a baby. Accused said she might tell someone. She promised she would not. Accused then took her arm and followed her into a room in the house where he threw her on the bed and forcibly had sexual intercourse with her. She kept screaming, trying to get away from him, and begging to get her baby away from the fire. Accused said, "if you don't run I will let you go get him". With accused tightly holding on to her arm, she went out and picked up the baby. Accused then led her back to the room and attacked her a second time. Penetration was had on both occasions. When accused left he said, "Make sure you don't tell no one I was here". Mrs. Mayeux, being afraid that accused was waiting outside, and that if she screamed, he would kill her, then locked herself in her room, and stayed there about an hour and a half. When she concluded he had gone she started screaming as loud as she could. Mrs. Carter, who was at a neighboring house heard her, came for her and took her to the home of a neighbor (R. 18-20). As a result of the attack Mrs. Mayeux had bruises on her face and back and a knot on her head, and was still suffering with her neck at the date of the trial. For about two weeks she had difficulty in straightening up, and is very nervous. She is five feet two inches tall and weighs 120 pounds (R. 27).

On cross examination Mrs. Mayeux was positive in her identification of the accused. Although she had viewed about 800 other soldiers brought before her between 8 August and 25 September 1944 Mrs. Mayeux did not identify any of them as her attacker until she identified the accused on 25 September 1944 (R. 26-27).

About 12:30 p.m., 14 August 1944, Mrs. Rosa Chevalier, who was then 61 years of age, and who lives about four miles from Camp Claiborne, heard a disturbance among the chickens in the yard and, thinking a hog was after them, went out to scare it off, and discovered a colored man, who, according to her statement, looked just like accused, "scootched" up by the kitchen wall. She started running toward the house shouting "here is the nigger". He pursued and caught her by the throat. She pulled his hands loose and screamed. He then put one arm around her body and the other on her throat. She pulled loose a second time. He then discontinued the attack, went over the fence, and left (R. 12-14).

During the months of August and September 1944, Captain Hugh R. Caston, Assistant Director, Security and Intelligence Division, Camp Claiborne, Louisiana, was engaged in the investigation of the charges here involved and in attempting to identify the alleged rapist (R. 80). Over 800 negro soldiers had been viewed by Mrs. Mayeux (R. 94). On 25 September 1944, accused was the twenty-sixth man she had seen that day. When accused was brought in the room where Mrs. Mayeux was sitting, he seemed very nervous. He gave her a quick glance as he stepped into the room, then turned his face. Captain Caston had difficulty in getting him to face her and when he did face her, he would not look at her. When accused was taken out, Mrs. Mayeux

was very upset emotionally, and for a moment or so could hardly answer Captain Caston's questions. When she could speak, she said accused was the man that raped her (R. 81). The accused was taken back to the stockade where Captain Caston and Sergeant Goldstine then went to talk to him (R. 84). Captain Caston read and explained to him the 24th Article of War, told him he need not make any statement, and that anything he said could be used against him, and asked him if he wanted to make a statement. Accused said he did, and thereupon stated that at the time alleged he went out to this house beyond the southwest gate, saw a lady out there and asked her for a dose of soda, that she went in the house, got the soda, prepared it for him,and started to give it to him when he started after her, caught her just before she reached the steps of the back porch, pounced on her, threw her to the ground and twisted her arm; that she started crying, screaming and begging him not to harm her; that he told her that if he did not kill her she would tell; that she said she had a husband and a baby and that she would do anything if he wouldn't kill her, whereupon he let her up and held her by the arm, twisting it and thus escorting her into the front bedroom where he raped her; that there was an interruption during the intercourse when he let her up to go out in the yard and get the baby to keep him from getting into the fire; that he took her by the arm, conducted her to the yard, and after she picked up the baby, conducted her back into the house, where he forcibly completed the act of sexual intercourse (R. 80-84).

Sergeant Saul Goldstine, Captain Caston's assistant, was present during the interview between Captain Caston and the accused. He testified as did Captain Caston that the accused's statements made to Captain Caston were not induced by any threats or promises and were made after the accused was fully advised of his rights under the 24th Article of War (R. 95).

About 30 minutes after Captain Caston talked with accused (R. 92), Lieutenant John A. Keck, Judge Advocate General's Department, Assistant Judge Advocate, Camp Claiborne, Louisiana, went to the stockade with a stenographer, Sergeant William T. Staton, to interview the accused. The interview lasted about one hour (R. 30). Lieutenant Keck stated that because of the seriousness of the charges, he took great pains to read the 24th Article of War to accused, and fully explained his rights to him. After being fully advised of his rights, that he did not have to make any statement, and that any statement made could be used against him, accused made a statement which was taken down in shorthand, and transcribed. On the following morning the statement was read to the accused who signed and swore to it (Pros. Ex. E; R. 29-35). In it accused states that on 8 August 1944 he went to a house in the country near Alexandria, Louisiana, found "a lady" in the yard, asked her for a dose of baking soda, and when she brought it, he grabbed her as she attempted to get away from him, forced her to go in the house and have intercourse with him; that the act of intercourse was interrupted during which he conducted his victim to the yard where she picked up her baby, and then after taking her back in the house

again forced her to submit to sexual intercourse. The statement of accused in so far as it refers to the alleged assault upon Mrs. Mayeux is in substantial agreement with the testimony of Mrs. Mayeux.

Over the objection of defense counsel the signed statement of the accused was admitted in evidence (R. 35; Pros. Ex. E).

In the statement the accused also stated that about five or six days after the 9th of August, he came out to camp on a bus and rode as far as the bus went; that he then got on a gravel road and started walking out through the woods when he came to a house about a mile from the southwest gate; that there was a lady there he thought was a young woman; that the woman came out of the house and then went back in, and when she did, he grabbed her; that he then saw she was an old woman; that he "didn't want any of it", and turned her loose (Ex. E, p. 10).

Captain Caston testified, on rebuttal for the prosecution, that Mrs. Mayeux never at any time identified any man, except accused, as the one who had raped her (R. 88).

b. For the Defense.

Accused being fully informed of his rights (R. 35a-b) elected to testify under oath. He stated that prior to making the written statement Captain Caston and a sergeant came over, about 10:00 o'clock that morning, and questioned him. He kept telling them he did not "do it", and they looked like they did not believe him. The sergeant told him he was telling a "damned lie", and told him he could be tried by either special, summary or general court-martial and if he did not tell the truth he would be "hung". They also said they had his fingerprints on a piece of board or paper which they had gotten off of some gloves accused had left "at this house". When they questioned him, they "started it off and had me carry it out, just like they know how it went". He stated that in that way they got him "scared" (R. 29-37). "This sergeant, he said to me if I didn't own up on this, I would just get a General Court-Martial and get hanged. If I did, I wouldn't get hung". So he decided "to own up to it". The accused testified that statements in the written confession were untrue (R. 51).

Accused also stated that he never went to the home of Mrs. Mayeux on 8 August 1944, and did not rape her and that he did not attack the "old lady" (Mrs. Chevalier) (R. 36-38). Further testifying, accused stated that he went absent without leave about the 3rd of August 1944. He went to Alexandria to the house of Rosa Mae President. On about 5 August 1944, he met a girl by the name of Ethel Lee McClain, who lives at 2525 Vance Street and was with her until 3:30 p.m., 5 August 1944. He went back to Rosa Mae's house where he stayed all week (R. 39). Tuesday, the 8th of August, he had his hair cut by Alfred Rue. The 10th was his birthday and his girl baked a cake for him. On the 13th he left there, and went "downtown" where his First

Sergeant attempted to apprehend him. Accused dodged the military police and came back to this girl's house, and stayed there until about the 17th. For about three nights he was with "Frank Cruse" who was also absent without leave (R. 41). He was then picked up by civil authorities and kept three nights, when he was turned over to the military police, who brought him to the stockade (R. 39-42).

On cross examination he testified that he was 19 years of age and had attended school through the 9th grade (R. 44). He admitted that the answers appearing in the statement (Pros. Ex. E) were given by him (R. 45), that they were made voluntarily; that he signed the statement voluntarily (R. 48-49,52), but that the answers were untrue (R. 50). He was afraid because he had been told that if he did not tell the truth he would be "hung", so he decided to "own up to it" (R. 50-51).

Private Willie C. Edwards testified that along in September 1944, he was ordered to bring four men to the Provost Marshal's Office; that accused Davis was put in the middle of the line, and Mrs. Mayeux called in. Witness was on the left end, and Mrs. Mayeux, pointing to witness, said, "that is the guy, on the end" (R. 55-56). On cross examination it was shown that this witness was at the time of the above occurrence a prisoner awaiting trial and subsequently was convicted and sentenced to 30 years' imprisonment.

Private William J. Miller testified that on August 10, 1944, he was identified by Mrs. Mayeux as the one who had raped her (R. 59).

Willie May Rue testified that accused was at her house in Alexandria, Louisiana, at 11:00 a.m., 8 August 1944. He came a few minutes before 11:00 while she was cooking dinner, sat on the porch a while and then asked if he could take a nap on the porch. When her husband came about 11:00 o'clock, accused was asleep on the porch (R. 62-64).

Alfred Rue testified that accused was at his house in Alexandria about 11:15, on 8 August 1944, when he got home for lunch (R. 68).

4. With reference to Charge I and its Specifications, the accused stands convicted of two offenses of rape upon Mrs. Gertrude C. Mayeux. The uncontradicted testimony of Mrs. Mayeux clearly shows that at the time and the place alleged in the specifications a colored soldier forcibly and without her consent had sexual intercourse with her. She described in vivid detail the force used by her assailant in effecting a penetration of her genital organs and also the resistance that she made to his attack and her futile cries for help.

Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration, however slight, of a woman's genitals

is sufficient carnal knowledge. The woman is required to take such measures to frustrate the execution of the man's design as she is able to, and are called for by the circumstances (MCM 1928, par. 149b, p. 165).

All of the elements of the crime of rape as set forth have been clearly proved beyond any doubt. That Mrs. Mayeux was raped at the time and place alleged is not disputed. The sole issue is whether the accused was the colored soldier who committed the crime.

Apart from the accused's confession, which will be discussed later, Mrs. Mayeux, over a period of about 50 days following the occurrence complained of, viewed over 800 soldiers in an effort to identify the one that had attacked her. During that time according to this witness and Captain Caston she did not identify any one of the 800 as her assailant. Only one of them did she say looked similar to him. Upon her first view of the accused on the 25th of September she positively identified the accused. The reason for her failure to view the accused before that time was readily apparent in that the accused was absent without leave from his organization until the 24th of September. Her identification of him is corroborated by him by his conduct when brought into her presence. He appeared nervous, would not face her, and when compelled to do so kept his eyes upward. Thus, apart from the accused's confession of guilt made within a few hours after his identification by Mrs. Mayeux, the record contains ample evidence of a convincing nature to support the conviction of the crimes committed upon Mrs. Mayeux.

With reference to Charge II and its Specification 1, it was shown by the testimony of Mrs. Chevalier that she was attacked by a colored soldier who grasped her and caused her to fall to the ground as she attempted to escape from him by running into her house screaming. While her testimony alone might not have been sufficient to support a finding of an intent on the part of her assailant to commit rape (CM 260611, Wilkinson and the authorities therein cited), all doubt concerning his intent is dissolved by the accused's voluntary statement or confession in which he admitted attacking a woman under identical circumstances believing her to be a younger woman. When he discovered she was an "old woman" he "didn't want any of it" and turned her loose. If admissible, such an admission proved that his intentions were none other than to have carnal knowledge of the woman. The offense charged- assault with intent to commit rape - would therefore be proved in all of its elements beyond any reasonable doubt.

The accused testifying in his own behalf denied that he perpetrated either crime. He admitted, however, that he was in that neighborhood at the times averred and was absent from his military organization stationed nearby. He also admitted that he voluntarily confessed the commission of both crimes verbally to Lieutenant Keck and later signed a transcript of his verbal confession reduced to writing. In doing so he claimed that he acted through fear; that he was told that if he did not tell the truth he

would be court-martialed and hung. In order to avoid this he "owned up to it". Nevertheless, in admitting the commission of the offenses he claimed that he did not tell the truth. Such reasoning is on its face contradictory. Nevertheless, because of the important part the confession plays in providing proof of the intent to commit rape in the one case and to identify the accused in the other its admissibility deserves close scrutiny.

Where a confession is clear and voluntary it is one of the strongest forms of proof known to the law(MCM 1928, par. 114, p. 114). The accused in the case under discussion clearly admitted his guilt as to the crimes charged. He admitted that he raped the one woman and attacked the other with that purpose in mind. He did not know their names nor definitely fix the places of the offenses, but by the circumstances surrounding each occurrence there can be no doubt that he was the colored soldier who committed the crimes. Mrs. Mayeux's positive identification of the accused would have been sufficient without the aid of the confession to convict him. In order to be admissible in evidence, it must appear that the confession was voluntary on the part of the accused. Where, as in the instant case, the confession was made to a military superior, all of the circumstances showing the manner in which it was obtained should be shown before the confession is admitted in evidence, and, if it appears from these circumstances that it was not made voluntarily, it should not be admitted (MCM 1928, par. 114b, p. 116).

The court in the case under discussion, in view of the accused's contention that his confession was not voluntary but was induced by fear, properly complied with all legal requirements as narrated above and produced as witnesses all persons present during the questioning of the accused. Contrary to the accused's inconsistent statement that he "owned up to it" because he was told that he would hang unless he told the truth, Captain Caston, Lieutenant Keck, and Sergeant Goldstine all testified that no such or similar threats were ever made, but that the accused voluntarily confessed after Mrs. Mayeux had identified him as her attacker. The court has therefore committed no error in concluding that the confession was voluntary and admitting it in evidence. The testimony of the prosecution's witnesses supplemented by the accused's voluntary admissions prove beyond any doubt that accused committed the crimes for which he was tried and convicted.

With reference to Charge III and its two specifications alleging absence without leave, the evidence and the admission of the accused conclusively showing his absence from his organization during the times alleged require no further comment or discussion.

5. The Charge Sheet shows the accused to be 19 years of age. Without prior military service he was inducted into the service on 4 December 1943. The record discloses that his home was in Louisiana.

6. The court was legally constituted and had jurisdiction over 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 of guilty and the sentence and to warrant confirmation thereof. A sentence either of death or imprisonment for life is mandatory upon conviction of rape in violation of Article of War 92.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 26 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private Lee R. Davis (38501612), Company D, 1324th Engineer General Service Regiment, 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 thereof. The record shows that the accused, a 19-year old soldier, on 2 August 1944 absented himself without proper leave from his station at Camp Claiborne, Louisiana, for a period of 51 days in violation of Article of War 61 (Charge III, Specifications 1 and 2). On 8 August 1944, at a place four miles away from the camp, he attacked a young married woman whom he discovered washing clothes in her yard. He forced her into her home and there in violation of Article of War 92 (Charge I, Specifications 1 and 2) twice committed rape upon her. On 14 August 1944, he attacked an elderly woman as she was about to enter her home, with the intent of committing rape upon her in violation of Article of War 93 (Charge II, Specification 1), but upon discovering her age he desisted in his efforts. Accused was sentenced to be hanged by the neck until dead, all members of the court present at the time the vote was taken concurring. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The evidence shows beyond a reasonable doubt accused's guilt of every element of the offense of rape as charged. There are no mitigating circumstances. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 363, 23 Jul 1945)

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

SPJGH
CM 268281

4 DEC 1944

UNITED STATES v. General Prisoners CARL BINGHAM, ARTHUR C. EGAN, JR., ANGELO ANTONACCI, ROBERT L. BROWN, HOMER V. CLARK, JOHN P. CONGELOSI, FREDERICK CRESCI, OLIVER H. CULP, WILLIAM J. McCORMICK, AUBREY THOMPSON and JOHN TIMERANKO.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at North Camp Hood, Texas, 10-11 October 1944. Each: Dishonorable discharge. Bingham: Confinement for fifteen (15) years. Egan: Confinement for twelve (12) years. Antonacci, Brown, Clark, Congelosi, Cresci, Culp, McCormick, Thompson and Timeranko: Confinement for ten (10) years. Bingham and Egan: Penitentiary. Antonacci, Brown, Clark, Congelosi, Cresci, Culp, McCormick, Thompson and Timeranko: Federal Reformatory.

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

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

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

CHARGE: Violation of the 66th Article of War.

Specification 1: In that General Prisoners Carl Bingham, Sess Haynes, and Arthur C. Egan, Jr., all general prisoners in confinement at Southern Branch, United States Disciplinary Barracks, North Camp Hood, Texas, acting jointly and in pursuance of a common intent, did, at Southern Branch, United States Disciplinary Barracks, North Camp Hood, Texas,

on or about 4 September 1944, cause a mutiny in Southern Branch, United States Disciplinary Barracks, North Camp Hood, Texas, by urging members of said Southern Branch, United States Disciplinary Barracks, North Camp Hood, Texas, concertedly to refuse to obey the lawful orders of First Lieutenant Mortimer T. Ficklin, their superior officer, to rise and leave the mess hall, with intent to override for the time being lawful military authority.

Specification 2: In that General Prisoners Carl Bingham, Sess Haynes, Arthur O. Egan, Jr., Angelo Antonacci, Robert L. Brown, Homer V. Clark, John P. Congelosi, Frederick Cresci, Oliver H. Culp, Lawrence O. DeGarimore, William J. McCormick, Aubrey Thompson, and John Timeranko, all general prisoners in confinement at Southern Branch, United States Disciplinary Barracks, North Camp Hood, Texas, acting jointly and in pursuance of a common intent, did, at Southern Branch, United States Disciplinary Barracks, North Camp Hood, Texas, on or about 4 September 1944, voluntarily join in a mutiny which had been begun in Southern Branch, United States Disciplinary Barracks, North Camp Hood, Texas, against the lawful military authority of First Lieutenant Mortimer T. Ficklin, their superior officer, and did, with intent to override such authority for the time being, in concert with sundry other members of said Southern Branch, United States Disciplinary Barracks, North Camp Hood, Texas, assembled in the mess hall, refuse to rise and leave said mess hall.

By direction of the appointing authority orders of nolle prosequi were entered as to General Prisoners Haynes and DeGarimore, covering all offenses charged against them. The accused Bingham and Egan pleaded not guilty to and were found guilty of the Charge and Specifications 1 and 2 thereof. The remaining accused pleaded not guilty to and were found guilty of the Charge and Specification 2 thereof. No evidence of any previous conviction of any of the accused was introduced. The accused Bingham and Egan were each sentenced to dishonorable discharge, total forfeitures and confinement for twenty-two (22) years, and each of the remaining accused was sentenced to dishonorable discharge, total forfeitures and confinement for eighteen (18) years. The reviewing authority disapproved the finding of guilty of Specification 1 of the Charge as to the accused Egan; approved all other findings and the sentence as to each accused; reduced the period of confinement as to the accused Bingham to fifteen (15) years, as to the accused Egan to twelve (12) years, and as to each of the remaining accused to ten (10) years; designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement of the accused Bingham and Egan, and the Federal Reformatory, El Reno, Oklahoma,

as the place of confinement of each of the remaining accused; and forwarded the record of trial for action under Article of War 50½.

3. The record of trial shows that the court convened for the purpose of trying the accused at North Camp Hood, Texas, on Tuesday, 10 October 1944. After the accused had been arraigned and each had pleaded not guilty, but before the introduction of any evidence, the defense counsel made a motion for a continuance "until next week" on the ground that the accused desired to be represented by an individual counsel in addition to the regularly appointed defense counsel and assistant defense counsel, stating that they had been in communication with a lawyer in Waco, Texas, who had agreed the previous day (9 October) to take the case but who, because of other engagements, would be unable to busy himself on the case "this week". It was also stated that neither the regularly appointed defense counsel nor the regularly appointed assistant defense counsel had had "enough time to properly prepare this case" or was "legally qualified" adequately to represent the accused. Such motion was denied. The argument and ruling on the motion are set out in the record as follows (R. 15-16):

"DC: If it please the court, before we start, I would like to correct an error on my part in saying that the accused desired to be represented by the presently appointed Defense Counsel and Assistant Defense Counsel. It was their wish that they also have special counsel, who has been contacted, and who I just called in Waco, and he stated that he has just agreed to take this case yesterday and has not had a chance to come over here, and he asked that we ask the court in his behalf to postpone the case until next week in order that he could be here and represent his client. The Defense makes that request of the court.

LM: Is that a motion?

DC: Yes, it is a motion.

TJA: If it please the court, the Prosecution would oppose the motion on the ground that there is not sufficient reason stated in support of it. The accused are ably represented by two outstanding officers of the Army of the United States and it is felt that no further representation is necessary. If the accused, Egan, or any of them, felt that additional counsel was necessary, I call attention to the fact that the charges in the case were served on the 4th day of October; today is the 10th, and that certainly is adequate time to procure individual counsel if such were desired. The Prosecution asks that the continuance not be granted.

DC: The accused have sent numerous wires in an effort to secure a defense counsel who was legally qualified to represent them at this trial. Neither the present Defense Counsel nor the Assistant Defense Counsel are legally qualified to spar in legal matters with the Prosecution, who is a very qualified lawyer and a member of either the House or Senate. I sent a wire to one of the accused's father asking that one of two persons to carry the defense, be secured to help him. The reply to that wire was received October 8th, which was Sunday, stating that he was trying to obtain counsel in this vicinity. The following telegram was received October 9th, and received by the accused this morning, stating that 'Counsel Jordan from Waco will contact you. Write me. Luck.' The boys, at the time they started trying to get proper counsel, did not know that the day of the trial was set. Had they known it, they would have made an attempt to secure counsel by that date. Attorney Jordan, to whom I talked, stated that he was only notified yesterday of the case, and he said that he had so much on his hands that he could not represent the client this week, neither could another associate attorney, and he asked that as had been done in previous cases, this case be postponed until he could assist in the defense of the accused. We feel like the postponement should be granted. Neither the Defense nor the Assistant Defense Counsel have had actually enough time to properly prepare this case.

LM: Subject to objection of any member, it is not sustained."

4. In CM 245664, Schuman, 29 B.R. 225, 232, the Board of Review declared:

"The right to prepare for trial is fundamental. To deny this right is to deny a fair trial. Article of War 70 provides 'In time of peace no person shall against his objection be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.' This does not mean that during war an accused may be deprived of the right to prepare his defense. It means rather that, during war, he may be tried as soon, after service of charges, as he has had a reasonable time to advise with counsel and prepare his defense. Such period will of course, vary with the facts and circumstances involved in each particular case. In some, a matter of hours will suffice; in others - even in time of war - the peacetime minimum of five days may be less than reasonable. The suspension, during war, of this peacetime limitation for which the statute, by implication, provides, was not designed to deprive accused persons subject to military law, of the fundamental right to prepare and present a defense in good faith, even in time of war."

To the same effect were the decisions of the Board of Review in CM 231119, Lockwood, 18 B.R. 139; and CM 236323, McClain, 22 B.R. 379.

The Supreme Court of the United States in Powell v. Alabama, 287 U.S. 45, 56, stated:

> "The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense."

In the instant case eleven accused were charged with joining in a mutiny, a capital offense. In addition, two of the accused were charged with causing a mutiny, likewise a capital offense. Without dwelling upon the seriousness of these offenses or the care with which a case of this nature should be prepared for trial, it is unquestionably true that a much longer period of time is required for the adequate preparation of the defense's case for trial in a case such as this, involving eleven accused, than would be required in a case involving, say, only one or two accused. It is evident, for instance, that the time required for the initial step alone of interviewing each of the accused and ascertaining his version of the facts is vastly multiplied where a large number of accused are involved. Yet the importance of full individual interviews with the various accused cannot easily be overemphasized, not only because of the necessity of thoroughly acquainting counsel with the facts and the names of the witnesses who will testify to the facts but also because of the importance of ascertaining whether significant conflicts of interests exist among the various accused necessitating the retention or assignment of separate counsel.

It is to be remembered, also, that all of the accused here were under the necessary handicap of being required to conduct or assist in the preparation of their defenses from prison cells. They were not free to go personally in search of witnesses or to call upon their counsel at will. These necessary prison restrictions likewise affected their ability to get in communication with and retain desired individual counsel, either in nearby towns or in their home or other distant communities.

The record discloses that the charges were served on the accused on 4 October 1944. The case was brought to trial on 10 October. The defense counsel, in arguing his motion for a continuance, stated that a civilian lawyer by the name of Jordan, of Waco, Texas (a distance of approximately 60 miles from the place of trial at North Camp Hood, Texas), with whom the accused had been in communication, had agreed on 9 October to take the case of the accused, but "had stated that he had so much on his hands" that he would not be able to represent the accused "this week".

Significant, also, is the statement of the defense counsel that neither he nor the assistant defense counsel had had "enough time to properly prepare this case". All of the accused were serving terms as general prisoners in the Southern Branch of the United States Disciplinary Barracks, at North Camp Hood. There is nothing in the record to suggest that any of them were about to be transferred to any other place. Nor is any other fact or circumstance urged by the prosecution as a reason for shortening, in this case, what otherwise might be considered a normal allotment of time for the securing of special counsel and the preparation of the defense's case.

It is unnecessary to speculate upon what additional materials, pertaining either to the facts or to the law, may have been acquired for use in defending the accused had the requested continuance been granted. To so speculate would be to enter the field of conjecture. The Board of Review is of the opinion that, under the circumstances of this case, the failure of the court to grant the requested continuance was an abuse of its discretion, which injuriously affected the substantial rights of the accused. As was said in CM 126651, "The question of a continuance is one for the sound discretion of the court. It is believed, however, that when it is apparent from the record that the court has abused its discretion, the conviction should be held illegal."

5. For the reasons indicated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentences as to all accused.

Thomas N. Tally, Judge Advocate.

Rauschenbach, Judge Advocate.

William H. Bamberger, Judge Advocate.

SPJGH
CM 268281 1st Ind.

War Department, ASF, J.A.G.O., Dec 13 1944

TO: Commanding General, Eighth Service Command, Army Service Forces, Dallas 2, Texas.

1. In the case of General Prisoners Carl Bingham, Arthur C. Egan, Jr., Angelo Antonacci, Robert L. Brown, Homer V. Clark, John P. Congelosi, Frederick Cresci, Oliver H. Culp, William J. McCormick, Aubrey Thompson and John Timeranko, 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 sentences as to all accused, 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 sentences as to all accused 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 268281).

(Signed) 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 268327

23 NOV 1944

UNITED STATES	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 1
v.	Trial by G.C.M., convened at Fort George G. Meade, Maryland, 9 November 1944. Dismissal.
First Lieutenant WENDELL E. RANKIN (0-1290812), 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 Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that First Lieutenant Wendell E. Rankin, Company E, 30th Replacement Battalion, 8th Replacement Regiment (Inf), did, without proper leave, absent himself from his organization at Fort George G. Meade, Maryland from about 0001, 19 September 1944 to about 0245, 12 October 1944.

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

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

By stipulation it was shown that the accused then stationed at Fort Jackson, South Carolina was duly assigned to Army Ground Forces Replacement Depot No. 1, Fort George G. Meade, Maryland, and ordered to arrive at that station during daylight hours 18 September 1944, and that he left Fort Jackson on 12 September 1944 (R. 6; Pros. Exs. A, B, and C). By further stipulation it was shown that the accused was arrested by military authorities at the Harrington Hotel in Washington, D. C. on 12 October 1944 (R. 6-7). By Special Order 273 of Headquarters, Army Ground Forces Replacement Depot No. 1 of 29 September 1944 accused was attached to Company E, 30th Battalion, 8th Regiment, of that organization (R. 8; Pros. Ex. E). The morning report of this

organization on 30 September 1944 showed that the accused had not joined and was "AWOL" as of 19 September 1944 (R. 8; Pros. Ex. D). Officers arriving at Fort George G. Meade are required to sign a register. The accused's signature did not appear in the register between 18 September and 12 October 1944 (R. 9).

4. The accused having had his rights explained to him elected to make an unsworn statement (R. 10). He stated in substance that he was commissioned 19 August 1942; served in the African Theater of Operations for 11 months, during which time his service rating was excellent and he was awarded the Purple Heart and French Service Cross; and that all of his service ratings have been "excellent" with the exception of one "very satisfactory" (R. 11).

5. The uncontradicted evidence for the prosecution shows that the accused was stationed at Fort Jackson, South Carolina, on 12 September 1944, when he was properly assigned to Fort George G. Meade and ordered to report there no later than 18 September 1944. On that date he left Fort Jackson, but instead of reporting at Fort George G. Meade within the time thus specified the accused failed to report and was apprehended and returned to military control on 12 October 1944. He was therefore absent from his station without proper leave from 19 September 1944 until he was apprehended on 12 October 1944. The prosecution has proved the averments contained in the Specification beyond any reasonable doubt.

6. War Department records show the accused to be 25 years of age, single, and a high school graduate. He enlisted and served in the National Guard of West Virginia from 19 November 1940 to 17 January 1941, and in the service of the United States Army from that date until 20 August 1942, when he was commissioned a second lieutenant, Infantry, Army of the United States. War Department records disclose that the accused went overseas with the 9th Infantry Division 25 September 1942. He was wounded in combat in the North African Theater of Operations on 25 April 1943, for which he was awarded the Purple Heart. He was also awarded the French Volunteer Military Service Cross on 23 March 1943. On 2 July 1943 he was promoted to the grade of a first lieutenant. He was returned to the United States in July 1943 and spent one month in Ashford General Hospital, West Virginia. On 2 November 1943 he was assigned to the 399th Infantry, Fort Jackson, South Carolina, and subsequently to the 300th Infantry.

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

the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 28 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 Wendell E. Rankin (0-1290812), 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. War Department records disclose that the accused went overseas with the 9th Infantry Division on 25 September 1942. He was wounded in combat in the North African Theater of Operations on 25 April 1943, for which he was awarded the Purple Heart. He was also awarded the French Volunteer Military Service Cross on 23 March 1943. On 2 July 1943 he was promoted to the grade of a first lieutenant. He was returned to the United States in July 1943 and spent one month in Ashford General Hospital, West Virginia. On 2 November 1943 he was assigned to the 399th Infantry, Fort Jackson, South Carolina, and subsequently to the 300th Infantry.

You will recall that the record of trial in this case was transmitted to you for the action of the President by first indorsement dated 29 November 1944. In view of the previous good record and combat experience of the accused I then recommended that the sentence to dismissal be confirmed but commuted to a reprimand and forfeiture of $50 pay per month for six months. You concurred in my recommendation and transmitted to the President for his action the record of trial and accompanying papers with a form of Executive action designed to carry into effect that recommendation. I regret to advise you that since that time this office has received an official communication from the Commanding General, Third Service Command, with inclosures, from which it appears that the accused has been absent without leave from his organization since 5 December 1944, and also that accused has issued five worthless checks amounting in all to $110. The communication with its inclosures is attached to the record of trial. It is apparent from the recent misconduct of the accused while awaiting the action upon his sentence that the accused has no proper appreciation of the responsibilities of a commissioned officer and that he is unworthy of the extension of clemency. I accordingly withdraw my former recommendation and recommend that the sentence to dismissal be confirmed and carried into execution.

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

Myron C. Cramer

4 Incls.
Incl.1-Record of trial.
Incl.2-Drft.ltr.Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-1st Ind. fr. CG, 3rd Ser.Com.w/incls.

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

- 4 -

(Sentence confirmed. G.C.M.O. 57, 27 Jan 1945)

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

SPJGN
CM 268431

8 DEC 1944

UNITED STATES	)	ARMY SERVICE FORCES FOURTH SERVICE COMMAND
v.	)	
Second Lieutenant CHARLES E. VENTER JR. (O-1168503), Field Artillery.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, 17-18 October 1944. Dismissal and confinement for one (1) year.

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

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

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that 2nd Lt. CHARLES E. VENTER, Service Battery, 798th Field Artillery Battalion, did, at Fort Bragg, North Carolina, on or about 27 May 1944 feloniously take, steal, and carry away about ten thousand (10,000) rounds of .22 caliber ammunition of the value of about $38.00, property, of the United States furnished and intended for the military service thereof;

Specification 2: (Nolle Prosequi entered).

Specification 3: (Finding of not guilty).

Specification 4: Identical as Specification 1, except date is 1 July 1944.

Specification 5: In that 2nd Lt. CHARLES E. VENTER, Service Battery, 798th Field Artillery Battalion,

did, at Fort Bragg, North Carolina, on or about 1 July 1944 wrongfully and knowingly dispose of by giving same to S/Sgt. Tony Piscitelli, Service Battery, 798th Field Artillery Battalion, about two hundred (200) rounds of shot gun ammunition of the value of about $4.76, property of the United States furnished and intended for the military service thereof;

Specifications 6-7: (Nolle Prosequi entered).

Specification 8: In that 2nd Lt. CHARLES E. VENTER, Service Battery, 798th Field Artillery Battalion, did, at Fort Bragg, North Carolina, on or about 15 July 1944 feloniously take, steal, and carry away about two hundred forty (240) rounds of shot gun ammunition of the value of about $5.71, property of the United States furnished and intended for the military service thereof;

Specification 9: (Nolle Prosequi entered).

Specification 10: (Nolle Prosequi entered).

Specification 11: In that 2nd Lt. CHARLES E. VENTER, Service Battery, 798th Field Artillery Battalion, did, at Fort Bragg, North Carolina, on or about 30 August 1944 feloniously take, steal, and carry away about seven (7) cases of .30 caliber Carbine M1 ammunition of the value of about $553.14, seven (7) cases .30 caliber M2 cartridge ball ammunition of some value, and six (6) hand grenades of the value of about $3.24, property of the United States furnished and intended for the military service thereof;

Specifications 12-13: (Nolle Prosequi entered).

Specification 14: In that 2nd Lt. CHARLES E. VENTER, Service Battery, 798th Field Artillery Battalion, did, at Fort Bragg, North Carolina, on or about 1 September 1944 feloniously take, steal, and carry away about ten (10) gallons of gasoline of the value of about $1.00 and two (2) gallons of oil of some value, property of the United States furnished and intended for the military service thereof;

Specification 15: In that 2nd Lt. CHARLES E. VENTER, Service Battery, 798th Field Artillery Battalion, did, at Fort Bragg, North Carolina, on or about 24 August 1944 feloniously take, steal, and carry away about five (5) gallons

of gasoline of the value of about $0.50, property of the United States furnished and intended for the military service thereof;

Specification 16: (Nolle Prosequi entered).

Specification 17: In that 2nd Lt. CHARLES E. VENTER, Service Battery, 798th Field Artillery Battalion, did, at Fort Bragg, North Carolina, on or about 24 June 1944, feloniously take, steal, and carry away about fifteen (15) gallons of gasoline of the value of about $1.50, property of the United States furnished and intended for the military service thereof;

Specifications 18-19: (Nolle Prosequi entered).

The accused originally pleaded not guilty to the Charge and all Specifications thereunder upon which he was arraigned. Subsequent to arraignment and prior to his pleas the prosecution entered a nolle prosequi to Specifications 2, 6, 7, 9, 10, 12, 13, 18 and 19 (R. 9). Before the conclusion of the trial he changed his plea to guilty of the Charge and Specifications 14, 15 and 17 thereunder and allowed his plea of not guilty to the other Specifications to remain (R. 131). During the trial the prosecution also entered a nolle prosequi to Specification 16 (R. 77). He was found not guilty of Specification 3 but guilty of the Charge and all other Specifications thereunder except those to which a nolle prosequi had been entered. He was sentenced to be dismissed the service and to be confined at hard labor, at such place as the reviewing authority might direct, for one (1) year. 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 at all material times involved herein was assigned to the Service Battery of the 798th Field Artillery Battalion which was stationed at Fort Bragg, North Carolina. Private Glen W. Stidham was the driver of the command and reconnaissance car of the Service Battery Ammunition Train. According to the testimony of Stidham, he and the accused on the morning of 27 May 1944 went in the command car to Magazine 31 (R. 11). The accused instructed Stidham to take a box of .22 caliber ammunition from the Magazine and place it in the car while the accused diverted the ammunition checker's attention (R. 12). This ammunition was not drawn for the organization (R. 21). The accused, Stidham and a Private Hall then left the Magazine in the command car, returned to the Battalion area where the accused's Ford coupe was parked and then proceeded in the two cars to a secluded spot beyond "Laundry No. 3" where the box of ammunition was transferred to the trunk of the accused's automobile. Thereafter the accused drove away in his automobile and the other two men returned to the Battalion area in the command car (R. 18).

According to the testimony of Private Amos D. Smith at about 0430 o'clock on 24 June 1944, the accused awakened him and carried him in the accused's automobile to the area where numerous government trucks were parked. There Smith, driving one of the trucks, followed the accused's car into the camouflage area where the accused siphoned about 15 gallons of gasoline into the tank of his own automobile from the truck (R. 83-88).

On the morning of 1 July 1944 the accused and Stidham went to Magazine 31 where, using the same tactics as formerly, Stidham at the accused's instruction, placed another case of .22 Caliber ammunition in the rear compartment of the command car in which they returned about an hour before the noon meal to the Battalion area where the car was parked (R. 30). Stidham about noon noticed that the car, in which the keys remained at all times, was gone and when he next saw it after the noon meal the case of ammunition had been removed and the shovel and pioneer equipment on the car were noticeably dirty (R. 31). On this occasion Stidham did not know whether or not the accused had a requisition for the ammunition taken (R. 34). However, other competent testimony shows that between 1 May 1944 and 1 September 1944 neither the 798th Field Artillery Battalion nor the "Field Artillery Board" requisitioned any .22 caliber ammunition (R. 94, 141).

During the same day Stidham, again at the accused's direction, removed a full case of shotgun shells from the rear compartment of the command car and carried it into the organization's Supply and Orderly room where it was opened and the accused gave about 10 or 12 small boxes containing about 200 shells to Sergeant Tony Piscitelli who placed them in a container under the counter before Stidham replaced the remainder in the command car (R. 35, 36). The accused had remarked to Stidham that he wanted to give the sergeant some shotgun shells but Stidham was unable to account for the manner in which the shells had been placed in the car and he could not identify them either as to make or gauge (R. 37-40).

On or about 15 July 1944 the accused and Stidham again went to Magazine 31 in the command car. The accused went into the Magazine and returned with about one-half case of shotgun shells, approximately 300, which he placed in the car (R. 41, 48). Observing the approach of the magazine officer and a checker, the accused directed Stidham to drive the car to Magazine No. 10 and to put the shells in another command car which was being driven by Hall. This was done while the accused remained to talk to the magazine officer and the checker (R. 42, 48). The latter, after all of them had arrived at Magazine No. 10, began to look around the car and the accused thereupon directed Hall to "Take a ride - - to get rid of it", and Hall drove off (R. 42, 49). The checker followed him but because of traffic was unable to maintain a successful pursuit (Id.). When Hall returned about 30 minutes later, the checker in the presence of all the persons above mentioned and a magazine guard advised

the accused that the removal of the shells had been observed and the accused, after first denying any knowledge of the matter, finally admitted their removal and agreed to return them (R. 42, 49). The accused and Stidham while following Hall determined to return the shells and upon reaching their place of concealment they were replaced in the accused's command car where they remained until the accused and Stidham returned them to the magazine early the next morning (R. 43-45, 49-52).

On or about 24 August 1944 the accused and Stidham went in the command car to the "ASP" area where the accused siphoned five gallons of gasoline from a 798th Field Artillery Battalion truck into a "GI" can which was placed in the command car. Later in the day the accused transferred the can of gasoline to his personal car and substituted an empty "GI" can in the command car (R. 72-76).

About 30 August 1944 the accused and Stidham investigated several trailers which they had observed to have been standing for some time off road in the camouflage area (R. 52). The trailers contained ammunition and they returned later in the day when they removed seven cases of .30 caliber carbine ammunition, seven cases of M2 ammunition and 6 hand grenades which they conveyed in the command car to a spot on the range several miles away where it was buried (R. 52-57). On 10 September 1944 after the accused had been restricted, he reported this incident to the preliminary investigating officer with the asserted explanation that his actions had been preliminary to a training problem which he intended to have the Service Battery perform. The ammunition and grenades, upon the information given by the accused, were recovered (R. 58-60). It was identified by the ammunition officer as having been issued to the 694th Ordnance Company and it was admitted into evidence (R. 61-64).

On 1 September 1944 while Stidham was driving for the accused, the accused siphoned five gallons of gasoline out of one of the battalion's trucks into a can which was placed in the command car. Later the can was transferred to the accused's personal car at a secluded spot which they hurriedly left after hearing suspicious noises. Later they returned to the secluded place and found a five gallon "GI" can full of gasoline, an empty "GI" can and two cans of oil which were all placed in the command car and taken to the post magazine where the gasoline was tested for sugar. No sugar being present in the gasoline, the accused directed that it and the oil be placed in a civilian's car. Later the same day the accused, while taking Stidham to nearby Spring Lake which was on the way to the civilian's home, stated that he was going by the civilian's residence (R. 62-72).

The value of the various types of personal property were competently shown to be as alleged (R. 62, 63, 88). On 22 September 1944 the accused, after being apprised of the provisions of Article of War 24, executed a sworn statement which was identified and admitted into evidence (R. 88-92; Ex. 2). In the statement the accused admitted that he directed Stidham to remove a box of ammunition for which there was no requisition on 27 May 1944 and that its removal was accomplished substantially as related by Stidham. He contended, however, that the box contained shotgun shells, .22 caliber and also .30 ammunition and that, after it was secretly placed in his car, he gave it to Hall and did not thereafter see it. The statement also relates that he removed about 8 to 10 gallons of gasoline from the truck driven by Smith on 24 June 1944. On 1 July 1944, according to the statement, he directed Stidham to remove the case of .22 caliber ammunition because a case of .30 caliber M1 ammunition previously issued to him had been stolen and he a few days later turned the .22 caliber ammunition in as having erroneously been issued instead of .30 caliber and secured the issue of the latter type in exchange thereby avoiding the necessity of reporting the theft. Likewise the statement contains an admission that the accused on or about 1 July 1944 gave Piscitelli about six boxes of shotgun shells and one box of .22 caliber ammunition to exchange with other outfits for some things for the battalion. Concerning the one-half case of shotgun shells taken on or about 15 July 1944 and returned the next morning, the statement fully admits the transaction. The statement does not specifically refer to any removal of gasoline on 24 August 1944 but in addition to that removed on 24 June 1944 and 1 September 1944 generally admits the removal of gasoline on three other occasions to the extent of about 20 gallons. The statement admits the removal of the 14 cases of ammunition and the hand grenades from the trailers in the camouflage area and their burial but contends that they were removed and buried as part of a training problem which the accused intended to have the service battery perform. Finally the statement admits the removal of the gasoline and oil on 1 September 1944 as related by Stidham but contends that the oil, the five gallons of gasoline and the empty can which were found were returned by the accused to the place where they were found (Id.).

4. The evidence for the defense shows that some seventeen fellow officers attributed to the accused an excellent character and excellent proficiency as an officer (R. 100-108, 138-140). The accused's form 66-1 showing two ratings of "S", two of "VS", four of "Ex" and one of "Sup" was admitted into evidence (R. 108; Def. Ex. 1). His wife had never seen any type of ammunition in their personal car (R. 140-141).

The accused, after being advised of his rights as a witness, elected to testify. During his testimony he admitted that the prosecution's testimony about the gasoline was substantially correct and therefore changed his plea of not guilty to guilty of the Charge and Specifications 14, 15 and 17 thereunder (R. 108-109, 131-133). His remaining testimony

in other material aspects did not substantially vary from his written statement except that he admitted that the shotgun shells given to Piscitelli by him were government property and that he denied ever selling or otherwise disposing of the ammunition except for the government's benefit (R. 111-131). He also contended that he had salvaged about $5600.00 worth of howitzer ammunition for the government and had reported the theft of ammunition to his immediate superior (R. 127).

Sergeant Tony Piscitelli acknowledged receiving from the accused several boxes of shotgun shells which were exchanged for some furniture for the battalion. He also recalled that the accused had mentioned a "problem" to another officer and had asked whether compasses were available for it (R. 133-138). It was stipulated that the ammunition officer would testify, if recalled, that over 90,000 rounds of .22 caliber ammunition had been missed from the "ASP" area within 10 or 12 days before the trial (R. 141).

5. In rebuttal the prosecution recalled the accused's immediate superior, Captain William J. Foley, who denied that the accused had ever reported to him the theft of any ammunition (R. 142-3).

6. In sur-rebuttal the defense offered the testimony of Captain Hugh F. Butner who recalled that in the latter part of July 1944, the accused had mentioned that ammunition was being stored in the barracks which he reported to Captain Foley (R. 143-145).

7. Specifications 1, 4, 8, 11, 14, 15, and 17 allege that the accused on designated times and places feloniously took, stole, and carried away various described types and quantities of personal property of certain alleged values which belonged to the government and were furnished and intended for the military service thereof. Specification 5 alleges that he wrongfully and knowingly disposed of by gift to a named person a certain amount of personal property of an alleged value which was similiarly owned and likewise intended for the use of the military service. The Specifications are alleged in violation of Article of War 94 of which they are clearly violative.

The evidence for the prosecution conclusively shows that the accused committed the offenses as alleged. Although the evidence for the prosecution was furnished largely by the testimony of accomplices and therefore should be subjected to the most careful scrutiny there is no substantial discrepancy therein which in any way tends to render it untrustworthy. Furthermore, the accused's written and sworn statement without question connects him with the offenses and shows his guilt thereof. Indeed, from the witness stand the accused admits his guilt of the offenses concerning the gasoline and changed his plea from not guilty thereof to guilty. His own testimony likewise admits his guilt

of the remaining Specifications upon which he was tried even though he seeks to ameliorate his intent by assigning patently spurious reasons for his acts. The court, as it was entitled, rejected such spurious reasons. The evidence therefore, beyond a reasonable doubt, establishes the accused's guilt as alleged and fully warrants the court's findings of guilty of the Charge and Specifications 1, 4, 5, 8, 11, 14, 15 and 17 thereunder.

8. The accused is about 25 years old. He is a high school graduate and attended college for 2½ years. He is married and from 1937 until 1942 was employed as an accountant by Montgomery Ward and Company and a bank. He has had enlisted service from 10 February 1942 until 18 August 1942 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.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and Specifications 1, 4, 5, 8, 11, 14, 15 and 17 thereunder and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 94.

Oliver E. Lippman, Judge Advocate.

Robert H. Conner, Judge Advocate.

Gabriel H. Rodier, Judge Advocate.

SPJGN
CM 268431

1st Ind.

War Department, J.A.G.O., DEC 14 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 E. Venter Jr. (O-1168503), 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 and ordered executed and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 68, 27 Jan 1945)

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

SPJGQ
CM 268478

1 DEC 1944

UNITED STATES v. First Lieutenant MAX C. BROWN (0-1637096), Signal Corps.	ARMY AIR FORCES EASTERN TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Sioux Falls Army Air Field, Sioux Falls, South Dakota, 6 November 1944. Dismissal, total forfeitures and confinement for two (2) years.

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

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

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

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

Specification: In that 1st Lieutenant Max C. Brown, Signal Corps, Air Technical Service Command, Wright Field, Dayton, Ohio, did, at Sioux Falls Army Air Field, Sioux Falls, South Dakota, on or about 31 July 1943, feloniously take, steal, and carry away 800 cords, CD-338, value of $432.00, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that 1st Lieutenant Max C. Brown, Signal Corps, Air Technical Service Command, Wright Field, Dayton, Ohio, having a lawful wife living, did, at Sioux Falls, South Dakota, and Dayton, Ohio, from about 21 August 1943 to about 22 August 1944, wrongfully, dishonorably and unlawfully live and cohabit with one Marion Bonnema, a female person not his wife.

He pleaded guilty to the Specification of Charge I and to Charge I; guilty to the Specification of Charge II, not guilty to Charge II, but guilty of violation of the 96th Article of War. Accused was found guilty of all Specifications and Charges. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence, remitted three years of the confinement imposed, and forwarded the record of trial for action under Article of War 48.

3. Charge I and the Specification.

The evidence for the prosecution shows that the accused, (then second lieutenant, Signal Corps), during June, July and August 1943, was stationed at Sioux Falls Army Air Field, Sioux Falls, South Dakota, serving as Signal Property Officer (R. 7,21). William M. Beach, a civilian employee was foreman of the warehouse working under the accused (R. 12). During the summer of 1943 a quantity of head-set cords were requisitioned by the Technical Services Officer at this Base. This item carried a stock number "CC-338" (R. 21). Thereafter a shipment of 800 extension cords, carrying a stock number of "CD-338" was received, apparently shipped, "as a substitute by mistake" (R. 23, 28; Pros. Ex. 7,9). After receiving the extension cords, the accused notified Major Ranney that they were in the warehouse. This officer informed the accused that extension cords were not desired and delivery of same was refused (R. 22). Extension cords of a similar type, approximately 200 in number, had previously been received by the Supplies Division at this Base, and had been charged out to the various branches of the school (R. 21,23). The value of the 800 extension cords was Four Hundred Thirty-Two Dollars ($432.00) (R. 24, 28; Pros. Exs. 4, 7).

The accused requested Beach to dispose of the extension cords indicating that "they had been laying around over there and no one seemed to want to take them - - - they were not placed on an accountable account" Accused and Beach, using an Army truck, removed the cords from the warehouse to the garage of the house where the accused resided (R. 8,10). Beach made three sales to local merchants obtaining the cords from accused's garage and delivering them to complete the transactions (R. 8). 300 cords were sold to West Sioux Falls Grocery, payment being made by check payable to "W. Beach", for $180 (R. 8,15,25; Pros. Ex. 5); 200 cords were sold to Johnson Hardware Company for $100 (R. 8,20; Pros. Ex. 3) and 100 to a Coast to Coast Store for $60 (R. 9,18), payment being made in each instance to Beach in currency (R. 18,20; Pros. Ex. 3). Beach turned over to accused the proceeds of all sales and in turn was paid his share which was approximately one-half (R. 8,13).

In September, 1943, the accused was succeeded by Captain Edward Urbanski, Signal Corps, who took over the property account. Prior to the transfer of property, Warrant Officer Russell made a statement in

the presence of the accused that 800 CD-338 cords were not accounted for, and the accused then stated that they had been issued to the radio school as expendable property (R. 24; Ex. 4). At this time the accused executed an expenditure voucher that the property had been issued to the school (R. 25, 28; Pros. Exs. 6, 8). The accused was shortly thereafter transferred to another post (R. 24; Pros. Ex. 4).

Charge II and the Specification.

Accused was married on September 15, 1941 at Pittsburgh, Pennsylvania, to Helen D. Koman (R. 31; Pros. Ex. 13), and has never been divorced from his wife (R. 31). He met Marion Bonnema in July,1943 and had a number of dates with her at Sioux Falls, South Dakota. On August 17, 1943 she joined accused in Ogden, Utah at his request. They stayed at a hotel for four days registering as husband and wife. Traveling by train they went to Sioux Falls where they lived as husband and wife until September 11, 1943. When the accused was transferred to Dayton, Ohio, she accompanied him on the trip. En route they stopped at hotels, registering as man and wife. They thus lived together as husband and wife until sometime subsequent to August 22, 1944, except for a brief period when Marion Bonnema visited her parents (R. 29; Pros. Ex. 10).

After being advised of his rights under the 24th Article of War, the accused made a voluntary statement to Major Flota, which was reduced to writing and was sworn to and signed by the accused (R. 29,30; Pros. Ex. 11).

At this time he was shown a statement previously made to an agent of the Federal Bureau of Investigation. The accused admitted the facts in said statement were true and correct and that the original statement was voluntarily made. This prior statement admits the removal of the 800 extension cords from the warehouse to accused's garage, the subsequent sale and removal by Beach, and the receipt by the accused of half of the proceeds from the sales (R. 30; Pros. Ex. 12).

The accused in that statement further admits his marriage to Helen Koman and that he was at the time of making the statement living with Marion Bonnema in Dayton, Ohio, whom he brought from South Dakota (Pros. Ex. 12).

4. The accused, after being fully informed of his rights as a witness, elected to remain silent and no evidence was introduced for the defense (R.32).

5. In addition to the pleas of guilty and the admissions by the accused, the prosecution produced clear, convincing and competent evidence that accused committed the offenses with which he is charged. The evidence shows that accused, while Signal Property Officer at Sioux Falls Army Air Field, received in the Base warehouse 800 CD-338 extension cords. This was property of the United States, furnished and intended for the military service thereof, and had a value of $432. After conspiring with his ware-

house foreman, one Beach, a civilian employee, the accused, aided by him, removed this property from the warehouse to a private garage adjoining accused's residence. Later, following an agreement between Beach and the accused, the cords were removed and sold by the former to local merchants. The proceeds from the sales were divided between the accused and Beach. Thereafter the accused being advised that this property was unaccounted for, stated it had been issued to the radio school. He then executed an expenditure voucher to the effect that the extension cords had been issued to the school.

His custody and control over the property was limited and subject to final control and disposition by his superior officers. The accused had "custody" only of the property as distinguished from "possession". Possession, the "present right and power absolutely to control" (MCM 1928, par. 149g) the property remained in the United States. As stated in paragraph 149g, Manual for Courts-Martial, page 172:

> "* * * where a servant receives goods or property from his master to use, care for, or employ for a specific purpose in his service, the master retains possession, and the servant has the custody only and may commit larceny of them. A person, then, has the custody of property, as distinguished from the possession, where, as in the case of a servant's custody of his employer's property, he merely has the care and charge of it for one who still retains the right to control it, and who, therefore, is in possession (i.e., constructive possession as distinguished from actual possession) of the property."

The removal by accused of the extension cords from the warehouse to his garage with larcenous intent constitutes larceny in violation of Article of War 94 (CM 220398, Yeager, 12 BR 397).

The evidence further shows that accused married Helen D. Koman in 1941 and has not been divorced from her. In July, 1943, he met Marion Bonnema and thereafter lived with her in various locations as husband and wife. This continuous and unlawful relation was open for approximately a year. The conduct of accused, a married man, in unlawfully living with a person not his wife fully warrants his conviction under Article of War 95 (CM 216152, Wells, 11 BR 111, 119). No persuasion is required to find such conduct unbecoming an officer and a gentleman.

In explaining to the accused the effect of his pleas of guilty, the Law Member incorrectly stated that the maximum sentence authorized for the offenses charged was dismissal, forfeiture of all pay and allowances and confinement at hard labor for five years. Since the sentence adjudged by the court did not exceed that stated by the Law Member, the error is not material.

The marriage license of accused was received in evidence without being properly authenticated. This documentary evidence was not needed to support or establish the finding of guilty under the Specification of Charge II. There was an admission by the accused of his marriage. A stipulation to the same effect was made later in the trial. It is noted that no objection was made to the evidence, and this may be regarded as a waiver (MCM 1928, par. 116b).

6. Four members of the court recommend clemency on the ground that this officer's confederate in the larceny of government property was tried for his part in the offense by a United States District Court and that the sentence imposed upon him was suspended.

7. The accused is 30 years of age, married, and has one child. He completed four years in high school and, in civilian life, worked in sales promotion and as a purchasing agent and shipping clerk. War Department records show accused was inducted 22 March 1941 and had enlisted service until commissioned second lieutenant, Signal Corps, on 27 October 1942. He was promoted to first lieutenant on 21 August 1944.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The sentence imposed is authorized upon conviction of a violation of Article of War 94. Dismissal is mandatory upon conviction of a violation of Article of War 95.

(on leave), Judge Advocate.

Herbert B. Fredrick, Judge Advocate.

[illegible], Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 21 1944 To the Secretary of War.

1. Herewith transmitted are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Max C. Brown (0-1637096), Signal Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Four members of the court recommend clemency on the ground that this officer's confederate in the larceny of government property was tried for his part in the offense by a United States District Court and that the sentence imposed upon him was suspended. The reviewing authority in this case remitted three years of the confinement imposed. Any further clemency is unwarranted in the light of conviction of the additional offense of cohabiting with a woman not his wife, even though confinement is not authorized by Article of War 95 under which this last named offense was laid. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution. I further recommend 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 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 as approved by reviewing authority confirmed. G.C.M.O. 43, 27 Jan 1945)

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

SPJGK
CM 268500

2 JAN 1945

UNITED STATES v. Second Lieutenant HOLLAND M. BUCHANAN (0-2047263), Medical Administrative Corps.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Barkeley, Texas, 26 October 1944. Dismissal.

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

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

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

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

Specification 1: In that Second Lieutenant Holland M. Buchanan, Medical Administrative Corps, Medical Department Replacement Pool, Army Service Forces Training Center, Eighth Service Command, Army Service Forces, Camp Barkeley, Texas, did, without proper leave, absent himself from his station at Camp Barkeley, Texas, from about 17 July 1944 to about 23 July 1944.

Specification 2: In that Second Lieutenant Holland M. Buchanan, * * *, did, without proper leave, absent himself from his station at Camp Barkeley, Texas, from about 24 July 1944 to about 10 September 1944.

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

Specification 1: In that Second Lieutenant Holland M. Buchanan, * * *, did, at Camp Barkeley, Texas, on or about 6 May 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Camp Barkeley Exchange, Camp Barkeley, Texas, a certain check, in words and figures as follows, to wit:

Pasadena, Calif. 5/6/1944 No._____
PASADENA FIRST NATIONAL BANK

Pay
to the
order
of Camp Barkeley Exchange $ 25 00

Twenty-Five & no/100 ---------- Dollars

For _____ /s/ Lt. H.M. Buchanan
0-2047263 MDRP-ASFTC

and by means thereof did fraudulently obtain from the Camp Barkeley Exchange, Camp Barkeley, Texas, $25.00 in lawful money of the United States, he, the said Second Lieutenant Holland M. Buchanan, then well knowing that he did not have and not intending that he should have sufficient funds in the Pasadena First National Bank, Pasadena, California, for the payment of said check.

Note: and five additional Specifications, identical in form with Specification 1, except as to the place and date, and the person by whom each check was cashed, and except as to the payee of each check, the date of cashing being in each instance the date on the face of the check, the person by whom cashed being in each instance the payee named in the face of the check, and the place of cashing being the same as the address of the person cashing the check, which excepted matters are as follows, respectively:

Specification	Date	Payee	Amount
2	10 May 1944	Camp Barkeley Exchange Camp Barkeley, Texas	$15.
3	26 July 1944	Sloane Drug Company Abilene, Texas	$10.
4	5 August 1944	Dallas National Bank Dallas, Texas	$25.
5	19 August 1944	Washer Bros. Fort Worth, Texas	$20.
6	26 August 1944	Monnig Dry Goods Co. Fort Worth, Texas	$25.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority 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 (R. 10).

a. Charge I, Specification 1 - absence without leave from 17 to 23 July. On 17 July 1944 accused was a member of the Medical Department Replacement Pool, Army Service Forces Training Center, Camp Barkeley, Texas, and was required to attend classes in a school then being conducted by that organization (R. 13). His absence from a class having been reported to Second Lieutenant Leonard M. Horton, commanding officer of the Pool, a search was made of accused's quarters and of the station, but accused was not found (R. 10,14). Similar searches for accused were made daily thereafter through 22 July without his being found (R. 14). Accused's bed was not made from 17 to 22 July, clothes lying upon it appeared to be the same and in the same position from day to day, and the bed did not have the appearance of having been slept in during that period of time (R. 59,61, 62). Accused was paged at the officers' club from time to time but did not respond (R. 61). He was returned to military control in Sweetwater, Texas, from the custody of civil authorities early in the morning of 23 July 1944 (R. 28). He was not authorized to be absent from his station during the time in question (R. 11). Original morning reports of accused's organization were introduced in evidence, duly certified extract copies thereof being substituted in the record, and in them accused was listed as from duty to AWOL as of 8:00 a.m. on 17 July 1944 and as returned to military control as of 12:40 a.m. 23 July 1944 (R. 11, Exs. A,B).

Lieutenant Horton admitted on cross-examination that he recalled directing accused to report to a "Captain Petty" to be interviewed with a view to being given a change in assignment, and that this could have occurred on or about 17 July. He did not recall at what time on that date it was first reported to him that accused was absent from class. It was Lieutenant Horton's understanding that accused went to see Captain Petty, but no change was made in accused's assignment (R. 14-16).

Two pre-trial statements, one dated 23 July and the other 24 July, voluntarily made, signed, and sworn to by accused after he had been advised of his rights in the premises, were introduced in evidence without objection (R. 27, Ex. M; R. 29, Ex. N). Accused admitted in these statements that it was his duty to attend the Instructors Guidance Course, but stated that he attended no classes between Monday (17 July) and the time he was arrested on 22 July. He also stated that he had spent all nights during that period in his quarters on the post except Wednesday night (19 July), which he spent at a hotel in Sweetwater, Texas.

Charge I, Specification 2 - Absence without leave, 24 July to 10 September. The original morning report of accused's organization for 25 July

1944 was introduced in evidence without objection, a certified extract copy thereof being substituted in the record, and in it accused was listed as from arrest in quarters to AWOL at 6:30 p.m. on 24 July 1944 (R. 12, Ex. C). Accused was delivered into the custody of Second Lieutenant James A. Berne from the Camp Plauche, Louisiana, stockade on 14 September 1944 for return to his organization (R. 25). On the day following his return to Camp Barkeley, Texas, accused voluntarily made and signed a written statement before Captain Wilfred E. Laswell, investigating officer, after having been informed of his rights in the premises, which statement was introduced in evidence without objection (R. 30,31; Ex. O). Accused stated that on the day he was placed in arrest in quarters (24 July) he left without authorization and went to Abilene, Texas, thence to Fort Worth and Dallas, Texas, and on to New Orleans, Louisiana, where he was later taken into custody by police (Ex. O). It was stipulated that he returned to military control on 10 September 1944 (R. 23, Ex. F).

b. Charge II and its six Specifications allege, in substance, that accused wrongfully and unlawfully, and with intent to defraud, made and uttered his worthless personal checks in violation of Article of War 95. The several checks or drafts as described in the Specifications, all of which were drawn on the Pasadena First National Bank, Pasadena, California, were properly identified and introduced in evidence without objection (R. 18-19, Ex. D; R. 22-23, Ex. E; R. 23, Exs. F,G,H,I; R. 24, Exs,J.K).

Mr. Leonard R. Williams, manager of Post Exchange No. 12, Camp Barkeley, Texas, stated that he gave accused $25 cash in exchange for the check which was introduced in evidence as Exhibit D, it being the check described in Specification 1 (R. 19). He passed the check on to Mr. Cecil W. Fields, Cashier of the Camp Barkeley Exchange, for deposit (R. 19).

Mr. Henry D. Toombs, manager of Post Exchange No. 1, Camp Barkeley, Texas, stated that he cashed the check which was introduced in evidence as Exhibit E, it being the check described in Specification 2 (R. 21). He would not attempt to identify accused as the person who presented the check, but stated that he looked at the official identification card of the person who did present it at the time he cashed it (R. 22). He did not recall whether all cash or part cash and part merchandise were given in exchange for the check, but it was his usual procedure to give cash (R. 21,22).

Mr. Fields, cashier, as aforesaid, of the Camp Barkeley Exchange, stated that he deposited the two checks last above mentioned, Exhibits D and E, in a bank for collection; that they were subsequently returned, and at the time of trial had not been paid (R. 37). He did not recall accused's having ever requested him to redeposit the checks and they had

only been deposited the one time (R. 38).

It was stipulated that accused made and signed the three checks or drafts which were introduced in evidence as Exhibits G, H, and I, they being the checks described in Specifications 3, 5 and 6, respectively; that he presented each of said checks to the payee therein named and received in exchange therefor, from such payee, the face amount of the check in cash (Ex. F).

It was stipulated that if R. D. Hargrave, cashier of the Dallas National Bank, Dallas, Texas, were present and called to testify, he would testify that accused, on or about 5 August 1944, received $25 in cash from the bank on his customer's draft which was introduced in evidence as Exhibit K, it being the draft described in Specification 4; that the draft was sent to the clearing house to be presented to the Pasadena First National Bank, Pasadena, for payment; that it was returned, unpaid, marked, "Insufficient funds"; and that the Dallas National Bank had not been refunded the $25 or any part thereof (R. 24, Ex. J).

It was stipulated that if S. L. Bierbauer, cashier and secretary of the Pasadena First National Bank, Pasadena, California, were present and called to testify, he would testify that during the period from 6 May 1944 to 21 August 1944 accused carried an account with that bank; that each of the six checks or drafts introduced in evidence as Exhibits D, E, G, H, I, and K was presented to the drawee bank in regular course of business for payment; that none of said checks or drafts was paid for the reason that accused did not have sufficient funds on deposit to pay any of them, and each was marked, "Insufficient funds" and returned, unpaid. On 21 August 1944, accused's account was closed because no funds remained to its credit (R. 24, Ex. L).

In his pre-trial statement made under date of 23 July, above referred to, accused stated that he had outstanding three checks, one to the Camp Barkeley Exchange, which had been returned for lack of funds, but that funds had been deposited to take care of them and the holders directed to redeposit the checks (Ex. M). In his pre-trial statement made under date of 24 July, also above referred to, accused admitted that he made and uttered to the Camp Barkeley Exchange the two checks which were introduced in evidence as Exhibits D and E (Specifications 1 and 2) and that he received in exchange for each the face amount of the check in cash (Ex. N). He stated that he was aware at the time of making the statement that both checks had been returned because of insufficient funds, but that he thought at the time he gave them that he had sufficient funds on deposit to meet them. He said that he did not keep a record of the number of checks he issued or of their amounts and had apparently withdrawn more money from the bank than he realized (Ex. N). In the third pre-trial

statement made by him, likewise already mentioned, accused admitted making and uttering the four checks which were introduced in evidence as Exhibits G, H, I and K to the respective payees in them named and receiving in exchange for each its face amount in cash, and that he knew when he tendered the checks that he did not have sufficient funds on deposit to meet them (Ex.O).

4. For the defense.

Upon being advised of his right to testify under oath, to make an unsworn statement, or to remain silent, accused elected to testify under oath. He was inducted into the Army on 30 June 1942, was commissioned a second lieutenant on 4 August 1943 at Camp Barkeley, Texas, and ordered to duty with Headquarters, Ninth Service Command, Fort Douglas, Utah. From there he was transferred to Pasadena Hospital, Pasadena, California, and remained there approximately eight months, until he was reassigned to Camp Barkeley, Texas, on 14 January 1944. He returned from McCloskey General Hospital, where he had been for mental observation (R. 45), on 7 July 1944, classified as "limited service", and was put in the Medical Department Replacement Pool to await assignment (R. 40). He attended The Instructors Guidance Course classes for one week, being the only member of the Medical Administrative Corps attending, all others being dental officers. His name was not called at any class during the week (R. 41). About 10:00 a.m. on Monday, 17 July, he was called to Pool Headquarters, relieved from attending the Instructors Guidance Course, and instructed by Lieutenant Horton to report to Captain (then Lieutenant) Petty at one o'clock that day relative to being transferred to the Transportation Section (R. 40). He went to the appointed place at one o'clock to see Captain Petty but the latter was not there, so accused waited for him most of the afternoon, finally getting to see him about 4:30 p.m., and thereafter he returned to his quarters (R. 41). He was not absent from the post anytime that day or from any duties, because he was relieved from school to see Captain Petty (R. 42). Captain Petty informed him that he (Petty) would have to consult higher authority about the change in assignment and that accused would be notified of the results through his own organization (R. 42). The following day, and each succeeding day, during normal working hours, he was at camp, either in his hut or at the Officers' Club (R. 42). He left camp only once prior to 22 July and that was on Wednesday night (19 July). He did not attend classes during the week because he had been formally relieved from school and was awaiting notice of a new assignment (R. 42, 43). He slept in his bunk each night with the exception of Wednesday night, did not see anyone looking for him, and did not know and had no reason to suspect that he was being carried as absent without leave on the morning reports of his organization (R. 43).

Accused stated that on 6 and 10 May, when he gave his checks

for $25 and $15, respectively (Exs. D,E), to the Camp Barkeley Exchange, he thought he had $75 or $80 in the bank, and issued the checks in good faith (R. 43,44,45). His wife had his bank book and he had not received a bank statement since December, so did not know his exact balance (R. 44). At the time of giving these checks, he was in McCloskey General Hospital and upon being released from there was granted a 30-day leave of absence, and therefore did not know that the checks had not been honored until after he returned from his leave (R. 45). He understood that the Exchange wrote him a letter about the checks but he did not receive it; his mail was not forwarded to him from the hospital while he was on leave (R. 45).

Accused admitted that the checks which were introduced in evidence as Exhibits G, H, I, and K, made and uttered on and after 26 July, while he was absent without leave, bore his genuine signature and were made and uttered by him, but claimed that he had no recollection of absenting himself without leave on 24 July or of making and uttering either of these checks (R. 45,46,52). He recalled being placed in arrest in quarters on or about 24 July and being informed that charges were going to be preferred against him under the 61st and 95th Articles of War, but stated that he was "emotionally upset at the time", and did not remember anything that transpired between then and 10 September (R. 45,46,49-52). He stated at one point, "To the best of my knowledge, I was an amnesia victim" (R. 50). He had paid none of the checks in question (R. 47,48, 49,50,51), but had offered to make full restitution out of his back pay and, more than a month before trial, had signed an instrument authorizing application of his back pay to redemption of the checks (R. 47). He had also offered to resign for the good of the service (R. 47).

On cross-examination, accused admitted that he made no effort between the time he arrived at Camp Barkeley on 20 January and the time of issuing his checks to the Camp Barkeley Exchange on 6 and 10 May, respectively, to ascertain the amount of his bank balance (R. 55). He thought he had sufficient funds on deposit to meet these checks, and their nonpayment by the bank was probably attributable to the fact that he had given other checks about the same time which reached the bank ahead of them (R. 56). He kept no record of his checks; was "trusting completely to [his] memory" (R. 56,57). He did not remember absenting himself without leave on or about 24 July or of giving any checks thereafter - was drunk at the time (R. 57) - but would have needed money and had no doubt made and uttered the checks (R. 57). He admitted that he had evidently had no trouble in remembering his name, organization, serial number, and home address, all of which appeared on the checks correctly in his handwriting (R. 52).

On re-direct examination, accused stated that after the two checks which he had given the Camp Barkeley Exchange were returned he wrote the Exchange a postcard, "telling them to redeposit the checks".

He added, "I was on leave at that time" (R. 58). His reason for requesting that the checks be redeposited was, "* * * I was going to put the money in the bank to cover those, if they would send them in" (R. 58). On re-cross-examination, accused admitted that he made no subsequent deposit to cover the checks. "At that time, they had already filed these charges against me, and I didn't have the money available" (R. 58).

While being cross-examined with reference to his alleged absence without leave from 17 to 23 July, accused admitted that he was only temporarily relieved from school on 17 July to go to see Captain Petty (R.53). He was not informed that he was going to be assigned to Captain Petty's department. He did not take it upon himself to relieve himself from the school, his "name wasn't being called there". He knew that he was supposed to attend the school irrespective of whether his name was called, but was under a "very great nervous strain at the time" - his "nerves were pretty well shot" - because "I didn't get this job" (presumably the assignment to Captain Petty's department) and because he had nothing to do in the school and because it had no competent instructor. "I didn't go to the school. That was the only thing. I was under a very high emotional strain" (R. 53).

5. Charge I, Specification 1 - Absence without leave, 17 to 23 July. The evidence of record is convincing that accused was not only absent from school classes which it was his duty to attend, but was also absent without leave from his station from 17 to 23 July, as alleged. The places where he claimed to have spent the working hours of those days were visited daily by other officers looking for accused, but he was not found. He claimed to have slept each night, except one, during the time in his own bunk, but it gave no evidence of having been slept in during any one of the nights. Accused's testimony was uncorroborated and is not at all convincing in the light of the other evidence of record. By his own admissions, he failed, without justification or excuse, to attend classes which he knew he was supposed to attend during the time in question, and was therefore, through his own fault, not at the place where he was required to be at the time he should have been there. The record is amply sufficient to support the findings.

Charge I, Specification 2 - Absence without leave, 24 July to 10 September. Absence without leave for a period of time as alleged was clearly established by the morning reports of accused's organization, by his own voluntary pretrial statement which was introduced in evidence, and by the fact that he was returned to military control several hundred miles from his proper station. Accused's claim that he was suffering from amnesia at the time is wholly uncorroborated and is not at all convincing when weighed in the light of the other evidence of record. The findings are amply supported by the record.

Charge II (AW 95) and its six Specifications - bad checks. The evidence clearly establishes that the six checks as described in the several specifications were negotiated by accused to the persons or firms alleged, that he received cash in exchange for the checks, and that each of the checks was presented in due course for payment and was dishonored and returned by the drawee bank because accused did not have sufficient funds on deposit to meet it. Accused knew that both of the checks which he gave the Camp Barkeley Exchange had been returned because of insufficient funds long before he gave either of the other four checks. He did not claim to have made any additional deposit during the intervening period of time. Obviously he knew that he had no funds on deposit to pay either of these four checks given while he was absent without leave. He admitted as much in his voluntary statement made immediately after he was returned to his station in September. As already indicated, his claim of having been a victim of amnesia and of having no recollection of giving the checks is uncorroborated and unconvincing in the light of the other evidence of record. As regards the two checks given the Camp Barkeley Exchange, accused did not claim to have made a deposit in the drawee bank after December 1943 and introduced no evidence tending to show that he had had such a bank balance at any time in the recent past before the checks were given as would justify a belief that they would be paid upon presentation. None of the checks had been paid at the time of trial notwithstanding a considerable period of time had elapsed since the last of the checks was given and several months since the first two were given. The positive evidence of record, together with accused's conflicting testimony, his failure to give any plausible explanation of his conduct and his long continued failure to make restitution, impels the inference that he issued each of the checks in question knowing that there were insufficient funds on deposit to his credit in the drawee bank to meet it and without intending that there should be. The negotiation of checks under such circumstances is a violation of Article of War 95 (par. 151, MCM 1928).

6. War Department records disclose that this officer is 27 years of age and married. He is a graduate of a high school and of the Capitol College of Pharmacy, and attended Macalester College for one year. He is a registered pharmacist and was engaged in the practice of his profession, as well as in other phases of drug store management and operation, before entering the service. He entered the service on 13 July 1942 as an enlisted man, received training in the Medical Corps, was an aviation cadet for a brief time, and, upon graduating from Officers Candidate School, on 4 August 1943, was appointed a second lieutenant, Army of the United States, Medical Administrative Corps, and reported for active duty the same day. He was admitted to McCloskey General Hospital, Temple, Texas, on 19 May 1944 and found to be suffering diseases of the nervous system not incurred in line of duty (EPTI and EPTEAD). On 27 June 1944 a Disposition Board convened at the hospital recommended that he be reassigned to temporary limited military service for a period of six months and that he thereafter be reexamined with a view to reclassification. Accused was returned to Medical Department Replacement Pool, Army Service Forces Training Center, Camp

Barkeley, Texas, to await reassignment to limited service, pursuant to the Board's recommendation.

7. The court was legally constituted and had jurisdiction of accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and authorized upon conviction of a violation of Article of War 61.

_____, Judge Advocate.

(On Leave), Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JAN 9 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 Holland M. Buchanan (0-2047263), Medical Administrative Corps.

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

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 94, 24 Mar 1945)

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

SPJGN
CM 268612

6 DEC 1944

UNITED STATES	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND
v.	Trial by G.C.M., convened at Hondo Army Air Field, Hondo, Texas, 1 November 1944. Dismissal and total forfeitures.
Second Lieutenant JAMES V. SPEED (0-1317051), 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 96th Article of War.

Specification 1: In that Second Lieutenant James V. Speed, Infantry, did, at Hondo Army Air Field, Hondo, Texas, on or about 16 October 1944, with intent to deceive First Lieutenant William R. Mac Pherson, Jr., his Flight Commander, officially state to the said First Lieutenant William R. MacPherson, Jr., that he, the said Second Lieutenant James V. Speed, was in the back seat of a car driving toward the colored section of San Antonio at about 0330, 15 October 1944, and for the first time that evening, saw Aviation Cadet Alfred G.Alston, who was then walking down the street with a civilian, and that Aviation Cadet Alfred G. Alston told him that he had been rolled, and that he, the said Second Lieutenant James V. Speed, then volunteered to take Aviation Cadet Alfred G. Alston back to the field, which he then did, or words to that effect, which statement was known by the said Second Lieutenant James V. Speed to be untrue.

Specification 2: In that Second Lieutenant James V. Speed, Infantry, was at or near San Antonio, Texas, on or about 15 October 1944, drunk and disorderly in uniform in a public place, to wit, Woodlake Country Club.

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

Specification: In that Second Lieutenant James V. Speed, Infantry, did, without proper leave, absent himself from his Station at Hondo Army Air Field, Hondo, Texas, from about 4 October 1944 to about 9 October 1944.

The accused pleaded not guilty to Specification 2 of Charge I and guilty to both Charges and the other Specifications thereunder. He was found guilty of all Charges and Specifications, "except the words 'drunk and'" in Specification 2 of Charge II, and was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved the sentence but remitted the confinement and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused, an infantry officer attached as a navigation student to Section K, 2523rd Army Air Forces Base Unit, Hondo Army Air Field, Hondo, Texas, was absent without leave from 4 October to 9 October 1944 (R. 6-7, 9, 13; Pros. Ex. 1). Although he was at the time awaiting reassignment and had no prescribed duties, he had been directed to remain on the post during duty hours pending the receipt of orders (R. 15, 21). First Lieutenant William R. MacPherson, Jr., his flight commander, made a thorough search of the post on four different days but was unable to find him. A visit by MacPherson to the colored section of San Antonio, Texas, on 4 October 1944 was equally unfruitful (R. 14, 16-19). A note tacked to the accused's door during the entire period of his absence without leave brought no response (R. 20).

On the night of 14 October 1944, five days after his return, he and Aviation Cadet Alfred G. Alston were at "Betty's", a "cafe for colored people" in San Antonio (R. 21-23). Both had a few drinks (R. 23-24, 41-43, 52). After a while they and several other aviation cadets and their "lady friends" decided to adjourn to the Woodlake Country Club, a "colored night club" (R. 23-24). Alston undertook to convey them all in a 1941 Ford coach which had been rented for him by and in the name of Cadet Henry Jones from the Texas Driverless Company (R. 22, 44, 50, 72-73). It was necessary for Alston to make two trips. The accused and his "lady friend" were passengers on the second. At the Woodlake Country Club he and Alston separated, joined different parties, and continued drinking (R. 24-25, 41-43, 51, 62, 71-72).

After midnight Alston indicated that he was ready to leave and, at the request of Aviation Cadet Glendyn C. Sydnor, whose own car was not then available, agreed to take the accused and Aviation Cadets Alves and Keene "back to San Antonio" (R. 24-25, 54, 69). Since Alston was a poor driver even when he had nothing to drink, the accused, at Sydnor's suggestion, seated himself behind the wheel of Alston's car (R. 54, 61, 63).

Sydnor's only purpose was to ensure the safety of Alston and the other fellow cadets (R. 70). Alston, on the other hand, "figured" that they had all been drinking and that he was "not as high . . . as the rest of them" and that consequently "it would be safer in [his] hands" (R. 27). Announcing that "I will drive," he "shoved [the accused] over" and took the wheel (R. 54-55, 67-68). Immediately thereafter in backing the car out of its parking place, Alston scraped the bumper against the fender of an adjacent automobile (R. 25, 54, 63).

After some discussion he agreed with the civilian owner of the other automobile that both would proceed in their respective vehicles to the office of the Texas Driverless Company and there enter into a financial adjustment (R. 25-26, 54-56). By this time the accused and Sydnor were convinced that Alston had had too much to drink and was "high" (R. 48). The accused accordingly insisted that he be permitted to drive and ordered Alston "to get in the back seat" (R. 26, 56, 68). Alston was defiant and declared that "if the others did not want to ride with [him] they could find other transportation . . ." (R. 26). He believed that "they did not want to ride with me and they had no means of transportation . . . and if they did not go back with me they would probably be late, and the idea was that they just did not want to ride with me, that they wanted to get back and they wanted to use the car and that was all there was to it" (R. 49).

Walking to the driver's side of the car, the accused again ordered Alston "to get in the back seat" and threatened to court-martial him in the event of disobedience. Alston became "pretty warm about that" and "some words were passed" (R. 26-27). Upon attempting to start the car, he discovered that the ignition keys were missing. They had been removed in the course of the argument by Sydnor who consistently sided with the accused (R. 27). In the meantime Alston became involved in a wholly independent controversy with the civilian whose fender had been damaged (R. 27-28). While engrossed in this secondary argument, Alston was pulled out of the car by Sydnor and "some one else" (R. 28,56). Once outside Alston was told by the accused "to get some sense in [his] head" or "go back with Sydnor" (R. 28).

Alston's only response was to endeavor to reenter his car. Before he could attain his objective he was seized by the accused, Sydnor, Aviation Cadet Alves, and several unnamed persons and carried or pushed toward Sydnor's car (R. 28, 46, 56). Upon reaching it Alston braced himself, "broke away", and fell to the ground. The accused dropped on top of him, gripped him by the throat with one hand, and began to choke him (R. 28-30, 46-47, 57, 65). According to Alston, there was a "wild",

"demonical", "fanatical" look in the accused's eyes (R. 34-35). Alston, who could neither "breathe or holler for help", was finally rescued by Sydnor who forcibly removed the accused's hand (R. 29-30, 51, 57, 65). Having been rendered weak and unable to resist, Alston was "picked up . . . like . . . a sack of potatoes" and thrown in the front seat of Sydnor's automobile. Sydnor followed him in and sat on his face. The accused, who remained on the outside, seized Alston's foot and twisted it. Alston suffered such excruciating pain that he screamed. By kicking at the accused Sydnor eventually caused him to desist (R. 31, 44, 58-59, 66).

In response to Alston's pleas Sydnor released him. Alston immediately ran to his car. The accused, who had seated himself behind the driver's wheel, "jumped out" and unbuttoned his coat. Before any blows could be exchanged Sydnor grasped Alston from behind and held him until the accused had started the car and set out for the office of the Texas Driverless Company (R. 32, 59-60). Both Sydnor and Alston followed, the former in his own automobile and the other in a car belonging to a friend of a girl in whose company he had been earlier in the evening (R. 32, 60, 74). At the office of the Texas Driverless Company a cash settlement was made with the civilian whose fender had been damaged (R. 33, 78-79). The girl who had obtained a ride for Alston cursed the accused for "doing what he did" and, although the accused tried to avoid further argument, some more "squabbling" ensued (R. 36, 75, 80). The accused talked "pretty loud" (R. 75, 80). He was not drunk at the time (R. 61-62, 79).

Despite their differences he and Alston were conveyed back to camp in the same car (R. 33). Their fracas had resulted in the cutting of Alston's lips and such severe bruising of his neck that scars were still visible some two weeks later (R. 30, 37, 89, 94). Realizing that these injuries would become the subject of official inquiry, he and the accused agreed to give the authorities a fabricated explanation (R. 36, 39). The story concocted was that Alston had been beaten into unconsciousness and "rolled", that is, robbed by three Mexicans and that, upon recovering his senses and while staggering around looking for the military police, he had been observed by the accused for the first time at about 3:30 a.m. on the morning of 15 October 1944 and had been directly conveyed by him to the post. These false allegations were made by the accused and Alston that morning to the guard at the gate and to the "COC". They were repeated by the accused the next day and on 18 October 1944 to Captain Roy W. Richards and First Lieutenant William R. MacPherson, Jr., his commanding officer and flight commander respectively, and, on 18 October 1944 only to Captain William J. Burton, the assistant Provost Marshal of Hondo Army Air Field (R. 36-37, 82-83, 86-87, 89-94). The statements to MacPherson, Richards, and Burton were all made in the course of official investigations (R. 82, 89, 93). A noteworthy discrepancy manifested itself at the very first interrogation before Lieutenant MacPherson. The accused represented that he had

found Alston in the company of a civilian. Alston, on the other hand, declared that, when first seen by the accused, he was with another cadet (R. 83). Although Alston intended to remain steadfast in his falsehoods to avoid giving "the class a bad record" and putting "it in a bad light", and although on the afternoon of 15 October 1944 he had impliedly, at least, renewed his promise to the accused to cling to the story concocted, Alston was caught in such a web of lies on 18 October 1944 that he "decided it would be best to just go on and tell the truth" (R. 37-39). The accused, when interrogated on this date, adhered to his original story, but subsequently on 25 October 1944, after being warned of his rights under Article of War 24, signed a statement reading as follows:

> "I will plead guilty to all the charges, with the exception of one specification and Charge, the one involving drunkeness and disorderly conduct. I am going to plead guilty in order to save unnecessary trouble, and the probability of incriminating some innocent people. I realize how grave the situation is and the offense committed, and I definitely know how wrong I was in touching the cadet. That does not, however, alter matters as they now stand, and I will plead guilty. Seemingly, this appears to be quite a tangled up situation, and there is a possibility of it being cleared up, but as that would probably not save me from punishment, I see no reason to incriminate a lot of people who had nothing to do with it. I will let things remain as they are."

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

5. Specification 1 of Charge I alleges that the accused did, "on or about 16 October 1944, with intent to deceive First Lieutenant William R. MacPherson, Jr., his Flight Commander," make certain false statements which were known by the said accused "to be untrue". Specification 2 of Charge II alleges that the accused was, "on or about 15 October 1944, . . . disorderly in uniform in a public place, to wit, Woodlake Country Club". Both offenses were laid under Article of War 96.

Although the accused's purpose in manhandling Alston may have been to remove a dangerous driver from the wheel, one who was a serious potential menace not only to his passengers but to all users of the highway, the methods employed were not consonant with the dignity and honor of an officer and a gentleman. The participation in a gang assault was in itself reprehensible, but in twisting Alston's leg and in choking him with sufficient force to inflict scars, the accused evinced such lack of self-control and such spite and vindictiveness toward an inferior as was wholly unworthy of one entrusted with authority. His conduct was reminiscent of the barroom rather than of the military establishment. He was dressed at the time in the uniform of an officer, his attack upon Alston was a breach of the peace

and per se disorderly, and it was committed in full view of several civilians, both male and female, at a country club, which was obviously a public place. Specification 2 of Charge I has accordingly been proved beyond a reasonable doubt.

The explanation of Alston's injuries fabricated by the accused and offered by him to Lieutenant MacPherson, his flight commander, in the course of an official investigation, was false in every detail and was calculated to deceive. This flagrant violation of Article of War 96 by the accused was materially aggravated by his persuasion of Alston to join in misleading the authorities.

6. The Specification of Charge II alleges that the accused "did, without proper leave, absent himself from his station . . . from about 4 October 1944 to about 9 October 1944". This was set forth as a violation of Article of War 61.

The unauthorized absence of the accused from his station for a period of five days has been established by his plea of guilty and by the testimony of Lieutenant MacPherson who searched the post for him on four of those days. Although the court improperly admitted a morning report prepared by an officer who did not have personal knowledge of the absence without leave, the offense was otherwise adequately proved and the accused's substantial rights were accordingly not prejudiced.

7. The accused, who is married, is about 24 years old. After attending Lincoln University for six months, he was employed from 1940 to 1941 as a laborer by the Baltimore & Ohio Railroad and by Swift & Company and as a "B Rammer" by the American Steel Foundry. He had enlisted service from 30 December 1941 to 10 April 1943 when he was commissioned a second lieutenant. Since this last date he has been on active duty as an officer.

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

Abner E. Lipscomb, Judge Advocate.

Robert Hannon, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 268612

1st Ind.

War Department, J.A.G.O., DEC 20 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 V. Speed (O-1317051), Infantry.

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

3. Consideration has been given to a letter dated 9 November 1944, from Mrs. James V. Speed, wife of the accused.

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

Myron C. Cramer

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

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Ltr. from Mrs. James V. Speed.

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 61, 27 Jan 1945)

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

SPJGQ
CM 268622

28 NOV 1944

UNITED STATES v. Private RICHARD F. SFER (32949816), 70th Harbor Craft Company, Camp Ross, Wilmington, California.	LOS ANGELES PORT OF EMBARKATION Trial by G.C.M., convened at Los Angeles Port of Embarkation, Los Angeles, California, 7 November 1944. Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for five (5) years. Rehabilitation Center.

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

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1. The record of trial in the case of the soldier named above, having been examined in the Office of The Judge Advocate General and there found legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves the lesser included offense of absence without leave, and to support the sentence, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Richard F. Sfer, 70th Harbor Craft Company, Camp Ross, Wilmington, California, did at Camp Ross, Wilmington, California on or about 24 August 1944 desert the service of the United States by absenting himself without proper leave from his organization and station with intent to shirk important service, to wit: military service in a foreign theatre of war, and did remain absent in desertion until he was apprehended at New York, New York, on or about 18 October 1944.

The accused pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures and con-

finement at hard labor for five years. The reviewing authority approved the sentence, ordered it into execution except the dishonorable discharge, which was suspended, and designated the Ninth Service Command Rehabilitation Center, Turlock, California, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 62, Headquarters Los Angeles Port of Embarkation, Los Angeles, California, 13 November 1944.

3. Competent evidence introduced by the prosecution established the following state of facts.

The accused, as a member of his organization when it was formed at Camp Anza, California, in April, 1944, was informed that the organization would complete a training program, would prepare for going overseas, and would have a "last furlough". The last of July, two weeks before furloughs were granted, a notice was placed on the bulletin board showing what men were eligible for embarkation furloughs. All the men were required to read the bulletin board. Preliminary training was completed at Camp Ross, California. A "readiness date" had been scheduled for the organization, of which the men were not told (R. 10). In July, as a part of the preparation for the expected movement, the Articles of War, including Article of War 28, were read to the men.

The accused was granted a furlough for 23 days, effective 1 August 1944 (R. 9; Ex. A). This was granted as a pre-embarkation or final furlough (R. 9), but the witness, the company commander, did not so inform the accused (R. 10), who was not required to give a reason in his application for furlough (R. 11). The accused overstayed his furlough 54 days (R. 7), until his apprehension, in uniform, in New York on 18 October 1944 (R. 12). The morning report showed him on 1 August 1944, duty to furlough 23 days (R. 9; Ex. A), on 25 August 1944, furlough to AWOL (R. 9; Ex. B), returned in confinement to his station 1 November 1944 (R. 9; Ex. D).

During his absence, when he was dropped from the rolls, his effects were turned in to the supply room (R. 11).

4. The accused, duly advised (R. 12), testified upon oath (R. 12-14), that he had been in the military service about 18 months and had had no trouble. He did not intend to desert. He took only a few articles on his furlough and left the rest at his post. Being without funds to return at the end of his furlough, he borrowed $82 from the Red Cross for that purpose, but started drinking and spent the money, so could not get back. Nobody told him that his furlough was given him because of embarkation upon returning (R. 14). Nobody told him that he could turn in to the nearest military post and be returned. He stayed at a service men's facility in New York (R. 14), ate at USOs (R. 17), "hitch-hiked" to Atlantic City (R. 19), and went to his home in a small New Jersey town (R. 20). There he wore civilian clothes part of the time, but only for sports and to go to the village store (R. 19, 20). He got small amounts of money from relatives and friends (R. 17). He did not work because he would have had to wear civilian clothes and risk being "stuck for desertion" (R. 14), and was afraid to try to hitchhike back to California for fear of apprehension (R. 16).

All that he knew about his company going overseas was that there were "a lot of rumors, nobody took it serious". He didn't remember when they first started (R. 15). He knew his outfit was in training, probably for overseas duty. He was learning to be a blacksmith. He did not have to give a reason for his furlough, and took the furlough because he wanted to go home and had the chance to do so (R. 15). He was not told that training was over or that this was a pre-embarkation furlough (R.16). He was not required to have a railroad ticket. He "hitchhiked" to New York (R. 18). He did not think it odd that so many others (75 men, R. 9) of his company were going on furlough, because the same thing had happened on his previous furlough (R. 18), last Christmas (R. 16).

5. As the charge of desertion is here predicated upon the alleged specific intent to shirk military service in a foreign theater of war, proof of that intent is an essential element in the case. Where, as here, such proof must be by inference from the fact of absence under the circumstances, the evidence must establish that the accused knew, or had reason to know and accordingly expected, that his embarkation for such foreign service was imminent and that his absence would avoid it. (CM 265447, Hodge; CM 262347, Moore; CM 253070, Moran; CM 231163, Sinclair, 18 BR 153, II Bull. JAG 139; CM 230826, McGrath, 18 BR 53; CM 227459, Wicklund, 15 BR 299; CM 226374, Collins; CM 225512, Henning, 14 BR 281; CM ETO2432, Durie.)

There is no such evidence here. Although Camp Anza, where the organization of which the accused is a member was formed, and Camp Ross, where it completed its training, are both in the area of Los Angeles Port of Embarkation at Wilmington, California, the organization had been there in training from April to August. It is not shown that its embarkation was in fact then imminent, or that it ever did embark. Still less is knowledge thereof imputed to the accused. An announcement in April that the organization would train for overseas duty and then have a last furlough, followed by a required reading of the Articles of War sometime in July and furlough notices posted on the bulletin boards the last of July, along with recurrent rumors of departure over an indefinite period of time, do not, either in law or in fact, so charge the accused with notice of imminent embarkation as to render unreasonable any hypothesis explaining his absence except that of intention to avoid overseas service.

Although in a proper case the fact that the accused has received orders contemplating overseas movement may be shown and considered as a circumstance upon which to base an inference of intention to abandon the service (CM 234716, Stinson, 21 BR 147, II Bull. JAG 268), the accused cannot be convicted of desertion with intent not to return where he is charged with desertion with the intent to shirk important service or avoid hazardous duty. (CM 265447, Hodge, supra; CM 262416, Morel; CM 224765, Butler, 14 BR 179.)

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

6. The charge sheet data, accepted at the trial, show that the accused is 19 9/12 years of age, and was inducted into the military service at Camden, New Jersey, on 11 May 1943.

7. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings of guilty of absence without leave by the accused from his organization and station at the time and place alleged, terminated by apprehension at the time and place alleged, in violation of the 61st Article of War, and legally sufficient to support the sentence.

(on leave), Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private Richard E. Sfer (32949816), 70th Harbor Craft Company, Camp Ross, Wilmington, California, together with the foregoing opinion of the Board of Review.

2. I concur in the opinion of the Board of Review and, for the reasons therein stated, recommend that so much of the findings of guilty of the Charge and Specification be vacated as involve findings of guilty of an offense by the accused other than absence without leave at the time and place alleged, terminated by apprehension at the time and place alleged, in violation of the 61st Article of War, and that all rights, privileges and property of which the accused has been deprived by virtue of the findings so vacated be restored.

3. The sentence is sustained and is appropriate.

4. Inclosed is a form of action suitable to carry into effect these recommendations, should such action meet with your approval.

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

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

(So much of finding of guilty of Charge and Specification vacated as involves findings of guilty of an offense other than absence without leave in violation of Article of War 61. G.C.M.O. 669, 20 Dec 1944)

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

SPJGN
CM 268694

2 FEB 1945

UNITED STATES	)	ARMORED CENTER
v.	)	Trial by G.C.M., convened at Fort Knox, Kentucky, 25-29, September and 2 October 1944. Death by hanging.
Private ELLIS V. HAMM (6971618), Battalion Headquarters & Headquarters Company, Armored School Demonstration Regiment.	)	

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

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

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

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

Specification: In that Private Ellis V. Hamm, Battalion Headquarters & Headquarters Company, Armored School Demonstration Regiment, did, in Meade County, Kentucky, on or about 9 May 1944 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant Jack O. Hollis, a human being by striking him with an iron bar.

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

Specification: In that Private Ellis V. Hamm, Battalion Headquarters & Headquarters Company, Armored School

Demonstration Regiment, did, at Fort Knox, Kentucky on or about 10 May 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Columbus, Georgia, on or about 4 June 1944.

He pleaded not guilty to and was found guilty of both Charges and the Specifications thereunder. He was sentenced to be hanged by the neck until dead. The findings and sentence were concurred in by all the members of the court who were present at the time the vote was taken. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: Sergeant Jack O. Hollis and the accused Private Ellis V. Hamm were both members of the Armored School Demonstration Regiment at Fort Knox, Kentucky (R. 193, 238, 244). About 10 a.m. on 9 May 1944, Sergeant Hollis was in the regimental guardhouse and displaying a roll of bills, among which could be seen two one-hundred dollar bills and several twenty dollar bills, when accused entered. Hollis, apparently referring to some prearranged venture, asked accused "if he had got the car" and accused said no, but he would go down "to the Reproduction" and see if he could obtain one. Hollis said, "Well, when you get the car you know where to find me" as accused departed. Hollis remained in the guardhouse about twenty minutes and then went out (R. 118-122).

Accused telephoned Sergeant Gerald A. Miller at the Reproduction Department of the Armored School, and asked if he could borrow his car "to go to Vine Grove to go to the bank" saying on his return he would repay Miller $10 he had previously borrowed. Miller agreed on condition accused was back in an hour. He did not see the accused take the car (the ignition key was in it) but when he glanced out about 10:30 a.m. the car was gone. The car was a buff colored, 1940 Mercury convertible coupe (R. 63-65, 82; Pros. Ex. 9). Sometime that morning "between eight and eleven" accused was seen driving the car on a gravel road leading to the "Dixie Highway" on the outskirts of Fort Knox. The individual who observed the car believed there were two persons in the car at the time (R. 126-129).

About noon, "in the early part of May", two women, living about a mile from Battletown, Kentucky, on Highway 228, saw a car resembling the Miller car turning around on the "old Paynesville and Richardson Landing Road" a little traveled side road. A man wearing what appeared to be a soldier's uniform got out, came around to the front of the car, and then got back in and rapidly drove away (R. 140-143, 146-148). Bonnie June Jones, age 10, living at Battletown, saw accused late one afternoon on an unspecified date. She was grazing a horse along the Battletown road when accused came by in a car and asked her if she wanted a ride. She got in

and accused put his arm around her and asked her if she wanted a drink of whiskey. She refused, asked to be driven home and accused complied (R. 151-155).

Sergeant Miller's car was returned to the Reproduction Center about 4 p.m. on 9 May 1944 and shortly thereafter accused was seen to get out of the car (R. 103-104, 110). He came over to a nearby parked car and of a stranger sitting therein he inquired, "Who are you?" (R. 104). He passed on and, meeting an acquaintance, paused to talk. There was a reddish looking stain on accused's right sleeve and this acquaintance observed that he had been drinking (R. 106-108). Accused then went into the Reproduction Center, used the telephone and gave a sergeant present $.40 cents he owed for a phone call he had made a month previously. The sergeant noticed nothing unusual about accused although a corporal present thought accused was untidy and had the odor of liquor on him. Accused's company commander, who saw him about the same time, noted nothing unusual in accused's appearance (R. 194-195).

Sometime after 4 p.m. Sergeant Miller saw that his car had been returned and went out to inspect it. The gas tank, which in the morning had five or six gallons in it, was almost empty. The exterior of the car, except for additional mud, presented the same appearance as in the morning. Inside, however, the floor of the car and the carpets were wet and there were fresh dark stains on the ceiling, the panel of the right door and the dash of the car. On the floor in the back of the car was a metal flag staff holder, approximately 20 inches long, 1 3/4 inches in diameter and weighing about ten pounds. There were "rusty brown" stains on it which later were identified as blood stains. The holder had not been in the car previously. When Sergeant Miller and some passengers went home from work at 5 p.m. they rolled up the right hand window and found dark red stains and hairs on it (R. 65-72, 87, 93-94, 98, 338, 420; Pros. Exs. 10-15).

Accused was seen near the Regimental Motor Pool shortly after 5 p.m. (R. 161). An hour later he entered a used car dealer's salesroom in Louisville and, after some bargaining, purchased a car on which he made a down payment of $285, giving the salesman two one-hundred dollar bills and some smaller ones. He exhibited no signs of drinking at the time (R. 169-171; Pros. Ex. 18). Later in the evening, about 10:30 p.m., he came to the house where he and his family occupied an apartment and took his wife, some friends and the landlady out in the newly acquired car to a nightclub. He and his wife did considerable drinking at the club. When the group returned home accused paid the landlady $49.11 that he owed her. She noticed that he had "some tens and twenties" in his wallet (R. 174-175).

Accused returned to the used car dealer at 8:30 the following morning, 10 May, and representing that he had been transferred to Texas and could not take the car with him, asked for the refund of his money. They refused to rescind the transaction and accused asked and received permission to leave the car there until that night (R. 190-191). Accused failed to appear for duty at camp and after a search was reported absent without leave on his organization's morning report as of 1300 on 10 May (R. 193-194; Pros. Ex. 19). Around midnight he telephoned his wife at the apartment but he did not come home until about 2 a.m. that morning, 11 May, and at that time he was wearing civilian clothes. About 8:30 a.m. accused and family hurriedly packed their belongings and vacated the apartment (R. 175-177, 183-186).

The badly decomposed body of Sergeant Hollis, with a hole an inch in diameter in the back of his head, was discovered on 26 May 1944 in an isolated wooded area off a wagon track connecting the Paynesville-Richardson Landing Road with Highway 228, near Cold Springs about seven miles from Brandenburg, Kentucky (R. 46-47, 61-62; Pros. Exs. 3-8). Sergeant Hollis' "dog tags" were still on the body and after its removal to the morgue several friends positively identified it (R. 50, 238-239, 244-245). An autopsy disclosed that death was the direct result of shock caused by a "multiple skull fracture with subsequent brain injury and damage". There was a complete fracture of the spine at the 3rd and 4th cervical level - a broken neck - and complete fractures of the left frontal bone and the occipital bone of the skull. There was an opening in the frontal bone measuring $3\frac{1}{2}$ cm. by $6\frac{1}{2}$ cm. and in the occipital bone measuring 3.2 cm. by 3.3 cm. The medical witness who performed the autopsy was of the opinion that the injuries had caused death in about 20 minutes. He estimated that when the body was found Hollis had been dead between 14 and 21 days (R. 219-223, 228, 232-233).

Accused was returned to military control at Fort Benning, Georgia, on 5 June 1944 (R. 193; Pros. Ex. 20). He was in civilian clothes when turned over on 8 June, to guards from Fort Knox. He was returned to Fort Knox and placed in confinement there on 9 June (R. 198-201; Pros. Ex. 21). The following day, 10 June, he was taken to the "Criminal Investigation Office" and after Article of War 24 was read and explained to him, he professed his willingness to answer the questions of Captain John I. Messmer, Post Intelligence and Investigation Officer, concerning his absence without leave and the death of Sergeant Hollis (R. 256, 261, 280-283). The accused was not threatened nor were any promises made to him (R. 261, 324). A verbatim transcript (Ex. 29) was made of the questions and answers which accused, after reading and correcting, signed and swore to on 14 June 1944 (R. 257-258, 283-284, 296-297, 392).

In his replies to Captain Messmer's questions accused stated

that on 8 May 1944 he and Sergeant Hollis were in a poker game during which accused lost $39 out of $46 in his possession (Pros. Ex. 29, p. 7). That evening he borrowed $20 from Sergeant Hollis (id. p. 8). Accused met Hollis at 7:30 o'clock on the morning of 9 May 1944, made arrangements to have breakfast with him later at the Main Post, and after borrowing Sergeant Gerald Miller's car, picked up Hollis at the regimental guardhouse about 10:45 a.m. (id. p. 11-13). After breakfast accused drove Hollis off the post by a back road so that Hollis could obtain some more whiskey. Hollis had a pint of whiskey with him at the time from which they had taken several drinks (id. p. 13-14). They finally found a store where they were able to obtain whiskey and headed back toward the post around 12 o'clock (id. p. 15-16). Hollis proposed they play poker so accused pulled off the road. By this time they were "pretty well along in the whiskey" (id. p. 16). Accused was very lucky and soon won $100 mostly in bills. The game continued and accused eventually won three $100 bills from Hollis, the $20 Hollis had loaned him and also a wrist watch. Accused now had about $450. Hollis asserted he was broke and asked accused to lend him $50 but accused refused. Embittered by his losses, Hollis, after making several caustic remarks, said he was going to get his money back (id. p. 16-19, 26). Taking a knife from his pocket but not opening the blade, Hollis took hold of accused's arm and said "Let me have that fifty dollars". Accused was sitting under the wheel and Hollis was at his side. Accused seized Hollis around the throat and "mashed" him until he released accused and fell back limp in the seat. It was then about two o'clock (id. p. 19-20). Accused got out of the car to relieve himself and then returned and sat down beside Hollis. Hollis finally aroused, picked up the knife which he had dropped on the floor, and opened the blade. Accused was afraid and picked up an iron bar that was in the back seat and ordered Hollis to put away the knife. Hollis asserted he was not going to bother accused and told him to drive back to the post. Accused replied he would not move so long as Hollis held the knife. Hollis, who was right handed, transferred the knife to his left hand and in accused's own words the following took place:

> "I was still a little leery, but I started to take off then. He started to push that knife towards me in his left hand. I told him, 'Jack, put that knife up, or I'll hit you with that bar.' As I said that he was going kind of slow toward me. Then he got it up against me. I told him, 'If you move it, I'm going to hit you with that bar.' I said, 'I can hit you with this worse than you can hit me with that knife.' I asked him to put the knife up and 'I'll lend you the money right now.' He said, 'No, I want it all.' Even though he's a hard loser, I admit that's kind of unusual to do that. Anyway he pushed that knife up against me. It wasn't near

my skin it seemed like, but I could feel the thing prickling. He said, 'Give it all to me, or I'll cut your guts out.' He started mashing, and it seemed just like I went crazy. I hit him with that bar several times. I'm afraid to say I actually hit him after he dropped the knife. It seemed like I went blind for a couple of minutes. I don't recall when I hit him last or where I through the bar, but when I could see again, everything seemed hazy. There was a lot of blood around everywhere. That's all I could see.

Q. How many times did you hit him?
A. Sir, I don't know. I wasn't drunk. I wasn't past the point where I knew what I was doing, but it seemed I was blind.

Q. You say you struck him several times? A. Yes, sir.

Q. Then what happened?
A. As I say, I wasn't too drunk to know what I was doing, but I was in a haze it seemes like. I don't recall relinquishing the bar at all, but I know I didn't have it in my hand. It seemed like - it didn't knock me out - but it seemed like I got up from the seat. When I actually come to, it seemed like I was raising myself up off the seat, and I didn't have the bar in my hand. He couldn't hit me, sir, he had the knife in his left hand. When I come to, he was laying back on the seat, and blood was still pouring."

Hollis was still breathing but it soon stopped and accused knew he was dead. Panic stricken he drove the car aimlessly around the countryside and finally decided to hide the body. He drove off the Brandenburg highway on a side road and removed the body from the car, staining the sleeve of his shirt in so doing. He got back in the car, drove on a little further on the side road and then turned around. The car becoming mired, accused got out, looked it over and then getting back in was able to pull out. He drove further on, picked up a little girl, tried to put his arm around her but as she wanted to go home he drove her there. He returned to the post, on the way stopping at a stream near Grahampton where he washed out the car. The knife which was lying on the floor of the car and Hollis' shoes which accused had removed from the body were dropped in the stream (id. p. 21-24). Accused's account of subsequent events is in substantial accord with the testimony of the prosecution. He purchased a car and went to a night club on the evening of 9 May (id. p. 24-29). The following morning he performed some duties on the post and was on his way to the Reproduction Center when he saw a

group of military police gathered around Sergeant Miller's car. He was frightened and, deciding to take his wife and baby home to Alabama, he left the post and went to Louisville (id. 29-30). After vainly attempting to secure a refund of his money on the car he purchased some civilian clothes and walked the streets afraid to go to the apartment. Early the following morning he went to the apartment and a few hours later he and the family hurriedly packed and fled from Louisville (R. 31-34). They arrived in Opelika, Alabama, on 12 May and then went to Columbus, Georgia, where they stayed with a relative. Accused was in civilian clothes all the time. While in Columbus accused attempted to make a phone call to his commanding officer but was unsuccessful. He made another call to a friend at the post to find out what charges were pending against him. On Sunday, 4 June 1944, he was apprehended by military police in Columbus (id. p. 34-36).

On 12 June 1944, and again on 15 June 1944, accused, after being warned of his rights, directed Captain Messmer and others in a car over the route which he and Sergeant Hollis had traversed on 9 May, pointing out the scene of the assault and the place of disposal of Hollis' body. The latter place was in a wooded area with dense, heavy undergrowth, weeds, briar and bushes (R. 292-301). On 3 July 1944, after proper warning; accused was again questioned by Captain Messmer. A transcript (Pros. Ex. 30) of the conversation was signed by accused on 7 July 1944 (R. 272, 286-287, 392). In the course of this conversation accused asserted that he had thrown the iron bar, with which Sergeant Hollis was later slain, into the car just before picking up Sergeant Hollis on 9 May. He had found the bar on the post when he stopped at "the cleaners" and had used it to knock out some dents in the fender before tossing it in the back seat (Pros. Ex. 30, p. 4). Accused also admitted removing a bracelet from Sergeant Hollis' arm which he stated he threw into the stream (id. p. 2). Immediately following his questioning on 3 July by Captain Messmer, accused was interviewed by Second Lieutenant John E. Kreps, the investigating officer in the case, and after being warned of his rights, made and signed a statement in writing (Pros. Ex. 2) "that the thirty-six (36) page sworn statement which I made to Captain Messmer on 10 June 1944 and which I signed on 14 June 1944 is the official statement which I desire to make" (R. 272-274, 279).

Prior to the reception in evidence of the statements of accused (Exs. 29, 30), testimony was introduced by the defense on the question of their voluntary character. Accused testified that when he was arrested on 4 June 1944 he was first placed in the "bull pen" of the stockade at Fort Benning with other prisoners. On the following day all of his clothes were taken away, he was given a blanket and placed in "solitary" in a small 4 x 8 cell. He asked to see his brother-in-law, Sergeant William Tarver, a member of the military police who was present when accused was arrested, but was not permitted to see him. He was

given three meals a day and at meal times was taken out to the latrine where besides the toilets there was one wash basin used indiscriminately by all the inmates. On 8 June he was taken out of the cell, was given a shave, his clothes were returned and he was turned over to guards from Fort Knox (R.370-373,380). The guards treated him well except that he was handcuffed. They traveled in a day coach and on the overnight trip he dozed as much as was possible under the circumstances. They arrived in Louisville on the morning of 9 June and after breakfast accused was lodged in a "solitary" cell in a downtown military police station, being moved later in the day to Fort Knox (R. 373-374). He was placed in confinement in a cell block consisting of two small adjoining cells with a hallway in front, off of which was a latrine. He was told to stay in the one cell except when let out to use the latrine. His clothing, except for shirt, pants and socks, was removed. Every 15 or 20 minutes the guard looked in at him. He did not have a mattress for his steel bunk, but only a blanket for several days. He slept poorly that night and the following morning was taken to Captain Messmer's office for questioning which lasted the greater part of the day (R. 375-378). His family arrived on 20 June and were permitted to see him. Except for their visit he was not permitted to see anyone out of Captain Messmer's presence until Lieutenant Kreps, the investigating officer, interviewed him (R. 377). When he attempted to talk to a guard he was told they were not permitted to talk to him (R. 375). It was not until the day charges were served on him [22 July] that he was permitted to speak to anyone in private. On that day he saw his defense counsel (R. 377, 381). He asked Captain Messmer several times about the advisability of securing civilian counsel and was told his defense counsel would take care of it when he was appointed (R. 378).

Members of the military police who maintained guard over accused at Fort Knox, testified that their orders were to permit no one to speak to or to visit accused unless Captain Messmer was present (R. 341, 348-349). They described the cell in which accused was kept as either 4 by 6 or 5 by 8 feet in size (R. 342, 357); there was a window at the back of the cell (R. 354), and a light in the ceiling (R. 360). The cell was equipped with a fold-down steel bed with a mattress (R. 361). The door of the cell was made up of bars as were the cells themselves (R. 353). The cell opened on a corridor off which there was a toilet to which he had free access. The door to this corridor was not locked. The cell in which accused was confined, an adjoining vacant cell and the corridor in front made up the cell block (R. 351, 360). The door leading to the cell block was a solid one with a small barred aperture (R. 353). There was an outside window directly opposite this aperture (R. 361). Accused was fed three meals a day, was never touched or treated in any manner different from other prisoners (R. 352). He did not request any letter-writing materials while confined (R. 365).

4. Evidence for the defense: Testimony concerning the character of Sergeant Hollis was given by several witnesses. Private Walter E. LaRue, who had known deceased for about a year at Fort Knox, testified that Hollis was "a nice guy" when sober but when drunk "it was otherwise". He stated that on one occasion Hollis started an argument over a card game and another time Hollis pulled out a pocket knife in the mess hall and threatened to cut the cook's throat if he did not cook him a steak (R. 395-397). Staff Sergeant Jess M. Gray, an acquaintance of Hollis since June 1942, observed that on several occasions Hollis had displayed temper in a poker game, had thrown the cards around, cursed and stalked off. However, he had never seen Hollis start a "rough house" or attack anybody. Sergeant Gray never played with Hollis because "he would win if he had to take it out of the pot between the cards" (R. 399-402). Five employees of the Kentucky Hotel in Louisville, where deceased usually spent his weekends, testified that Hollis was peaceful when sober but when drinking he was loud and rowdy and would "cut up a little bit" (R. 398, 403, 408). Two of these witnesses gave their opinion that Hollis' reputation for peace and quietude was bad when drunk. On several occasions it was necessary to quiet him (R. 407, 408). Hollis carried a knife and one night had it out and was playing with it when an "MP" came by and told him to put it away. He did not threaten anybody with it (R. 404, 409-410).

Accused, cognizant of his rights, testified in connection with the desertion charge only (R. 410-412). He stated that during his absence in Columbus, Georgia, he made three attempts to communicate by telephone with his company commander. He made one call the day before he was apprehended in an attempt to find out if he should turn in at Fort Benning or Fort Knox (R. 412, 418). During the period he was in confinement at Fort Knox he had opportunities to escape but never attempted to do so (R. 413-415).

On cross-examination accused admitted being in civilian clothes while in Columbus. He knew that Fort Benning was only seven or eight miles away but did not surrender there. There was also a military police depot in Columbus (R. 415-416). He asserted the reason he called camp was to find out if he was charged with absence without leave or desertion. If charged with desertion he would have surrendered immediately (R. 417).

It was stipulated that Sergeant William F. Tarver (brother-in-law of accused) would testify that on three different occasions between 13 May 1944 and 4 June 1944 accused, in his presence, placed long distance calls for accused's commanding officer at Fort Knox (R. 339).

5. Specification, Charge I: It is alleged that accused did, "in Meade County, Kentucky, on or about 9 May 1944, with malice aforethought,

willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant Jack O. Hollis, a human being by striking him with an iron bar", in violation of Article of War 92.

Murder is the unlawful killing of a human being with malice aforethought. By "unlawful" is meant without legal justification or excuse. The term "malice aforethought" may mean any one of the following states of mind preceding or coexisting with the act or omission by which death is caused: an intention to cause the death of, or grievous bodily harm to any person (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; or intent to commit any felony" (MCM, 1928, par. 148a). Robbery is, of course, a felony.

The words "deliberately" and "with premeditation" have been held to mean "* * * an intent to kill, simply, executed in furtherance of a formed design to gratify a feeling for revenge, or for the accomplishment of some unlawful act" (Wharton's Criminal Law, Vol. I, sec. 420).

The evidence against the accused, even outside of his own admissions, presents a chain of entangling and incriminating circumstances which indisputably and inexorably link him with the brutal death of Sergeant Jack O. Hollis. The accused was shown to have promised, on the morning of 9 May 1944, to borrow a car and drive Hollis to some previously selected destination. Hollis had in his possession at the time a large roll of currency including two $100 bills. Accused did borrow a car and was seen driving it in a wooded area outside of Fort Knox near Battletown, Kentucky. Fifteen days later, on 26 May 1944, the body of Hollis, his neck broken and skull bashed in, was found hidden in the same area. A pathologist estimated he had been dead between 14 and 20 days. Late in the afternoon of 9 May, accused returned the borrowed car with the interior showing signs of having recently been washed out in a vain attemp to obliterate dark red stains, some of which still appeared on the ceiling, sides, and windows. In the back seat was a heavy, blood spattered metal pipe, obviously the lethal weapon. Accused himself was seen about this time and was observed to have a blood soaked sleeve. On the evening of 9 May accused purchased a used automobile and gave two $100 bills as part of the down payment. The same evening he took his wife and friends to a night club and also paid a $50 rent bill. The following day, 10 May 1944, accused did not appear at camp for duty and after some furtive and apprehensive actions indicative of his guilty frame of mind, finally came to his apartment clad in civilian clothes. Early the following morning accused took his family and fled. He was returned to military control at Columbus, Georgia, 5 June 1944.

This web of circumstantial evidence, together with the conclusions and inferences legitimately derived therefrom, brand the accused as the murderer of Hollis with robbery as the obvious motive. No other fair and rational hypothesis save that of guilt is justified under the record. In addition to and corroborating this circumstantial evidence, there are the admissions of accused that he wielded the deadly weapon and inflicted the wounds by which Hollis' life was ended. It is unnecessary to decide whether the statements of accused, because of the elements of self defense and provocation they introduce, constitute admissions rather than confessions and hence admissible without proof of their voluntary character, because their voluntary character is plainly established. The introduction of these written statements of accused was strenuously opposed by counsel for accused on the alleged ground that their involuntary character was established by the nature of accused's confinement prior to questioning. With this contention the Board of Review cannot agree. While it is true that accused was closely confined he does not appear to have been restricted beyond reasonable limits. There is no showing or claim of any mistreatment of the accused. He appears to have received the same food, was allowed the same hours of sleep, similar toilet facilities, as other prisoners. He was not grilled extensively, was not threatened or abused in any manner. No duress or coercion was exercised nor, on the other hand were any promises extended him. He was not prevented from obtaining counsel nor from seeing friends or relations or communicating with them except that, according to accused, he was not permitted to speak to his brother-in-law while temporarily confined at Fort Benning. Inasmuch as his brother-in-law was a member of the military police and apparently aided in accused's apprehension it seems doubtful that any useful purpose would have been served by such interview or that any prejudice resulted from denying it if such be the fact.

In his statements accused admitted striking Hollis many times with a metal flag staff holder around and over the head and killing him. He contended, however, that preceding his assault the two had engaged in a game of poker, that he had won all of Hollis' money and that Hollis had attacked him with a pocket knife in an attempt to recover his money. The improbability of the two men pausing by the wayside to engage in a game of poker by themselves is heightened by the fact that outside of the twenty dollars Hollis had lent him the night before accused had only seven dollars in his possession while Hollis had several hundred dollars on his person. But even under this story as related by accused there is lacking any real excuse for his murderous attack upon Hollis. According to accused the two exchanged blows, Hollis holding an unopened knife in his hand and accused choking Hollis until he fell back limp, the knife falling to the floor of the car. Hollis did not revive for several minutes and then picked up the knife and opened the blade. He transferred the knife to his left hand and pushed it slowly against accused

at the same time threatening him. Accused with insensate rage then struck Hollis over the head repeatedly with the iron bar. It is contended that accused acted in self defense. The following language from the Manual for Courts-Martial (par. 148a) enunciates the settled rules governing self defense:

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

The events leading up to the killing of Hollis as described by accused do not disclose reasonable grounds for a belief by accused that it was necessary for him to kill Hollis in order to save his, the accused's life nor does it appear that the accused honestly believed that his life was imperiled. Although accused asserted that he was put in fear when Hollis opened his knife, yet accused qualified this statement by saying "He couldn't hit me, Sir, he had the knife in his left hand" (Hollis was right-handed). When the accused's story is viewed in the light of the character of his attack upon the deceased, the hollowness of his plea of self defense appears. Even if the use of some force by the accused was justified, the circumstances described did not warrant the use of such excessive violence as resulted in Hollis' neck being broken and his skull left with gaping holes. It is an elementary principle of the law of self defense that greater force may not be used than is necessary to repel an attack. The conclusion follows that the brutal killing of Hollis was not done in self defense.

Furthermore, there is lacking such provocation as would reduce accused's offense to manslaughter, even under his own version of the crime. On the question of provocation, the Manual for Courts-Martial (par. 149a) states the following:

> "The law recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by the provocation, and not from malice, he may strike a blow before he has had time to control himself, and therefore does not in such a case punish him as severely as if he were guilty of a deliberate homicide.
>
> "In voluntary manslaughter the provocation must be such as the law deems adequate to excite uncontrollable

passion in the mind of a reasonable man; the act must be committed under and because of the passion, and the provocation must not be sought or induced as an excuse for killing or doing bodily harm. (Clark).

"The killing may be manslaughter only, even if intentional; but where sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists. Instances of adequate provocation are: Assault and battery inflicting actual bodily harm, an unlawful imprisonment, and the sight by a husband of an act of adultery committed by his wife. If the person so assaulted or imprisoned, or the husband so situated at once kills the offender or offenders in a heat of sudden passion caused by their acts, manslaughter only has been committed.

"Instances of inadequate provocation are: Insulting or abusive words or gestures, trespass or other injuries to property, and breaches of contract."

Although Hollis' actions as related in accused's version of the killing, amount to something more serious than "Insulting or abusive words or gestures" they fall short of an "Assault and battery inflicting actual bodily harm". When all the events allegedly preceding the killing are considered, such as the struggle between the men, the throttling of Hollis into insensibility by accused, and the ensuing "cooling time", no valid reason appears why Hollis' actions should have excited accused into sudden, uncontrollable passion. The evidence indicates accused's attack was motivated by malice rather than by any adequately provoked passion.

There are present in this case circumstances which render accused's version of the killing unacceptable. His actions following the killing are not those of a man who has killed in self defense or on justifiable provocation. It is possible that one involved in such a situation, fear ridden and panic stricken, might be foolish enough to hide the body and conceal the crime as accused did here. But what is inconceivable is that a person in such a frame of mind could immediately afterwards purchase an automobile, take his wife and friends joyriding and visit a night club. These are not the timorous reactions of a fear-struck individual unwittingly involved in the death of another but rather the calloused and hardened actions of a murderer.

It is the instrument by which the murder was accomplished, the heavy metal flag staff holder, that furnishes the most damning link in the chain of evidence against accused. The fact that accused placed it in the car on the morning of the killing just before picking up Hollis demonstrates most eloquently that accused had already planned to rob Hollis of the money which accused knew Hollis carried and that he intended to use the holder as a bludgeon in accomplishing his purpose. Accused states, in effect, that he had no particular purpose in placing the holder in the car, that he simply saw it on a street inside the post, used it to beat out a dent in the fender and then idly tossed it in the back seat. The

explanation is not convincing. There is no reason why accused should carry away a piece of property, presumably belonging to the government, for which he would have no use except in the manner in which it was in fact used.

The undisputed facts indicate a planned crime. The accused had lost most of his money in a poker game and then became aware that Hollis had a large sum of money on his person. He made arrangements to drive Hollis to some destination and before picking him up placed an iron bar in the rear seat. He drove Hollis to a secluded spot, killed him, hid the body and attempted to conceal other evidence of the crime. He secured possession of Hollis' money and the same day spent a large part of it. The following day, becoming frightened, he fled to his home several hundred miles distant. The picture thus presented is plainly that of premeditated murder. There is testimony that accused was drinking at the time. The applicable rule is stated in 26 American Jurisprudence, sec. 118, as follows:

> "One intoxicated to the extent of being deprived of mental capacity to deliberate or premeditate cannot be guilty of a crime of which premeditation is an essential element, if he formed no purpose to commit the crime prior to the time he became intoxicated. * * * It is to be noted however, that intoxication of one accused of murder will not reduce the grade of the offense where the killing was done with deliberation and premeditation. If one who, while sober, deliberately resolves to kill another, makes himself drunk for the purpose of nerving himself for the accomplishment of his design, and is temporarily insane and unconscious of what he is doing, he is still guilty of murder in the first degree. Intoxication resorted to for the purpose of blunting moral responsibility, only increases the culpability of the defendant.
>
> "Before intoxication can be relied upon as reducing the degree of the crime, the intoxication must have been of such a degree as in fact to render the slayer incapable of attaining the purpose, intent, or malice, that the law deems an ingredient of the offense. * * *".

The Manual for Courts-Martial (par. 126) provides:

> "It is a general rule of law that voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for a 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.

"Such evidence should be carefully scrutinized, as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act."

Accused in his statements denied that he was intoxicated at the time of the killing, which he asserted, occurred about 2 p.m. When accused was seen later at about 4 p.m., he was not intoxicated. The evidence accordingly fails to show any intoxication which would render accused incapable of entertaining the intent requisite in the crime of murder. In the opinion of the Board of Review the offense is proven beyond reasonable doubt.

6. Specification, Charge II: It is alleged that accused deserted his organization at Fort Knox on 10 May 1944, and remained absent in desertion until apprehended at Columbus, Georgia, 4 June 1944, in violation of Article of War 58. The evidence shows that on 10 May 1944, the day following the murder of Sergeant Hollis, the accused, seeing military police examining the car he had borrowed from Sergeant Miller, fled from Fort Knox, and remained absent without leave until 5 June 1944 when he was apprehended at Columbus, Georgia. While residing in Columbus, Georgia, he was only a few miles from an army post. During the major portion of the period of absence he was dressed in civilian clothes. The absence of accused was clearly prompted by his belief that his crime had been discovered and when considered with all the surrounding circumstances affords ample basis for the inference of an intent to remain away permanently. Although accused made several telephone calls to Fort Knox during his absence it is apparent that they were not made for the purpose of furthering his return to military control but probably to ascertain if the body of Hollis had been discovered.

7. Counsel for the defense entered a special plea to the jurisdiction of the court on the ground that there had been no compliance with Article of War 70. A careful examination of the testimony introduced concerning the character of the investigation discloses substantial compliance with the provisions of that Article. The action of the court in overruling the plea was proper.

The defense also moved for a continuance at the commencement of the trial on the ground that a copy of the service record of the deceased Sergeant Hollis had been requested of The Adjutant General's office but not received. No showing was made as to the materiality of this document. The motion for continuance was overruled. During the trial the

desired document was received by the defense but no use was made of it. Under these circumstances no abuse of discretion on the part of the court in denying the motion is shown.

8. The charge sheet shows that the accused is 27 years of age and that he enlisted at Fort Benning, Georgia, 10 July 1939, with no prior service.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The death penalty is authorized upon conviction of murder, in violation of Article of War 92, or of desertion, in violation of Article of War 58.

Abner E. Lipscomb, Judge Advocate.

Robert J. Connor, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN-CM 268694 1st Ind
Hq ASF, JAGO, Washington 25, D. C. 16 JUN 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 Ellis V. Hamm (6971618), Battalion Headquarters & Headquarters Company, Armored School Demonstration Regiment.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence to death by hanging be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life, that the sentence as thus commuted be ordered executed, and that the United States Penitentiary, Terre Haute, Indiana, be designated as the place of confinement.

3. Honorable J. Hardin Peterson and John S. Gibson, Members of Congress, appeared before me personally in accused's behalf. They also appeared before the Board of Review together with Honorable Stephen Pace, Member of Congress, and Mr. Guy C. Shearer, Louisville, Kentucky, civilian counsel for the accused. Consideration has been given to letters concerning accused from Mr. Gibson and Mr. Peterson, to various character references in behalf of accused submitted by Mr. Pace and Mr. Peterson, and to a written brief and argument submitted by Mr. Shearer.

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

13 Incls
Incl 1 - Record of trial
Incl 2 - Lft. ltr. for sig. S/W
Incl 3 - Form of action
Incl 4 - Ltr. fr. Cong. Peterson, dated 28 Oct. 1944.
Incl 5 - Ltr. fr. Cong. Peterson, dated 6 Nov. 1944, w/4 incls.
Incl 6 - Ltr. fr. Cong. Gibson, dated 6 November 1944
Incl 7 - Six character references
Incl 8 - Written brief and argument
Incl 9 - Ltr. fr. Mr. Freeman R. Hamm
Incl 10 - Ltr. fr. Mr. H. L. Thomas
Incl 11 - Ltr. fr. Mr. John W. Jones
Incl 12 - Ltr. fr. Mr. Ellis V. Hamm, Sr. w/incls
Incl 13 - Ltr. fr. Mrs. Bernice Hamm

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for life. G.C.M.O. 383, 30 Jul 1945)

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

SPJGN
CM 268795

3 JAN 1945

U N I T E D S T A T E S	)	SACRAMENTO AIR SERVICE COMMAND
v.	)	Trial by G.C.M., convened at McClellan Field, California, 30 September 1944. Dismissal.
First Lieutenant DALE A. BAKER (0-560583), Air Corps.	)	

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

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

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

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

Specification 1: In that 1st Lt Dale A. Baker, 77th Army Air Force Base Unit (Second Army Airways Communications System, Overseas Processing Squadron), did, without proper leave, absent himself from his organization at McClellan Field, California from about 21 August 1944 to about 26 August 1944.

Specification 2: In that 1st Lt Dale A. Baker, 77th Army Air Force Base Unit (Second Army Airways Communications System, Overseas Processing Squadron) did, without proper leave, absent himself from his organization at McClellan Field, California from about 0915 4 September 1944 to about 2215 4 September 1944.

Specification 3: In that 1st Lt Dale A. Baker, 77th Army Air Force Base Unit (Second Army Airways Communications System, Overseas Processing Squadron), did, without proper leave, absent himself from his organization at McClellan Field, California from about 4 September 1944 to about 5 September 1944.

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

Specification 1: (Disapproved by Reviewing Authority).

Specification 2: In that First Lieutenant Dale A. Baker, 77th Army Air Force Base Unit (Army Airways Communications System, Second Overseas Processing Squadron), did at Sacramento, California, on or about 24 August 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Hull Senator Hotel, Sacramento, California, a certain check, in words and figures as follows, to-wit:

AMERICAN TRUST COMPANY Bank
Name of Bank

HH
Branch Hull Hotels CUSTOMER'S CHECK
Name of Branch

Sacramento, Calif. Address Date Aug. 26 19 44
Bank Address

Pay to the
order of CASH $ 15.00
Fifteen and 00/100 DOLLARS

for value received, I represent the above amount is on deposit in said bank or trust company, in my name, is free from claims and is subject to this check.

Sign Here (s) DALE A. BAKER

Address 1st Lt AC, McClellan Fld.
0-560583

In payt. of
Unable to Locate

and by means thereof, did fraudulently obtain from the Hull Senator Hotel, $15.00, lawful money of the United States, then well knowing that he did not have and not intending that he should have any account with the Sacramento Office, American Trust Company, Sacramento, California, for the payment of said check.

Specification 3: In that First Lieutenant Dale A. Baker, 77th Army Air Force Base Unit (Army Airways Communications System, Second Overseas, Processing Squadron), did, at Sacramento, California, on or about 25 August 1944, with intent to defraud, wrongfully and unlawfully make and utter to Albert Oxman, Sacramento, California, a certain check, in words and figures as follows, to-wit:

HEAD OFFICE
San Francisco

SACRAMENTO OFFICE 90-1348 No. 27
AMERICAN TRUST COMPANY
1011 10th Street
SACRAMENTO, CALIFORNIA Aug. 25 19 44

Pay to the Order of CASH $ 10.00

Ten and 00/100 DOLLARS

Member Federal Reserve System 12-L

Unable to locate

(s) DALE A. BAKER
1st Lt AC 0-560583.

and by means thereof, did fraudulently obtain from Albert Oxman, $10.00, lawful money of the United States, then well knowing that he did not have and not intending that he should have any account with the Sacramento Office, American Trust Company, Sacramento, California, for the payment of said check.

Specification 4: (Disapproved by Reviewing Authority).

The accused pleaded guilty to Specifications 1, 2, and 3 of Charge I and to Charge I; guilty to Specification 1 of Charge II "except the words 'with intent to defraud wrongfully'" and to Specifications 2, 3, and 4 of Charge II "except the words 'with intent to defraud' and 'fraudulently'"; and guilty to Charge II. He was found guilty of all Charges and Specifications and sentenced "to be dismissed from the service of the United States Army". The reviewing authority disapproved Specifications 1 and 4 of Charge II, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that from 21 August to 26 August 1944 the accused absented himself without leave from the 77th

Army Air Forces Base Unit, McClellan Field, California, of which he was a member. When taken into custody on this last date, he inquired of First Lieutenant Edward Francis Scanlon, the arresting officer, "What have you got me for?" Lieutenant Scanlon did not reply directly but said, "Suppose you tell me". The accused responded by stating, "A couple of days AWOL, that is all" (R. 7-8, 39; Pros. Exs. A, H).

As of 9:15 a.m. on 4 September 1944 the accused again absented himself without leave. That night "shortly after 10:00 o'clock" Captain Clyde G. Jones, Jr., his commanding officer, saw him in the lobby of the Hotel Senator in Sacramento and summoned the Military Police. The accused, who then appeared to be normal, was "picked up" at about 10:15 p.m. and returned to McClellan Field. Since he was a "casual" and had no duties "other than * * * calisthentics," he would ordinarily have been free to visit Sacramento without a pass upon the sole condition that he sign the "register of the Officers' Section" in the morning and in the afternoon. He had neglected to do so on either occasion. In addition, although a bulletin had been posted that day requiring his presence at "the civilian payroll", he had neither initialed the order nor attended (R. 9-12; Pros. Exs. A, H).

Upon being brought back to McClellan Field he was told that he was in arrest in quarters and asked whether he knew "what that means?" Although his answer was in the affirmative, he absented himself for the third time without authority at 11:30 p.m. and spent the night at a hotel in Sacramento (Pros. Exs. A, H). The following day at 4:30 p.m., while sitting at the bar of Bedell's Tavern, he was arrested by a Sergeant Victor P. Castro of the Military Police. He was again escorted to McClellan Field and placed in arrest in quarters (R. 12-14; Pros. Exs. A, H).

Previously, on 25 August 1944 Mr. Albert Oxman, the proprietor of the Clayton Club, a restaurant and tavern located in Sacramento, California, was solicited by a Lieutenant to cash a check for $30.00. Mr. Oxman stated "I am sorry, I can't do it", and "in order to get rid of him * * * made believe [he] could do it later". In about two hours the Lieutenant returned and repeated his request. Mr. Oxman declined to supply so large an amount but offered to accept a check for $10.00. An instrument in that sum, drawn on the American Trust Company of Sacramento, California, payable to the order of "Cash", and bearing the signature of the accused was then presented to him. The face amount was paid in full by Mr. Oxman after he had scrutinized the Lieutenant's identification card. Mr. Oxman did not recollect whether there was a picture on the card, his attention being entirely devoted to the name and serial number (R. 24-27; Pros. Exs. D, H).

Another check in the sum of $15.00, payable to "Cash", drawn on the American Trust Company of Sacramento, California, and also bearing a signature in the handwriting of the accused was accepted and paid at full face value by the Hotel Senator of the same city on 26 August 1944 (R. 18-20; Pros. Exs. C, H). The individual presenting this instrument established his identity by means of an "AGO pass" on which his picture appeared (R. 21). Mr. John D. Owen, the Assistant Manager of the Hotel who authorized the cashing of the check, did not know him and would be unable to recognize him again. Although Mr. Owen did not specifically remember the instrument, his initials were on it. Similarly while he did not recall examining the particular "AGO" card in question, he was certain that he had because he "always follow/ed/ that procedure" with strangers (R. 22-23).

The checks to Mr. Oxman and to the Hotel Senator were dishonored and returned unpaid by the drawee bank with the notation "Unable to locate" (R. 27; Pros. Exs. C, D). As of the date of the trial the accused did not have and never had had an account with the American Trust Company of Sacramento, California (R. 31; Pros. Ex. G).

4. After having been apprised of his rights relative to testifying or remaining silent, the accused took the stand on his own behalf. Although he knew that he was required to sign or initial the bulletin board every day except Sunday, he had gone downtown on 21 August 1944 and had not returned until arrested on 26 August 1944 (R. 44, 46). He had been drunk each night during the periods of his absences without leave, but in each instance he was sober in the mornings and realized the nature of his offense (R. 52). Although the checks to Mr. Oxman and the Hotel Senator were in his handwriting, he did not recall signing or passing either of them (R. 44, 46-47). His failure to recollect was attributable to his then being "under the influence of liquor" (R. 44-45, 47, 54-56). He had never been asked to pay either check. If he had, he "would have made some arrangements" to redeem them (R. 45, 49-50).

5. Mr. Oxman, upon being recalled by the court as a witness, testified that there was nothing unusual about the accused's actions on the afternoon of 25 August 1944 when the check for $10.00 was cashed (R. 56-57). Captain Jones, who was also recalled by the court, stated that the accused was not under the influence of intoxicants on the night of 4 September 1944 (R. 57-58). Prior to 3 September 1944 officers had been required to register only once a day in the late morning. Between that date and 6 September 1944 a new notice was posted on the bulletin board directing registration twice a day. If the old order had been effective on 4 September 1944, Captain Jones would still have known the accused to be absent without leave "because he missed his detail with the civilian

payroll". When confronted by Captain Jones that night, the accused "said he had a date to keep" and pleaded that he not be turned over to the military police (R. 59).

6. Specifications 1, 2, and 3 of Charge I allege that the accused "did, without proper leave, absent himself from his organization" from 21 August to 26 August 1944, from 0915 to 2215 on 4 September 1944, and from 4 September to 5 September 1944 respectively. These offenses were laid under Article of War 61.

The evidence for the prosecution and the accused's own testimony establish that he was guilty of three unauthorized absences each of which was terminated by arrest. That he could have rendered his visits to Sacramento lawful and proper simply by signing the register daily does not constitute an exculpatory circumstance. It is true that, while awaiting "shipment", he had no routine full-time duties to perform, but it does not follow that he had no duties whatsoever. His designated task was to affix his signature once or twice daily to the register, and in failing to do so he was derelict in the fulfillment of his responsibilities. His neglect to attend a detail to which he had been assigned aggravated his thrice repeated offense. The record discloses no mitigating or extenuating factors. Specifications 1, 2, and 3 of Charge I have been proved beyond a reasonable doubt.

7. Specification 2 of Charge II alleges that the accused did "on or about 24 August 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Hull Senator Hotel, Sacramento, California, a certain check" drawn on the American Trust Company of Sacramento, California, "and by means thereof, did fraudulently obtain from the Hull Senator Hotel, $15.00, lawful money of the United States, then well knowing that he did not have and not intending that he should have any account with the /said bank/ for the payment of said check". Specification 3 of Charge II alleges that the accused did on or about 25 August 1944 commit the same offense by making and uttering to Albert Oxman a certain check drawn on the American Trust Company of Sacramento, California, "and by means thereof, did fraudulently obtain from Albert Oxman, $10.00, lawful money of the United States, then well knowing that he did not have and not intending that he should have any account with the /said bank/ for the payment of said check". These acts were set forth as violations of Article of War 96.

In his pre-trial statement the accused admitted that both of the checks described were in his own handwriting. His sole defense was extreme intoxication at the time of their execution. This theory finds scant support in the record. Mr. Oxman testified that on the afternoon

of 25 August 1944 the accused had not conducted himself in an unusual manner. The instruments themselves were written in a clear, firm hand and contained all of the data essential to their negotiation. Although the accused asserted that his handwriting on each of them differed from his normal script as represented by his signature to his pre-trial statement, an examination of these various instruments reveals no perceptible basis whatsoever for the purported distinction (R. 48-49; Pros. Exs. C, D, H). Since he received full value for both checks and since he had no account at the time in the drawee bank, Specifications 2 and 3 of Charge II have been proved beyond a reasonable doubt.

8. At the conclusion of the prosecution's case counsel for the defense asked leave to withdraw the original pleas and to enter pleas of not guilty to all Charges and Specifications. Among other things he contended that his advice as to the pleas had been "inadvertently accepted" by the accused and that "the elements of the offense as charged /have/ not been made out at this time". The court denied the motion on the ground that the accused had been fully instructed concerning the effect of his original action (R. 41-42).

Paragraph 64 of the Manual for Courts-Martial, 1928, states that:

> "The court should ordinarily grant an application not manifestly made in bad faith to change or modify a plea."

Paragraph 70 of the Manual for Courts-Martial, 1928, goes on to say that:

> "Whenever it appears to the court that a plea of guilty may have been entered improvidently or through lack of understanding of its meaning and effect, or whenever an accused, after a plea of guilty, makes a statement to the court, in his testimony or otherwise, inconsistent with the plea, the president or the law member, if so directed by the president, will make such explanation and statement to the accused as the occasion requires. If, after such explanation and statement, it appears to the court that the accused in fact entered the plea improvidently or through lack of understanding of its meaning and effect, or if after such explanation and statement the accused does not voluntarily withdraw his inconsistent statement, the court will proceed to trial and judgment as if he had pleaded not guilty."

In view of these explicit directions the court should have granted the motion for leave to change the pleas of the accused from guilty to not guilty. There is no evidence that defense counsel's application was made in bad faith. The subsequent testimony of the accused, insofar as it pertained to the two checks, was obviously inconsistent with his original plea. In the absence of any evidence or circumstances affirmatively showing that defense counsel acted in bad faith his motion should have been immediately granted upon the grounds urged. When, thereafter, the accused took the stand on his own behalf and testified inconsistently with his original plea, the court was placed under an obligation to permit the substitution of pleas of not guilty for those previously entered. In failing to do so the court committed error. Since, however, the evidence supports the findings beyond a reasonable doubt, the substantial rights of the accused have not been injuriously affected.

The sentence imposed was dismissal from "the service of the United States Army". Although the accused is a member of the Army of the United States, the court's meaning is clear and the words "of the United States Army" may be considered mere surplusage.

9. The accused is about 28 years old. After being graduated from high school, he was employed from December of 1934 to January of 1937 as an assistant production clerk by the Leach Company of Oshkosh, Wisconsin, and from February of 1937 to February of 1939 as a bookkeeper by Fred T. Merten, who operated a plumbing and heating business in the same city. The accused had enlisted service from 1 September 1940 to 5 August 1942 when he was commissioned a second lieutenant. He was promoted to first lieutenant on 7 July 1943. On 10 July 1944 he was reprimanded and directed to forfeit $80.00 of his pay for one month under Article of War 104 for driving an automobile while under the influence of intoxicating liquor. Subsequent to the trial discussed above he again absented himself without leave for several days but returned voluntarily. A medical examination revealed him to be suffering from psychoneurosis, anxiety state, moderate.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings 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. Cannon, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN
CM 268795

1st Ind.

War Department, J.A.G.O., JAN 9 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 First Lieutenant Dale A. Baker (O-560583), Air Corps.

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

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

Myron C. Cramer

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

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

(Sentence of dismissal confirmed. G.C.M.O. 85, 22 Mar 1945)

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

SPJGH
CM 268822

15 DEC 1944

UNITED STATES	)	U. S. TROOPS
v.	)	Trial by G.C.M., convened at Adak, Alaska, 11 October 1944. Dishonorable discharge and confinement for life. Penitentiary.
Technician Fifth Grade BERLIN WADE (38133916), 383rd Port Battalion (Transportation Corps).	)	

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 Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade Berlin Wade, Company "C", 383rd Port Battalion (Transportation Corps) did, at Adak, Alaska, on or about 2 September 1944, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, purposely, maliciously and with premeditation kill one James E. Burrell, a human being, by shooting him with a rifle.

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 dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. After the members of the court and the personnel of the prosecution had been sworn, but before arraignment, the defense made a special plea in bar of trial that "the accused doesn't know the difference between right and wrong and if he does, he hasn't the intelligence to adhere to the right" (R. 3). Testimony was thereupon taken upon the issue of sanity thus raised.

a. For the defense upon issue of sanity:

Captain Russell N. Cassel, Personnel Consultant, Headquarters Eleventh Air Force, testified that he holds a masters degree in psychology from the University of Pennsylvania, and is a graduate of the Army Personnel Consultant School. On 20 September 1944 he gave the accused an intelligence test, in official use in the Army and known as the "Wechsler Test". The witness's official report of the test, dated 20 September 1944 was offered in evidence, without objection, as Defense's Exhibit B. The results of the test showed that the accused has a mental age of 6 years and 8 months, a "marked mental deficiency" and "lack of capacity for abstract thought". The accused was particularly weak on the portion of the test relating to "ethical values". There were "no indications of mental distortion". Persons of low mentality are divided into three groups, denominated: morons, imbeciles and idiots. The accused "falls in the top part of the first group, a high-class moron". In the opinion of the witness "the results of the test could not be an indication of sanity or insanity". The witness testified that the accused "is able to differentiate between right and wrong", but, when asked whether the accused was able to adhere to the right, the witness replied "I am not in a position to answer" (R. 4, 7, 8).

Major Melvin W. Thorner, M.C., Post Psychiatrist, after qualifying as an expert in psychiatry, read from a report of psychiatric examination made by him of the accused dated 7 September 1944 (Def. Ex. A). In the opinion of the witness the accused, at the time of the alleged offense "was not so far free from mental defect as to be able, concerning the particular acts charged, either to distinguish right from wrong or to adhere to the right", nor is he "sufficiently intelligent to conduct or cooperate in his defense". Referring to that portion of his report in which it was stated that on 2 September 1944 the accused's blood alcoholic content was 1.5 mg. per c.c., the witness testified that some persons show effects of alcohol when their blood alcoholic content is 1.5 mg. per c.c. whereas "others may show no effects at all" (R. 14-17).

b. For the prosecution upon issue of sanity:

Lieutenant Colonel Edward L. Sherrer, M.C., testified that he is President of the Board of Officers appointed by Special Orders No. 233, Headquarters U. S. Troops, dated 16 September 1944, to examine into the mental condition of the accused. He graduated in medicine in 1922, has been active in his profession since that time and has had experience in psychiatric cases. He and the other two members of the Board, Major Charles B. Hudson, M.C., and Major Edward C. Nemec, M.C., examined the accused on 19 September 1944. The conclusion of the Board, embodied in its official report (Pros. Ex. A), was that the accused "was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able, concerning the particular act charged, to distinguish right from wrong and to adhere to the right". The Board further concluded that the accused "is capable of cooperating

intelligently in his own defense". The Board's conclusions were based upon (1) conversations with the accused, (2) a physical examination of the accused and (3) a conversation with the accused's commanding officer (Pros. Ex. A). In the opinion of the witness, the accused has a mental age of 8 or 9 years. The Board further reported that the accused has "a fairly good memory for recent and past events", has "no evidence of illusions or hallucinations", has caused his company commander no particular trouble, has performed his duties as a cook satisfactorily and "is able to read and write fairly well" (R. 9-10, 12-14; Pros. Ex. A).

Captain Crossan Hays, C.M.P., Post Provost Marshal, testified that he first saw the accused on 2 September 1944 and that in his opinion the accused was not, at that time, drunk. Subsequently he observed the accused while at work in the stockade. The work consisted, among other things, in helping to erect huts. In the opinion of the witness the accused's work was performed in a satisfactory manner (R. 20-22).

c. Ruling of court upon issue of sanity:

The court, having received all evidence offered by the defense and the prosecution, respectively, on the sanity issue, in closed session, "denied the plea of insanity" (R. 22).

4. Evidence for the prosecution upon the general issue:

Captain Samuel Manelis, M.C., 364th Infantry, surgeon, was called to a hut in the area of Company C, 383rd Port Battalion, Adak, Alaska, at about 5:15 p.m. on 2 September 1944. He found there the dead bodies of two men whom he identified as "Burrell and Baskett". In his opinion both of the deceased had been dead about 15 minutes, and both had died as the result of "wounds from bullets" (R. 24-25).

First Lieutenant Charles E. Brockman, T.C., was the commanding officer of Company C, 383rd Port Battalion, on 2 September 1944. Shortly after 5 p.m. that day he went to a hut in the area of Company C where he saw the dead bodies of "Sergeant Burrell" and "Sergeant Baskett". He then went to the Company Orderly Room where he saw the accused, who looked "dazed" (R.26). He asked the accused "what he did with the weapon" and the accused replied "It's on my bed" (R. 30). He then went to the hut occupied by the accused and found a .30 caliber M1 rifle, serial No. 356911, lying between two beds. The witness identified the rifle, which was introduced in evidence as Prosecution's Exhibit C (R. 26, 27). Beer had been issued in Company C the preceding evening (1 September). The witness saw the accused at the time of the issuance of the beer, and instructed him and the other cooks "not to drink because they were on duty". The accused made no reply, but "just laughed" (R. 28).

Harold A. Settles was First Sergeant of Company C on 2 September 1944. He saw the accused in the Company Orderly Room shortly after 5 p.m. that day, at which time the accused told him that "he shot two men who were rotten and were always picking on him" (R.31). The accused seemed to be "kind of dazed" and "his eyes were larger than usual" (R.31).

Staff Sergeant Jack N. Hubert was in the Company C Orderly Room on 2 September 1944. The accused came in and said "I just killed two mother-fuckers". Accused "looked strange" and "his eyes were large and wild looking" (R. 33).

Eyewitnesses testified that at about 5 p.m. on 2 September 1944, a dice game was in progress in the rear end of Hut 29, Company C. The accused and at least two other soldiers were playing in the game. Simultaneously, a poker game was in progress in the fore part of the hut, with Sergeant Burrell, Sergeant Baskett and others participating (R. 40, 41, 46). A dispute arose in the dice game "because the dice were cocked" and Burrell walked back to the dice game and "settled that little misunderstanding" (R. 40). Soon the dice game became noisy again and Burrell asked them "three or four times to cut out the noise or stop the game" (R. 46). The noise continued and finally Burrell walked back to the dice game again and broke up the game by picking up the dice and the blanket (R. 46, 49). He returned to the poker game and threw the dice on the poker table. One die fell to the floor and could not be found. A moment later the accused approached the poker table and asked Burrell for his dice. Burrell looked around the poker table for the dice but could find only one. The accused became angry and left the hut, declaring that when he returned "somebody" would give him his dice (R. 46, 49). He returned in approximately five minutes with his rifle and again asked Burrell for his dice. Burrell said the dice must be around the table. Thereupon the accused said, "That's all right, I'm tired of being fucked" and raised his gun and fired from five to eight times. The first person struck was Burrell, who fell to the floor. The only other person hit was Baskett, who was in back of Burrell. Accused was approximately "six paces" from Burrell when he first shot him and he aimed the rifle at him (R. 47). The accused "also shot Burrell in the head while he was on the floor" (R. 46, 48, 49). Immediately following the shooting, the accused went to his hut where he said to Private Black, "I am going to the orderly room and give myself up because I killed two men" (R. 38). Immediately prior to the shooting the accused had entered his hut, picked up his rifle and "stuffed a clip" in it. Private Black warned him that "he shouldn't get himself into trouble", to which he replied "Lay off me" (R. 38). No witness recalled seeing the accused take a drink of beer or whiskey during the day, 2 September.

5. Evidence for the defense upon the general issue:

The accused, after having his rights as a witness explained to him by the court, elected to testify under oath in his own behalf. He was on duty as a cook on the night of 1-2 September 1944, and "got off" at about 8 a.m. on 2 September (R. 52). He gave his recollections of the events of 2 September as follows (R. 50-51):

> "Q. Tell the court to the best of your recollection, everything you remember from the 2nd to the 3rd of September, 1944?
>
> A. I remember getting off from work the 2nd of September and going to the cooks' hut where they were playing poker. I started a small poker game in the back of the hut, but before I got into the game I saw a jug of whiskey and I asked for some. I drank about half of a coke bottle full and then played poker for a while. Then the game broke up and I went up to the mess hall to get something to eat but I don't remember leaving the mess hall. The next I remember was that I was at the hospital getting a spinal tap."

On further questioning he testified that during the day he drank "about ten or twelve bottles of beer and about half a coke bottle full of whiskey" (R. 51). He specifically denied recalling any shooting (R. 52a). On cross-examination he testified that he played poker continuously throughout the day (R. 53). He recalled seeing Baskett in the hut where the game was in progress (R. 53) but he had no recollection of seeing Burrell (R. 54). He was issued a rifle "on Attu" and has had the same rifle ever since (R. 54). He denied that he was in a dice game on 2 September and denied further that there was a dice game being played in the hut where the poker game was in progress (R. 54, 56, 60).

6. The conclusion of the court that the accused was mentally responsible for the offense alleged, implicit in the denial of the plea of insanity and in the findings of guilty, is fully supported by the record of trial. The testimony adduced upon the issue of sanity was contradictory. In these circumstances it was the function and duty of the court to consider all of the competent evidence so adduced and to accord to it that weight and credence which in the judgment of the court it was entitled, rejecting such portions as it believed to be unworthy of credence or otherwise untrustworthy (CM 128252, Heppberger). In reaching its ultimate conclusion as to the mental responsibility of the accused, the court, in the instant case, had the benefit not only of the evidence adduced on the sanity issue but also of its own observations of the accused during the time he was testifying under oath at the trial. Perhaps the most cogent evidence against the

accused's contention of lack of mental responsibility was the fact that he left the hut where the game was in progress with a threat on his lips, went to his own hut, obtained his rifle, loaded it, returned to the hut where he had been playing and when he did not get his dice proceeded to carry his threat into execution. When warned by an occupant of his hut not to get into trouble, he replied, "Lay off me". After the shooting, he said he was going to the orderly room to give himself up because he had killed two men, and when he got to the orderly room he told the sergeant present there that he had done so. It is difficult if not impossible to reconcile his behavior with his claim of a complete "blackout" of his mind from the morning of the 2nd of September until the time of his spinal tap at the hospital or with the claim of inability to know the difference between right and wrong and to adhere to the right. If his conduct was not that of a rational being, then it would be difficult to conceive of any case of a killing in which it could be said that the accused acted rationally. In the opinion of the Board of Review there was ample evidence that the accused was mentally responsible for the offense alleged.

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

Murder is defined as "* * * the unlawful killing of a human being with malice aforethought". The word "unlawful" as used in this definition means "* * * without legal justification or excuse". A justifiable homicide is "A homicide done in the proper performance of a legal duty * * *". An excusable homicide is one "* * * which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense on a sudden affray, * * *". The definition of murder requires that the death of the victim "* * * take place within a year and a day of the act or omission that caused it, * * *" (MCM, 1928, par. 148a). It is universally recognized that the most distinguishing characteristic of murder is the element of "malice aforethought". The authorities, in explaining this term have stated that the term is a technical one and that it cannot be accepted in the ordinary sense in which the terms may be used by the layman. In the famous Webster case, Chief Justice Shaw explains the meaning of malice aforethought as follows:

> "* * * Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended

to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.

* * *

"* * * It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed; it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought,' in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance" (Commonwealth v. Webster, 5 Cush. 296, 52 Am. Dec. 711).

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

"Malice aforethought.—Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark.)

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not by a wish that it may not be caused; intent to commit any felony. * * *" (MCM, 1928, par. 148a).

The uncontradicted evidence shows that the accused shot and killed the deceased, Burrell, at approximately 5 p.m. on 2 September 1944, the deceased dying almost instantly. It is equally clear that this homicide was unlawful in that it was without legal justification or excuse. Further, an analysis of the evidence reveals ample proof to sustain the finding that the killing was done with malice aforethought. There is no evidence that the deceased had struck the accused or threatened him with any violence. No basis exists for an inference that the shooting was perpetrated in the heat of passion. On the contrary it appears from the evidence that the accused had a deep-seated hatred of the deceased and that the homicide was calculated and deliberate.

Nor does the evidence support an inference that the accused was under the influence of alcohol to such an extent that he did not realize clearly what he was doing at the time of the homicide. He himself testified that his drinking during the course of the day, from the time he came off duty at 8 a.m. until late in the afternoon, consisted of only "about half a coke bottle full of whiskey" and ten or twelve beers. No witness testified that he saw the accused take a drink that day or that the accused was drunk. Yet the uncontradicted testimony is that the accused spent the entire day in the company of numerous soldiers. It is apparent from the accused's remarks, uttered at or about the time of the homicide, and from his actions, that he conceived the idea of obtaining a rifle and shooting the deceased and that he methodically carried out the plan, surrendering himself immediately afterwards at the Company Orderly Room.

The Board of Review is of the opinion, therefore, that the record of trial amply supports the findings of guilty of the Specification and the Charge.

8. The accused is 24 years of age. He was inducted into the service on 1 July 1942, with no prior service.

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

Thomas N. Taffy, Judge Advocate.

[illegible], Judge Advocate.

William H. Trambrell, Judge Advocate.

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

SPJGQ
CM 268852

20 DEC 1944

UNITED STATES v. Second Lieutenant JAMES E. MANUEL (O-741205), Air Corps.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Laredo Army Air Field, Laredo, Texas, 7 November 1944. Dismissal and forfeiture of pay.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Disapproved by the reviewing authority).

Specification 2: In that Second Lieutenant James E. Manuel, 2126th Army Air Force Base Unit, Section A, Laredo Army Air Field, Laredo, Texas, did from about 6 September 1943 to about 2 September 1944 wrongfully live together and cohabit as man and wife in Childress, Texas; Harlingen, Texas; and Laredo, Texas, with one Joyce Moore, a woman who was not his wife, and during said period did represent and hold her out as being his wife.

He pleaded not guilty to Specification 1; guilty to Specification 2 and the Charge. He was found guilty of Specification 1 of the Charge, except the words, "persuade, induce and entice" and the words "to go" and substituting the words "go with"; of the excepted words, not guilty, of the substituted words guilty; and guilty of Specification 2 of the Charge and the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the finding of Specification 1 of the Charge, approved the sentence, remitted so much of the forfeitures imposed as pertained to allowances, and forwarded the record of trial for action under Article of War 48.

3. Inasmuch as the finding of guilty under Specification 1 of the Charge was disapproved by the reviewing authority, no review of the evidence adduced in support of this Specification is required. The evidence for the prosecution offered in connection with Specification 2 is, substantially, as follows:

The accused on 10 August 1943 met Joyce Moore, then age 18 (R. 26), at Childress, Texas, and thereafter "kept company with her socially". There was some discussion of marriage between the two and the accused asked her to marry him, "in a round-about way" (R. 7-8). On 4 September 1943 the accused and Miss Moore went, by bus, from Childress, Texas to Lawton Oklahoma. On arriving at Lawton at about 9:00 or 9:30 p.m., they went to a local hotel (R. 8,9,24; Pros. Ex. 2), spending the night together and occupying the same bed. On this occasion the couple engaged in sexual intercourse (R. 9). The room had been reserved by a corporal who was a friend of the accused (R. 13,14). Before going to Lawton the two had discussed marriage and had planned to marry while on the trip. After leaving Childress they found out they would not arrive in Lawton in time to marry, so they decided to get married when accused obtained another leave (R. 14, 15).

On 5 September 1943 accused and his companion checked out of the hotel and returned by bus to Childress, Texas, where accused was stationed. They established a home and lived together in Childress, the accused holding Miss Moore out as his wife and introducing her as such to others (R. 10,11). When the accused was later transferred to Harlingen, Texas, he was accompanied there by Miss Moore. They registered at a hotel as man and wife, and lived together as such in Harlingen, where accused held her out as his wife (R. 11). Accused was again transferred, going to Laredo, Texas, Miss Moore joining him there about ten days later. The couple lived together in Laredo, Texas, as husband and wife, until about the middle of September 1944 (R. 11,12,19-21). The accused was married to Marian J. Bernhardy on 26 July 1938 at Pittsburgh, Pennsylvania (R. 24; Pros. Ex. 3). Miss Moore did not know of the existence of this marriage until accused went on leave (R. 12). Walter A. Moore, the father of Joyce Moore, met the accused in May or June 1943. Later, accused informed Mr. Moore that he had married Joyce in Oklahoma. Accused and Miss Moore were living at that time in a tourist camp in Childress, and later at 702 Logan Avenue in Laredo (R. 17,18,19). The couple visited Mr. Moore on weekends in Memphis, Texas, where they occupied the same bedroom (R. 18,19). About 4 September 1944 the couple moved into a home at Laredo with Mr. and Mrs. Moore (R. 20), occupying the same bedroom. The accused stayed there for two or three weeks until he went on leave (R. 20,21). A child was born to Miss Moore on 10 August 1944 at Laredo, Texas (R. 13,20,24; Pros. Ex. 4). The accused, according to Miss Moore, is the father of this child (R. 13, 20). Miss Moore "held herself" to be the wife of the accused and did not object to his referring to her as his wife (R. 17). She had been previously married and divorced (R. 26,27).

The accused, after being warned of his rights under the 24th Article of War, made a statement, which was reduced to writing, signed and verified under oath (R. 22,23; Pros. Ex. 1). In this statement accused admitted his marriage to Mrs. Marian Bernhardy in 1938. He further admitted going with Miss Moore to Lawton, Oklahoma on 4 September 1943 and staying with her that night at a hotel. He asked her to marry him "in a round-about way" - he "never came right out with it". He stated that thereafter they lived together as man and wife in Childress, Texas, Harlingen, Texas, and Laredo, Texas until in September, 1944. The accused admitted that he is the father of the child, named Edward Walter Manuel, born on 10 August 1944 (Pros. Ex. 1).

4. The accused, being properly advised of his rights by the court, elected to remain silent, and no evidence was offered by the defense (R. 25).

5. In addition to the plea of guilty the prosecution introduced full, convincing and competent evidence to prove the commission of the offense charged beyond any doubt. The accused on 4 September 1943 commenced his improper and unlawful relations with Joyce Moore. At first their cohabitation was under an agreement to marry, for which the accused was incapacitated by his existing marriage. Thereafter, for almost a year, as charged, the couple lived together in Childress, Texas, Harlingen, Texas, and Laredo, Texas, as man and wife. This unlawful relationship was open, flagrant and continuous, the accused introducing Miss Moore as his wife and otherwise holding her out as such. He admitted being the father of her child, born one year after their first meeting. The commission of the offense was clearly established and was properly charged as a violation of Article of War 96. (CM 216152, Wells, 11 BR 111,118).

6. Over the objection of the defense counsel, evidence concerning the birth of Miss Moore's child was received by the court. Such evidence was competent and properly admitted (Underhill, Criminal Evidence, 4th ed., sec. 641, p. 1228).

7. The accused is 28 years of age and is married. He completed four years of high school and was employed as a machinist in civilian life. War Department records show that he had enlisted service from 29 March 1942 until 6 March 1943, when he was commissioned a second lieutenant, Army of the United States (Air Corps), and that since the latter date he has had active service as an officer.

8. The court was legally constituted and had jurisdiction of the person and subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support

the findings as approved by the reviewing authority, to support the sentence as modified by the reviewing authority, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

(on leave), Judge Advocate.

SPJGQ
CM 268852

1st Ind.

War Department, J.A.G.O., DEC 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 James E. Manuel (0-741205), Air Corps.

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

3. Inclosed are a draft of a letter for your signature, transmitting the record of trial to the President for his action, and a form of Executive action designed to carry 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. Sec. of War.
Incl.3-Form of action.

(Sentence as modified by reviewing authority confirmed but remaining forfeitures remitted. G.C.M.O. 100, 24 Mar 1945)

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

SPJGK
CM 268894

12 DEC 1944

UNITED STATES v. Second Lieutenant ROBERT J. HEILAND (0-690889), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Goodfellow Field, Texas, 8 November 1944. Dismissal, total forfeitures and confinement for two (2) years and six (6) months.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Second Lieutenant Robert J. Heiland, Air Corps, did, at Goodfellow Field, Texas, on or about 27 October 1944, feloniously take, steal and carry away, Twenty Dollars ($20.00), lawful money of the United States, the property of Major Robert L. Duling.

Specification 2: In that Second Lieutenant Robert J. Heiland, Air Corps, did, at Goodfellow Field, Texas, on or about 6 October 1944, feloniously take, steal, and carry away lawful money of the United States in the amounts of about One Hundred and Thirty Dollars ($130.00), the property of First Lieutenant Heywood W. Pierce, about Fifteen Dollars ($15.00), the property of Captain Donald L. Cameron, and about Thirteen Dollars ($13.00), the property of First Lieutenant Milton Rosenblatt.

He pleaded guilty to and was found guilty of the Charge and Specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of two years and six months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

The evidence for the prosecution shows that on the dates set forth in the specifications and at the time of the trial the accused was in the military service of the United States as a second lieutenant, Air Corps, on duty with Section B, 2533rd Army Air Forces Base Unit stationed at Goodfellow Field, Texas (R. 6, 10, 14,17, 27). On 6 October 1944, between 1345 and 1400, First Lieutenant Heywood W. Pierce and Captain Donald L. Cameron went together to what is known as the PT Room (Physical Training Room) in the southwest corner of the BOQ Building 91 (Bachelors Officers Quarters Building 91), Goodfellow Field, San Angelo, Texas. There they changed into their physical training clothes and left the room. Before leaving, each hung his clothes in the room, and each left his wallet in his trousers pocket. Lieutenant Pierce had either $134.00 or $144.00 in his wallet, and Captain Cameron had $19.00 in his wallet. All such money was lawful currency of the United States, and neither gave anyone permission to remove it or any part thereof.

After playing handball together for about an hour, both the abovenamed officers returned to the PT Room, dressed, and went their separate ways. After Captain Cameron had returned to his office at approximately 1615, he checked his wallet and found $15.00, in the form of one $10.00 bill and one $5.00 bill, missing therefrom. He then called Lieutenant Pierce by telephone and asked if he had seen anyone in the dressing room while he was there. Lieutenant Pierce had in fact seen the accused there undressing at the same time he was. Lieutenant Pierce, after the telephone call, then checked his own wallet and found only three $1.00 bills therein, so that at least $130.00 was missing from the wallet. After discovering his loss Lieutenant Pierce reported it to the Provost Marshal. The Provost Marshal "did some checking up and finally brought out a picture" of the accused which was recognized by Lieutenant Pierce as the person whom he had seen in the PT Room when Lieutenant Pierce was there undressing.

On the day previous to the trial the accused repaid Captain Cameron and Lieutenant Pierce the money lost by them and stated to each that he was sorry for any inconvenience he had caused them. Such payment was purely voluntary and without any solicitation on their part (R. 6-13).

At about 1345 on the same day, viz: 6 October 1944, First Lieutenant Milton Rosenblatt also undressed in the PT Room and left his wallet containing $13.00 in lawful money of the United States in his trousers pocket. He took physical training and returned to the room about 1515. He did not, however, check his wallet until about 1630, at which time, intending to pay a bill, he discovered at the Post Tailor Shop that the wallet was empty. He gave no one permission to take the money. The day prior to the trial the accused voluntarily repaid him the money he had lost, stating, "I am sorry if I have inconvenienced you" (R. 14-16).

On 7 October 1944, Major Robert L. Duling, Air Corps, the Provost Marshal at Goodfellow Field, evolved a plan to catch the thief or thieves who, between the first and tenth of each month for a period of approximately six months, had been stealing money from the PT Room while the officers were at physical training. In furtherance of this plan, he put $32.00 in the form of one $20.00 bill, two $5.00 bills, and two $1.00 bills in a wallet (Pros. Ex. A) with a zipper which closed the compartment thereof for bills. This $32.00 belonged to Major Duling and was lawful money of the United States. At that time Major Duling made a memorandum of the denominations, serial numbers, and types of the bills (Pros. Ex. C). The $20.00 bill (Pros. Ex. B) was a Federal Reserve note, bearing serial number K13017038A. On six occasions prior to 27 October 1944 this wallet was placed in clothing in the PT Room and was never disturbed (R. 28-29).

However, on the morning of 27 October 1944, shortly before the 1030 physical training class, Sergeant Rolla B. Lunn, an investigator for the Provost Marshal, and Second Lieutenant John H. Naffke, Assistant Provost Marshal, went to the PT Room. There Lieutenant Naffke changed to physical training clothes and hung up his trousers. At that time Lieutenant Naffke and Sergeant Lunn checked the contents of the wallet and found them intact, following which, Lieutenant Naffke placed some of his personal papers in the card compartments of the wallet and placed the wallet containing $32.00 as above described in the left rear pocket of his trousers, so that the wallet protruded slightly therefrom. From a crack in the wall of a room directly across the hall from the PT Room it was possible to observe through the open door of the PT Room the trousers and the south part of the PT Room. About 1025 Lieutenant Naffke proceeded in physical training clothes to the physical training department and left Sergeant Lunn at the observation point in the room across from the PT Room (R. 17-20, 21-22).

About that time the accused went into the PT Room, changed clothes, and left the room. Shortly after 1100 the accused again entered the PT Room, went directly to the trousers of Lieutenant Naffke, and removed the wallet. He then took out a bill, disappeared momentarily from Sergeant Lunn's view, and then returned to the trousers, rubbing the billfold with a towel. Thereafter, he replaced the wallet in the trousers pocket, dressed, and left hurriedly. After reaching the hall he returned and again removed the billfold, rubbed it with a handkerchief, and replaced it, following which he left the building. Sergeant Lunn then ran to the PT Room, secured the wallet, checked it and noted that the $20.00 bill was gone, and followed the accused to the Officers' Club, Goodfellow Field. Sergeant Lunn then reported to Major Duling and returned with him to the Officers' Club, remaining outside while Major Duling went inside (R. 23-24). There Major Duling found the accused sitting at the bar, asked him to accompany him, and the two rejoined Sergeant Lunn. All then went together to "Colonel Keene's" office , where Major Duling, in the accused's presence, reported

that Sergeant Lunn had seen the accused take the money. The accused first denied any knowledge of the matter. He was then searched by Major Duling, who found a $20.00 bill in the right breast pocket of the accused's blouse. Upon comparison with the memorandum previously made, the $20.00 bill was found to fit the description of that listed on the memorandum. Colonel Keene and Major Duling then wrote their names on the memorandum and sealed it and the bill in an envelope, which was unopened until the trial and was there identified by Major Duling (R. 24, 30-32).

> "* * * Col. Keene said to Lt. Heiland, 'What do you have to say about that, Lieutenant?' Lt. Heiland replied, 'There is not much I can say, Sir'. Lt. Heiland started to say something else, I do not remember what it was, but Colonel Keene interrupted him before he committed himself, and said to Lt. Heiland, 'Before going any further I must remind you that you do not have to make any statement, and any statement you make will be voluntary, and anything you say can be used against you'. Lt. Heiland said, 'But I do want to make a statement, Sir', or words to that effect. I do not remember very definitely the exact course of the questions and answers thereafter, but Colonel Keene and I questioned Lt. Heiland at some length, and he gave substantially the same answers which he gave to me later, and which were recorded by the stenographer." (R. 37)

Shortly thereafter on the same day the accused was advised that he need not make any statement and that any statement that he might make might be used against him. Accused thereupon volunteered to answer any questions put to him by Major Duling. A stenographic record was made of the conversation and when, on the same day, it was transcribed, the accused voluntarily subscribed and swore to it. Accused affixed his signature to each page of the document (R. 34).

The voluntary statement of accused was admitted in evidence (R. 35-37; Pros. Ex. D). In such statement the accused admitted the theft of the $20.00 bill on 27 October 1944; that he had taken other money from the PT Room since 1 October 1944; that he could not recall the dates or amounts of the previous thefts; that all told he took less than $200.00; that he had no acute need for the money, but wanted it so that he could buy extra things for his wife and baby; that he intended to pay the money back, although he did not know to whom it belonged; that he figured he might learn from the Provost Marshal to whom the money belonged, but if he had not done so was going to give the money to charity; that one day early in October he took money from several different wallets, having taken five or six $20.00 bills from one, a $10.00 bill from another, and a $5.00 bill from still another.

b. For the defense:

The accused for a period of over a year has been a flying instructor under the supervision and daily observation of First Lieutenant G. W.

Pollan, his squadron commander, who characterizes the work of accused as "Excellent". During this time the accused was conscientious in the performance of his duties. Accused was not much of a mixer with his brother officers, and Lieutenant Pollan never saw him gambling at cards (R. 38-39).

From January 1944 to June 1944 accused was also under the supervision and daily observation of Captain J. G. Neel, who also characterized his work as "Excellent". Captain Neel never observed accused playing cards (R. 40).

The accused, after proper warning as to his rights, took the stand as a witness in his own behalf. In substance, his testimony was that his home is on a farm at Pound, Wisconsin; that he completed high school at the age of nineteen during May 1942 and enlisted in the Army on 28 July 1942; that after several months of basic training at Sheppard Field, Texas, he entered cadet training and successively was stationed at San Antonio Aviation Cadet Center, Primary School at Vernon, Texas, Basic Training School at Enid, Oklahoma, and Advanced Training School at Victoria, Texas, where he was commissioned a second lieutenant on 29 August 1943 and rated a pilot; that he married on the same day that he was commissioned; that he was then sent to AAF Central Instructors School, Randolph Field, Texas; and, after completing his training there was permanently assigned to Goodfellow Field, Texas, on 13 October 1943. In August 1943, while on leave, he learned that his parents were divorced, and this upset him terribly. In February 1944 he was further disturbed when his mother remarried. In April 1944, at his mother's insistence, he accepted a deed to an eighty acre farm which was subject to a $700.00 mortgage. Meanwhile, he was in debt for furniture he had bought, and his wife was about to have a baby, which was born in June 1944. Due to the fact that the medical officers at Goodfellow Field were so busy, his wife went to a civilian doctor, which fact put him to additional expense. After her confinement he could get no help, so he had to pay the expenses of his wife's aunt from Chicago and return; plus the increase in living costs brought about by her presence, in order to secure help for his wife. It then became necessary to borrow money, which he did. His indebtedness was further increased when his sister and her husband and four children made an extended visit of about a month. In the meantime he had made out an allotment of $150.00 per month to his wife and her first check did not reach them until about 15 October 1944, so that he drew only $145.00 of his pay on 1 October 1944. During September his winter flying jacket was stolen from the line. All these worries, coupled with the fact that he had been doing a good deal of flying, wore him out physically, making him nervous and irritable, and resulted in loss of appetite and weight. This condition made him susceptible to temptation, and on 6 October 1944 he took $158.00 from the wallets of Lieutenants Pierce and Rosenblatt and Captain Cameron. After taking the money he realized he could not use it to pay debts without letting his wife know of it, so he kept the money hoping to pay it back. During the week of 27 October 1944 he went to see Lieutenant Luftman, the Trial Judge Advocate, intending, if possible, to find out to

whom the money belonged without divulging his own guilt, but Lieutenant Luftman was in the hospital. On 27 October 1944 he took the $20.00 belonging to Major Duling without any good reason at all, and, after leaving the room, he returned to replace the money in the wallet, but then decided not to do so. He has never gambled and owed no debts other than those above-mentioned. He has now repaid Lieutenants Pierce and Rosenblatt and Captain Cameron and took their receipts therefor (Def. Exs. 1,2,3), having repaid the money voluntarily to clear up his conscience. He signed the confession abovementioned because the evidence was against him and he figured that by doing so he might get another chance. He likes to fly and hopes that he will be given another chance (R. 42-48).

4. Discussion.

The accused pleaded guilty to and was found guilty of stealing various sums of money from his fellow officers in violation of Article of War 93.

Larceny is the taking and carrying away by trespass, of personal property which the trespasser knows to belong to another with intent to deprive such owner permanently of his property.

Once a larceny is committed a return of the property or payment for it is no defense to a charge of larceny (MCM, 1928, par. 149g, p. 171).

> "Proof. - (a) The taking by the accused of the property as alleged; (b) the carrying away by the accused of such property; (c) that such property belonged to a certain other person named or described; (d) that such property was of the value alleged, or of some value; and (e) the facts and circumstances of the case indicating that the taking and carrying away were with a fraudulent intent to deprive the owner permanently of his property or interest in the goods or of their value or a part of their value."

The evidence for the prosecution, the testimony of the accused and his pleas of guilty conclusively show that the accused did, at the times and at the place alleged in the Specifications take and carry away the sums of money alleged which belonged to the officers named under circumstances indicating that he intended to deprive those officers permanently of their property. As it was currency of the United States that was stolen it was not necessary to prove its value.

All of the elements of the crime were therefore proved beyond any reasonable doubt.

5. War Department records show the accused to be 21-9/12 years of age. The record of trial shows him to be married and the father of one child. After graduating from high school he enlisted in the service 28 July 1942 as an aviation cadet. Upon the completion of his training as a pilot he was

commissioned second lieutenant, Air Corps, Army of the United States, 30 August 1943.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., Dec 15 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert J. Heiland (O-690889), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed, that the forfeitures be remitted, that the Federal Reformatory, El Reno, Oklahoma, be designated as the place of confinement, and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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. 65, 27 Jan 1945)

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

SPJGQ
CM 269057

14 DEC 1944

UNITED STATES v. Major Harry A. Muir (0-525305), Corps of Engineers.	SEVENTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Riley, Kansas, 7 November 1944. Dismissal.

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

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

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

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

Specification: In that Major Harry A. Muir, CE, having a lawful wife then living, to wit, Reah Jeannette Lynch Muir, did, at Pensacola, Florida, on or about 12 January 1944, wrongfully and unlawfully marry Eunice Charlotte Mosier.

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

Specification: In that Major Harry A. Muir, CE, then 1058th Engineer Base Port Construction and Repair Group, APO 134, c/o Postmaster, New York, New York, did, at Pourthcawl, England, on or about 2 May 1944, with intent to deceive Lieutenant Colonel J. D. Hillyer, CE, Commanding Officer of the 1058th Engineer Base Port Construction and Repair Group, officially execute to the said Lieutenant Colonel Hillyer a certificate, to wit: "To Whom It May Concern: Having been advised of the allegation from American Red Cross of Manhatten, Kansas that would indicate that I had committed bigamy. This is to certify that I have not consumated a second marriage and consequently am not guilty of the allegation. I am fully aware of my rights under the 24th A.W. SIGNATURE /s/ Harry A. Muir, Major, C.E.", which

> certificate was known by the said Major Harry A. Muir, CE, to be untrue, in that he married Eunice Charlotte Mosier on 12 January 1944 at Pensacola, Florida, and thereafter lived with her as husband and wife.

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

3. The evidence shows that on 1 October 1919, at St. Louis, Missouri, the accused married Reah Jeannette Lynch, who is living and resides in Manhattan, Kansas. Reah has never been divorced from accused, and the marriage has not been dissolved. In 1937, Reah was admitted to the Kansas State Hospital for the Insane, Topeka, Kansas. She remained there as a patient for approximately a year (Ex. A). On 12 January 1944, at Pensacola, Florida, accused and Eunice Charlotte Mosier were married (Exs. C, D). After the ceremony they "lived together as husband and wife" (Ex. E).

On 1 and 2 May 1944, Lieutenant Colonel J. D. Hillyer, Corps of Engineers, was commanding officer of the 1058th Engineer Base Port Construction and Repair Group, of which organization accused was a member. On 2 May 1944, accused gave Lieutenant Colonel Hillyer a certificate signed by accused and reading as follows:

> "May 2 - 44
> H.M.
>
> CERTIFICATE
>
> To Whom It May Concern:
>
> Having been advised of the allegation from American Red Cross of Manhatten, Kansas that would indicate that I had committed bigamy. This is to certify that I have not consumated a second marriage and consequently am not guilty of the allegation. I am fully aware of my rights under the 24th A.W." (Exs. H, I)

Without objection by the defense, a statement made and signed by accused was received in evidence (R. 6; Exs. F, G). Apparently it was made to Major Charles T. Shanner, J.A.G.D., on 19 July 1944 at Base Section Number 2, CZ, ETOUSA, APO #350. Although no evidence was introduced to show the circumstances under which it was made, the statement itself contains language disclosing that accused received

the necessary information relative to his rights and the defense did not object to its admission. In the statement, accused admitted both marriages. By his first wife he has four children, ranging from a son about twenty-three years of age to a daughter about sixteen. He has allotted $130 per month to his first wife. Under proper management, this sum is adequate to take care of the family, but the first Mrs. Muir wastes money. As recently as 27 June 1944, accused has received word of his first wife, and, so far as he knows, she is alive. They have not been divorced, although in December 1943, accused commenced divorce proceedings in Jacksonville, Florida, and "Harrison", his lawyer, was "very confident" that he would win the case. The case is "still open".

Since their marriage, accused and "Charlotte", his second wife, have lived together as husband and wife. She is the beneficiary of his government insurance, and he named her as his beneficiary for "emergency care". During the latter part of February 1944, accused left for overseas.

Reah, the first Mrs. Muir, has never been a wife to accused, and since 1928 or 1929 they have not occupied the same bed nor had intercourse with one another. She did not take proper care of the children nor run the house in proper fashion. She had no conception of the value of money. She was mean and vindictive, and on various occasions struck or slapped her parents, her children, and accused. On one occasion she tore a new dress off the older daughter because she thought that the daughter should have bought it for her. There was a fight, and next morning the daughter left home. At one time the first Mrs. Muir told the older son that he would have to leave home.

Subsequently, when the older daughter, Rhea Jane, married and brought her husband to call, Mrs. Muir, the first, told him that he had married a girl who was no better than a woman of the streets and who had "lived with a man in Salina".

Continuing the "confession", accused stated that his first wife's physical condition is "perfect" and that she is not "mentally unbalanced". She belongs to various clubs and "can be desirable as far as conduct is concerned". In 1937 she was committed to a state hospital for mental and nervous cases. Accused caused her to be sent there because she had written an instructor at Kansas State College, suggesting that he take her with him on his summer vacation. She remained in the institution about three or four months.

When accused married his second "wife", his organization had received overseas orders. Accused believed that his chances of returning were poor, and that if he failed to come back, the children would not receive any benefits from his insurance. The marriage was

entered into for the purpose of making a home for the two younger children, accused's lawyer assuring him that the divorce would be granted. Charlotte (wife number two) and accused could see no other way to protect the children and give them a home. If the first wife is obliged to go to an institution again, the two younger children will go to Charlotte. At present, James, the younger son, who is 18 years of age, is with his grandmother, and Nancy Marie, the younger daughter, who is 16, is with her mother. Harry, the elder son, is in Mexico, and Rhea Jane, the elder daughter, is widowed and residing in Houston, Texas. James knows Charlotte. The older daughter knows Charlotte, knew of the second marriage, and considers Charlotte her mother "as to feeling and love for one another".

In the "confession", accused admitted having made the statement (Ex. H) ascribed to him in the Specification of Charge II, and he admitted that Lieutenant Colonel Hillyer was his commanding officer at the time. In stating, "I have not consumated a second marriage and consequently am not guilty of the allegation", he intended "evading" Lieutenant Colonel Hillyer's question (Ex. F).

The prosecution offered and there was received in evidence a "statement of service" of accused (R. 5; Ex. B). This document shows his various duties and performance ratings, which latter vary from superior to satisfactory.

4. The defense introduced in evidence a letter to accused from Julius S. Harrison, a lawyer of Jacksonville, Florida, said by the defense counsel to be the Harrison referred to by accused in his statement (R. 7; Ex. 1). The letter was dated 25 October 1944, and referred to a "case" and to prior correspondence (Ex. 1). The defense also introduced a document purporting to be a receipt for a money order in the amount of $25, sent to Harrison by someone (R. 7; Ex. 2).

Mr. Ira Snyder, a lawyer of Manhattan, Kansas, testified as follows: On 12 October 1944, accused came to Snyder's office and told Snyder that he was "a very unhappy man," who had been "in constant sorrow for ten years or more". He told Snyder of his wife and four children, and expressed worry about his younger daughter. Water was "running out of" his eyes, although he "wasn't sobbing or crying". He told Snyder that he did not want to harm the mother of his children any more than necessary. His relations with Mrs. Muir (the first) he described as having been "varied and depressing". He had hoped never to come back from overseas, in which event his daughter "could get" his insurance. Accused's appearance was "depressing" to Snyder. Snyder dictated for accused a petition for divorce (R. 8, 9). A copy of the divorce petition was received in evidence (R. 9; Ex. 3). It charges the wife with gross neglect of duty and extreme cruelty.

Continuing his testimony, Snyder stated that both he and his secretary were worried about accused. Pending further investigation, Snyder did not file the petition. He found out about Mrs. Muir's previous incarceration in the hospital for the insane. After talking to "Dr. Brewster", a clergyman, Snyder decided not to file the divorce petition, since to do so might so shock Mrs. Muir as to render her insane again. A few days later, witness again saw the accused, who was in the hospital at Camp Funston. Sobbing, accused told Snyder that immediately before his departure for England, in order to protect his children, he had married a woman in whom he had confidence and who he thought would look after "his child". He told Snyder that he had tried to obtain a divorce in Florida, but that "it hadn't resulted in anything". After this interview, Snyder visited the first Mrs. Muir, whom he described as "a woman abandoned of a soul". Her clothes were disheveled, and the living room was dusty. She asked whether accused was in the United States, and she wanted $60,000 in the event of a divorce, although after talking with Snyder, she lowered her terms to "$150.00 or whatever (accused) was paying her over a period of ten years". Snyder testified that he could see "the terrible situation that this man has been under for probably many years" (R. 9, 10).

The accused testified. He reiterated what he had said in his "confession" about the failure of the first Mrs. Muir properly to care for the children and about his second marriage, made to assuage his worries concerning them (R. 13-15). During 1943, he received a letter from his younger daughter, saying that she intended to run away from home because she "couldn't stand it there any longer". His older daughter also wrote him, asking him "to do something about the children". About 22 December 1943 (R. 15), while on the way to "Gordon Johnson, Florida", accused stopped at Jacksonville and consulted Harrison, who assured him that it would take only about thirty days to "put through" a divorce proceeding and that in Florida it is permissible to remarry "as soon as the divorce is granted". Harrison also assured him that "there would be no doubt in the world" of his receiving the divorce. After arriving at "Gordon Johnson", accused "got in contact with" Miss Mosier, whom he had known for a number of years, and who said she would be "glad to take care of the youngsters" for him. Early in January, prior to the twelfth, accused returned to Jacksonville and started the divorce proceedings. Then his organization was alerted for overseas (R. 13). About 9 or 10 January, he telephoned Harrison, who told him that there had been no contest or objection and that the divorce would "go through" (R. 16-17). Not until accused arrived overseas did he learn that Mrs. Muir had contested the divorce and that the matter would have to "rest" until his return to the United States. After his return, he consulted Ira Snyder about starting new proceedings (R. 14).

When accused married Charlotte Mosier, he did not know whether the divorce had been granted, and did not "contact" Harrison to find

out (R. 17). Charlotte knew that he had not been divorced from his first wife (R. 14). Accused would not have married unless he had been positive that the divorce was "going through" (R. 15). He realizes that he "must have been temporarily insane due to that worry and everything" (R. 14).

5. The bigamy and execution of the false certificate were conclusively proved; in fact, the accused admitted them. The second marriage, solemnized in Florida by a notary public, was legal (Fla. Stat. Ann., 1944, secs. 741.01, 741.07). At the time of that marriage, the accused admittedly knew that he was still married to the first Mrs. Muir. Assuming the truth of accused's account of the first Mrs. Muir's deficiencies as wife and mother, and the purity of purpose actuating him in contracting a second marriage, the fact remains that he was cognizant of the bigamous nature of that union, and it is startling, to say the least, that he should have resorted to a felonious act to remedy a family situation which, it would seem, could have been relieved by lawful and less drastic measures.

The argument that Charlotte's knowledge of the accused's marital status is a defense to the accused, is untenable (Fla. Stat. Ann., 1944, secs. 799.01-799.03; Miller, Criminal Law, p. 425). Bigamy does not depend upon the innocence of the second spouse (Ibid.).

In connection with the Specification of Charge II, it is alleged that accused executed the false certificate at Pourthcawl, England. The proof did not include the place of execution. However, it is apparent from the record of trial that accused was not misled and that the false certificate received in evidence and referred to by the accused in his statement and testimony, was the same certificate set forth in the Specification. Furthermore, the facts concerning the offense were proved in such detail that double jeopardy is beyond the realm of possibility. Under the circumstances, the exact place of execution becomes immaterial, and the failure to prove it did not injuriously affect the substantial rights of the accused (A.W. 37).

6. War Department records show that accused is 49 years old and married. He has four children, two of whom are minors. He graduated from high school and attended Kansas State College for five years, receiving a "special" degree in mechanical and civil engineering. For many years he has been in the building construction business, and he has acted in a supervisory capacity as a superintendent of building construction. He served in the last war as an enlisted man for almost two years. On 14 June 1943, he was appointed major, Army of the United States, and he entered upon active duty on 5 August 1943.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting

the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings, to support the sentence as modified by the reviewing authority, and to warrant confirmation thereof. Dismissal is mandatory under Article of War 95 and authorized under Article of War 96.

(on leave), Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], 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 Major Harry A. Muir (O-525305), Corps of Engineers.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings, to support the sentence as modified by the reviewing authority, and to warrant confirmation thereof. I recommend that the sentence as modified 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 the above recommendation into effect, should such action meet with approval.

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

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

(Sentence as modified by reviewing authority confirmed. G.C.M.O. 54, 27 Jan 1945)

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

SPJGK
CM 269101

14 DEC 1944

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Drew Field, Tampa, Florida, 13 October 1944. Dismissal.
Second Lieutenant EDWARD L. MINION (O-832658), Air Corps.	)	

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 96th Article of War.

Specification: In that Second Lieutenant Edward L. Minion, Air Corps unassigned, attached to Squadron S, 337th AAF Base Unit (CCTS F), Venice Army Air Field, Venice, Florida, did, at or near the Venice Army Air Field, Venice, Florida on or about 26 September 1944, wrongfully violate paragraph 16a (1)(d), Section II, AAF Regulation No. 60-16, dated 6 March 1944, by flying a military airplane at an altitude of less than 500 feet above the ground.

CHARGE II: Violation of the 83rd Article of War.

Specification: In that Second Lieutenant Edward L. Minion, * * *, did at or near Venice Army Air Field, Venice, Florida, on or about 26 September 1944, through neglect, suffer a BT-13B airplane of the value of approximately $21,000.00, military property belonging to the United States, to be damaged by striking the Gulf of Mexico.

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

3. Evidence.

a. For the prosecution.

Paragraph 16 of Army Air Forces Regulation No. 60-16 of 6 March 1944, prohibits the operation of Army Air Force aircraft in the United States below an altitude of "500 feet above the ground" except during take-off and landing (Pros. Ex.A). The accused, a second lieutenant in the military service of the United States, was scheduled by the Operations Officer of Army Air Forces, Venice, Florida, together with Second Lieutenant Harold W. Burch to pilot a BT-13 "ship" at 1030 27 September 1944 (Pros. Ex. B). At that time and place the accused and Second Lieutenant Harold W. Burch took off in the basic trainer described on an instrument flight during which the former was to act as safety pilot and the latter as the instrument pilot. The plane was dual-controlled so that Lieutenant Burch could fly it by instruments while under the hood and the accused could take over control from his position in case of necessity. Lieutenant Burch flew the plane for about an hour by instruments and then signalled the accused to take over control. This flying by instrument was done at an altitude of 3000 feet, or more (R. 5).

The accused thereupon took over the piloting of the plane to fly it back to the field. He immediately put the plane into a steep dive over the Gulf of Mexico and as he was making a right turn and levelling off the plane struck the surface of the water. One of the landing wheels hit first, the plane's right wing tipped and then the stabilizer hit the water. Accused got the plane off the water and returned to the field where he was instructed to land on the right side of the runway because of his missing wheel. The landing gear minus the wheel caused the landing plane to tilt so that its propeller struck the ground and was damaged. Lieutenant Burch endeavored to contact the accused by the interphone as the plane was being piloted by the accused in the steep dive but was unable to do so because the phone was not operating (R. 6,7).

There was admitted in evidence without objection a written statement signed and sworn to by the accused (Pros. Ex. C) wherein the accused stated:

> "Before I came back to the Field I dove down on the water. My right wing hit the water and also my right wheel was knocked off * * * so I returned to the Field and called for landing instructions. I was pilot in the airplane when it hit the water."

It was stipulated that "the damage done to the airplane, military property of the United States, on the above date totaled $4,212.00" (R. 10).

b. For the defense.

Having been fully advised as to his right to remain silent, to make an unsworn statement, or to testify under oath, the accused elected to testify. He stated that it had been over a month before the 26th of September since he had flown a BT-13B aircraft. His total flying hours on that type of plane were 71 hours. At the time in question he took over the control of the plane from Lieutenant Burch and flew it down to "see what the water looked like". There was a haze on the surface of the water and hs misjudged the altitude. He had no idea that he was about to strike the water until the plane actually hit. He thereupon flew back to the field and landed according to instructions. He is 21 years of age and familiar with the flying regulations, but did not think of them when he flew down to see the water (R. 13). His total flying time of all types of planes totaled 318 hours (R. 14).

4. The evidence for the prosecution and the testimony of the accused conclusively show that on 26 September 1944 accused was engaged in a flight over the Gulf of Mexico in a military aircraft, belonging to the United States, and took over its control at an altitude of approximately 3,000 feet. Accused proceeded to put the plane into a steep dive and not only descended to an altitude of less than 500 feet above the Gulf, but through failure to exercise good judgment or through lack of skill or carelessness suffered the plane to strike the waters of the Gulf and to be damaged thereby to the extent of $4,212. There were no mechanical defects in the plane, there were no intervening factors which caused accused to lose control, and there was no necessity or military reason for the descent, accused being activated solely by a desire to "see what the water looked like". Even if this were a valid reason (and there is no contention to that effect) it is apparent that the surface of the Gulf was visible from a far greater height than 500 feet. Accused admitted that he had actual knowledge of the regulations which prohibit flying military aircraft at an altitude of less than 500 feet above the ground, and that he violated these regulations in the manner described in the Specification of Charge I. In the opinion of the Board, therefore, the evidence fully supports the findings of guilty of both Charges and the Specification under each.

With regard to Charge I and its Specification, while the flight was over the Gulf of Mexico at the time of the violation, the term "ground" in paragraph 16 of Army Air Forces Regulation 60-16 refers to the earth's surface and includes both land and water (CM 260637, Arthur). A violation of these regulations constitutes an offense under Article of War 96 (CM 260637, Arthur, CM 261063, Myers, CM 263303, Varnell).

With reference to Charge II and its Specification, there is no doubt whatsoever that the damage to the plane in the amount specified was caused by its impact with the waters of the Gulf as a result of the unnecessary and unauthorized dive initiated by accused. The primary purpose of the regulations prohibiting low flying is the protection of life and property. Accused, admittedly a flier of limited experience, intentionally put his plane into a dive for no reason other than the gratification of a personal

desire to "see what the water looked like". His lack of experience or inability to judge altitude, while violating the positive provisions of a prohibitory regulation, unquestionably caused the contact with the water, with the resultant damage to the plane. Accused's action, therefore, clearly constitutes negligence under Article of War 83. In a discussion of this Article, the Manual for Courts-Martial, 1928, says at page 158:

> "* * * A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a probable loss, damage, etc.
>
> "The wilful or neglectful sufferance specified by the Article may consist in a deliberate violation or positive disregard of some specific injunction of law, regulations, or orders; or it may be evidenced by such circumstances as a reckless or unwarranted personal use of the property; * * *." (Underscoring supplied.)

There is nothing to indicate that accused deliberately intended to strike the water, but criminal intent is not a necessary element of the offense of violation of Article of War 83 - "a special neglect of a positive and gross character" is all that need be established (Winthrop's Military Law and Precedents, 2d Edition, p. 559; CM 260637, Arthur). In the opinion of the Board of Review every element of the offense with which accused is charged under Article of War 83 has been established and the evidence fully supports the findings that accused through neglect suffered the Government's plane to be damaged (CM 233196, Bell, 19 B.R. 369; CM 260637, Arthur).

5. War Department records show the accused to be 21 years and 9 months of age, single, and a high school graduate. He enlisted in the service on 10 December 1942, entered active service in the Army Air Forces 19 February 1943, and upon completion of his training as a pilot on 23 May 1944 he was commissioned a second lieutenant.

6. 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 either Article of War 96 or Article of War 83.

_____, 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 Second Lieutenant Edward L. Minion (0-832658), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

3. Consideration has been given to the attached memorandum from Lieutenant General Barney M. Giles, Deputy Commander, Army Air Forces, dated 12 December 1944, stating that he is familiar with the facts in this case and recommending that the sentence to dismissal be confirmed but commuted to a forfeiture of $50 of accused's pay per month for a period of six months, in which recommendation I concur.

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

Myron C. Cramer

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

5 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft. of ltr. for sig. of S/W.
Incl.3-Form of Action.
Incl.4-Memo. fr. Lt.Gen. Giles, 12 Dec. 44.
Incl.5-Ltr. fr. Mrs. Laura Minion 8 Dec. 44.

(Sentence confirmed but commuted to forfeiture of $50 per month for six months. G.C.M.O. 71, 12 February 1945)

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

SPJGN
CM 269103

10 JAN 1945

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at MacDill Field, Tampa, Florida, 30 October 1944. Dismissal.
First Lieutenant MILTON E. ZOLLER (0-649445), Air Corps.	

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

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

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

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

Specification: In that First Lieutenant Milton E. Zoller, Air Corps, Squadron S, MacDill Field, Tampa 8, Florida, did, without proper leave, absent himself from his organization at MacDill Field from about 0900 30 July 1944, and did remain absent without proper leave until apprehended by military police at or near St. Petersburg, Florida, on or about 1315, 2 August 1944.

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

Specification 1: In that First Lieutenant Milton E. Zoller, Air Corps, Squadron S, MacDill Field RTU (HB), MacDill Field, Tampa 8, Florida, did, at Tampa, Florida on or about 14 July 1944, with intent to deceive wrongfully and unlawfully make and utter to the Hotel Floridan, Tampa, Florida, a certain check in words and figures as follows, to wit:

Tampa, Florida July 14 1944

Pay to the Order of HOTEL FLORIDAN

Dollars	Cents
15	00

Fifteen and no- - - - - - 100 Dollars

To Amalgamated Trust & Savings
111 So. Dearborn Street
Chicago, Illinois

s/Milton E. Zoller,
1st Lt. AC 0-649445
MacDill Field, Section S

and by means thereof, did fraudulently obtain from Hotel Floridan, Tampa Florida cash of the value of $15.00, he the said First Lieutenant Milton E. Zoller, then well knowing that he did not have and not intending that he should have sufficient funds in the Amalgamated Trust and Savings Bank (of Chicago) for the payment of said check.

Specification 2: (Finding of guilty disapproved by reviewing authority.)

Specification 3: In that First Lieutenant Milton E. Zoller, Air Corps, Squadron S, MacDill Field RTU (HB), MacDill Field, Tampa 8, Florida, did, at MacDill Field, on or about 19 July 1944, with intent to deceive wrongfully and unlawfully make and utter to the MacDill Field Officers' Mess for cash, a certain check, in words and figures as follows to wit:

$15.00 Tampa, Fla. 19 July 1944

Pay to the order of MACDILL FIELD OFFICERS' MESS

Fifteen and no----------100 Dollars

To Amalgamated Trust and Savings Bank
Name of Bank

Chicago Ill.
Location of Bank

s/Milton E. Zoller,
1st Lt. AC, 0-649445
Section S

and by means thereof, did fraudulently obtain from the MacDill Field Officers' Mess, MacDill Field, Tampa 8, Florida cash of the value of $15.00, he the said First Lieutenant Milton E. Zoller, then well knowing that he did not have and not intending that he should have sufficient funds in the Amalgamated Trust and Savings Bank (of Chicago) for the payment of said check.

Specification 4: In that First Lieutenant Milton E. Zoller, Air Corps, Squadron S, MacDill Field RTU (HB), MacDill Field, Tampa 8, Florida, did, at MacDill Field, on or about 25 July 1944, with intent to deceive wrongfully and unlawfully make and utter to the MacDill Field Officers' Mess for cash, a certain check, in words and figures as follows to wit:

$10.00 Tampa, Fla., July 25 1944

Pay to the order of MACDILL FIELD OFFICERS' MESS

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

To Amalgamated Trust and Savings Bank
Name of Bank
111 So. Dearborn St.
Chicago Ill
Location of Bank

s/Milton E. Zoller
1st Lt., AC 0-649445 Section S

and by means thereof, did fraudulently obtain from the MacDill Field Officers' Mess, MacDill Field, Tampa 8, Florida cash of the value of $10.00, he the said First Lieutenant Milton E. Zoller, then well knowing that he did not have and not intending that he should have sufficient funds in the Amalgamated Trust and Savings Bank (of Chicago) for the payment of said check.

Specification 5: In that First Lieutenant Milton E. Zoller, Air Corps, Squadron S, MacDill Field RTU (HB), MacDill Field, Tampa 8, Florida, did, at MacDill Field, on or about 27 July 1944, with intent to deceive wrongfully and unlawfully make and utter to the MacDill Field Officers' Mess for cash, a certain check, in words and figures as follows to wit:

$10.00 Tampa Fla., July 27 1944

Pay to the order of MACDILL FIELD OFFICERS' MESS

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

To Amalgamated Trust and Savings Bank
Name of Bank

111 So Deaborn St Chicago, Ill
Location of Bank

s/Milton E. Zoller,
1st Lt AC 0-649445, Section S

and by means thereof, did fraudulently obtain from the MacDill Field Officers' Mess, MacDill Field, Tampa 8, Florida cash of the value of $10.00, he the said First Lieutenant Milton E. Zoller, then well knowing that he did not have and not intending that he should have sufficient funds in the Amalgamated Trust and Savings Bank (of Chicago) for the payment of said check.

Specification 6: In that First Lieutenant Milton E. Zoller, Air Corps, Squadron S, MacDill Field RTU (HB), did, at Batista Field, Havana, Cuba, on or about 22 July 1944, with intent to deceive, wrongfully and unlawfully wear certain decorations and service ribbons, to wit:

Silver Star
Soldiers Medal
Distinguished Flying Cross
Purple Heart
Air Medal with two (2) Oak Leaf Clusters
Asiatic Pacific Theater Ribbon with three (3) Battle Stars

then well knowing that he, the said First Lieutenant Milton E. Zoller, was not entitled to wear said decorations and service ribbons.

The accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specification 2 of Charge II and approved only "so much of the findings of guilty of Specifications 1, 3, 4, and 5 of Charge II and of Charge II as involve a finding of guilty of wrongfully and unlawfully making and uttering the checks described, of the values, to the payees, and at the times and places alleged, and by means thereof obtaining the sums alleged from the payees alleged, in violation of " Article of War 96. The sentence was also approved, and the record of trial was forwarded for action under Article of War 48.

3. The evidence for the prosecution shows that the accused absented himself without leave on 30 July 1944 from Squadron S, MacDill Field, Tampa 8, Florida, to which he was attached (R. 5, 12; Pros. Ex. A). He was apprehended by Sergeant Paul J. Greison of the Military Police at the Tides Hotel in St. Petersburg, Florida, on 2 August 1944 and was immediately returned to MacDill Field (R. 6-7).

Shortly before, on 14 July 1944, the accused executed a check in the sum of fifteen dollars drawn on the Amalgamated Trust & Savings Bank of Chicago, Illinois, and obtained the face amount in cash from the Hotel Floridan of Tampa, Florida, which was designated as the payee. The balance to his credit on that date at the drawee bank with whom he had maintained an account for at least several months was only $13.31 (R. 7-8; Pros. Exs. B, M). Upon being presented for payment the instrument was returned with the notation "not sufficient funds" (R. 7-8; Pros. Exs. B, M). The hotel, on 29 July 1944, wired the accused advising him of the dishonor and requesting that he remit an "amount to cover" (R. 8-9; Pros. Ex. C). Not having received a reply, the hotel, on 2 August 1944, sent a letter to the Commanding Officer of "Section S" invoking his assistance in enforcing collection (R. 9-10; Pros. Ex. D). As of the date of the trial the reimbursement had not yet been made (R. 9). In the absence of a request for redeposit by the maker, checks were not "sent back a second time" by the hotel because many banks objected to such a practice (R. 10). While there was "a possibility" that the accused had called on the telephone in answer to the telegram, his message, if actually transmitted, would normally have been accorded "the proper attention" (R. 11).

Three other checks, the first in the sum of fifteen dollars and the last two in the sum of ten dollars each, were made and executed by him on 19, 25, and 27 July 1944 respectively. They were drawn on the Amalgamated Trust & Savings Bank of Chicago and cashed by the MacDill Officers' Mess which was in each instance designated as the payee (R. 12, 15; Pros. Exs. F, G, H, I, K). The ledger sheet reflecting the accused's account shows that his maximum net balance between 19 July and 3 August 1944 was $3.31 (Pros. Ex. M). All three instruments were deposited for collection by the Officers' Mess and returned because of insufficient funds. The accused, when informed of their rejection, redeemed them with cash "that same afternoon or the next morning" at face value (R. 13-16). According to Major Joseph V. Lauro, the Club officer, one or two of these instruments had originally been accepted by him upon the condition that no attempt at collection would be made until 1 August 1944. His assistant, a Lieutenant Fagyal, not knowing of this arrangement, had turned the instruments over "to the bookkeeper to deposit". Upon learning of this careless act, Major Lauro called the accused on the telephone and, after acquainting him with the fact, was informed by him that, "they are going to bounce" (R. 13, 16).

Some evidence was adduced to show that, while attending a party at the Officers' Club at Batista Field in Cuba on the night of 22 July 1944, the accused had worn ribbons representing the Silver Star, the Distinguished Flying Cross, the Air Medal with Oak Leaf Clusters, the Purple Heart, the Soldiers Medal, and the South Pacific Ribbon with battle stars. First Lieutenant Joseph X. Brown, who was present and who was the only witness to the offense introduced by the prosecution, definitely noted only one of the decorations on that occasion. He was able to identify the others only because he had seen them previously and assumed that the same group was being displayed (R. 21-24). The accused had formerly been a member of his crew. In the course of their acquaintance the accused had remarked that he had served at Bouganville and the surrounding "general area", that he had received the Air Medal after flying more than fifty missions, that he had "won" the Soldiers Medal in an airplane crash at Salt Lake City two years before, and that he has been awarded the Silver Star and the Distinguished Flying Cross (R. 20-21).

That none of the decorations enumerated had actually been earned was indicated by the testimony of Captain Arthur D. Williamson, the Base Classification Officer, who had no personal knowledge of the subject and relied entirely upon the accused's service records maintained on a War Department AGO Form 66-2. This document contained no entries showing that the accused had ever been stationed at Salt Lake City, that he had had overseas experience, or that he had the right to wear any medal or ribbon (R. 25-28). All of the posts to which he had been attached were located within the continental United States (R. 26-27).

Although defense counsel objected to the testimony of Captain Williamson and moved to strike it on the ground that the entries in the service record were not original but "made from hearsay", the court permitted the "report" to be "retained for what value it may have" (R. 26-27, 29). Further examination disclosed that the document was incomplete in that it omitted any reference to the accused's aeronautical rating as a navigator (R. 28). Captain Arthur D. Williamson, the Base Classification Officer, admitted that it was "entirely possible through human error" for personnel orders not to be entered (R. 29).

4. The accused, after having been fully apprised of his rights relative to testifying or remaining silent, took the stand on his own behalf. Two other witnesses were called by the defense. Sergeant Taylor R. Barbee, whose duty it was to "take care of the 66-2's" at the Field, stated that many of them were not up to date, "especially on decorations" (R. 30). After two specific instances had been cited, the request that the testimony of Captain Williamson be stricken in its entirety was again renewed but the motion was denied (R. 31).

Private Richard T. O'Brien, the second witness for the defense, was the Morning Report Clerk who had made the entry on Prosecution's Exhibit A by which the accused's absence without leave had been established. The

remarks had been recorded on 4 August 1944, several days after the event, and were based not on personal observation or knowledge but upon information received from "either the first sergeant or the adjutant" (R. 31-32). Previously, on 28 July 1944, Private O'Brien had corrected a morning report involving the accused to show two officers "from duty to hospital" instead of three officers (R. 32). He had been "told" to make the entry of 4 August 1944 (R. 33). In view of this testimony counsel requested that Prosecution's Exhibit A "be withdrawn" as hearsay. This motion was also denied.

The accused admitted the execution and cashing of the checks to the Hotel Floridan and to the MacDill Field Officers' Mess (R. 34). His account of the steps taken by him upon receiving a telegram message from the Hotel Floridan demanding reimbursement was as follows:

> "I immediately phoned the hotel and asked for Mr. Bates ... He wasn't there at the time, so I then asked for the cashiers office and I told him my name and told him that the hotel had wired me collect saying that this check was no good, and I told them to put the check back in and he said he would.
>
> * * *
>
> "I had assumed that it would be redeposited. My checks go to the bank every month, and this being the end of the month I felt certain that my deposit slip would come in ... And it being Saturday, I knew it couldn't be deposited before Monday, so I had nothing to worry about and did not hesitate to have him redeposit it" (R. 34).

Had the accused known that the instrument would not be again presented, he would have taken steps to redeem it. He was never informed of the letter sent to his Squadron Commander by Mr. Bates (R. 35). Major Lauro was mistaken in asserting that he had been asked by the accused to hold two checks until the first of August 1944. The accused never entered into any such arrangement with anyone. "With considerable less embarrassment [he] could have gone to somebody to lend [him] the ten dollars" (R. 34). The very day that he heard that the checks had been dishonored he paid their aggregate face amount by another check and not in cash as Major Lauro had asserted (R. 34-35, 37).

5. Upon being recalled as a witness for the prosecution Major Lauro reiterated the substance of his previous testimony. He conceded, however, that he might possibly have confused the accused with someone else (R. 37).

6. The Specification of Charge I alleges that the accused "did, without proper leave, absent himself from his organization ..., from about 0900 30 July 1944, and did remain absent without proper leave until apprehended by military police ... on or about 1315, 2 August 1944." This was set forth as a violation of Article of War 61.

The morning report introduced into evidence as Prosecution's Exhibit A definitely establishes the inception of the accused's unauthorized absence. Its termination by apprehension was testified to by Sergeant Greison. These two items of evidence prove the Specification beyond a reasonable doubt.

The attack made by the defense upon the admissibility of the morning report was not well-founded. Counsel for the accused relied entirely upon the statement in Dig. Op. JAG, 1912-1940, sec. 395 (18) that:

> "Where it is manifest that entries in an official record required to be kept, such as a morning report or a muster roll, could not have been based upon the personal knowledge of the person who made such record, such entries are not competent evidence of the facts therein stated."

This opinion did not require the rejection of the morning report dated 4 August 1944. As is printed out in paragraph 177 of the Manual for Courts-Martial, 1928, an "official statement in writing ... is admissible when the officer or other person making it had the duty to know the matter so stated and to record it". It is of course well settled that this duty devolves upon the commanding officers of the lowest administrative units, that is, upon company commanders in the various ground organizations and upon squadron commanders in the air forces (paragraph 1, Army Regulation 245-5, 2 June 1942; paragraph 3d, Army Regulation 345-50, 27 July 1942; paragraph 2, Army Regulation 345-400, 1 May 1944). The task is one which cannot ordinarily be delegated but its manual and clerical aspects need not be performed personally. This distinction has not always been recognized because of confusion arising from the indiscriminate use of the word "make" in discussing the maintenance of morning reports. When the authorities refer to the "making" of these particular instruments, the act contemplated is one which will be performed by the commanding officer of a basic adminsitrative unit and not by a mere clerk who renders the service of an amanuensis. It follows in the instant case that Private O'Brien's personal knowledge or lack of knowledge of the accused's absence without leave was immaterial. His task was the manual one of entering various remarks in the morning report but the actual "making" of that report was the designated duty of the squadron commander. Since there is absolutely nothing in the record to impugn the squadron commander's personal knowledge of the accused's absence without leave, the court rightfully inferred such knowledge from the usual presumption of regularity and properly admitted the morning report.

The opinion in III Bull, JAG, August 1944, does not provide authority for the contrary proposition, for in that case the evidence indicated that the squadron commander could not have had personal knowledge of the facts recorded in the morning report.

7. Specifications 1, 3, 4, and 5 of Charge II as modified by the reviewing authority allege that the accused did on or about 14, 19, 25, and 27 July 1944 wrongfully and unlawfully make and utter four checks, one to the Hotel Floridan of Tampa, Florida, and the remaining three to the MacDill Field Officers' Mess, the first two being in the sum of $15.00 each and the last two in the sum of $10.00 each. These offenses were found to be violative of Article of War 96.

The four checks in question were all returned to the payees by the drawee bank because of insufficient funds. As soon as the accused learned that the one check dated 14 July 1944 had been dishonored, he contacted one of the employees of the Hotel Floridan and requested that the instrument be redeposited. Had the accused's directions been followed the face amount would unquestionably have been paid. As soon as he learned that the remaining three checks to the Officers' Mess had also been rejected by the drawee bank, he satisfied their aggregate principal sum in full. His prompt efforts to effect redemption strongly indicate that his issuing of the four checks was merely negligent and not the product of an intent to defraud. As the court properly found, however, negligence alone in passing worthless instruments is sufficient to constitute an offense under Article of War 96. To quote from CM.245908, Riley, XXIX BR 325, "Where, as here, the status of the accused's account results from his own acts, he is properly chargeable with knowledge of it." Once this principle is recognized, the conclusion follows that:

> "A member of the military establishment is under a particular duty not to issue a check without maintaining a bank balance or credit sufficient to meet it. 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)." III Bull. JAG, July 1944, p. 290, sec. 454 (67).

The defense has not succeeded in proving an "honest mistake". Specifications 1, 3, 4, and 5 have accordingly been sustained beyond a reasonable doubt.

8. Specification 6 of Charge II alleges that the accused did, "on or about 22 July 1944, with intent to deceive, wrongfully and unlawfully wear certain decorations and service ribbons ... then well knowing that he ... was not entitled to wear said decorations and service ribbons." This was also represented to be a violation of Article of War 95.

The only testimony adduced to show that the accused was not entitled to any of the various decorations and ribbons which he displayed on the night of 22 July 1944 was founded exclusively upon his service record. With respect to this instrument paragraph 117 of the Manual for Courts-Martial, 1928, states that it

> "is not an original paper, so far as relates to facts compiled in it from other original sources, and therefore is not evidence of such facts ... A failure to object to a document on the ground that the information therein is compiled from other original sources may be regarded as a waiver of the objection."

There was no such waiver in this case, for counsel for the defense reiterated his objection to the "hearsay" character of the testimony several times. When it is remembered that the particular service record in issue was not only not an original document but was also incomplete, the record must be held to be legally insufficient to sustain the Specification.

9. The accused is about 27 years old. After attending the Illinois Institute of Technology for three years, he was employed as a purchasing agent by the Midland Machinery Company of Chicago, Illinois, from December of 1941 to January of 1942. He had enlisted service from 20 January to 11 September 1942, was commissioned a second lieutenant on 12 September 1942, and was promoted to first lieutenant on 20 February 1943. Since 12 September 1942 he has been on active duty as an officer.

10. The court was legally constituted. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Specification 6 of Charge II and legally sufficient to support all of the other 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. Glomen, Judge Advocate.

(On Leave), Judge Advocate.

SPJGN-CM 269103 1st Ind.

Hq ASF, JAGO, Washington 25, D. C. JAN 29 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 First Lieutenant Milton E. Zoller (0-649445), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 6, Charge II, legally sufficient to support all of the other findings as approved by the reviewing authority, and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed and ordered executed.

3. Consideration has been given to a communication received on 13 December 1944, from Major General Westside T. Larson, the Reviewing Authority.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Communication from Gen. W. T. Larson.

(Finding of guilty of Specification 6, Charge II, disapproved. Sentence confirmed. G.C.M.O. 135, 9 Apr 1945)

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TITLE

DATE	BORROWER'S NAME	EXT.