OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 46

1944 - 1945

R
16
B63
v.46

Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume XLVI

including

CM 270942 to CM 273159

(1944-1945)

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

Office of The Judge Advocate General

Washington : 1945

03059

CONTENTS OF VOLUME XLVI

CM No.	Accused	Date	Page
270942	MacDonald	21 Feb 1945	1
271083	Barry	3 Jan 1945	19
271097	Coleman	2 Feb 1945	25
271098	Phoenix, Nunn	1 Feb 1945	39
271105	Lacy	29 Dec 1944	47
271119	Simpson	24 Jan 1945	53
271153	Karsanoff	22 Jan 1945	61
271155	Massey	18 Jan 1945	71
271265	Weed	21 Feb 1945	79
271286	Kelley	9 Feb 1945	89
271311	Appel	30 Jan 1945	97
271315	Coleman	25 Jan 1945	103
271330	Presba	15 Jan 1945	109
271426	Cannon	11 Jan 1945	115
271588	Blackburn	9 Feb 1945	121
271591	Bailey	28 Feb 1945	129
271594	Pritchard	29 Dec 1944	141
271661	Krueger	19 Feb 1945	145
271690	Williamson	8 Feb 1945	157
271731	Cooper, Reeves, Lawrence, Crowder	2 Feb 1945	169
271737	Chafin	23 Jan 1945	177
271769	Reese	31 Jan 1945	183
271803	Rooney	5 Jan 1945	187
271859	Manning	11 Jan 1945	189
271889	Barbera	3 Mar 1945	193
271956	Swinney	28 Feb 1945	219
271991	Boyd	13 Feb 1945	227
272067	Langford	25 Jan 1945	237
272083	Vaus	9 Mar 1945	243
272108	Smith	24 Jan 1945	261
272197	Dezan	12 Jan 1945	269
272306	Graham	13 Jan 1945	273
272457	Smith	29 Jan 1945	281
272571	Foster	6 Feb 1945	295

CM No.	Accused	Date	Page
272582	Rushing, Chiribel	23 Jan 1945	301
272588	McGovern	24 Jan 1945	305
272589	Skirvin	25 Jan 1945	315
272610	Armas	1 Feb 1945	319
272624	Waters	8 Feb 1945	327
272638	Harrison	9 Mar 1945	335
272642	Bailey	21 Feb 1945	343
272733	Burham	15 Jan 1945	351
272772	Morgan	24 Jan 1945	355
272944	Wilburn	19 Jan 1945	361
273060	Carrillo	2 Mar 1945	365
273087	Salsbury	26 Jan 1945	371
273089	Kaempfer	15 Feb 1945	375
273105	Waring	29 Mar 1945	387
273159	Jackson	23 Feb 1945	393

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

SPJGQ
CM 270942

21 FEB 1945

UNITED STATES	)	SIXTH AIR FORCE
v.	)	Trial by G.C.M., convened at Albrook Field, Canal Zone, 13 November 1944. Dismissal and total forfeitures.
Captain WILLIAM J. MACDONALD (O-563747), Air Corps.	)	

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

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

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

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

Specification 1: In that Captain William J. MacDonald, Air Corps, (formerly Inspector General's Department), 350th Base Headquarters and Air Base Squadron, being then and there a married man having a lawful, living wife and not being divorced, did without due cause, from on or about 1 March 1943 to on or about 30 June 1944, dishonorably fail and neglect to support said wife.

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

Specification 1: In that Captain William J. MacDonald, Air Corps, (formerly Inspector General's Department), 350th Base Headquarters and Air Base Squadron, did, at United States Army Air Base, Albrook Field, Canal Zone, on or about 10 April 1944, wrongfully borrow from Technical Sergeant James D. Giokaris, Headquarters and Headquarters Squadron, Sixth Air Force, the amount of ten dollars ($10.00), this to the prejudice of good order and military discipline.

(2)

Specification 2: In that Captain William J. MacDonald, Air Corps, (formerly Inspector General's Department), 350th Base Headquarters and Air Base Squadron, did, at United States Army Air Base, Albrook Field, Canal Zone, on or about 1 June 1944, wrongfully borrow from Staff Sergeant Frank R. Miner, Headquarters and Headquarters Squadron, Sixth Air Force, the amount of twenty dollars ($20.00), this to the prejudice of good order and military discipline.

Specification 3: In that Captain William J. MacDonald, Air Corps, (formerly Inspector General's Department), 350th Base Headquarters and Air Base Squadron, did, at United States Army Air Base, Albrook Field, Canal Zone, on or about and between 1 January 1943 and 31 May 1944, wrongfully borrow from Staff Sergeant Ethbert C. Abercrombie, Headquarters and Headquarters Squadron, Sixth Air Force, sums of money in the total amount of one hundred and sixty dollars ($160.00), this to the prejudice of good order and military discipline.

Specification 4: In that Captain William J. MacDonald, Air Corps, (formerly Inspector General's Department), 350th Base Headquarters and Air Base Squadron, being indebted to Technical Sergeant Stephen C. Paspek, Headquarters and Headquarters Squadron, Sixth Air Force, in the sum of four dollars and fifty cents, ($4.50), which amount became due and payable on or about 3 May 1944, did, at United States Army Air Base, Albrook Field, Canal Zone, from on or about 3 May 1944 to on or about 4 July 1944, dishonorably fail and neglect to pay said debt.

Specification 5: In that Captain William J. MacDonald, Air Corps, (formerly Inspector General's Department), 350th Base Headquarters and Air Base Squadron, being indebted to Technical Sergeant James D. Giokaris, Headquarters and Headquarters Squadron, Sixth Air Force, in the sum of thirty-six dollars and fifty-five cents, ($36.55), which amount became due and payable on or about 20 April 1944, did, at United States Army Air Base, Albrook Field, Canal Zone, from on or about 20 April 1944 to on or about 30 June 1944, dishonorably fail and neglect to pay said debt.

Specification 6: In that Captain William J. MacDonald, Air Corps, (formerly Inspector General's Department), 350th Base Headquarters and Air Base Squadron, being

indebted to Staff Sergeant Frank D. Miner, Headquarters and Headquarters Squadron, Sixth Air Force, in the sum of twenty dollars, ($20.00), which amount became due and payable on or about 10 June 1944, did, at United States Army Air Base, Albrook Field, Canal Zone, from on or about 10 June 1944 to on or about 6 July 1944, dishonorably fail and neglect to pay said debt.

Specification 7: In that Captain William J. MacDonald, Air Corps, (formerly Inspector General's Department), 350th Base Headquarters and Air Base Squadron, being indebted to Staff Sergeant Ethbert C. Abercrombie, Headquarters and Headquarters Squadron, Sixth Air Force, in the sum of fifty-one dollars and fifty cents, ($51.50), which amount became due and payable on or about 1 December 1943, did, at United States Army Air Base, Albrook Field, Canal Zone, from on or about 1 December 1943 to on or about 4 July 1944, dishonorably fail and neglect to pay said debt.

Specification 8: In that Captain William J. MacDonald, Air Corps, (formerly Inspector General's Department), 350th Base Headquarters and Air Base Squadron, being indebted to Staff Sergeant Ethbert C. Abercrombie, Headquarters and Headquarters Squadron, Sixth Air Force, in the sum of forty dollars, ($40.00), which amount became due and payable on or about 10 June 1944, did, at United States Army Air Base, Albrook Field, Canal Zone, from on or about 10 June 1944 to on or about 24 June 1944, dishonorably fail and neglect to pay said debt.

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

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

Charge I and Specification:

In support of Charge I the trial judge advocate announced that "Mrs. MacDonald is the main witness, and, in fact, the only witness for the prosecution as to that charge...". Inasmuch as she was, at the time of the trial, residing in Battle Creek, Michigan, the prosecution offered her deposition, "subject to objection by the defense counsel". Defense counsel, for reasons appearing hereafter, thereupon

requested that the prosecution "permit the introduction of the deposition of Mrs. MacDonald dated November 3, 1944, before the introduction of the deposition dated October 17, 1944" (R. 10).

Thereupon, the prosecution offered in evidence the deposition of Mrs. Lorna Lee (Richison) MacDonald taken on 3 November 1944 and it was received without objection (R. 11; Government's Ex. #1).

The deposition, as framed, sought answers from Mrs. MacDonald to eight questions propounded by the prosecution and to one cross-interrogatory of the defense. The deposition as received in evidence contained, in the answer to the third interrogatory, a general declination to give any evidence in the case, as follows:

> "Third answer: I do not want to testify against my husband for any purely military offense. He is supporting me, I am in love with him, and we have never had any trouble" (Gov. Ex. 1).

The prosecution then offered in evidence, subject to objection by defense, the deposition of Mrs. MacDonald taken on 17 October 1944. Defense objected to its introduction for the reason that a wife may refuse to testify against her husband and cannot be compelled to do so; and, further, because the first deposition disclosed a reluctance to testify against her husband in any proceedings and the latter deposition clearly evidence her declination to do so (R. 11, 13-17). The objection was overruled and the first deposition was, likewise, admitted in evidence (R. 17; Gov. Ex. 2).

In substance this deposition sets forth that the accused and the deponent were married on 9 June 1941 and have never been divorced. They lived together in various places until October 1942 when the accused was sent to Panama, after which she received an allotment of $150 per month. From 1 November to 23 December 1942 she had visited and stayed with the accused's parents in Maine. Thereafter she visited her own parents. About 1 March 1943 she visited friends in Tulsa, Oklahoma, at their invitation. In May she visited another friend upon invitation. There were no expenses involved in any of these visits except transportation. In November 1943 she went to Miami, Florida, staying there until May 1944 during which time her husband bore her expenses. In March 1943 the accused had cancelled the allotment and from then to 30 June 1944 she received approximately $250.00 from the accused; but her living expenses for food, clothing and general maintenance did not exceed the amount of money which her husband had sent her between 1 March 1943 and 30 June 1944, and at no time during this period was she destitute or without means of support. She made a request in March 1943 that the accused make another allotment and in April he promised to make one increasing the amount to $175.00. On 9 June 1944 she wrote a letter to the Inspector General's Department in the hope that it

might assist in getting an allotment started. She informed her husband about the letter, which she now regrets sending, and intended writing to Colonel Miller in the Inspector General's Department requesting that no disciplinary action be taken against the accused but concluded that the sentiments expressed in her letter to her husband would serve the purpose if shown to Colonel Miller. In August 1944 the accused made an allotment of $200 per month, which has been in continuous effect since. Mrs. MacDonald still loves her husband, expects to live with him when the war is over and, as far as she knows, he has always been a faithful husband. She was never subjected to any scandal or disgrace by reason of any failure of her husband to send her money; no one has ever spoken critically about her husband because of his neglect; the matter was a purely private one and no one outside of the family had any knowledge of the circumstances. The last answer of the deposition is quoted:

> "I feel that my husband didn't intentionally omit starting the allotment but due to his work it just slipped his mind. I don't want him to be court-martialed because my allotment has been started and I have no complaints against him."

A copy of the letter to the Inspector General's Department and of the Certificate of Record of Marriage of the accused and his wife were admitted in evidence by stipulation (R. 18; Gov. Ex. 1-B).

Charge II, Specification 1:

It was shown that, at some time "in the early spring of 1944," the accused asked Staff Sergeant James D. Giokaris who was on duty in the office of the Air Inspector of the Sixth Air Force with the accused, for the loan of $10.00, which amount the sergeant then loaned to the accused without specifying any date for repayment (R. 20). The sergeant felt that the transaction was purely on the basis of friendship, involved no coercion because of the accused's position, and he contemplated no advantages because of it (R. 26).

Specification 2:

Without objection, the deposition of Staff Sergeant Frank R. Miner, Headquarters Squadron, 6th Air Force, was admitted in evidence (R. 27; Gov. Ex. 3), excepting, however, the third, fifth and sixth redirect interrogatories, and the answers thereto (R. 27, 28).

In substance the deposition establishes that Miner was acquainted with the accused since May 1942. On about 2 or 3 June 1944 at approximately 9 a.m. the accused approached Miner at the Air Base of the 6th Air Force and stated that he wanted to borrow some money. Miner told him "it looked rather peculiar for a captain in the army to

have to borrow so soon after pay day" and passed the matter off. No amount had been mentioned. Later in the day the accused again requested a loan from Miner, this time specifying $50.00 as the sum needed. Miner said the amount was too much and that he could not afford to make the loan. Still later on the same day the accused came to Miner's quarters, and again requested the loan of $50.00 whereupon Miner said it was out of the question but told him he could let him have $20.00. This sum he then loaned to the accused.

Specification 3:

Staff Sergeant Ethbert C. Abercrombie met the accused in December 1942 when both worked in the Inspector General's Office, 6th Air Force. Sometime in January 1943, Abercrombie, then a private, at the request of the accused, then a second lieutenant, loaned him $25.00. This was repaid on the following pay day (R. 33). Sometime later (on dates not specified) accused made loans of $20.00 and $25.00, respectively, and both were repaid on the ensuing pay day (R. 34, 35). Some time in November (on dates not specified) Abercrombie, then a "buck" sergeant, at the accused's request loaned him $35.00, $20.00 and $2.00, respectively (R. 35) and in May 1944, again at accused's request, he loaned him $40.00 (R. 37), these loans being made under conditions hereinafter set forth (See Specification 7).

Specification 4:

Technical Sergeant Stephen C. Paspek had also become acquainted with the accused in December 1942 when both were on duty in the Inspector General's Office, 6th Air Force (R. 28, 29). In April 1944 Paspek made a trip to Guatemala, and brought back with him, in May 1944, a pair of rope sandals and a handbag which the accused had requested him to buy for him and which he bought with his own money. The articles were delivered to the accused but, although Paspek told him the cost was $4.50, the accused did not have the change and said he would pay him later. He did pay Paspek right after pay day in the early part of July 1944 (R. 29, 30). On cross-examination Paspek stated that he had no thought of obtaining any advantage by accommodating the accused, inasmuch as the purchase was made on the basis of friendship and it was common practice for anyone away on a trip to purchase articles for and at the request of others (R. 31, 32). He had never made any demand upon the accused for payment (R. 31).

Specification 5:

In March 1943 Staff Sergeant Giokaris made a trip to Talara and while there, at the request of the accused but with his own money, he purchased blankets for the accused. The accused paid the major portion of the amount due to Giokaris but a balance of $4.35 remained due and

payable (R. 20). Subsequently, on unspecified dates, Giokaris made purchases of a carton of cigarettes and some stationery for the accused for which he paid, respectively, 50¢ and 35¢ and for which he was not reimbursed by the accused when the articles were delivered. In September 1943 Giokaris made a purchase in Guatemala, of another blanket for the accused at his request. The record does not disclose what was paid for this blanket although it does show that the accused did not pay for it on delivery (R. 21). Subsequent to September 1943 Giokaris gave $10.00 to the accused with the request that he purchase a blanket for him on a trip to Salinas. The accused was unable to buy the blanket but did not refund the $10.00 upon his return (R. 22). At another time (date not disclosed) Giokaris paid a dry cleaning bill of the accused in the sum of $2.35. In August 1944, Giokaris received payment for these items, together with the $10.00 loan (Specification 1), which had been accumulating since March 1943, by a postal money order which he thought was in the amount of $36.55 (R. 23, 24). Giokaris had made no complaint about the debt because he had confidence that it would be repaid (R. 25). He expected no advantage because of the favors he had done for the accused but considered them on a friendly basis. For these reasons he never demanded payment from the accused. Quoting him, ".... I never worried about the money ... it never inconvenienced me ... I felt as though it was in the bank as savings ... I knew I would be getting it and probably taking it home with me..." (R. 27).

Specification 6:

When Staff Sergeant Miner loaned $20.00 to the accused in the early part of June 1944 (Specification 2) he did so on condition that it would be repaid on the 10th or 15th of the month (June) (witness was not certain which) and that the accused would come to him and not oblige Miner to go to the accused and ask for it. The loan was not repaid on 10 June and the accused avoided Miner when he saw him. Miner became angry and, going to the accused's office around the middle of June 1944, asked him for the money. Accused told him he would have the money as soon as a letter he was expecting would arrive and that if the letter did not arrive in a few days he would call or go to see Miner. When he neither saw nor heard from the accused, Miner called him by telephone on about 18 June 1944 but without avail. Accused did pay the money around 1 July 1944 (Gov. Ex. 3).

Specifications 7 and 8:

The loans in the sums of $20.00, $35.00 and $2.00 made by Staff Sergeant Abercrombie in November 1943 (Specification 3) were on condition that they be repaid on the following pay day but the accused failed to do so (R. 35, 36). In December 1943 the accused, at the request of Abercrombie, purchased an article for him while at Fort Amador and upon his return accused asked Abercrombie to credit him with $5.50, the cost

of the article, upon the debt owing from him to Abercrombie (R. 36). The balance remaining thus stood at $51.50 (R. 37). In May 1944 accused borrowed an additional $40.00 from Abercrombie and promised him to pay half of the $91.50 obligation on the 10th of June and the balance on the next pay day which was 1 July 1944 (R. 37). Accused made no payment on 10 June 1944, but, shortly after 1 July 1944 sent a money order for $50.00 to Abercrombie. On 1 August 1944 he sent one for $20.00 and sometime after 1 September 1944 discharged the balance owing. Thus the sum of $51.50 owing to Abercrombie by accused in December 1943 remained outstanding and unpaid until 1 July 1944 (R. 38). Abercrombie testified that all of the loans had been made as to a friend; he granted them of his own free will with no coercion or thought of advantage; and in the confidence that they would be repaid. He made no demands upon accused for the money until June 1944 when he told him, either over the telephone or in person, that he needed some money but received none until after 1 July 1944 (R. 40, 41).

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

He is 28 years of age and has been in the service for 6 years.

After he had left for Panama and prior to March 1943 his wife had gone, by agreement, to live with his parents until he returned. He did not want her to work so she was not employed at the time. Subsequently, at the invitation of many friends and after obtaining his consent, she did a great deal of travelling in order to make visits. During this time she was adequately supported and was not obliged to make any of these visits for a place to live (R. 50, 57). It reached a point where her allotment checks were not reaching her until quite late in the month. He, therefore, cancelled the allotment in March 1943 but with the intention of making a new one giving her address as at his parents' home in Maine. He was then ordered out on an inspection trip and was away from his post for about a month and the matter unintentionally "slipped (his) mind" (R. 50). His wife had never indicated in any of her letters to him that she was destitute and whenever she asked him to send her money he would do so (R. 51). In this way he had sent her $350.00 to $400.00 (R. 56) and this, together with savings from the allotment he had provided for her until he cancelled it, placed her in position where she could reciprocate the hospitality of her friends (R. 55). She had written to him explaining how and why she wrote to the Inspector General's Department (R. 51). It appears that she discussed the matter of the allotment with a colonel of the department who suggested the writing of the letter and assisted her in preparing one (R. 51). In this fashion, the accused believes that the facts are unnecessarily exaggerated (R. 57, 58); in fact, his wife regretted sending the letter and inquired of the accused as to the advisability of writing further requesting that no disciplinary action be taken. This, the accused advised her, would be of no value at all, inasmuch as the

original letter had been sent to the accused's superior officer, Colonel Miller (R. 52), by whom the accused was unfavorably regarded though the accused knew no reason for it (R. 48, 49).

He admitted that the testimony of Sergeants Abercrombie, Giokaris and Paspek was true (R. 47). He did, however, deny portions of Sergeant Miner's evidence. He claimed to know Miner very well through every day contact and considered him a friend although socially they had no contact or obligations. He had made only one request for a loan from Miner and that was by telephone at noon on 2 or 3 June 1944 at which time he asked for $40.00 (R. 44). Miner replied that he could not give him that much but would be glad to let him have $20.00. The accused said he would pick it up during the afternoon and he did so at about 4 p.m. He promised to repay Miner on or about 15 June 1944 (R. 45) as he was expecting money from home (R. 53). He never avoided him after the loan was made and when he was unable to make the payment he, about the middle of June, again told Miner that he was expecting money from home and would pay him as soon as he got it, to which Miner replied "O.K." (R. 46, 53). They still had daily contact thereafter and the accused spoke to Miner whenever he saw him (R. 45, 46). Miner reported the matter to Colonel Miller who then called the accused in and told him he had heard something which reflected upon his character and "immediately swore (him) and took (his) testimony." Following this a letter was sent to Washington requesting the accused's relief from the department although prior to this the accused's ratings had been "excellent" and "superior" (R. 49).

At the time of the loans the accused did not consider that rank or any coercion was involved (R. 47) and did not "honestly think that (he) was committing a crime or that (he) would ever be court-martialed for it, nor did (he) think that (he) was doing anything wrong" (R. 53, 54). All of the transactions were "purely through friendship". He did not borrow any of the money with intention not to repay it, never avoided any of his creditors, and would never have refused to pay them if they had asked him for the money (R. 47).

He had discussed his debt to Abercrombie with him in December and told him he would pay him in the near future, to which Abercrombie replied that he was in no hurry for the money, did not need it at the time and told the accused that, whenever he got the money, he could pay him; and, thereafter, loaned the accused $40.00 in addition, bringing the total obligation to $91.50. Thereafter the accused was transferred to Rio Hato and sent Abercrombie $50.00 on 3 July 1944 (R. 55).

5. Whether the record of trial is legally sufficient to support the findings of guilt upon Charge I, and the Specification which alleges dishonorable failure and neglect on the part of the accused to support his wife, depends solely upon the wife's testimony inasmuch

as she supplied the only evidence in support of the Charge.

Her evidence was in the form of a deposition; but, subsequent to executing it and when summoned to respond to the interrogatories of a later, supplementary, deposition in the same cause, she declined to give any testimony, stating that she had no complaints against her husband and did not want him to be court-martialed.

The question to be decided, therefore, is whether the deposition given by Mrs. MacDonald in October was competent at the trial, when it is viewed in the light of her declination to testify by further deposition in November, which later refusal can only be interpreted as a general disinclination to be a witness against her husband in the pending cause.

At common law, because of public policy founded upon reasons too well understood to require discussion, neither husband nor wife is competent to testify against the other save in exceptional cases involving crimes of violence by one spouse against the other (28 R.C.L. 478, sec. 64; 70 C.J. 162, sec. 200, 201). Abandonment and non-support of wife and children were not included within the category of exceptional cases and these crimes were later recognized as such by statutes (70 C.J. 164, sec. 205).

The Manual for Courts-Martial provides:

> "Wife and husband may testify in favor of each other without limitation; but unless both consent, neither wife nor husband is a competent witness against the other, except as follows: A wife may testify against her husband without his consent whenever she is the individual or one of the individuals injured by an offense charged against her husband. Thus in such cases as bodily injuries inflicted by him upon her, bigamy, polygamy, or unlawful cohabitation, abandonment of wife and children, or failure to support them... the wife may testify against her husband; but she can not be compelled to do so" (par. 120d, MCM 1928).

The statutes enlarging the ancient rule, being in derogation of the common law, are subject to strict rules of construction and should be so applied by the courts as to benefit and not harm the administration of justice (Taylor v. State, 25 Ala. App. 408; 147 So. 647); and, although provisions of the Manual for Courts-Martial are not statutory enactments they are executive pronouncements which govern the administration of military justice and the above quoted provisions being in derogation of the common law, by analogy, are subject to strict rules of construction and should be humanely applied.

The general rule is that the competency of a deponent depends upon his status and the state of the law at the time a deposition is offered at the trial. In contemplation of law, the deposition itself, is the witness, and the witness is presumed to testify when the deposition is used (18 C.J. 744, sec. 363; 26 C.J.S. 934, sec. 92). Otherwise stated, a party testifies when a deposition is admitted in evidence, not when it is taken (State v. Painter, 123, S.E. (W. Va.) 227).

A statute providing that the husband and wife "may" testify either for or against each other in criminal cases but shall not be "compelled" to do so, is sufficient to change the common law; and under such statute the witness spouse has an election to testify, and a wife may testify against her husband over his objection if she so desires, although until the election is made, neither is a competent witness and cannot be compelled to testify (70 C.J. 139, sec. 168).

It is well settled that the determination of the competency of a witness is within both the province and the duties of the court (Wharton, Criminal Evidence, 11th Ed., sec. 1154, p. 1993); and the same rules as to the competency of witnesses apply in the taking of evidence by deposition that apply in the examination of a witness before the court (par. 119, a MCM 1928).

Accordingly, although Mrs. MacDonald answered the interrogatories of the first deposition without apparent protest, the question whether this was an election which made her a competent witness and estopped her from exercising her right not to testify at the trial, remained a matter to be ultimately decided by the court when the deposition was offered in evidence.

What actually transpired is important in the determination of the matter in this case. It does not appear that any question of the wife's competency arose at the time the depositions were taken; neither does it appear that anyone undertook to inform the wife of her rights and privileges in the matter and it cannot be presumed that she was so informed.

From an examination of the whole record it is apparent that the prosecution relied strongly, if not solely, upon a letter written by Mrs. MacDonald to the Inspector General's Department. According to her sworn answers to interrogatories, the only purpose of the letter was to seek assistance in having an allotment made by her husband in her favor. On the other hand, it is obvious that, by its introduction in evidence, the prosecution sought to prove the essential elements of Charge I against the husband. Allusion was made to the letter in the 24th interrogatory of the first deposition and the answer thereto indicated that a copy of the letter was attached to the deposition as "Inclosure B". The copy was, however, attached as inclosure "5". Almost a month later a supplementary deposition directed certain

interrogatories to Mrs. MacDonald for the purpose of correcting the error and in this deposition, which was clearly a part of the first proceeding, she declined to testify against her husband. In the first deposition she specifically stated that she did not want her husband to be disciplined or court-martialed and that she had no complaints against him. In the second deposition she stated that she and her husband have never had any trouble and expressly said she did not want to testify against him in the military proceedings. The situation presents no conflict in her testimony and no question of impeachment by prior inconsistent statements and however anomalous her position may appear to be, it seems clear that such information as she voluntarily disclosed in answers to the interrogatories was not to be used as evidence against her husband in the pending proceedings.

Considerable confusion resulted from the manner in which the two depositions were offered in evidence. The last deposition was offered first, admitted in evidence without objection and was then read to the court. The court was thus informed, at the outset, of the wife's refusal to testify. Subsequently the law member stated that this exhibit, viz: the second deposition, "is admitted at this time for identification purposes only, subject to a further ruling by the court on the prosecution's offer". Thereupon the prosecution offered the first deposition in evidence and, before a ruling upon its admissibility, read it to the court. After objection to its admissibility and extended argument thereon, the law member overruled the objection and admitted both depositions, stating that "a military court is not concerned with the personal desires of a wife."

Obviously this was a grave misstatement of the law. Military courts are equally jealous, with civil courts, in safeguarding, for all parties and witnesses, the rights and privileges accorded to them under the law and the mistaken view expressed by the law member was an arbitrary disregard of the plain duty imposed on the court in this case of inquiring into and determining the wife's wishes in the matter of testifying against her husband. Failure to do so constituted error which violated substantial rights of the accused. Moreover, the determination of the competency of a witness is an interlocutory matter upon which each member of the court was privileged to challenge the ruling of the law member and demand a vote of the entire court for its decision (A.W. 31; par. 51, MCM 1928). Consequently, the failure of the law member to make his ruling subject to the objection of any member of the court resulted in foreclosing the exercise of this right by any member of the court and, under the circumstances, this error was not harmless.

After a careful examination of all that is contained in the two depositions the Board is of the opinion that Mrs. MacDonald plainly evidenced her intention not to testify against her husband in the proceedings and that the court should have recognized the incompetence of her testimony.

To hold otherwise, in this case, would effect a gross miscarriage of justice. The accused is charged with conduct unbecoming an officer and a gentleman in dishonorably neglecting to support his wife. There is no comparable offense known to the civil law although most jurisdictions provide a quasi-criminal method whereby a recalcitrant husband may be compelled to contribute to the support of his wife and children and be punished if he fails to comply with court orders so to do. Conversely there is no method known to military law whereby a husband in the service may be compelled, by court-martial to furnish support money for a wife or child. Courts-martial provide only punishment for the husband in such case but no relief for the wife.

It is apparent in the record of trial that the accused had a plausible reason for temporarily cancelling the first allotment to his wife and that he contemplated making a new and more substantial award to her. Whether or not he required persuasion to do so is beside the point. That he did accomplish the execution of a larger allotment as of 1 August 1944, almost two months before charges were served upon him, is indicated in the deposition of Mrs. MacDonald and by the testimony of the accused.

To allow the wife's answers in the first deposition, together with the unsworn letter in question, to be accepted by the court as the sole basis for convicting the accused of neglecting to support his wife when it appears that he is, in fact, supplying her with more than adequate means of support, would result not only in compelling her to testify against the accused when she had declined to do so, but would likewise force her, against her expressed wish to the contrary, to be a party to the means whereby her husband's desire to provide for her would be nullified and the allotment made in accordance therewith irrevocably destroyed by his discharge from the service. Neither the principles of law applicable to the matter nor the facts and circumstances of the case justify the action of the court in receiving the wife's first deposition and the letter in question as proof of the Charge.

Although unnecessary, it is deemed appropriate to point out that even if the wife's testimony were considered admissible, a careful scrutiny thereof fails to reveal any compelling evidence which would support the Charge. The letter in which so much confidence is placed by the prosecution is not under oath and must be interpreted in the light of the wife's explanation of its purport and the manner in which it was prepared and submitted. When so viewed and weighed in connection with her answers to the interrogatories, under oath, it loses the importance and effect attributed to it by the prosecution. Moreover, in her testimony under oath, she specifically denied that her living expenses exceeded the amount of money sent to her by her husband during the period when no allotment was in effect; she admitted that she was never destitute or without means of support during the period; that she had never been

subjected to any scandal or disgrace by reason of any failure of her husband to send her money inasmuch as the matter was of a private nature and no one outside of the family had any knowledge of it; and that, consequently, no one had ever spoken critically of her husband because of his neglect. She insisted that her motive in writing to the Inspector General's Department was solely to seek assistance in having an allotment made to her and that her reason for wanting an allotment was to prevent her husband from wasting his funds at his station and to assist him in saving his money. The last words of the deposition in which she declined to testify constitute an epitome of all she had said theretofore, viz: "He is supporting me; I am in love with him, and we have never had any trouble."

Such evidence, given its most favorable construction, could not possibly support the findings on the Charge and Specification to which it was directed and since it was the only evidence of the prosecution on that charge and was in the possession of the prosecution before the trial, it is difficult to understand why request was not made for leave to enter a nolle prosequi as to Charge I and the Specification thereof (par. 41c, MCM 1928).

Turning next to the consideration of the financial transactions between the accused and certain enlisted men it is evident that the offenses alleged in Specifications 1, 2 and 3 of Charge II are admitted by the accused in his sworn testimony and require no discussion. It is an offense under Article of War 96 for an officer to borrow money from an enlisted man (par. 453 (5), and 454 (19), Dig. Op. JAG 1912-40; Bull JAG July 1942, p. 106 and April 1943, p. 144). The record of trial is, therefore, legally sufficient to support the findings of guilty as to these Specifications.

Specifications 4 to 8, inclusive, allege dishonorable failure to pay debts, specifications 5, 6, 7 and 8 being founded upon the neglect to discharge the obligations alleged to have been contracted in Specifications 1, 2 and 3.

It has been consistently held that mere neglect on the part of an officer to pay his debts promptly is not of itself sufficient ground for Charges against him (par. 453, (14) (15), Dig. Op. JAG 1912-40). To constitute an offense which is prejudicial to good order and military discipline or service discrediting within the purview of Article of War 96, the neglect must be dishonorable and to be dishonorable it must have been a failure to pay which is characterized by a fraudulent intent or calculated or deceitful design to evade payment (CM 235676, Davis, 22 B.R. 209; CM 240754, Raquet, 26 B.R. 119; CM 240885, Holley, 26 B.R. 162; Winthrop Military Law and Precedents, 2d Edition (Rep. 1920), p. 715).

Even where there has been a promise to pay, the mere failure of an officer to keep his promise has been held not to be dishonorable unless the promise is made with a false or deceitful purpose, or unless the failure to pay is characterized by a fraudulent design to evade payment (CM 221833, Turner, 13 B.R. 246).

The evidence as to Specification 4 discloses that the accused owed Sergeant Paspek $4.50 for several articles which Paspek had purchased for him, at his request. Not having the change when the articles were delivered to him in May 1944, the accused promised to pay for them "later" and did so after the pay day early in July 1944. Paspek testified that the purchase was a friendly accommodation according to common practice at the post and he had made no demand upon the accused for the payment of the debt.

With regard to Specification 6 it was shown that the accused borrowed $20.00 from Sergeant Miner in the early part of June 1944. The accused testified that at the time the debt was contracted he promised to pay the amount as soon as some money arrived for him from home which he expected would be "on or about the 15th of June". Miner said the accused promised to pay the sum on either the 10th or 15th of the month (he could not remember which), but made no mention of expecting money. Both Miner and the accused testified that about the middle of the month, when Miner asked for the money, the accused explained his failure to pay on the ground that the funds from home had not arrived and that he would pay the debt when he received them. He did pay the amount owed around 1 July 1944.

Since there is nothing surrounding either of these transactions from which a fraudulent intent when the loans were made, or a deceitful design to evade payment thereafter, can be reasonably inferred, the record of trial is not legally sufficient to support the findings of guilt as to these Specifications.

An examination of the transactions out of which the offenses alleged in Specifications 5, 7 and 8 arose, however, discloses that they rest upon a different basis. The accused's indebtedness to Sergeant Giokaris originated when the accused borrowed $10.00 from him in the early Spring of 1943 and continued to accumulate at intermittent intervals by reason of advances which Giokaris made for the accused in purchasing sundry articles for him and the failure to return a sum of money given to the accused for the purpose of making a purchase for Giokaris, which purchase was not made. The evidence as to these transactions is vague and indefinite and although Specification 5 alleges that the total indebtedness of $36.55 became due and payable on 20 April 1944, nothing in the record shows any fixed due date for the payment of any of the individual items of indebtedness. The last transaction as to which a specific date was shown is the one in September 1943 when Giokaris gave the accused $10.00 to purchase a blanket for him, as to which it appears that Giokaris never received either the blanket or the return of the money. However, the accused admitted, at the trial, that Giokaris'

testimony is true and the only subsequent transaction, according to Giokaris, was the advance of $2.35 made by him to pay a dry cleaning bill for the accused. Thus, the major portion of the $36.55 was owing from September 1943 until it was paid by the accused in August 1944. It is true that Giokaris testified that he had full confidence the money would be repaid, that he never worried about it and looked upon the money owed by the accused "as though it was in the bank as savings"; but this, of itself, cannot be allowed to remove any stigma which attaches to the unconscionable delay on the part of an officer to pay a debt owing to an enlisted man.

Mere neglect on the part of an officer to pay debts contracted with persons with whom he has dealt on an equal footing is not of itself sufficient ground for charges against him. This rule does not apply where the money was borrowed from enlisted men. The relations between officers and enlisted men are such as very naturally inspire trust and confidence by the men in the officers, and require respect and submission by the men. When the officer abuses his trust and unreasonably delays repayment, it is in the interest of the service to purge it from the influences which such conduct naturally creates. Accordingly, it has been held that when an officer has failed for a period of six months to repay a loan solicited by him from an enlisted man for which no definite time of repayment had been fixed, the mere fact that the enlisted man testified that in his opinion the officer did not keep him waiting too long should not be permitted to control the judgment of the court upon all the facts laid before it by the evidence (par. 454 (19), Dig. Op. JAG 1912-1940).

A consideration of all the evidence offered in support of Specification 5 shows a course of dealing with Giokaris which cannot be laid to forgetfulness or simple neglect but displays such a persistent disregard of obligations over a long period of time as can only indicate a deliberate design to evade payment thereof.

His indebtedness to Abercrombie was far more substantial and arose out of loans which he promised, in each instance, to discharge on the next pay day. Six months passed by without any attempt to pay any part of the sum of $51.50 borrowed in November 1943 and then followed the additional loan of $40.00 with a new and likewise defaulted promise to pay on a specific date. That the debt was eventually paid cannot alter the circumstances, expecially since it is apparent that an investigation was being made of the accused's financial transactions, and charges were preferred against him in July 1944. From the circumstances attending these transactions it may fairly be inferred that the accused fraudulently intended to evade payment of his debts to Abercrombie at the time he made the loans and the long and unexplained failure to pay them was such as to constitute a dishonorable neglect to do so.

6. Records of the War Department disclose that the accused was born in Maine, is 28 years of age and married. He was graduated from high

school but nothing appears regarding civilian employment from that time to his enlistment in the army on 10 January 1939. Upon completion of the prescribed courses at Air Forces Officer Candidate School, Miami Beach, Florida, he was commissioned a second lieutenant, Army of the United States on 16 September 1942 and ordered to active duty at said school. On 14 April 1943 he was promoted to first lieutenant. On 19 June 1943 he was detailed for duty in the Inspector General's Department and on 23 February 1944 was promoted to captain.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as hereinabove stated no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Charge I and the Specification thereof, and Specifications 4 and 6 of Charge II, but is legally sufficient to support the findings of guilty of Specification 1, 2, 3, 5, 7 and 8 of Charge II, and of Charge II, and to support the sentence and to warrant confirmation thereof. Dismissal and total forfeitures are authorized upon conviction of a violation of Article of War 96.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ - CM 270942 1st Ind

13 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 Captain William J. MacDonald (O-563747), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge I and the Specification thereof, and of Specifications 4 and 6 of Charge II, but is legally sufficient to support the findings of guilty of Specifications 1, 2, 3, 5, 7 and 8 of Charge II, and of Charge II, and to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry 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 forfeitures remitted. G.C.M.O. 139, 11 Apr 1945)

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

SPJGH
CM 271083

3 JAN 1945

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Will Rogers Field, Oklahoma City, Oklahoma, 29 November 1944. Dismissal.
First Lieutenant EDMUND T. BARRY (0-728958), Air 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 a single Charge and Specification as follows:

CHARGE: Violation of the 96th Article of War.

Specification: In that First Lieutenant Edmund T. Barry, Air Corps, Squadron S, 348th Army Air Forces Base Unit, Will Rogers Field, Oklahoma City, Oklahoma was, at Oklahoma City, Oklahoma, on or about 5 November 1944, in a public place, to wit, Biltmore Hotel, 228 West Grand, Oklahoma City, Oklahoma, drunk while in uniform.

He pleaded guilty to the Charge and guilty to the Specification except the words "in a public place, to wit", substituting therefor the words "at the" and except the words "while in uniform", of the excepted words he pleaded not guilty. He was found guilty of the Specification and the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Mr. William B. Bahn, house officer at the Biltmore Hotel, Oklahoma City, Oklahoma, observed accused standing in the lobby of the hotel at about

2 o'clock on the morning of 5 November 1944. Accused was without shoes, coat, necktie or headdress, but had on a khaki shirt and officers' pink slacks. He did not observe any insignia or other thing about accused that would indicate rank or that accused was in fact in the military service. He went over to accused and inquired if he had a room at the hotel, but accused did not answer. He asked accused for his name and he did not answer that. After satisfying himself that accused was not a guest of the hotel he asked him for his identification card and accused pulled out his billfold. The room clerk removed his identification card therefrom which showed his name to be Barry. During all of this time accused talked very little if any, but he staggered and required assistance to stand. Mr. Bahn considered him to be drunk and unable to talk. The Biltmore Hotel is the largest hotel in Oklahoma City and frequented by the public. On this occasion there was no one present in the lobby except the room clerk, the bell captain and shore patrol. He would not have known accused was a member of the armed forces except for his identification card. He telephoned the military police and turned accused over to them (R. 5-7).

Captain Henry A. Weatherby, Military Police Detachment, Oklahoma City, Oklahoma, came to the Biltmore Hotel in the early morning of 5 November 1944, in response to a telephone call which his office had received, and there found accused lying on the floor of the latrine in a doubled up position in a little anteroom just outside the latrine proper. He was without coat, shoes, necktie or headdress. He was wearing a cotton khaki shirt without insignia of any kind, khaki socks, officers' pinks and belt. He and Sergeant Rahman helped accused to his feet, took him outside to an automobile and transported him to Military Police Headquarters. They bore the greater part of accused's weight in getting him to the car and then put him in the car. He considered accused to be drunk. En route to Military Police Headquarters accused asked Captain Weatherby where he was taking him. "He wasn't noisy. He was quite well modulated. He was not noisy at any time." He said, "Weatherby, where are you taking me, what are you doing". "He was quite incoherent" (R. 11-12). Upon arrival there accused was partially able to stand on his feet and maintain his equilibrium. Accused refused to exhibit his identification card and to submit to a sobriety test (R. 12). Technical Sergeant R. D. North, Military Police Detachment, saw accused at Military Police Headquarters when he was brought in by Captain Weatherby and Sergeant Rahman. Accused could not walk straight and could not talk much. He considered accused to be drunk (R. 12-13).

4. It was stipulated that if Captain Homer A. Baker, Jr., 348th Army Air Forces Base Unit, Will Rogers Field, were present and sworn he would testify as follows (R. 13):

"First Lieutenant Edmund T. Barry, O-728958, AC, Squadron S, 348th Army Air Forces Base Unit, Will Rogers Field, Oklahoma City,

Oklahoma, has been commissioned for two years and who has a total of 1650 flying hours, has more than the average flying hours for an officer commissioned for two years."

It was further stipulated that War Department, A.G.O. Form No. 66-2 relating to accused showed his flying performance ratings in the order in which they are recorded to be as follows: VS - VS - VS - VS - EX - EX - EX - EX (R. 14).

Captain Joseph C. Schardt, Jr., 348th Army Air Forces Base Unit, Will Rogers Field, in charge of classification at the field, testified that from his observation of examining officers' efficiency ratings extending over a period of several years, "very satisfactory" was the general rating for a pilot officer and that as many if not more pilot officers received that rating than received excellent (R. 14-15).

After having his rights fully explained, accused elected to remain silent.

5. The prosecution's evidence shows that on 5 November 1944, at about 2 o'clock in the morning accused was observed standing in the lobby of the Biltmore Hotel, Oklahoma City, Oklahoma, wearing a khaki shirt, officers' pink slacks, khaki socks and regulation belt, but without coat, necktie, shoes, headdress or insignia of any description. Accused staggered, was unable to talk coherently and needed assistance to stand. Shortly thereafter a military police officer, accompanied by two enlisted men came to the hotel in response to a telephone call and found accused lying on the latrine floor dressed in the manner above-described. He was unable to walk without assistance, his breath smelled strongly of alcohol, and he was considered to be intoxicated. There was no one present in the hotel lobby except the room clerk, the bell captain, the house officer and shore patrol. Accused was not noisy or boisterous. He was quite well modulated, but incoherent. He was removed to Military Police Headquarters, where he refused to give his identification or submit to a sobriety test. Such evidence leads to the inevitable conclusion that accused was drunk in a public place, but while in improper uniform. However, the words "in uniform" appearing in the Specification include improper as well as proper uniform (CM 231487, Campbell, 18 B.R. 225, 232). Thus the evidence fully supports the court's finding of guilty of the Specification.

6. Attached to the record of trial is a recommendation for clemency signed by nine of the ten members of the court which tried accused, as well as by the trial judge advocate and defense counsel.

7. Accused is 28 years of age and single. He is a high school graduate and attended Millikin University, Decatur, Illinois, for one half year preceding his enlistment as an aviation cadet on 20 January 1942. Upon graduation

from Victorville Army Flying School, Victorville, California, he was commissioned a second lieutenant, Army of the United States, 27 August 1942 and ordered to active duty with the Army Air Forces on the same date. He was promoted to first lieutenant 16 April 1943.

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

Thomas N. Tappy, Judge Advocate.

William H. Gambrell, Judge Advocate.

Robert C. Trewethan, Judge Advocate.

SPJGH
CM 271083

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 Edmund T. Barry (0-728958), 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. Punishment was recently imposed upon accused under the 104th Article of War for disorderly conduct, molesting a civilian waitress, resisting civilian officers and refusing to identify himself to military police in Oklahoma City, Oklahoma, all on 17 October 1944. In view, however, of the petition signed by nine of the ten members of the court which tried accused requesting clemency, the fact that his intoxication was unaccompanied by any disorderliness and observed by only a few persons, 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

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 execution suspended. G.C.M.O. 80, 21 Mar 1945)

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

SPJGK
CM 271097

2 FEB 1945

UNITED STATES	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND
v.	Trial by G.C.M., convened at Greenville Army Air Field, Greenville, Mississippi, 13, 14, 15 November 1944. Dismissal.
Second Lieutenant SIDNEY M. COLEMAN (O-823030), 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 Charge and Specifications:

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

Specification 1: In that Second Lieutenant Sidney M. Coleman, Air Corps, Section B, 2122nd Army Air Forces Base Unit (Pilot School, Basic), did, at Memphis, Tennessee, at or about 0155, 21 August 1944, violate the provisions of Army Air Forces Regulation Number 60-16A, Paragraph 1a, 15 April 1944, to which he was subject and which provides as follows: "1. General: a. Reckless Operation. An AAF pilot will not operate aircraft in a reckless or careless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, persons, or property on the ground." in that he piloted and flew an airplane described as a BT-13A in a reckless and careless manner and so as to endanger persons and property on the ground.

Specification 2: In that Second Lieutenant Sidney M. Coleman, * * *, did, at Memphis, Tennessee, at or about 0155, 21 August 1944, violate the provisions of Army Air Forces Regulation Number 60-16, Paragraph 16a (1) (a), 6 March 1944, to which he was subject and which provides as follows: "16. Minimum Altitudes of Flight: a. Except during take-off and landing, aircraft will not be operated: (1) Below the following altitudes: (a) 1,000 feet above any building, house, boat, vehicle, or other obstructions to flight." in that he piloted and flew an airplane described as a BT-13A at an altitude below 1000 feet above a

building at a time when he was not engaged in taking off or in landing.

Specification 3: In that Second Lieutenant Sidney M. Coleman, * * *, did, at Memphis, Tennessee, at or about 0155, 21 August 1944, violate the provisions of Army Air Forces Regulation Number 60-16, Paragraph 16a (1) (b), 6 March 1944, to which he was subject and which provides as follows: "16. Minimum Altitudes of Flight: a. Except during take-off and landing, aircraft will not be operated: (1) Below the following altitudes: (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." in that he piloted and flew an airplane described as a BT-13A above a congested section of a City, at a time when he was not taking off or landing, and below an altitude which would permit an emergency landing outside of such section in the event of complete power failure.

Specification 4: In that Second Lieutenant Sidney M. Coleman, * * *, did, at Memphis, Tennessee, at or about 0155, 21 August 1944, wrongfully disturb persons in and in the vicinity of Saint Joseph's Hospital, by wrongfully and unnecessarily causing an airplane, which he was piloting to make an excessive noise.

Specification 5: In that Second Lieutenant Sidney M. Coleman, * * *, did, at Memphis, Tennessee, at or about 0300, 21 August 1944, violate the provisions of Army Air Forces Regulation Number 60-16A, Paragraph 1a, 15 April 1944, to which he was subject and which provides as follows: "1. General: a. Reckless Operation. An AAF pilot will not operate aircraft in a reckless or careless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, persons, or property on the ground." in that he piloted and flew an airplane described as a BT-13A in a reckless and careless manner and so as to endanger persons and property on the ground.

Specification 6: In that Second Lieutenant Sidney M. Coleman, * * *, did, at Memphis, Tennessee, at or about 0300, 21 August 1944, violate the provisions of Army Air Forces Regulation Number 60-16, Paragraph 16a (1) (a), 6 March 1944, to which he was subject and which provides as follows: "16. Minimum Altitudes of Flight: a. Except during take-off and landing, aircraft will not be operated: (1) Below the following altitudes: (a) 1,000 feet above any building,

house, boat, vehicle, or other obstructions to flight." in that he piloted and flew an airplane described as a BT-13A at an altitude below 1000 feet above a building at a time when he was not engaged in taking off or in landing.

Specification 7: In that Second Lieutenant Sidney M. Coleman, * * *, did, at Memphis, Tennessee, at or about 0300, 21 August 1944, violate the provisions of Army Air Forces Regulation Number 60-16, Paragraph 16a (1) (b), 6 March 1944, to which he was subject and which provides as follows: "16. Minimum Altitudes of Flight: a. Except during take-off and landing, aircraft will not be operated: (1) Below the following altitudes: (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." in that he piloted and flew an airplane described as a BT-13A above a congested section of a City, at a time when he was not taking off or landing, and below an altitude which would permit an emergency landing outside of such section in the event of complete power failure.

Specification 8: In that Second Lieutenant Sidney M. Coleman, * * *, did, at Memphis, Tennessee, at or about 0300, 21 August 1944, wrongfully disturb persons in and in the vicinity of Saint Joseph's Hospital, by wrongfully and unnecessarily causing an airplane, which he was piloting, to make an excessive noise.

Without any objection and with the express consent of the parties the accused and Flight Officer John N. Sommer were jointly tried upon identical Charges and Specifications. Each pleaded not guilty to and was found guilty of the Charge and all Specifications. No evidence was introduced of any previous conviction. Lieutenant Coleman was sentenced to be dismissed the service and Flight Officer Sommer to be dishonorably discharged the service. The reviewing authority approved the sentence of each and forwarded the record of trial as regards Lieutenant Coleman for action under Article of War 48 and as regards Flight Officer Sommer for action under Article of War 50½.

3. Evidence for the prosecution.

A map of the City of Memphis, Tennessee, with the location of St. Joseph's Hospital marked upon it, together with aerial photographs of the area of the city in which the hospital is situated, was introduced in evidence without objection (R. 11, 12; Exs. 1, 4, 5, 6). These exhibits reflect that the hospital, established by the evidence to be the focus of the flying which gave rise to these prosecutions, is located in a congested area in the west central portion of the city of Memphis. The hospital is a five

story building, approximately 100 feet high at its highest point, and has a large, isolated smokestack that extends a similar height above the ground (R. 12, 26; Exs. 2, 3). Major Phillip G. Warner, Air Corps, stated that he had flown over the area in which the hospital is located, both in the daytime and at night; that it is a congested area, and that there are numerous buildings, smokestacks, telephone and electric light poles and wires and other obstructions to flying in the area of the hospital which are not lighted at night (R. 37-38). He also stated that from actual experiment he had discovered that in order for one flying a plane of the type being flown by the two accused on the morning in question successfully to clear the congested area of the City of Memphis and reach the nearest point outside that area where a forced landing could be accomplished in the event of a complete power failure while flying in the immediate vicinity of St. Joseph's Hospital, one would have to be flying at an altitude of at least six or seven hundred feet at the time of the power failure (R. 40).

The flights complained of occurred during the early morning of 21 August 1944. Sister Clara Frances stated that just after the first flight of two planes which attracted her attention she looked at her clock and the time was 1:50 a.m.; that her attention was attracted a second time by the flight of planes about 3:00 a.m., and still another time about five minutes later (R. 16, 18). Sister Mary Magdela testified to hearing the three flights and stated that the second one occurred about 3:00 a.m., she having looked at her clock at the time (R. 22; Ex. 10).

Sister Clara Frances, who was temporarily in charge of the hospital, and sleeping on the third floor thereof, stated that upon the first flight of the planes (1:50 a.m.) she was awakened from a sound sleep by the noise of their approach. "It was the most deafening roar I have ever heard from airplanes" (R. 16). She was frightened - thought the planes were in trouble and were going to crash into the hospital. After the planes passed over she looked out the window and saw the lights of two planes. They were then gaining altitude and were traveling in a southerly direction, in the general direction of the airport (R. 16, 18). Sister Frances did not look out when she next heard planes about 3:00 a.m. but did look some five minutes later when the third flight passed over the hospital. She again saw the lights of two planes and upon this occasion they were traveling in a southwesterly direction toward the Mississippi River (R. 16). She stated that the planes were extremely low and gained altitude after they left the hospital (R. 17). The planes which she saw at 1:50 a.m. and those which she saw about 3:00 a.m. were flying at about the same altitude, which she estimated to be not more than four or five hundred feet (R. 16,17). She had often watched planes pass at night but had never seen any flying as low as those she observed upon the occasions in question except at the airport when they were landing or taking off (R. 17). The noise made by the planes upon each of the three flights over the hospital was "the worst [she had] ever heard

made by planes." "It was sufficient to get us all up out of the beds. Some operative cases of only two days had gotten up" (R. 17).

Sister Camilliana was in the childrens' ward on the second floor of the hospital during the first flight of planes. One boy in the ward said at the time that he was scared. When the second flight of planes occurred, Sister Camilliana thought that they were awfully close and went outside into a parking lot. While she was there, two planes came from the east so low that she got scared, stumbled and fell. She "thought they were in trouble" and that "they were going into the building" (R. 20).

Sister Mary Magdela, who was suffering from a heart ailment, was on the second floor of the hospital and became frightened each of the three times the planes passed. The first time they passed, she became afraid that they were going to strike the hospital, got out of bed and ran into the hall in her nightgown. She noticed that the nurses' signal lights were on and nurses going into the rooms of patients. She thereafter sat in a chair for a time, "trembling". When the planes had passed the third time, she again got up and sat in a chair. The second time the planes passed, she saw a bright light flash by her window and the whole window was caused to vibrate (R. 22; Ex. 10).

Miss Patsy Ruth Phelps, technician, was sleeping on the fourth floor roof of the hospital on the morning in question, heard the planes twice, and saw them once. The time she saw them, there were two planes, and they approached from the northeast. She was looking up when she saw the planes and they appeared to be $2\frac{1}{2}$ or 3 times as high as the hospital (R. 32,34).

Miss Josephine Armetta, student nurse, was in the hospital delivery room, in charge of two patients who were in labor, each of the three times the planes passed. She herself was a little frightened, and her patients were alarmed by the first flight but did not appear to be bothered by the subsequent flights (R. 34-36).

Miss Bernadine Reed, nurse, stated that, at sometime after three o'clock on the morning in question, while she was in the milk laboratory of the hospital, she saw two planes fly over a portion of the hospital and past the window of the laboratory. She was, she believed, looking straight out the window and not upwards, and therefore was of the opinion that the planes were flying below the highest roof level of the hospital (R. 43,45). (Note: The witness pointed out on one of the pictures in evidence the location of the milk laboratory but the floor of the hospital upon which it was located does not appear of record.)

Miss Susan Rhea Sevier, nurse, was on the fourth floor of the hospital, heard planes pass three times and saw two planes the last time.

The planes "sounded very loud, sort of a roar, as though the motor was being raced. It was a sound [she] had never heard a plane make before." At the time, she "wondered whether they [the planes] were high enough to clear the building. They seemed barely high enough to clear the building" (R. 42; Ex. 13).

Miss Mary Frances Luebker, nurse, was on duty on the third floor of the hospital on the morning in question, saw planes on the first two of three occasions they flew near the hospital and heard them the third time (R. 46). In her judgment, the planes, of which there were two, were flying at an altitude of about twice the height of the hospital (R. 47). One of the planes was to the rear but not directly behind the other (R. 48). They were making a "terrific" noise (R. 50). Some of her patients were awakened the first time the planes passed and all were awakened by the second and third flights (R. 47). She had a heart patient who became frightened (R. 47).

Miss Rosetta Bertasi, nurse, was frightened by the "terrific noise" of the planes (R. 52). Some of her patients, mostly female, were frightened, others just woke up (R. 52). The hospital windows on the second floor, where the witness was on duty at the time, were made to vibrate by the passing of the planes (R. 55).

Misses Eugenia J. and Edith Colbert, who lived within a block of St. Joseph's Hospital, were awakened (Eugenia, twice; Edith, once) on the morning in question by the sound of planes (R. 27,30). Edith stated that she saw one plane which she judged to be flying at an altitude of about two or three times the height of the hospital (R. 30).

None of the witnesses was able to give any description of the planes engaged on either of the three flights referred to. The identification of the planes flown by the two accused was and is wholly dependent upon circumstantial evidence.

During the night of 20 August and the morning of 21 August 1944, the accused and Flight Officer Sommer flew two BT-13 Army airplanes from Des Moines, Iowa, to Greenwood Army Air Field, Greenwood, Mississippi (R. 10, 11, 129). They proceeded under joint flight plans by way of Chanute Field, Illinois, and Memphis, Tennessee, stopping at both of the latter named places (R. 10, 11). Miss Lillian D. Calkins, Women's Air Force Service Pilots, rode in the rear seat of Lieutenant Coleman's plane as a passenger, and Miss Cody G. Clinkscales, Women's Air Force Service Pilots, rode in the rear seat of the plane piloted by Flight Officer Sommer, also as a passenger (R. 10, 11). The accused and Flight Officer Sommer landed their planes at the Municipal Airport, Memphis, Tennessee, at approximately 1:52 a.m. on 21 August 1944, having arrived there from Chanute Field (R. 11, 14). The direction of landings and take-offs at the airport between the hours of one and four o'clock on that morning was south, and the direction of traffic

was left (R. 14).

The Memphis Municipal Airport was situated about five or six miles southeast of St. Joseph's Hospital (R. 41, Ex. 1). Lieutenant Coleman's mother, Mrs. Elizabeth Kent, resided in the City of Memphis, in the immediate vicinity of St. Joseph's Hospital (R. 11; Ex. 1).

At approximately 2:54 a.m. (21 August), the accused and Flight Officer Sommer took off from the Memphis Municipal Airport in the two planes above mentioned to complete their flight to Greenwood, Mississippi (R. 10, 11, 14). It was stipulated that if Fred E. Wallace, chief controller at the airport, were called as a witness, he would testify that he watched the planes piloted by accused and Flight Officer Sommer after their take-off and saw them proceed in a southerly direction for approximately three miles and then execute a wide right-turn and assume flight in a west-northwest direction, and that when he last saw the aircraft they were both about three miles west of the airport, flying a westnorthwest course, and at an altitude of approximately 1500 feet (R. 14, 15).

Both accused and Flight Officer Sommer testified at the previous trial of this case. Portions of the testimony then given by each, as contained in the record of the previous trial, identified by the court reporter as a correct transcription of shorthand notes taken by him at the trial, were introduced in evidence, the testimony of each to be considered only against himself (R. 57). At such previous trial, Lieutenant Coleman stated that before taking off from the Memphis Airport, he and Flight Officer Sommer agreed to meet over the airport or over the City of Memphis for the purpose of forming their flight to Greenwood, Mississippi; that he made a normal take-off, broke traffic, made a shallow turn which carried him over the City of Memphis, climbed to an altitude of 2500 feet, levelled off, and was joined by Flight Officer Sommer (R. 58). Flight Officer Sommer stated at the previous trial that before taking off from the Memphis Airport, he and Lieutenant Coleman agreed to "rendezvous" over the City of Memphis (R. 58).

It was stipulated that if present, the operations officer of the Naval Air Station, Millington, Tennessee (located near Memphis), would testify that no aircraft were flying locally from the Naval Air Station between the hours of one and six o'clock on the morning in question (R. 15). It was also stipulated that if present the Controller of the Memphis Municipal Airport would identify as correct and complete a record which was introduced in evidence showing the times of arrival and departure of all planes landing at and taking off from the Municipal Airport between the hours of one and five o'clock, except as to one C-47 engaged in local flying, together with the types of the planes and their destination or the point of origin of their flights (R. 13, 14). All planes except the two piloted by the accused and Flight Officer Sommer arriving at or departing from the Municipal Airport, between the mentioned hours, arrived and departed singly (R. 13, 14). Two commercial planes, either cargo or transports, landed at and one Army cargo

plane and two commercial planes took off from the airport at intervals within from 3 to 22 minutes of the time the accused landed, and one Army cargo plane landed at and one commercial plane departed the airport within 6 and 19 minutes, respectively, of the time the accused took off. The C-47 unaccounted for by this stipulated testimony was accounted for by Flight Officer Richard Robinson, Air Corps, its pilot, who testified that he landed at 2:10 a.m., after having been in the air for approximately two hours with a student (R. 23, Ex. 11; R. 24, 25). He had no recollection of having flown over the city of Memphis during the two hours he was in the air but admitted that he could have done so (R. 24, 25). He stated that he probably practiced a few initial approaches to the field, initial approach being 2000 feet, but practiced no final approaches and made no "let-downs" (R. 25). He used the north and south "legs of the beam", the north leg of which ran almost directly across the business district of the City of Memphis (R. 25).

After testifying that he had flown in a BT-13 plane a total of 1500 or 1600 hours and that he was familiar with the relative locations of St. Joseph's Hospital and the Municipal Airport in Memphis, Major Warner stated that, while low propeller pitch was used on such planes in landing and in taking off, he could think of no legitimate reason why one preparing to land at the airport from any approach or with any "T-setting", during either the day or night, should change the plane's propeller pitch from high to low over St. Joseph's Hospital or should let down to an altitude lower than 1000 feet in that vicinity (R. 38, 39, 40). Nor could he visualize any necessity for one taking off from the airport for a direct flight to Greenwood, Mississippi, during either the day or night, being in the vicinity of St. Joseph's Hospital, or, if so, being at an altitude of less than 1000 feet, this regardless of the "T-setting" when he took off (R. 40). After taking off and climbing with the propeller in low pitch, it would ordinarily be changed to high pitch at the time of levelling off (R. 39). With its propeller in low pitch, the BT-13 is the noisiest airplane that Major Warner knows of (R. 38).

Motion by defense counsel for findings of not guilty of all Charges and Specifications was by the court considered in closed session and denied (R. 59).

4. For the defense.

Some twelve witnesses who claimed to have heard and seen planes in the vicinity of St. Joseph's Hospital at about the times fixed by prosecution witnesses testified for the defense. These included, among others, the head nurse on duty on the third floor of the hospital at the time, a captain in the Air Transport Corps, a Women's Airforce Service Pilot, and three highway patrolmen. Aside from the nurse, who was in the hospital, these witnesses were at distances of from one block to one mile from the

hospital at the times they observed the planes. Some saw the planes on only one occasion while others claimed to have seen them pass at both about two and three o'clock. Approximately half of the defense witnesses stated that the planes were making an unusual amount of noise, some describing it as a "buzzing noise", and some stating that the planes sounded as if their propellers were in low pitch (R. 61, 63, 66, 72, 76, 109, 110, 125), while the remainder heard no unusual noise. Two of the witnesses stated that the excessive noise occurred when the planes made a "tight turn" north of the hospital (R. 66,77). The witnesses were in accord in stating that they saw no dives made by the planes at any time. Walter O. Berryhill, who was approximately four blocks from the hospital at the time he observed the planes, stated that they appeared to be gaining altitude when he saw them pass the last time (R. 126). The nurse, Mrs. Kelso Brumback, stated that she saw only one plane around two o'clock. When first attracted by the noise she thought it sounded as if the plane was losing altitude but upon looking out, she saw that it appeared to be flying as high as the mail plane ordinarily flew (R. 115). She saw two planes at three o'clock and they appeared to be flying at about the same altitude as the one she had previously seen (R. 115). She did not notice any windows shaking, and no commotion was caused on her floor of the hospital by the passage of the planes on either occasion (R. 117,118). The witnesses made varying estimates of the altitudes of the planes when they observed them. Some estimated that they were ten or twelve times as high as the hospital, others that they were from 1000 to 2000 feet high, and others stated that they were as high as planes ordinarily flew over the city (R. 60-61, 68, 72, 76, 80,81, 91, 92, 95, 98, 99, 110, 115, 124). One witness, Miss Frances Trull, stated that she was awakened about three o'clock by a flight of planes and saw four flying in formation just above the house tops (R. 120).

Oscar T. Hines, radio electrician for Civil Aeronautics Administration, who qualified as an expert on acoustics, stated that high buildings "chamber" sound and that because of this and because pavement and the walls of buildings refract instead of absorb sound or sound waves, planes passing overhead would make a much greater sound to one in a city than would be true in the country (R. 106). He expressed the opinion that one inside St. Joseph's Hospital would encounter great difficulty in judging the altitude of a plane by the noise it made (R. 107). The highest altitude from which a plane might make windows in the hospital vibrate would be dependent upon too many variable circumstances to permit of an estimate (R. 107-8).

Counsel for the defense announced that the rights of the accused as a witness had been explained to him and that accused elected to remain silent (R. 128).

5. <u>For the court.</u>

The court called as witnesses Miss Calkins and Miss Clinkscales, who, as above stated, were riding with the accused and Flight Officer Sommer on the morning in question. Both professed to have slept most of the way from Chanute Field to Memphis, and Miss Calkins stated that she noticed nothing unusual in their flight upon arrival at or departure from Memphis (R. 131-2). They passed over the City of Memphis upon arrival and went directly to the airport, and met over the city upon departing for Greenwood, but neither knew at what altitude they were flying upon either occasion (R. 132, 133, 134, 140, 141, 142). The accused and Flight Officer Sommer were flying the planes (R. 132, 142). Miss Clinkscales expressed the opinion that they flew over the northwestern portion of the City of Memphis (R. 141, 142). She said that they did not "buzz" the city in the sense of diving but that both planes lost some altitude over the city (R. 145, 146). She did not feel an abrupt descent and did not believe that she saw the lights of the city over the nose of the plane (R. 146). While over the City of Memphis after their take-off for Greenwood, Flight Officer Sommer changed the pitch of the propeller on his plane from high to low (R. 142). Greenwood, Mississippi, their destination, is situated slightly southwest of Memphis, Tennessee (R. 141).

6. The evidence of record is amply sufficient to justify the court in concluding that upon each of the three occasions that the two planes flew over or near St. Joseph's Hospital, once at approximately 1:50 o'clock and twice at approximately 3:00 o'clock, on the morning of 21 August 1944, they dived and descended to altitudes as low as 250 to 500 feet in the immediate vicinity of the hospital; that they were unnecessarily making an excessive amount of noise which, under the circumstances, was calculated to and did disturb and alarm the occupants of the hospital; that such flights were over buildings and a congested area of the City of Memphis and that in the event of a complete power failure at these low altitudes the planes would have been unable to land outside such congested section. The defense offered an abundance of evidence tending to negative these propositions, but the court obviously decided the issues against the accused, and, as above indicated, the record is legally sufficient to support the court in its action. The evidence is also legally sufficient to establish beyond reasonable doubt that the accused and Flight Officer Sommer were piloting the planes that made these three flights. The fact that Lieutenant Coleman's mother lived in the vicinity of the hospital supplied a motive on his part for the unusual flights; and the circumstances generally: (1) the proximity in point of time between the times the flights complained of occurred and the times at which the accused and Flight Officer Sommer arrived at and departed Memphis; (2) the fact that in approaching and departing the Memphis Airport the accused and Flight Officer Sommer flew over that portion of the city in which the hospital was situated - without legitimate reason, apparently, at the time they were departing; (3) the showing that Flight Officer Sommer, at least, changed the pitch of his propeller from high to the noisier low and that both planes "lost altitude" over the city; (4) and the further fact that the accused and Flight Officer Sommer were flying two planes close together and that no other flights

except theirs involving more than one plane at a time appear to have been made over the City of Memphis during the morning in question, are of a nature to impel the conclusion that the accused and Flight Officer Sommer were piloting the planes that made the flights under discussion. The record being legally sufficient to support findings of the nature mentioned, it is legally sufficient to support the findings made by the court.

The accused stands convicted of two series of four Specifications each, the first series (Specifications 1 to 4, inclusive) growing out of the flight which occurred at approximately 1:50 a.m. and the second series (Specifications 5 to 8, inclusive) growing out of the flights which occurred at approximately three o'clock. Each series of Specifications alleges, in the order indicated, the following offenses in violation of Article of War 96, to wit: (1) a violation of paragraph 1a, Army Air Forces Regulations No. 60-16A, 15 April 1944, by operating an aircraft in a reckless and careless manner and so as to endanger persons and property on the ground; (2) a violation of paragraph 16a (1) (a), Army Air Forces Regulations No. 60-16, 6 March 1944, by flying an aircraft at a lower altitude than 1000 feet over a building when not engaged in taking off or in landing; (3) a violation of paragraph 16a (1) (b), Army Air Forces Regulations No. 60-16, 6 March 1944, by flying an aircraft over a congested section of a city at an altitude insufficient to permit landing outside the congested section in the event of a complete power failure; and (4) wrongfully disturbing persons in the vicinity of St. Joseph's Hospital by wrongfully and unnecessarily causing the airplane which he was piloting to make an excessive noise.

The portions of the Army Air Forces Regulations alleged to have been violated were not introduced in evidence, but they are matters of which the court and the Board of Review may properly take judicial notice, and are as set out in the Specifications and contained in paragraph number two of this opinion. It is too well established to require discussion that a violation of these safety provisions of the regulations constitute violations of the 96th Article of War (CM 254880, Williams; CM 263303, Varnell; CM 264535, Bowman).

What has already been said is sufficient, in view of the plain provisions of the Regulations, to dispose of Specifications 2 and 6 (flying over a building at an altitude of less than 1000 feet) and Specifications 3 and 7 (flying over a congested section of a city too low to permit landing outside it in the event of a complete power failure) and further or separate discussion would serve no worthwhile purpose.

Notwithstanding the accused did not actually cause damage to any person or to any property on the ground, and may very well have had his plane under perfect control at all times, the Board of Review is nevertheless of the opinion that the court properly found him guilty of operating the plane in a reckless and careless manner and so as to endanger persons and property on the ground (Specifications 1 and 5). The evidence is sufficient to warrant the inference that the plane was operated in such

manner that the least failure of material or the slightest display of poor technique by the accused would have resulted in injury to some person or in damage to property on the ground, which is sufficient to constitute the offense alleged (CM 254880, Williams).

It is clear that in unnecessarily causing his plane to make such excessive noise as to awaken, disturb and frighten people in and near the hospital, the accused was guilty of conduct of a nature to bring discredit upon the military service, and therefore and thereby violated Article of War 96.

It is apparent that the four Specifications resulting from the flight made at approximately 1:50 a.m. arose out of one and the same transaction, as did also the four which resulted from the flight which occurred about 3:00 o'clock. Since, however, a finding of guilty of anyone of the Specifications and the Charge would support the sentence, it does not appear that accused was prejudiced by this multiplication of charges.

7. War Department records disclose that Lieutenant Coleman is 21 years of age and single. He is a high school graduate and was a personnel manager for Gulf Refining Company before entering the service. He appears to have had R.O.T.C. training from 1937 to 1941. He enlisted on 7 November 1942 for the Air Corps Enlisted Reserve, was called to active duty on 31 January 1943, became an aviation cadet on 1 May 1943, and was appointed a second lieutenant, Army of the United States, Air Corps, on 8 February 1944.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

FEB 5 1945

(37)

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 Second Lieutenant Sidney M. Coleman (0-823030), 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.

3. Consideration has been given to a letter to The Adjutant General of the Army from Sister M. Clara Francis, Assistant Superintendent, St. Joseph's Hospital, Memphis, Tennessee, and to letters to The Judge Advocate General from United States Senator Kenneth McKellar of Tennessee and United States Senator James J. Davis of Pennsylvania, and a letter from Honorable Clifford Davis, Member of Congress, to Brigadier General W. E. Hall, Deputy Chief of Staff, all requesting clemency in behalf of the accused. These communications are attached to the record of trial. Consideration has also been given to the attached memorandum from General H. H. Arnold, Commanding General, Army Air Forces, dated 15 January 1945, recommending that the sentence to dismissal of the accused be confirmed but commuted to a forfeiture of $50 pay per month for ten months, in which recommendation I concur.

4. General Arnold makes the same recommendation as to Flight Officer John N. Sommer who was jointly tried with Second Lieutenant Coleman upon an identical Charge and Specifications, and who was sentenced to be dishonorably discharged the service. The case of Lieutenant Coleman goes to the President for his action under the provisions of Article of War 48. Since Flight Officer Sommer is not a commissioned officer the record of his trial will be disposed of in accordance with the provisions of Article of War 50½. In the interest of equality and uniformity of sentence final action by the reviewing authority upon the sentence in the case of the flight officer will be withheld pending the action of the President upon the case of Lieutenant Coleman.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General.

8 Incls.
1. Record of trial
2. Drft.ltr.sig.Sec of War
3. Ltr.fr Sister M.Clara Francis
4. Ltr fr Sen McKellar
5. Ltr fr Sen Davis
6. Ltr.fr Hon DavisMC
7. Ltr fr Gen Arnold,CG AAF
8. Form of Ex action

(Sentence confirmed but commuted to forfeiture of $50 per month for ten months. G.C.M.O. 118, 5 Apr 1945)

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

SPJGH
CM 271098

1 FEB 1945

UNITED STATES	SECOND ARMY
v.	Trial by G.C.M., convened at Fort Jackson, South Carolina, 16, 17 November 1944. Phoenix: Dishonorable discharge and confinement for thirty (30) years. Nunn: Dishonorable discharge and confinement for twenty (20) years. Both: Penitentiary.
Privates EARL F. PHOENIX (33287951) and JASPER NUNN (34740932), both of Company B, 1700th Engineer Combat Battalion, Fort Jackson, South Carolina.	

REVIEW by 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 two soldiers named above.

2. Both accused were tried jointly upon the following Charge and Specifications, viz:

CHARGE: Violation of the 93d Article of War.

Specification 1: In that Private Earl F. Phoenix, Company B, 1700th Engineer Combat Battalion, Private Jasper Nunn, Company B, 1700th Engineer Combat Battalion, acting jointly, and in pursuance of a common intent, did, at Columbia, South Carolina, on or about 7 October 1944, with intent to commit a felony, viz, murder, commit an assault upon Private Marshall Hill, by willfully and feloniously shooting him in the abdomen and arm with a rifle.

Specification 2: In that Private Earl F. Phoenix, * * *, Private Jasper Nunn, * * *, acting jointly, and in

pursuance of a common intent, did, at Columbia, South Carolina, on or about 7 October 1944, with intent to commit a felony, viz, murder, commit an assault upon Technician Fourth Grade Joseph Veiga, by willfully and feloniously shooting him in the hands with a rifle.

Specification 3: In that Private Earl F. Phoenix, * * *, Private Jasper Nunn, * * *, acting jointly, and in pursuance of a common intent, did, at Columbia, South Carolina, on or about 7 October 1944, with intent to commit a felony, viz, murder, commit an assault upon Private Joshie Lee Maynor, by willfully and feloniously shooting at him with a rifle.

Specification 4: In that Private Earl F. Phoenix, * * *, Private Jasper Nunn, * * *, acting jointly, and in pursuance of a common intent, did, at Columbia, South Carolina, on or about 7 October 1944, with intent to commit a felony, viz, murder, commit an assault upon Staff Sergeant William H. Pope, by willfully and feloniously shooting at him with a rifle.

(N.B. At the time of trial Staff Sergeant John H. Thorpe who had been jointly charged with both accused in the above Charge and Specifications was granted a severance and separate trial. The court amended each Specification by striking his name therefrom).

Both accused pleaded not guilty to, and were found guilty of, the Charge and all Specifications. Evidence of one previous conviction for absence without leave from 1 August to 3 August 1944, was introduced as to accused Phoenix. Accused Phoenix was sentenced to dishonorable discharge, total forfeitures and confinement for 30 years. Accused Nunn was sentenced to dishonorable discharge, total forfeitures and confinement for 20 years. The reviewing authority approved the sentence of each accused, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The prosecution introduced the following evidence to prove commission of the offenses alleged in the Charge and the four Specifications. Sometime shortly after 7:30 p.m. on 7 October 1944, Private Marshall Hill and Technician Fourth Grade Joseph G, Veiga, military policemen on patrol duty in Columbia, South Carolina, were called to quell a disorder in a cafe, known as Shangri La, located on Gervais Street in that city. There they found that Private John L. Arnold, Company C,

1700th Combat Engineer Battalion, had been creating a disturbance by walking across the tops of the tables. After escorting him outside and admonishing him of his conduct, they permitted him to return. Accused Phoenix had entered the Shangri La as Arnold was being conducted therefrom and on the latter's return the former vituperatively expressed his sentiments about military policemen (R. 16-18, 20, 21, 48, 50, 51).

During the course of their patrol Hill and Veiga visited the Shangri La a second time. Apparently a substantial number of customers, including accused Phoenix, were crowded about the bar and when Hill told accused Phoenix to cease creating a disturbance and either leave the bar or take a seat at a table the latter refused. An argument ensued during which Hill struck accused Phoenix with his police stick whereupon the latter and several other soldiers laid hands upon Hill and commenced molesting him. Hill then drew his pistol whereupon all of the occupants of the cafe fled therefrom (R. 21, 22, 29-31, 46, 49, 51, 52). Veiga and Hill remained in front of the cafe for some 15 or 20 mintues and eventually permitted the soldiers to re-enter the establishment. They were then joined by two other military policemen, Staff Sergeant William H. Pope and Private Joshie L. Maynor, and all four of them continued down the street on patrol (R. 22, 23, 52, 53, 59, 61, 67).

After fleeing from the cafe, accused Phoenix informed Private First Class Chester Green, Company C, 1700th Engineer Combat Battalion, that he was going to obtain his rifle and "get the guy" that had struck him. Accused Phoenix and Green, Sergeant John H. Thorpe and a soldier named Brooks then started down the street and eventually met accused Nunn who was promptly told about the events related above. Sergeant Thorpe told accused Nunn that the military police had struck the "wrong person" and that they were on their way to camp to obtain their rifles to which Nunn replied, "I am with you" (R. 73, 75, 77). All five of them then went to Fort Jackson by cab. There accused Phoenix and Nunn left the cab for a short time and then returned to it each armed with a rifle. All but Sergeant Thorpe returned in the cab to the city of Columbia where Green and Brooks separated from accused Phoenix and Nunn who went off together armed with their rifles (R. 75, 76, 78-80).

Soon thereafter, some 45 minutes since the disturbance at the Shangri La, the four military policemen, Hill, Veiga, Pope and Maynor, were walking on patrol two abreast down Gervais Street toward the Shangri La. Hill and Veiga walked in the van followed by Pope and Maynor. As they reached a point about 20 feet from the Shangri La and in front of a house adjoining it, rifle shots rang out. The first or second bullet struck Hill in the abdomen and felled him to the ground. Seeking refuge he crawled to the corner of the house where another bullet struck him in the arm. A later bullet tore off the index finger on Veiga's right hand. Veiga, Pope and Maynor promptly sought cover on

the front porch of the house and some six or eight shots struck the house as they crouched for protection. They observed that the rifle fire was coming from a row of shrubbery in front of a house located across the street from the Shangri La. The four military policemen variously estimated that a total of some ten or fifteen shots were fired at them before the onslaught ceased (R. 23-26, 35, 39, 53-56, 61-63, 67-69, 116, 118; Pros. Ex. 6).

About 9:40 p.m. that night Hill was medically examined at the Regional Hospital, Fort Jackson, and found to be suffering from an extremely serious wound in the lower abdomen. His intestines had been torn from his body and were hanging over his flanks. He also had a bullet wound in his right forearm (R. 40, 41).

Green and Brooks had gone to the Shangri La after returning from Fort Jackson in the cab with accused Phoenix and Nunn and while there they heard the rifle fire. Thereafter, about 9 p.m., they went to a USO in town and were joined by accused Nunn around 9:30 p.m. who told them that he had lost his hat and rifle and also that they "got him." About a half hour later they met accused Phoenix at the USO and he informed them that he had "shot a M.P." and had "buried his rifle" (R. 46, 81-83).

City policeman Clarence E. Cannon arrived at the scene of the shooting shortly after the rifle fire had ceased. Behind the shrubbery which fronted the house located across the street from the Shangri La he found "ten or twelve 30 caliber rifle cartridges and two or three 45 cartridges that had not been fired" (R. 88, 89; Pros. Ex. 7). In the yard of another house which was located to the rear of the one from which the rifle fire had come the policeman found an M1 Army type rifle and a cap lying on a pile of lumber and also four clips of ammunition. A second M1 rifle was discovered in the yard, buried a few inches below the surface of the ground (R. 80-93; Pros. Ex. 8). It was stipulated by the prosecution, defense and the accused Nunn that the cap so found had been worn by Nunn on the night of 7 October 1944 (R. 112). One of the rifles found by the policeman had been issued to accused Phoenix by his organization (R. 111, 112, 120, 121; Pros. Ex. 20). The other rifle had been issued to Private First Class Gaston Johnson, a member of the same organization as accused Phoenix (R. 113, 114, 121-123; Pros. Ex. 21). Johnson had not used his rifle since 5 October 1944 (R. 124).

Some two or three days after the shooting and while in the custody of the civil authorities in the city of Columbia, both accused made voluntary statements after having been warned of their rights by civil and military personnel (R. 94, 95, 98, 105, 107, 108, 146-148; Pros. Exs. 11, 12). Accused Nunn stated that when he met accused Phoenix, Sergeant Thorpe, Green and Brooks, he was told that the military police

were beating "our boys" and that the group were going to get their rifles and put a stop to it. They took a taxicab to Fort Jackson where Nunn was given a rifle and ammunition by accused Phoenix and Sergeant Thorpe. All except Sergeant Thorpe returned to town and accused Phoenix and Nunn hid behind some bushes in front of a house. When accused Phoenix began to fire his rifle, accused Nunn fired three shots from his, all straight into the air. He then ran down through the rear yard of the house, tossing his rifle away and losing his hat as he fled (Pros. Ex. 11).

Accused Phoenix stated that after the fracas with Hill in the Shangri La he and the other enlisted men returned to camp where he and accused Nunn obtained rifles and ammunition and then returned to the city. They hid in bushes in front of a house on Gervais Street "where we waited for the MP." One group of military police passed but "they weren't the ones." Later another group passed and "that's when I saw the one that hit me. I started shooting at him." He fired four or five rounds and then his rifle jammed. Thereafter he fled. He had previously collected ammunition while at the rifle range because the Engineers and military police did not "get along at all" inasmuch as "the MPs had been beating on the Engineers ever since we had been at Ft. Jackson." (Pros. Ex. 12).

4. After their rights had been fully explained to them, both accused elected to make unsworn statements.

Accused Nunn stated that a soldier had been killed by the military police in August of 1944 and that when he met accused Phoenix and the other enlisted men on the night of 7 October 1944, they told him the military police were beating up soldiers again and that accused Phoenix and the others were going to put a stop to it (R. 131). He accompanied them to camp, obtained a rifle, returned to the city with Phoenix and hid in the bushes. In about five minutes one group of military police passed but they were not the ones for whom accused Phoenix was looking. Accused Nunn denied that he aimed his rifle at anyone or that he intended to shoot anyone when he fired his three shots. He just followed accused Phoenix from the cab to their place of concealment in the bushes without knowing what was going to be done (R. 132-134). He also stated that when he told the civil authorities he wanted to make his statement to military authorities, he was informed that if he didn't give a statement to them he would be turned over to a civil court and placed in the electric chair. He further stated that he did not get much food in the city jail and only made the statement he did because he wished to return to camp where he could obtain better food (R. 134-136).

Accused Phoenix stated that without provocation he was struck by a military policeman in the Shangri La on the evening of

7 October 1944. The same individual had struck accused some three or four weeks prior thereto. Accused related that thereafter he and the other enlisted men took a cab to camp where accused obtained a rifle and ammunition and then returned to town (R. 137, 138). He saw four or five military police pass by and then in a few minutes he saw Hill approaching. He fired only at Hill's legs and was surprised to learn later he had been hit in the stomach. He saw three of his shots strike the ground (R. 139). While being questioned in the city jail one of the detectives had a flashlight which he continuously pounded in the palm of his hand. The food in the city jail was not good and accused had to sleep on the concrete floor of his jail cell. He was told that he would be left there until the civil authorities got "everything out of" him (R. 141).

5. In rebuttal Captain Shep A. Griffith of the Columbia Police Department testified that before either accused gave their statements to the authorities they were advised that they did not have to make any statement but that if they did it could be used against them. No threats or force were used. He admitted he might have had a flashlight in his hand when accused Phoenix was being questioned because it was nighttime but he denied pounding it in his hand in an intimidating manner. He testified it was possible but not probable that the accused had been placed in the cell which had no bunk and which was customarily reserved for drunks so that they would not roll onto the floor and injure themselves (R. 146-148).

6. Accused Phoenix and Nunn are charged jointly with committing four assaults with intent to murder, each assault relating to one of the four military police. The evidence reveals that, after having had a fracas with one of the military policemen, Phoenix and several other enlisted men met Nunn and told him they were out to obtain revenge to which Nunn replied, "I am with you." Thereafter Phoenix and Nunn traveled to camp, armed themselves with rifles and ammunition, returned to town and concealed themselves in a screened position. When Hill, the object of their revenge, approached, along with the three other military policemen, they opened fire upon the group. The first or second shot felled Hill who then crawled to the corner of the porch where a later shot also struck him. The other three military policemen sought cover on the front porch of a house which was then peppered with some half dozen more bullets.

The proof amply establishes that accused Nunn knew of the design of accused Phoenix to assault certain military police and that he actively aided and abetted Phoenix in the plan by obtaining a rifle and ammunition and by accompanying Phoenix to the scene of the assault where both engaged in rifle fire. In view of these facts accused Nunn was properly charged as a principal in the commission of these aggravated assaults (CM 240646, Campbell, et al, 3 Bull. JAG 188).

An assault with intent to murder is an attempt to murder; it is an assault aggravated by the concurrence of a specific intent to murder. If a person shoots at another with the intent to murder, the fact that the shot misses its mark does not alter the offense. If a person fires into a group of people with intent to murder someone, he is guilty of an assault with intent to murder each member of the group (MCM, 1928, par. 149l). The intent to murder, essential to this aggravated assault, is established if the facts are such that had death resulted from the assault the offense would have been murder (Wharton's Criminal Law, 12th ed., Vol. 1, sec. 841; CM 265699, Ferry; CM 270939, O'Gara). Here, the two accused fired some ten or fifteen shots at a group of military policemen. It is obvious that they knew their acts were well calculated to cause grievous bodily harm to any or all of the group. Knowledge by the accused that the act would probably cause such bodily injury establishes the intent to kill (MCM, 1928, par. 148a). Thus, had death here resulted from their acts the offense would have been murder. Accordingly, the evidence amply sustains the findings of guilty of the four Specifications of the Charge.

7. Accused Phoenix is 31 years of age. He was inducted into the military service on 11 August 1942. Accused Nunn is 24 years of age. He was inducted into the military service on 15 February 1943.

8. The court was legally constituted and had jurisdiction of the persons and the offenses. No errors injuriously affecting the substantial rights of either 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 sentences as to both accused. Assault with intent to murder is an offense of a civil nature punishable by penitentiary confinement for more than one year under Section 22-501, District of Columbia Code. Accordingly, under the provisions of Article of War 42 accused's entire sentence of confinement may be executed in a penitentiary.

Thomas N. Tabby, Judge Advocate.

William H. Bamberell, Judge Advocate.

Robert E. Trevethan, Judge Advocate.

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

SPJGN
CM 271105

29 DEC 1944

UNITED STATES	)	FOURTH ARMY
	)	
v.	)	Trial by G.C.M., convened
	)	at Fort Sam Houston, Texas,
Captain FRANK B. LACY	)	30 November 1944. Dismissal,
(0-905319), Corps of	)	and total forfeitures.
Engineers.	)	

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

---

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

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

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

Specification 1: In that Captain Frank B. Lacy, 1300th Engineer Combat Battalion, did, at a place unknown, between on or about 20 April 1944 and on or about 31 May 1944 wrongfully and without proper authority, alter and change the Manner of Performance ratings for each of the following respective dates: 22 Jun 42 - 1 Oct 42; 2 Oct 42 - 4 Apr 43; 5 Apr 43 - 30 Jun 43; 1 Jul 43- 31 Dec 43, appearing in paragraph 15 of WD AGO Form 66-1 pertaining to the said Captain Frank B. Lacy, from "S" to "SUP".

Specification 2: In that Captain Frank B. Lacy, 1300th Engineer Combat Battalion, did, at a place unknown, between on or about 20 April 1944 and on or about 31 May 1944 wrongfully and without proper authority, add the following words to paragraph 31 of WD AGO Form 66-1 pertaining to the said Captain Frank B. Lacy, to wit, "American Theatre Ribbon".

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

Specification 1: In that Captain Frank B. Lacy, 1300th Engineer Combat Battalion, did, at a place unknown,

between on or about 20 April 1944 and on or about 31 May 1944 wrongfully and without proper authority, alter and change the Manner of Performance ratings for each of the following respective dates: 22 Jun 42 - 1 Oct 42; 2 Oct 42 - 4 Apr 43; 5 Apr 43 - 30 Jun 43; 1 Jul 43 - 31 Dec 43, appearing in paragraph 15 of WD AGO Form 66-1 pertaining to the said Captain Frank B. Lacy, from "S" to "SUP".

Specification 2: In that Captain Frank B. Lacy, 1300th Engineer Combat Battalion, did, at a place unknown, between on or about 20 April 1944 and on or about 31 May 1944 wrongfully and without proper authority, add the following words to paragraph 31 of WD AGO Form 66-1 pertaining to the said Captain Frank B. Lacy, to wit, "American Theatre Ribbon".

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

3. The evidence for the prosecution shows that on or about 20 April 1944 the accused was at APO 502 with orders to return to the United States (Pros. Ex. A-1). According to the stipulated testimony of Major Arthur A. Burnham, Chief of Military Personnel Branch at such station, he interviewed the accused shortly before his departure. At this time a new copy of the accused's WD AGO Form 66-1 was prepared from the original form which was retained by Major Burnham (Id). At that time the efficiency ratings under paragraph 15 of the new form showed four "S"s and from paragraph 31 there was omitted the authorization for the American Theatre Ribbon to which it had been determined during the interview the accused was not entitled (Pros. Ex. A-1, A, B). The new form was then given to the accused for delivery to the appropriate officer upon arrival at his new assignment (Id.). Photostatic copies of both forms were admitted into evidence (Id. R. 7-8; Ex. C).

When the accused was interviewed by Lieutenant Colonel Elbridge Bacon, Jr., in early June, 1944, at Fort Sam Houston, Texas, the new form, which had shortly before been delivered by the accused at that station, was secured and it showed in paragraph 15 four efficiency ratings of "SUP" and in paragraph 31 authorization for the American Theatre Ribbon in such a way as to plainly indicate that the changes had been made by someone other than the person filling out the form (Pros. Ex. A-1, A, B). An admitted specimen of the accused's lettering and writing was received in evidence (Pros. Ex. D) and two qualified

handwriting experts testified that the addition of the letters "UP" to the four "S"s and the words "American Theatre Ribbon" were written by the same person who wrote the admitted specimen (R. 9-18, 19-30 @ 11, 21, 22).

4. The accused, after explanation of his rights as a witness, testified in his own behalf (R. 31, 32). He admitted that when he received the 66-1 form at APO 502 it showed four efficiency ratings of "S" and omitted authority for the American Theatre Ribbon but that enroute to the United States he noticed that the letters "UP" had been added to the four "S"s and the authority for the American Theatre Ribbon inserted (R. 34). While admitting that the words "American Theatre Ribbon" may have been inserted by him when under the influence of intoxicants, he denied changing the efficiency ratings and attributed all the changes to unknown officers' facetious or malicious acts while drinking in celebration of his departure (R. 33-35). His wife testified that the accused, after his arrival in the United States, had told her that his "66-1" card did not "look as though it were right" and that it authorized the American Theatre Ribbon which he was not entitled to wear (R. 38-39).

5. Specifications 1 and 2, Charge I, respectively allege that between 20 April 1944 and 31 May 1944 the accused wrongfully and without proper authority altered and changed four efficiency ratings upon his "WD AGO Form 66-1" from "S" to "SUP" and similarly added thereto the words "American Theatre Ribbon". The alleged offenses are laid under Article of War 95. Specifications 1 and 2, Charge II, allege the identical offenses in violation of Article of War 96. Entries upon "WD AGO Form 66-1", commonly known as an officer's classification card, are authorized to be made only by certain personnel as prescribed by and pursuant to appropriate Army Regulations relative thereto. Particularly is this applicable to entries relative to an officer's efficiency rating and to authorization for decorations (AR 605-90, C3, 23 January 1943). The accused does not fall within the category of personnel authorized to make entries upon such record and his acts are clearly prejudicial of good order and military discipline and discreditable to the military service (MCM, 1928, pars. 152a - b). Manifestly the unauthorized changing of one's efficiency rating record from "S", denoting merely satisfactory, to "SUP", denoting the highest rating of superior, is a deceitful act which is unbecoming an officer and a gentleman as it seeks to represent a performance record to which such a one is not entitled. Likewise, the addition of an authorization for a decoration is a similarly deceitful act. The offenses alleged are therefore violative of Article of War 95 also. The alleged offenses are analogous to that of cheating upon an examination which is violative of Article of War 95 (8 BR 277).

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

SPJGQ
CM 271119

24 JAN 1945

UNITED STATES	)	FOURTH ARMY
v.	)	Trial by G.C.M., convened at Camp Hood, Texas, 7 November 1944. Dishonorable discharge and total forfeitures.
Second Lieutenant LEROY L. SIMPSON (0-1825713), Infantry.	)	

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

---

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Leroy L. Simpson, 2d Lt, 659th Tank Destroyer Battalion, did without proper leave absent himself from his station at Fort Riley, Kansas, from about 18 August 1944 to about 20 August 1944.

Specification 2: In that Leroy L. Simpson, 2d Lt, 659 Tank Destroyer Battalion, did, without proper leave absent himself from his station at Fort Riley, Kansas, from about 21 August 1944 to about 4 September 1944.

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

Specification: In that Second Lieutenant Leroy L. Simpson, Headquarters Company, 659th Tank Destroyer Battalion, did, at Camp Hood, Texas, on or about 12 October 1944, fail to repair at the fixed time to the properly appointed place of assembly for reveille.

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

Specification 1: In that Second Lieutenant Leroy L. Simpson, Headquarters Company, 659th Tank Destroyer Battalion, did, at Camp Hood, Texas, on or about 12 October 1944 wrongfully take

and use, without the consent of the owner, a certain vehicle, to wit, a one-quarter ton four by four vehicle, property of the United States of America.

Specification 2: (Finding of not guilty).

The accused pleaded not guilty to the Specifications and Charges. He was found not guilty of Specification 2, Additional Charge II, and guilty of the remaining Specifications and of the Charges except that as to Additional Charge II the finding was "Guilty except of Specification 2; Of the excepted Specification, not guilty." This form of finding is erroneous, but it is clear that the effect of the court's action was to find accused guilty of Additional Charge II (MCM, 1928, par. 78b), and the irregularity is not prejudicial. No evidence of previous conviction was introduced. The accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge and forfeiture of all pay and allowances due or to become due, and forwarded the record of trial for action under Article of War 48.

3. The accused was a member of Headquarters Company, 659th Tank Destroyer Battalion, Camp Hood, Texas (R. 8) which battalion was a part of the 24th Tank Destroyer Group (R. 13). By orders issued on 12 June 1944, he was directed to proceed to Fort Riley, Kansas, on temporary duty for twelve weeks to attend an advanced mechanized course at the Cavalry School. He was to report at Fort Riley on 30 June or 1 July and to return to his organization upon completion of the temporary duty (Ex. A).

With reference to the two Specifications of the original Charge, the prosecution based its case entirely upon morning report entries. Entries in the morning reports of the applicable Student Officers' Detachment at Fort Riley show accused absent without leave on 18 August 1944, returned to duty on 20 August 1944, and absent without leave on 21 August 1944 (Ex. B). The morning report of Headquarters Company, 659th Tank Destroyer Battalion, Camp Hood, Texas, shows accused from absent without leave to duty on 4 September 1944 (Ex. C).

The prosecution's evidence relating to the Specification of Additional Charge I and Specification 1 of Additional Charge II, is as follows:

At the time in question, accused was Battalion Transportation Officer of the 659th Tank Destroyer Battalion, stationed at Camp Hood, Texas (R. 10, 19). Certain Government motor vehicles, including "one-quarter ton four by four vehicles" were the "property" of the battalion (R. 12). They were available for official business only and not for personal use, and, in addition to the fact that this was standard operating procedure, orders

to that effect had been issued and were in force on 12 October 1944 (R.12, 13, 14, 15, 18, 30, 31). Accused was aware of these orders (R. 13, 15).

Between 12 and 12:30 a.m. on 12 October 1944, the accused came to the battalion motor pool and told Sergeant Howard Radcliffe, Headquarters Company, 659th Tank Destroyer Battalion, who was the Assistant Truck Master and Dispatcher, that he wanted a "Jeep, quarter ton, four by four", to go to Temple (R. 19, 20, 21). From a map of the United States it appears that Temple is about 25 miles in a direct line from Camp Hood. Sergeant Radcliffe procured for accused a vehicle of the type requested and made out a trip ticket. At accused's direction, Sergeant Radcliffe entered upon the trip ticket the words "Personal, USO show" (R. 20, 21, 25, 26, 27; Def. Ex. 1). In accordance with accused's request, Radcliffe drove him in the "jeep" to Temple, leaving the motor pool about 12:30 a.m. and arriving at Temple about 2 a.m. After remaining at the Santa Fe railroad station for about an hour, drinking coffee and talking, they rode around the town for about 45 minutes, and then stopped at a house. Accused remained in the house for about fifteen minutes, and, upon his return, directed Radcliffe to drive him back to camp, which Radcliffe did (R. 21, 22). They arrived at camp about 5:50 a.m. (R. 23). While in Temple they did not go to a "USO show" (R. 27), and in fact the battalion did not have any show or other activity in Temple on 12 October (R. 34). Accused did not have permission from higher authority to make the trip (R. 13, 14, 18, 31, 33).

Upon his return to the motor pool from the trip to Temple, accused entered the dispatcher's office and lay down on a bed, where he remained until about 8 a.m., at which time First Lieutenant Adolph Holmes, the Battalion Adjutant, found him asleep (R. 23, 27, 34, 35). Accused was not clothed in his "working attire" (R. 36). Lieutenant Holmes woke him and told him to get up, go to his quarters, put on his "work clothes," and come back to work (R. 23, 24, 35). Thereupon, accused arose (R. 24).

All officers of the battalion were required to attend reveille at 6:30 a.m. daily, except Sunday (R. 10, 11, 31). The requirement included the Battalion Transportation Officer (R. 15, 16, 17, 27), and, specifically, accused was required to attend reveille on 12 October 1944 (R. 10). He was not present at reveille on that date (R. 11, 12) and his absence had not been authorized (R. 11, 31).

4. For the defense, Corporal Dakice Hawes, Headquarters Company, 659th Tank Destroyer Battalion, testified that between 6:45 and 7:30 a.m. on either 12 or 13 October he saw accused "over around Headquarters' Motor Shop" and did not see him in the dispatcher's office (R. 37, 38, 39, 42). So far as witness recalled, accused was wearing coveralls (R. 39).

The accused testified as follows:

He admitted that he was absent without leave from Fort Riley from 18 to 20 August 1944 and from 21 August until "about" 4 September 1944 (R. 53). His wife had promised to spend her vacation at Junction City (near Fort Riley), but instead went to Chicago (R. 45). Accused requested a leave but no action was taken with reference thereto (R. 45, 46). He was very disturbed, could not keep his mind on his work, and was "going half nuts" because his wife "was some place else" (R. 45, 46, 47). Deciding that the situation "warranted something to be done," he went to Chicago and brought his wife home, after which he returned to Fort Riley (R. 45, 46). He returned to Camp Hood on 2 September under orders from the school (R. 46).

Accused admitted that his use of the Government vehicle on 12 October was not for official business and that he was not authorized to take it for his "own personal use" (R. 49, 52, 53, 54). He stated, however, that in a case where one cannot do otherwise, "it becomes a necessity," and so he "took it on" himself to take the vehicle for his own personal use (R. 53, 54). He used the vehicle because his wife was "coming down here" and he was supposed to meet her. He "just had no alternative". He had to make arrangements "for her to have a place to stay". He went to the station and she did not arrive on the train. He "made arrangements" and, when she did not arrive, he "went and told them that she was coming on the Santa Fe, but did not come in" (R. 47). The original trip ticket (of which Defense's Exhibit 1 was certified to be a true copy) was "made out to go to Temple, to the Santa Fe Station," and if the original contains a notation that the trip concerned "USO shows," that notation was not on the trip ticket in "the Sergeant's handwriting," but was placed there by someone else (R. 47).

When accused returned to camp from Temple, it was after 5 a.m. and "not anywhere time for Reveille" (R. 48). He went to the motor pool and motor park to see that the men were properly engaged in their duties, and when the motor shop opened for the day, he "went over there and was standing around" (R. 48). Then he went to the dispatcher's shed and "just lay down across the bed," but did not fall asleep. When Lieutenant Holmes came in and shook him, he had been lying on the bed "possibly ten or fifteen minutes" (R. 47, 48, 49, 51). He was dressed in "fatigues" at the time (R. 49).

Accused admitted that he was absent from reveille on 12 October, and testified that he was in the motor pool at the time, checking "the early men who were leaving, and the maintenance men" (R. 50, 53). Although all officers, including accused, were supposed to be at reveille except on

Sundays, and although accused ordinarily attended reveille, the requirement was modified in the case of an officer having duties to perform during reveille, and on many occasions accused had such duties at the motor pool (R. 49, 50).

First Lieutenant Robert L. Myers, 659th Tank Destroyer Battalion, testified that he had been associated with accused for four months and that, so far as witness knew, his reputation was good. Witness regarded accused "in the upper class" as to capability (R. 55, 56).

Lieutenant Colonel Chester A.Nichols, 669th Tank Destroyer Battalion, knew accused as an enlisted man serving in his command. According to the witness, accused's reputation was good, and witness regarded him as a good soldier. Witness has not observed accused since the latter's elevation to commissioned grade (R. 56, 57).

Major William H. Simmons, 659th Tank Destroyer Battalion, testified as follows: After accused's dismissal from the school at Fort Riley, he was placed upon a probation status and given an "assigned job" as Battalion Transportation Officer, which he held for approximately twenty days. During that period, witness watched him closely and would rate him "satisfactory" on the quality of his work (R. 60).

Lieutenant Colonel Donald McGrayne, Field Artillery, Commanding Officer of the 659th Tank Destroyer Battalion (R. 28), was recalled by the prosecution and testified as follows: Accused's reputation is not good. His work as an officer has been poor and witness does not consider him a very good officer and would like to have him removed from the organization (R. 58, 59).

5. The morning report entries show that accused was absent without leave as alleged in Specifications 1 and 2 of the Charge, and accused admitted the unauthorized absences, although his testimony concerning the termination of the second absence is not clear. The court was justified in adhering to the dates appearing on the morning reports. Accused's desire to bring his wife home from Chicago, while understandable, affords no excuse for an unauthorized absence, and, in any event, accounts for only one absence.

The evidence for the prosecution and the admissions of the accused prove conclusively that on 12 October 1944 the accused wrongfully and without authority took the Government vehicle for his personal use (Specification 1, Additional Charge II). His contention that he did so for the purpose of meeting his wife at the railroad station is no defense

even if believed, and its truth is extremely questionable in view of Sergeant Radcliffe's testimony that they spent the time at the station in drinking coffee and talking and in view of the absence of anything therein to indicate the arrival of a train or the communication by the accused to Radcliffe of the claimed objective of the trip.

The prosecution proved that accused's presence at reveille on the day in question was required and that he was absent therefrom without authority (Specification, Additional Charge I). The testimony shows that after his return from Temple, accused reclined upon a bed in the dispatcher's office and fell asleep. Accused admitted his absence and sought to justify it upon the ground that he was performing necessary duties at the motor pool. But accused admitted that ordinarily he was required to be present at reveille, and his testimony fails to disclose any extraordinary duty which would warrant his absence on 12 October. Thus, his own account of his activities does not amount to a defense, and, in any event, the court had a right to believe the testimony of the prosecution. Corporal Hawes' testimony is not decisive, both because he was uncertain of the date and because he claims to have seen accused between 6:45 and 7:30 a.m., which was after the time set for reveille.

In the opinion of the Board of Review, the offenses were clearly proved.

6. Some hearsay testimony was admitted, but accused was not prejudiced thereby.

Lieutenant Colonel McGrayne, who signed the original Charge and Specifications as accuser, was asked by the prosecution whether he filed all the charges which he thought the facts might substantiate. He replied: "I did not" (R. 59). This evidence was incompetent, but the proof of guilt was so clear that its admission cannot be said to have prejudiced the substantial rights of accused.

The court sentenced the accused to dishonorable discharge. Since accused was an officer, this portion of the sentence was inappropriate. However, it was not illegal, and the irregularity in form may be cured by the action of the confirming authority (CM 249921, Maurer, 32 BR 229).

7. War Department records disclose that accused is 27 years of age and married. He was graduated from high school and, in 1941, from Florida Normal College. In civilian life he has been employed as a waiter and bellman in a hotel and as a stockman and packer in a wholesale drug company. He also taught in elementary school for six months. He served as an enlisted man in the Army from 15 July 1941 until, upon graduation from

the Tank Destroyer School, Camp Hood, Texas, he was appointed a second lieutenant, Army of the United States, on 25 June 1943. In recommending him for Officer Candidate School, his commanding officer stated that his character was excellent and that he had demonstrated outstanding qualities of leadership.

8. The court was legally constituted and had jurisdiction. 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 approved by the reviewing authority, and to warrant confirmation of the sentence. Dismissal is authorized under Articles of War 61 and 96.

Fletcher R. Andrews, Judge Advocate

Herbert B. Frederick, Judge Advocate

[illegible], Judge Advocate

SPJGQ-CM 271119 1st Ind

Hq ASF, JAGO, Washington 25, D. C. FEB 7 1945

TO: 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 Leroy L. Simpson (0-1825713), Infantry.

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 approved by the reviewing authority, and to warrant confirmation of the sentence. I also concur in the opinion of the Board of Review that the portion of the sentence imposing dishonorable discharge, while inappropriate in the case of a commissioned officer, is not illegal. The accused's conduct reveals a complete lack of the sense of responsibility required of a commissioned officer. I recommend that only so much of the sentence be confirmed as provides for dismissal 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 the above recommendation into effect, should such action meet with approval.

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Only so much of sentence confirmed as provides for dismissal. G.C.M.O. 125, 5 Apr 1945)

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

SPJGH
CM 271153

22 JAN 1945

UNITED STATES v. Second Lieutenant BORIS D. KARSANOFF (0-1175477), Infantry.	INFANTRY REPLACEMENT TRAINING CENTER CAMP BLANDING, FLORIDA Trial by G.C.M., convened at Camp Blanding, Florida, 9 December 1944. Dismissal.

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

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: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Boris D. Karsanoff, Infantry, Company "A", 197th Infantry Training Battalion, 61st Infantry Training Regiment, Camp Blanding, Florida, did, at Columbus, Georgia, on or about 13 September 1944, with intent to defraud wrongfully and unlawfully make and utter to King Grocery Company Inc, Columbus, Georgia, a certain check, in words and figures as follows, to wit:

Sept 13 1944

BANK Farmers National Bank
(Write name of your bank on this line)

CITY AND STATE Salina, Kansas

PAY TO
ORDER OF Cash $ 10.00/00

Ten ——— and ——— no/00 DOLLARS
For value received I claim that the above amount is on deposit in said bank in my name subject to this check, and is hereby assigned to payee or holder hereof.

and by means thereof, did fraudulently obtain from King Grocery Company Inc, Ten dollars ($10.00), he the said Second Lieutenant Boris D. Karsanoff, then well knowing that he did not have and not intending that he should have sufficient funds in the Farmers National Bank for the payment of said check.

N.B. At trial court permitted prosecution to amend Specification 1 by striking "King Grocery Company, Inc, Columbus, Georgia" and inserting therefor "Wynnton Pharmacy, Columbus, Georgia" (R. 10).

Specification 2: Same allegations as Specification 1, except check in the amount of $25, dated 16 September 1944, and uttered on or about 16 September 1944, to Butlers Cleaners, Columbus, Georgia.

Specification 3: Same allegations as Specification 1, except check in the amount of $25, dated 16 September 1944, and uttered on or about 16 September 1944, to Wynnton Pharmacy, Columbus, Georgia.

Specification 4: Same allegations as Specification 1, except check in the amount of $25, dated 16 September 1944, and uttered on or about 16 September 1944, to White Laundry, Inc., Columbus, Georgia.

Specification 5: In that Second Lieutenant Boris D. Karsanoff, Infantry, Company "A", 197th Infantry Training Battalion, 61st Infantry Training Regiment, Camp Blanding, Florida, being indebted to Camp Cooke Section, Army Emergency Relief, Camp Cooke, California, in the sum of Three Hundred and Fifty dollars ($350.00) for a loan which was due and payable in monthly installments of thirty-five dollars ($35.00) each, commencing 1 March 1944, did at Fort Sill, Oklahoma, Camp Phillips, Kansas, Fort Benning, Georgia, and Camp Blanding, Florida, from 1 March 1944 to 1 October 1944, dishonorably fail and neglect to pay the installments, aggregating two hundred and eighty dollars ($280.00), due and payable on the first days of March to October, 1944, inclusive.

Specification 6: In that Second Lieutenant Boris D. Karsanoff, * * * did, at Fort Benning, Georgia, on or about 1 August 1944, with intent to deceive Captain Walter E. Burr, Com-

manding Officer, 11th Company, 1st Student Training Regiment, The Infantry School, officially state to the said Captain Burr that he had in the month of July, 1944 sent a payment to the Camp Cooke Section, Army Emergency Relief, Camp Cooke, California upon a loan extended to him on 30 December 1943, which statement was known by the said 2d Lieutenant Boris D. Karsanoff to be untrue.

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

Specification 1: (Withdrawn at trial by direction of the appointing authority, R. 3).

Specification 2: (Withdrawn at trial by direction of the appointing authority, R. 3).

Specification 3: Same allegations as Specification 1 of Charge I, except check for $10 was dated 18 September 1944 and was uttered on or about 18 September 1944 to Lane Drug Store #100, Jacksonville, Florida.

Accused pleaded not guilty to, and was found guilty of, all Charges and Specifications on which he was tried. No evidence of previous convictions was introduced. He was sentenced "to be dishonorably discharged the service, and to forfeit all pay and allowances due or to become due". The reviewing authority approved only so much of the sentence "as provides that the accused be dismissed the service" and forwarded the record of trial for action under Article of War 48.

3. The evidence introduced by the prosecution to prove the Charges and Specifications is hereinafter summarized under appropriate headings indicating the Charges and Specifications to which particular evidence is pertinent.

a. Charge, Specifications 1-4 inclusive, and Additional Charge, Specification 3:

It was stipulated by the prosecution, defense and the accused that if various persons associated with or employed by Wynnton Pharmacy, Butler's Cleaners and White Laundry, Inc., all of Columbus, Georgia, and Lane Drug Store No. 100, Jacksonville, Florida, were present in court, they would testify that the following checks were made and uttered by the accused on or about the respective dates thereof and were cashed for him by their respective establishments, viz (R. 8-11; Pros. Exs. A,B,F,G,H,I):

Ch & Spec	Date of Check	Amount of Check	Payee	Cashed by	Drawee Bank
Ch, Spec 1	13 Sep 44	$10	Cash	Wynnton Pharmacy	The Farmers Natl. Bk, Salina, Kansas
Ch, Spec 2	16 Sep 44	$25	Cash	Butlers Cleaners	" "

Ch & Spec	Date of Check	Amount of Check	Payee	Cahed By	Drawee Bank
Ch, Spec 3	16 Sep 44	$25	Cash	Wynnton Pharmacy	The Farmers Natl Bk, Salina, Kansas
Ch, Spec 4	16 Sep 44	$25	White Laundry	Payee	" "
Add Ch, Spec 3	18 Sep 44	$10	Cash	Lane Drug Store #100	" "

After presentment for payment, all of these checks were returned unpaid by the drawee bank but were subsequently paid and redeemed by the accused (R. 10,11; Pros. Ex. B).

According to accused's bank statement he had a balance of $64.55 on deposit in The Farmers National Bank, Salina, Kansas, on 15 September 1944. By 16 September 1944 it had been reduced to $10.70 and by 18 September 1944 it had been further reduced to 70 cents and did not rise above that level until a deposit of $280 was made on 5 October 1944. A similar deposit of $280 was made the following month on 4 November 1944 (Pros. Ex. C).

b. Charge, Specifications 5 and 6:

The prosecution introduced the deposition of Second Lieutenant L. G. Weller of the Camp Cooke Section of the Army Emergency Relief, Camp Cooke, California, wherein he deposed that the records of that section show that Second Lieutenant Boris D. Karsanoff applied for a loan on 30 December 1943 and a loan of $350 was made to him on 10 January 1944 (Pros. Ex. D). First Lieutenant George W. Lockett, and not the deponent, was Army Emergency Relief Officer at Camp Cooke when this loan was made. Lieutenant Weller further deposed that the loan was to be repaid at the rate of $35 per month commencing 1 March 1944, but only one payment of $30 made on 12 October 1944 had been received (Pros. Ex. D).

A basic communication from Camp Cooke, California, with eleven indorsements thereto was admitted in evidence without objection by the defense (R. 10). The basic communication requested an explanation of accused's failure to repay the Army Emergency Relief loan of $350 according to its terms and the 2nd Indorsement from the Commanding Officer of 11th Company, 1st Student Training Regiment, called upon accused to reply by indorsement, explaining his failure to make payments thereon. By 3rd Indorsement prepared sometime between 29 July 1944 and 1 August 1944 inclusive, accused replied that it had been "most difficult to make any payments" on this loan because of "hospital and doctor's bills and expenditures involved in traveling" and concluded with the statement that "I have sent a payment this month and shall continue to do so until this

obligation is disposed off (sic)". However, no such payment was received and, when asked to explain this situation, accused replied by 10th Indorsement, dated 28 September 1944, stating in part that "Prior to making the statement on the third indorsement I instructed my wife to send payment to the Camp Cooke Section, Ninth Service Command Branch, Army Emergency Relief. Therefore, at the time of making this statement I believed that the payment had been forwarded" (Pros. Exs. A, E).

4. It was stipulated by the prosecution, defense and the accused that the five checks involved in these proceedings had all been paid and redeemed (R. 11).

After accused's rights had been explained to him, he elected to take the stand and give sworn testimony in his own behalf. With respect to the worthless checks involved in the Charge, Specifications 1-4 inclusive, and the Additional Charge, Specification 3, accused testified that on 1 August 1944, he opened a joint checking account with his wife in the Farmers National Bank, Salina, Kansas. He did not keep account of his bank balance by check stubs and other records but, as he explained, "I tried to keep it in my mind as much as I could. Occasionally, I would try to keep a record of it by writing it down in a notebook" (R. 12). His wife would cash checks on the account and, to keep a record of them, "she [wife] would tell me [accused] when I came in from the post that she had written one or two checks and I tried to keep it in my head or write it down"(R. 13, 14). Accused did not request the bank to send him a checkbook until approximately two weeks before trial (R. 16). He received it about a week later and since then he maintained a written record of the checks cashed and deposits made (R. 12, 13, 16). He further testified that he thought he had about $100 on deposit when he uttered the checks here in issue because "I was pretty sure in my own mind at that time I had not written so many checks that there would not leave a balance of $100 in the bank" (R. 14, 17). He admitted that he and his wife were together when he issued these five checks over the period from 13 September to 18 September 1944, and that he would have known the amount of his bank balance if he had kept a record of it (R. 19).

With respect to Specification 5 of the Charge, accused admitted that he received the loan from the Army Emergency Relief on 10 January 1944, under an agreement to repay it in monthly installments of $35 commencing 1 March 1944. He also admitted that he did not make the monthly payments due during the months of March to September inclusive, and for the months of November and December although he did make a payment of $30 in October 1944. He did not contact the Army Emergency Relief section at Camp Cooke during these months that he failed to make the agreed payments (R. 17-19). From January to August 1944, accused experienced four changes of station and he also incurred medical and hospital bills totaling $250 because of an illness suffered by his wife (R. 15, 16). To use accused's own words, he did not have sufficient funds to make his monthly payments on this loan because "I had so many transfers during the last year and the additional expenditures that came along with these transfers"

(R. 14). However, he admitted that he received proper travel pay on his changes of station and also that he gave his wife $150 in November 1944, when she traveled to Oregon to visit her brother (R. 18,19).

With respect to Specification 6 of the Charge, accused testified that he was stationed at Fort Benning, Georgia, when he received the basic communication and the first two indorsements thereto, all relative to the loan from Army Emergency Relief. He instructed his wife at their home in Columbus, Georgia, to send a payment on the loan and, returning to the post the next morning, he replied by indorsement to the communications, stating that the payment had been sent inasmuch as he felt certain his wife had attended to it. However, he did not inquire of his wife at any subsequent time to determine whether or not she had followed his instructions (R. 14,18).

5. With respect to Specification 1 of the Charge, accused is charged with fraudulently obtaining $10 on a check made and issued on or about 13 September 1944 then well knowing that he did not have and not intending to have sufficient funds on deposit to pay it. The evidence shows that on 15 September 1944 accused had a balance of $64.55 on deposit in his bank account. There is no evidence as to the amount he had on deposit on 13 September 1944, when he made and issued the check for $10, nor any evidence as to the amount of accused's outstanding checks. Thus, proof of the offense alleged is insufficient inasmuch as there is no proof of the essential allegation that accused did not have sufficient funds on deposit to pay this check when it was uttered on 13 September 1944 (CM 242967, Helton, 27 B.R. 239, 3 Bull. JAG 101). However, the check was dishonored when presented for payment and the evidence shows that from 18 September to the end of the month accused had insufficient funds on deposit in his account to pay it. Mindful of the fact that the check was cashed in Columbus, Georgia, while the drawee bank was located in Salina, Kansas, the conclusion is inescapable that the check was dishonored because accused had insufficient funds on deposit in his account when the check reached the drawee bank for payment after passing through usual banking channels. Accused's own testimony shows that he kept no written record of the checks he and his wife cashed on this account although he possessed or could easily have acquired all such information inasmuch as he and his wife were living together during this time. Furthermore, there is no showing that checks cashed by accused's wife on this joint account were responsible for reducing it below an amount adequate to pay this $10 check. It is quite apparent that accused's carelessness and neglect, rather than an honest mistake, caused the entire situation. Accordingly, although accused is not guilty of the offense charged, the evidence is sufficient to sustain a finding of guilty of the lesser included offense of failing to maintain a sufficient bank balance to pay this check, in violation of Article of War 96 (CM 249232, Norren, 32 B.R. 95, 3 Bull. JAG 290).

The four checks covered by Specifications 2, 3 and 4 of the Charge, and Specification 3 of the Additional Charge were all issued by accused and presented to the drawee bank for payment when the balance in his account was insufficient to pay them. The only question is whether or not the evidence establishes an intent to defraud. The evidence shows that accused redeemed the dishonored checks and prompt redemption of dishonored checks, although not a defense, "favors the inference" that accused "did not intend to defraud the payees" of the checks (CM 249006, Vergara, 32 B.R. 5, 3 Bull. JAG 289, 290). The only evidence as to accused's bank account and the balance therein from time to time is a certified copy of his bank statement from 15 September 1944 to 13 November 1944. It reveals that two deposits of $280 each were made in accused's account, one on 5 October 1944 and the other on 4 November 1944. Thus, it is apparent that accused's account was active both during and after commission of the offenses here charged. The bank statement further indicates a regularity of deposit, presumably the proceeds of accused's pay check. In the face of these facts it cannot be said that the evidence establishes beyond a reasonable doubt that accused intended to defraud when he issued these four checks for moderate amounts. Rather, he issued them carelessly and neglectful of the sufficiency of his bank account to pay them (CM 240885, Holley, 26 B.R. 157). Thus, the evidence is only sufficient to sustain a finding of guilty of the lesser included offense of failing to maintain a sufficient bank balance to pay these four checks in violation of Article of War 96.

With respect to Specification 5 of the Charge, the evidence demonstrates that after borrowing $350 from Army Emergency Relief, accused failed for eight months to make the agreed monthly payments thereon of $35 each, making but one payment of $30 about two months after his conduct had received official attention. He did not contact the lender during this time or arrange to make monthly payments of less amount than that agreed upon. Indeed, even after he had been officially called upon to account for his failure to repay this loan in August 1944, and after he had officially stated that he would commence his monthly payments, he was content to continue to disregard making payments thereon although he could afford to give his wife $150 to make a trip to Oregon in November 1944. Such evidence sustains the inference that accused's promise to pay was "made with a false or deceitful purpose" and demonstrates that his failure to pay was "characterized by a fraudulent design to evade payment", all in violation of Article of War 95 (CM 220760, Fanning, 13 B.R. 61, 1 Bull. JAG 23). The failure of accused to pay this debt to the extent his income permitted also branded his conduct as dishonorable (CM 228894, Peterson, 16 B.R. 365, 2 Bull. JAG 64). It should be observed that the loan and its nonpayment was established by the prosecution, not by introduction in evidence of the original records of the Army Emergency Relief relative thereto but by a deposition of an individual acquainted with the contents of these records. No objection was raised by the defense at the time of the introduction of this secondary evidence. Accordingly, any objection to the admission of the contents of this

deposition on the grounds that it was not the best evidence, was waived by the defense by failure to object when the deposition was proferred in evidence (MCM, 1928, par. 116a; CM 222489, Cutting, 13 B.R. 293). In addition, accused in his own testimony admitted that he contracted the loan and that he failed to pay it as alleged in the Specification. The evidence sustains the finding of guilty of Specification 5 of the Charge.

With respect to Specification 6 of the Charge, the evidence shows that, in an indorsement dated either the last of July or first part of August 1944, accused stated to his company commander that he had sent a payment "this month" on the loan from Army Emergency Relief. As a matter of fact no such payment had been made. Even if accused's testimony that he made this statement because he had told his wife to send a payment and took it for granted that she had done so be accepted as the truth, that would constitute no defense inasmuch as the statement that he had made the payment was still false. Furthermore, the defense did not offer accused's wife as a witness to corroborate this testimony. Standing alone as testimony only from the lips of the accused it cannot be said that the court was unwarranted in disbelieving it. That his testimony was entitled to no credence seems clear when we consider his statement that, after writing the indorsement, he did not inquire of his wife to determine if in fact she had made the payment. Any ordinary reasonable person would at least have done that to assure himself of the correctness of the statement made in the indorsement. Accused's testimony is at odds with human experience. The evidence sustains the finding of guilty of Specification 6 of the Charge.

6. An examination of the record reveals that the Charge and its six Specifications were referred for trial to First Lieutenant Lowell B. Vail, trial judge advocate of the general court-martial appointed by paragraph 87, Special Orders No. 237, Headquarters Infantry Replacement Training Center, Camp Blanding, Florida, 3 October 1944. The Additional Charge and its Specification 3 were referred for trial to Second Lieutenant Charles D. Fogle, trial judge advocate of the general court-martial appointed by paragraph 77, Special Orders No. 256, issuing from the same command on 25 October 1944. All charges were in fact tried by Captain F. Ned Hand, trial judge advocate of the general court-martial appointed by paragraph 47, Special Orders No. 294, issuing from the same command on 8 December 1944. There is no order in the record referring the charges for trial before the last named court. The appointing authority of all three courts was Major General Fales and that appointing authority also acted as reviewing authority on the record of trial. Under such circumstances the general court-martial which tried the case had jurisdiction thereof (CM 232790, Brandon, 19 B.R. 193).

The court sentenced accused to be "dishonorably discharged" the service. Inasmuch as accused is an officer his sentence should have been to dismissal. However, "dishonorable discharge" and "dismissal" are legal equivalents and the sentence although inartful is in legal effect a sentence to dismissal and was properly approved as such by the reviewing authority (CM 249921, Maurer, 32 B.R. 229).

At the trial the court permitted the prosecution to amend Specification 1 of the Charge by striking out the name of the alleged payee of the check, "King Grocery Company", and by substituting therefor the name "Wynnton Pharmacy". The defense stated it had no objection thereto (R. 10). This amendment was properly allowed inasmuch as it did not materially change any of the essential elements of the offense alleged nor did it prejudice any substantial rights of the accused (CM 232925, Stengle, 19 B.R. 245).

7. Accused is 26 years of age and married. He is a high school graduate and prior to his induction into the Army as a member of the Washington National Guard in September 1940 was employed by the Winthrop Motor Company, Tacoma, Washington, as a floorman, receiving $36 per week. Upon graduation from the Officer Candidate Field Artillery School, Fort Sill, Oklahoma, he was appointed second lieutenant, Army of the United States, 31 December 1942 and ordered to active duty on the same date.

8. The court was legally constituted and had jurisdiction of the person and the offenses. Except as otherwise noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of Specifications 1, 2, 3 and 4 of the Charge and of Specification 3 of the Additional Charge as involve findings of guilty of the lesser included offense of failing to maintain a sufficient bank balance to pay the five checks described therein in violation of Article of War 96, legally sufficient to support only so much of the finding of guilty of the Additional Charge as involves a finding of guilty of a violation of Article of War 96 and legally sufficient to support the findings of guilty of all other Specifications and of the Charge, and to support the sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96 and is mandatory upon conviction of a violation of Article of War 95.

Thomas N. Tobey, Judge Advocate.

William H. Bambrell, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

SPJGH-CM 271153 1st Ind

Hq ASF, JAGO, Washington 25, D. C. JAN 30 1945

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 Boris D. Karsanoff (0-1175477), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Specifications 1, 2, 3 and 4 of the Charge and of Specification 3 of the Additional Charge as involves findings of guilty of the lesser included offense of failing to maintain a sufficient bank balance to pay the five checks described therein in violation of Article of War 96, legally sufficient to support only so much of the finding of guilty of the Additional Charge as involves a finding of guilty of a violation of Article of War 96, and legally sufficient to support the findings of guilty of all other Specifications and of the Charge, and to support the sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

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
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 as approved by reviewing authority confirmed. G.C.M.O. 128, 9 Apr 1945)

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

SPJGN
CM 271155

18 JAN 1945
FORT LEWIS, WASHINGTON

UNITED STATES	Trial by G.C.M., convened at Walla Walla, Washington, 24 November 1944. Dishonorable discharge and confinement for five (5) years. Federal Reformatory, El Reno, Oklahoma.
v.	
Private ROBERT L. MASSEY (34640993), Engineers Unassigned, Attached Detachment of Patients, McCaw General Hospital.	

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

---

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

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

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

Specification 1: In that Private Robert L. Massey, Engineers Unassigned, attached Detachment of Patients, McCaw General Hospital, Walla Walla, Washington, did, at Walla Walla, Washington, on or about 9 November 1944, in the nighttime feloniously and burglariously break and enter the dwelling house of Major and Mrs. Oliver M. Warner, with intent to commit a felony, viz larceny.

Specification 2: In that Private Robert L. Massey, Engineers Unassigned, attached Detachment of Patients, McCaw General Hospital, Walla, Walla, Washington, did, at Walla Walla, Washington, on or about 9 November 1944, feloniously take,

steal, and carry away money, value about $59.46, the property of Mrs. Oliver M. Warner.

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

Specification: In that Private Robert L. Massey, Engineers Unassigned, attached Detachment of Patients, McCaw General Hospital, Walla Walla, Washington, having been restricted to the limits of McCaw General Hospital, Walla Walla, Washington, did, at McCaw General Hospital, Walla Walla, Washington, on or about 9 November 1944, break said restriction by going to Veterans Hospital, Walla Walla, Washington.

He pleaded not guilty to Charge I and the Specifications thereunder and guilty to Charge II and its Specification. He was found guilty of both Charges and all Specifications. Evidence of one previous conviction of disorderly conduct in uniform in a public place, in violation of Article of War 96, was received in evidence. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution concerning the Specifications of Charge I show that at about 4 o'clock on the morning of 9 November 1944, the accused, without authority, entered the house of Doctor Oliver M. Warner of the Veterans Hospital, Walla Walla, Washington, and took from a coin purse therein the sum of $59.46 (R. 13). When discovered by the occupants of the Warner home, the accused turned on the lights and remarked that "* * * he didn't want to cause any trouble" (R. 7). While V. J. Brown of the Warner household was preparing to take the accused back to his camp, the accused left the house. Two of the three witnesses who observed the accused while he was in the Warner home testified respectively that the accused acted "like he might have been in a stupor" (R. 6), and "like a person that might have been drugged" (R. 10). A third witness when asked if the accused acted as if he were in control of his mental faculties replied, "Well, I only saw him for a short time and he was rather heavy on his feet and when he went down the stairwey he held on with both hands, but after he went out he went at a normal speed and went out". When asked, "did he act like he was drunk?" she replied, "I don't know" (R. 12-13).

Later at about 7:30 o'clock on the same morning the accused

came into the area of the Veterans Hospital where Frank R. Bigler was "checking the traffic" into a parking lot. Bigler, who had been informed that someone had entered the Warner home suspected the accused and sent a janitor to bring the police. He then tried to detain the accused by engaging him in conversation. The accused could not, however, be successfully detained and Bigler endeavored to restrain the accused by force resulting in a wrestling scuffle. The accused succeeded in escaping and ran away "At a normal gait". When asked whether or not the accused appeared to be intoxicated or under the influence of drugs Bigler replied, "As far as under the influence of liquor I don't think so. If it was drugs I don't think I could have told it". Bigler testified further that he endeavored to "keep a conversation to hold him until the MP's and police came" but that "There was nothing intelligently said by him" (R. 15, 16).

Shortly after the accused's encounter with the traffic guard Bigler, the accused was arrested by Technical Sergeant Gilbert L. Huck while the accused was lying "on his bunk in his fatigue trousers". When asked by Sergeant Huck how long he had been in his barrack the accused replied that, "* * * he didn't know" (R. 17). After carrying the accused to the local guardhouse, Sergeant Huck endeavored to talk with him but "could not get an intelligent answer". "He acted as though he was in a stupor or trance. He appeared to be under the influence of something. I couldn't tell what it was" (R. 17).

Sergeant Robert Siegel, who also interviewed the accused after his arrival at the guardhouse, testified that accused "didn't act like he was drunk, * * * but he wasn't exactly normal. His actions weren't exactly normal" (R. 21).

4. The accused, after being advised of his rights relative to testifying or remaining silent, testified that he was attached to McCaw General Hospital as a patient. He explained that on 8 November 1944 he went to town in company with another soldier. Upon going to town he had carried approximately $80 with him, $60 of which he had received from his aunt, Lucille Burt. While he was in town he purchased approximately eight pints of wine, a part of which he consumed and in addition thereto he had drunk some whiskey. He had purchased a marihuana cigarette from a civilian and had smoked it. Upon returning to his barrack at about 11 or 12 o'clock, his nurse, at his request, had given him two sleeping capsules. Thereafter he did not remember what had occurred (R. 22-28).

Mrs. O. L. Nash testified that on the morning of 9 November 1944 she was awakened in her home at the Veterans Hospital by someone in her room. Upon turning on the lights she discovered the accused. She then awakened her husband who arose, asked the accused what he was doing and led him to the front door. While the accused was in the room she detected the odor of wine. The accused acted as if he had been in a stupor. An

examination of their premises revealed that nothing had been taken (R. 28-30).

Mr. O. L. Nash corroborated the testimony of Mrs. Nash, testifying that when he was awakened by his wife the accused was standing at the foot of his bed. He testified that the accused acted bewildered and as if he were under the influence of liquor or drugs (R. 32).

Private Julius Roy corroborated the accused's testimony concerning the accused's visit to Walla Walla, on the evening preceding the accused's arrest. He also corroborated the accused's testimony concerning the purchase of wine, the drinking of whiskey and the purchase of cigarettes (R. 32-34).

Mrs. Charles Turney testified that at about 6:30 on the morning of 9 November 1944 while she and her husband were eating breakfast, the accused had come to their trailer to see her husband. She testified specifically that the accused "acted odd" and that he might have been under the influence of drugs but that she "couldn't say for sure". She had not detected the odor of intoxicating liquor on the accused's breath (R. 34-35).

Second Lieutenant Isabel N. Mulvihill, a nurse at the McCaw General Hospital testified that on the evening of "9 November on Thursday", the accused was seen by her "to be staggering". She explained that the accused had come to her and had "almost demanded" sleeping pills and that she had given him two nembutal pills of one and one-half grains each (R. 35-36).

Major Samuel Cohen testified that he was a doctor of medicine and was a specialist in the treatment of mental diseases. He testified that he had examined the accused "at the guardhouse" and at that time the accused was "completely confused". "He showed a lack of understanding and a lack of awareness at the time and he was so unsteady on his feet I could not interview him at all". Approximately 24 hours later he had again examined the accused and found him to be in a normal condition. In examining the accused he had found him to be "more ataxic than his breath would indicate". The accused's blood alcoholic test had shown 1.7 milligrams of alcohol. He testified specifically that "in the light of [his] knowledge having examined [the accused] some weeks before and examining him that morning when he was ataxic and 24 hours later, it was definitely [his] opinion that he was under the influence of some drug". He further stated, "I think it was due to the combination of drinking and the barbituate, as they go poorly together". When asked the question "was he mentally responsible for his actions?" the witness had replied "at the time he definitely was not" (R. 36-39).

5. Since the physical facts concerning the accused's unauthorized entry into the Warner home during the early morning hours of 9 November 1944 are clearly established and since the evidence also establishes that the accused took the sum of $59.46 from a coin purse therein, the only question requiring discussion is the accused's mental responsibility for the offenses of burglary and larceny.

"Burglary is the breaking and entering, in the night, of another's dwelling house, with intent to commit a felony therein" (MCM, 1928, par. 149d). "Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein" (MCM, 1928, par. 149g).

One of the essential elements in the crime of burglary requires that the house be entered "with intent to commit a felony therein". Similarly, one of the essential elements in the crime of larceny requires that the act of taking of property be accompanied by "intent to deprive such owner permanently of his property therein".

The Manual for Courts-Martial states that "In certain offenses, as * * * larceny, burglary, * * * a specific intent is a necessary element. In such a case the specific intent must be established either by independent evidence as, for example, words proved to have been used by the offender or by inferences in the act itself" (MCM, 1928, par. 126a). If the evidence fails to establish the specific intent essential to each offense, the crimes alleged have not been established. The Manual also states that "voluntary drunkenness whether caused by liquors or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense" (MCM, 1928, par. 126a).

Two of the witnesses who observed the accused at the time he was discovered in the Warner home testified that he acted "like he might have been in a stupor" and "like a person that might have been drugged". The third witness who observed the accused at the time described the accused as heavy on his feet and as going down the stairway with both hands on the stair rail. Each of the other witnesses for the prosecution described the accused as "appearing to be under the influence of something" or as acting or talking in an abnormal manner. In addition to the testimony presented by the prosecution's witnesses which present grave doubt as to the accused's ability to have entertained the specific intents charged against him, the evidence for the defense increases that doubt. The defense testimony shows that the accused, after leaving the Warner home wandered into the home of Mr. and Mrs. O. L. Nash. Thereafter he entered a trailer occupied as a home by Mr. and Mrs. Charles Turney. Major Samuel Cohen who

was shown to be a medical expert, testified that he examined the accused apparently on the morning following the accused's entry into the Warner home, and that in the witness' opinion the accused was definitely under the influence of some drug and was not at that time "mentally responsible for his actions".

In a case similar to the present one the Board of Review stated that,

> "Whatever the inference of intent which might normally be taken from the acts and words of accused, true comprehension of the significance of those acts and words may not be had without considering them in relation to his normal state" (10 BR 237, 244).

The inference of a criminal intent which ordinarily arises from evidence showing an unauthorized entry into a house at night is predicated upon the presumption that the accused was in control of his mental faculties. When, however, as here, the evidence presented both by the prosecution and the defense clearly refutes this presumption, the inference may not properly be drawn. In other words, the conduct of a drunken or drugged accused which reveals a lack of a sense of awareness or a lack of purpose cannot give rise to an inference that he was motivated by the specific intent of mind required to constitute the offenses of burglary and larceny. We must conclude, therefore, that there is no substantial evidence to sustain the findings of guilty of Specifications 1 and 2, Charge I and Charge I.

6. The findings of guilty of the Specification, Charge II alleging that the accused breached restrictions by going beyond the limits of McCaw General Hospital on or about 9 November 1944, to which he pleaded guilty, are clearly sustained. The evidence shows that the accused's drugged or drunken condition occurred after he had breached his restriction by going into the town of Walla Walla, Washington, where he had procured wine, marihuana cigarettes and whiskey, and before he had been given two nembutal pills.

7. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications 1 and 2, Charge I and Charge I; legally sufficient to support the findings of guilty of the Specification, Charge II and Charge II, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for one month at a place other than a United States Penitentiary, Federal Reformatory or Disciplinary Barracks, and forfeiture of two-thirds of his pay for a like period.

Abner E. Lipscomb, Judge Advocate.

Robert J. Glennon, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN-CM 271155 1st Ind.

30 JAN 1945

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

TO: Commanding General, Headquarters Fort Lewis, Washington.

1. In the case of Private Robert L. Massey (34640993), Engineers Unassigned, Attached Detachment of Patients, McCaw General Hospital, I concur in the foregoing holding by the Board of Review, and for the reasons therein stated, recommend that the findings of guilty of Charge I and the Specifications thereunder be disapproved, that the other findings be approved, and that only so much of the sentence be approved as involves confinement at hard labor for one month, at a place other than a United States Penitentiary, Federal Reformatory, or Disciplinary Barracks, and forfeiture of two-thirds of accused's pay for a like period. Upon compliance with this recommendation you will have authority to order the execution of the sentence.

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

(CM 271155).

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

SPJGN
CM 271265

21 FEB 1945

UNITED STATES	)	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND
v.	)	Trial by G.C.M., convened at San Antonio Aviation Cadet Center, San Antonio, Texas, 24 November 1944. Dismissal.
Captain JOHN T. WEED (0-360117), 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 94th Article of War.

Specification 1: In that Captain John T. Weed, Air Corps, did, at San Antonio Aviation Cadet Center, San Antonio, Texas, on or about 7 September 1944, feloniously embezzle by fraudulently converting to his own use, about sixty ($60.00) dollars, lawful money of the United States, the property of the United States furnished and intended for the military service thereof, intrusted to him the said Captain John T. Weed by the United States Government.

Specification 2: In that Captain John T. Weed, Air Corps, did, at San Antonio Aviation Cadet Center, San Antonio, Texas, on or about 8 September 1944, feloniously embezzle by fraudulently converting to his own use about ten ($10.00) dollars, lawful money of the United States,

the property of the United States furnished and intended for the military service thereof, intrusted to him the said Captain John T. Weed by the United States Government.

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

3. Evidence for the prosecution: Accused was designated an "Alternate Class A Agent Officer" for the purpose of disbursing the pay roll of the 2535th Army Air Forces Base Unit at San Antonio Aviation Cadet Center, San Antonio, Texas (R. 15; Pros. Ex. C). On 6 September 1944, he received from the post finance officer the sum of $2,691.83 to pay the August 1944 supplemental pay roll of certain sections of the organization (R. 6-8; Pros. Ex. A-1). The pay roll contained the names of approximately 54 aviation students and cadets including Aviation Cadets Charles H. Grant, Robert D. Simison, Robert J. Blinder, James W. Franklin, Sam Yarost, George E. Frioux, Jr., Brant M. Coopersmith and William S. Greece, Jr. (R. 8; Pros. Ex. A). Along with the pay roll, accused received from the post treasurer's office a "collection sheet" showing the amount owing by each cadet for laundry, mess and similar items of indebtedness (R. 10-12; Ex. B).

Accused disbursed the pay roll on 7 and 8 September 1944. All of the cadets listed above were paid on the morning of 7 September except Coopersmith, who testified that he was paid on 8 September (R. 16-17, 22, 32, 38, 39). Cadets Grant and Greece were paid at the same time. Grant received $64.08 which amount was less than he anticipated inasmuch as he had been on furlough for fifteen days and was entitled to $15 for furlough rations in addition to the amount he usually received on the pay roll, about $61. He complained to accused who, after re-examining the pay roll and collection sheet, stated that Grant had not received any furlough subsistence allowances on that particular pay roll but probably would receive them on the regular September pay roll (R. 16-21).

Cadet Yarost was paid about $64 and he immediately complained to accused that he should have received $10 more for subsistence while on furlough but after going over the figures accused stated the amount was correct. Yarost examined the pay roll and collection sheet but found no error and consequently did not argue the matter as he thought "perhaps I just didn't see it" (R. 31-33, 35-37). Cadet Coopersmith received approximately $58 which he thought was an overpayment of $10 having the erroneous impression that his mess bill had been deducted from that pay roll. Accused went over the figures and stated they were correct. It was not until Coopersmith signed the September pay roll, that he discovered that the mess bill had not been deducted from the supplemental August pay roll and that instead of being overpaid $10 he was actually

underpaid $10 (R. 39-41). Cadet Frioux was paid $75.05 by the accused. He thought at the time he was being underpaid $10 (R. 38).

Cadets Simison, Blinder and Franklin received payment together. Accused had a "tally sheet" before him on which he had worked out in pencil the specific amounts due and he referred to this sheet in making disbursement. Simison received approximately $64 and believing the amount was incorrect, asked accused to recheck the figures. Accused did so and stated they appeared to be correct. He also permitted Simison to examine the pay roll and collection sheet. Simison questioned a $3 deduction and accused told him to come back later in the day and in the interim he would find out what this charge represented (R. 21-23, 30). After Simison, Blinder and Franklin returned to their barracks they refigured their pay and each concluded they had received less than they were entitled to (R. 27-28). When Simison reported back to accused he requested that accused recheck his figures and after some further calculation accused found that he had made a mistake of $10 each as to Simison, Blinder and Franklin. He expressed his regret for the errors, and taking $30 from the bank pouch containing the pay roll funds, he gave Simison $10 for himself and $20 for Blinder and Franklin (R. 23-24, 26, 29).

After accused had completed disbursement of the pay roll he asked First Lieutenant Roby C. Fagg to sign as witnessing officer. Although Fagg had not been present at the disbursement he signed the pay roll upon the representation of accused that everything was in order (R. 44-46; Ex. A). Accused then returned the pay roll and accompanying voucher to the finance officer showing payment of all the men listed therein except two (Armstrong and Smythe) who were "red-lined". The sum due these men, $154.90, was returned with the pay roll (R. 7). Accused also returned the collection sheet to the post treasurer's office with the correct amount of cash as shown therein (R. 12-13).

About 15 September 1944, when Coopersmith signed the September pay roll and discovered that he had been underpaid $10, he approached accused and told him that he believed there had been some mistake. Accused promised to look into the matter and the following day paid $10 to Coopersmith (R. 41-42). Cadet Frioux went to the personnel office and the post treasurer about 21 September 1944, and complained of being underpaid $10. The very next day accused came to Frioux and paid him the $10 saying he was sorry he had made a mistake (R. 38-39). When Cadet Grant signed the September pay roll he also found he had received no furlough subsistence allowances which prompted him to make inquiry concerning the matter at the finance office thereby discovering that he had been underpaid in the sum of $10 (R. 18). Cadet Greece also complained of being underpaid and the finance office thereupon brought the deficits to the attention of Lieutenant Fagg inasmuch as accused had been transferred from the field. Lieutenant Fagg wrote accused concerning the claims and accused remitted $20 to be paid to Grant and Greece (R. 46-47). Cadet Yarost received $10 from accused through the post judge advocate's office just prior to trial (R. 33-34).

4. Evidence for the defense: Accused testified in his own behalf (R. 51). He graduated from Culver Military Academy in 1934 and subsequently attended Ohio University and Ohio State University for about four years studying at the latter institution for a bachelor of science degree in commerce and majoring in public accounting. His schooling was interrupted on two occasions:

in 1938-1939 when he dropped out of school to take a position as a deputy county treasurer and as an officer in the Civilian Conservation Corps, and another time when he worked as a junior accountant. He was commissioned a second lieutenant in the Officers' Reserve Corps in 1937 and was called to active duty in 1941 (R. 52).

While in the Army accused had served as an academic instructor and an assistant plans and training officer for a preflight school, as a squadron executive and as a squadron statistical control officer (R. 53). He was acting in the last named capacity and also as squadron bond and voting officer at the time of the events in question in this case (R. 54). He had worked on pay rolls and collection sheets, and had handled "thousands and thousands of dollars" including war loan drives and had never had a shortage. In the 3rd war loan drive he had been commended by "General Davis" for his work (R. 53, 59). This "discrepancy" in the present case was "a careless mistake". He never intended to defraud anybody. The mistakes were brought to his attention when Cadet Simison complained to him and upon checking the pay roll and collection sheet accused found errors in the cases of Simison, Blinder and Franklin. After paying them he found he still had $30 left over so he locked it up in his desk assuming the cadets who were underpaid would come in and the errors would be rectified. At no time did he commingle the $30 with his own personal funds (R. 54,-58). He was not aware of any provision by which such money could be returned to the finance office. It was common practice in event of an overage to hold it until the cadets made a claim for it. Several days after returning the pay roll Cadet Coopersmith claimed he was underpaid $10 and so accused paid him. A few days later another cadet complained, through the post treasurer's office, of underpayment and accused paid him $10. He did not question these claims because he had $30 in his possession which rightfully belonged to somebody else (R. 55-56). On 20 September accused was transferred from San Antonio and took the remaining unclaimed $10 with him thinking somebody would write him when the shortage was discovered. While stationed at Atlantic City he received word from Lieutenant Fagg that two cadets were claiming underpayment of $10 each so he immediately mailed $20 to Lieutenant Fagg. After his return to San Antonio in connection with the case Cadet Yarost complained of underpayment and "knowing that so many mistakes had been made" he paid Cadet Yarost $10. In making these payments he used $20 of his own personal funds (R. 56-57). He realized it was irregular to disburse the pay roll without a witnessing officer being present but this was due to the fact that the cadets could not be paid in a group and it was impracticable to have another present at all the times when the cadets were paid. It was common practice at the post to make payments in the absence of a witnessing officer (R. 57-58). Cadets had full opportunity to examine the pay roll and the collection sheet at the time they were paid (R. 57).

Accused concluded his testimony in chief as follows:

> "The only other statement I would like to make to the court is the fact that I am not guilty of any intention of trying to defraud anybody out of any funds or any monies rightfully due them; that I was very careless in the manner that I handled this pay roll in question. I would also like to state to the court that I think it is my duty and pride and privilege to be able to serve our country in time of this strife. I have also, probably it is irrelevant, but I have two brothers both

in the service now, and both of them are overseas, one of them serving in Belgium and the other one serving in the islands in the Northern Pacific. Also, I would hate to think that it would be considered that I would even try to pilfer any monies that was not my own. I have no need for anybody else's money, I have access from my friends if I was in need of money, from my friends or family, any money that I might need if it would be over and above my regular salary as an army officer. Also the trust of my mother and my wife and child, that they have in me, I would not even think of distorting it for any amount of money that might come into my possession" (R. 60).

On cross-examination and examination by the court accused admitted that he had not mentioned to Lieutenant Fagg or anyone else the fact that he had $30 left over after disbursing the pay roll. His reason was that he thought the cadets entitled to the money would claim it and the matter would be cleared up. He was afraid to call the cadets back and inquire who had been underpaid because under such circumstances he would have been swamped by everybody making a claim. (R. 62-64). He declared that his intention was to hold the money until it was called for and admitted that if nobody claimed it he would have held it indefinitely. He left the post with $10 still in his possession but did not report that fact to anybody (R. 64-65). When Cadet Simison complained of underpayment accused checked his records and discovered the mistakes made as to him, Blinder and Franklin. However, he did not discover any further errors at the time (R. 66). He had a work sheet showing the amount due each cadet and the collections to be deducted which gave the net balance payable. Before leaving San Antonio he found that he had made an error in subtraction of $10 each in two more instances (R. 66-68).

Lieutenant Colonels Robert J. Bruton and Pearl Roundy, and Major Matt R. Storey, each of whom had known and associated with accused for a period of at least two years, testified as to his good reputation for honesty. Colonel Roundy had entrusted accused with "hundreds of thousands of dollars" in connection with war bond drives, charity drives, and pay roll disbursements, and accused had accounted "for every penny". Colonel Roundy further stated that he would not hesitate to have accused in his command and to intrust him with his funds and finances (R. 71-75).

5. The accused is charged under Article of War 94 with embezzling, by fraudulently converting to his own use, $60 on 7 September 1944 (Spec. 1) and $10 on 8 September 1944 (Spec. 2), both sums the property of the United States, furnished and intended for the military service, and entrusted to accused by the United States Government.

The Manual for Courts-Martial (par. 149h) defines embezzlement as follows:

"Embezzlement is the fraudulent appropriation of property

by a person to whom it has been intrusted or into whose hands it has lawfully come (Moore v. U.S., 160 U.S. 268).

"The gist of the offense is a breath of trust. The trust is one arising from such fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship."

To establish the offense of embezzlement it was necessary to prove: (a) That the accused was intrusted with the sums alleged by the United States Government; (b) that accused fraudulently converted or appropriated the money; and (c) that the conversion or appropriation was with fraudulent intent (MCM, 1928, par. 149h).

It is not disputed that the accused, a "Class A Agent Officer" was intrusted with government funds for the purpose of disbursing a pay roll. Pay roll funds delivered to an agent officer for the purpose of disbursement remain the property of the United States and may be the subject of embezzlement by such officer (CM 122562, Dig. Op. JAG, 1912-40, sec. 452 (3)).

The evidence offered to prove that accused fraudulently converted $70 of the pay roll funds to his own use shows that in disbursing the pay roll accused underpaid seven cadets in the approximate amount of $10 each on 7 September 1944, and one cadet in the same amount on 8 September 1944, or a total underpayment of approximately $80. Several of the men underpaid immediately complained of the shortage. Three men registered a complaint to accused on the afternoon of 7 September and received the $30 due them. Accused thereafter procured another officer to sign the pay roll as witnessing officer on the representation that everything was in proper order and then returned the pay roll to the finance office showing all cadets paid in full (except two men red-lined whose pay was returned). A week later another one of the eight men underpaid complained to accused and accused gave him $10. About 20 September, when accused was transferred from San Antonio, he paid a fifth cadet $10 upon his complaint of a shortage in his pay. Subsequent to his transfer accused repaid $20 to two other complainants and the eighth man received $10 just prior to trial.

It cannot be gainsaid that the relatively large number of errors made by accused in disbursing the pay roll, his failure to disclose the overage in his hands to anyone, and attendant circumstances, tend to indicate that the underpayments were intentional and the accused fraudulently converted such sums. This indication is strengthened by the fact that accused's background shows considerable experience in accounting and in the disbursing of government pay rolls, making such errors singular indeed.

Against the foregoing conclusions a number of factors must be weighed. The accused is shown to have had an excellent reputation for honesty previously and to have handled large sums of money with such fidelity as to earn the fullest confidence of his superior officers, whose trust in accused, it appears from the record, was not shaken by the charges in the present case. It is argued that an officer who has faithfully accounted for sums of money running into the hundreds of thousands of dollars would not be likely to stoop to the petty peculation of the comparatively trifling amount of $70 or $80. It is further argued that the open nature of the alleged misappropriation demonstrates the lack of any fraudulent motive. It appears that the cadets paid by accused were aware of the approximate amounts of money to which they were entitled as is shown by their voicing complaints at the time of the disbursement and subsequently to the finance office. The record also shows that accused allowed the men to examine the pay roll and collection sheets freely to ascertain the amounts due them. It is obvious that the shortages were bound to come to the attention of superior authority and it is argued that it is wholly improbable that an officer of accused's background of education and experience would be so foolish as to attempt to perpetrate such a bald fraud under such adverse conditions.

The fraudulent intent requisite for establishing the offense of embezzlement must necessarily be inferred from the facts of the case. Concerning such inference the following comment is made by Wharton (Crim. Law, 12th Ed., vol. 2, Sec. 1279 and 1302):

> "* * * Since embezzlement necessarily involves secrecy and stealth, if the defendant, in rendering his account, instead of denying the appropriation of property, admit the appropriation, alleging a right in himself, no matter how unfounded, his offense in taking and keeping is no embezzlement. * * * The fraudulent appropriation is to be inferred from facts, among which is the denial of the reception or the suppression of the facts of such reception. And it is usual to require in addition to proof of reception, some proof of attempted concealment, flight, or other facts inferring fraud; among which facts the falsification of accounts is to be noticed as peculiarly significant * * *".
>
> * * * *
>
> "Insolvency, flight, falsification of accounts, or refusal to pay are the usual and most effective evidences of conversion, though these are not the sole facts from which embezzlement can be inferred * * *".

As previously noted there was little secrecy on the part of accused in the underpayment of the cadets. Although he failed to report the overage in his hands nevertheless he did not deny it and as the various cadets involved made a complaint their money was forthcoming. He explained his failure to report the overage as prompted by belief that the men underpaid would eventually make claim to it thus clearing up the matter. He

asserted that if he called the men together and told them there was an overage he would have been swamped with claims. He further testified that he never commingled this overage with his own funds, which is corroborated in part by the testimony of Cadet Simison that when accused repaid $30 of the allegedly misappropriated money accused took it from the pouch which originally contained the pay roll funds.

There is no direct evidence that accused fraudulently converted the retained pay roll funds to his own use. A study of the evidence discloses few of the inculpating circumstances usually found in an embezzlement case. Any inference of fraud must be drawn from the manner in which the underpayment occurred and his subsequent failure to report his overage. The rule is well established that where the only competent evidence is circumstantial, it must, in order to be sufficient to support conviction, be of such nature as to exclude every reasonable hypotheses save that of guilt (Dig. Op. JAG, 1912-40, sec. 395 (9), CM 153330 (1922); 169811 (1926)). Although the commission by accused of such a relatively large number of errors is a strong indication of guilt the Board believes that when the evidence is considered as a whole and due weight is given to all the factors involved that the conclusion must be reached that every reasonable hypotheses except that of accused's guilt is not excluded. The conclusion of the Board of Review in CM 235184, Husvar, 21 BR 317, 325, is pertinent:

> "Considering the evidence as close, the deciding factor here, as always, should be the splendid reputation of the accused in civilian and military life, a factor that should be considered and given weight".

Although the evidence does not establish that accused fraudulently retained the money in making the disbursement or that he had the fraudulent intent to convert the money to his own use nevertheless he was guilty of wrongdoing in retaining the overage when he returned the pay roll to the finance office. The funds remaining in his hands after the disbursement of the pay roll remained the property of the government and accused was clearly obligated to disclose the existence of the overage and return such funds with the pay roll (par. 17, C4, 28 April 1944, AR 35-320, 17 June 1943). In retaining this money accused exercised a wrongful dominion over it and was thereby guilty of wrongful conversion, an act prejudicial to good order and military discipline and violative of the 96th Article of War. His declared intention to pay the money to any claimants who might later establish their right to the money constitutes no excuse for such action. The evidence for the prosecution shows that on the afternoon of 7 September accused paid over $30 of the $60 overage, which he was charged with converting under Specification 1 and that he retained the $30 balance and also the $10 overage resulting from an underpayment on the following day which is the subject of Specification 2. The wrongful conversion of such amounts is accordingly sustained.

6. The accused is about 28 years and 3 months of age and is married. War Department records disclose that he is a native of Ohio, received his preparatory training at Culver Military Academy (1930-1934) and later attended Ohio and Ohio State Universities for four years. In 1937 he received a senatorial nomination as an alternate candidate for the United States Military Academy but failed to pass the mental and physical tests for entrance to that institution. He was employed as a deputy county treasurer for three months in 1938 and subsequently worked as a clothing store salesman for fifteen months and as an accountant for three months. He was appointed a second lieutenant in the Infantry, Army of the United States, 18 October 1937, and served on active duty from 3 July 1938 to 16 July 1938, and from 12 January 1939 to 11 July 1939, the latter service being with the Civilian Conservation Corps. He was promoted to first lieutenant, Army of the United States, 29 November 1940, entered upon extended active duty 22 August 1941, and was promoted to the grade of captain, Army of the United States, 18 March 1944.

7. The court was legally constituted. 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 of Specification 1 and of Specification 2 thereunder as includes the findings that at the time and place alleged accused wrongfully converted the sums of $30 and $10 respectively of the money described, in violation of Article of War 96; legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Abner E. Lipscomb, Judge Advocate.

Robert J. Hamner, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN-CM 271265 1st Ind

MAR 3 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 Captain John T. Weed (O-360117), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specifications and the Charge as includes the findings that at the time and place alleged the accused wrongfully converted $30 and $10 of the funds described in Specifications 1 and 2 respectively, in violation of Article of War 96; legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed but that execution thereof be suspended during good behavior.

3. Consideration has been given to a memorandum submitted by Honorable Thomas A. Jenkins, Member of Congress, and a letter requesting clemency, from Mr. Charles C. Lemert, Lawyer, Zanesville, Ohio, in accused's behalf.

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
1. Rec of trial
2. Drft ltr for sig S/W
3. Form of Action
4. Memo fr Hon Jenkins
5. Ltr fr Mr Lemert

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but execution suspended. G.C.M.O. 126, 5 Apr 1945)

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

SPJGQ
CM 271286

9 FEB 1945

UNITED STATES v. First Lieutenant BURDIS KELLEY (0-494604), Corps of Military Police.	CENTRAL AFRICAN DIVISION Air Transport Command Trial by G.C.M., convened at Accra, Gold Coast, British West Africa, 3 November 1944. Dismissal.

- - - - - - - - - -

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

- - - - - - - - - -

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 1st Lt Burdis Kelley, 168th Military Police Company, Security Section 1202d AAF Base Unit, was at Accra, British West Africa on or about 22 October 1944 in a public place, to wit, Anis's Bar, drunk and disorderly in uniform.

Specification 2: In that 1st Lt Burdis Kelley, 168th Military Police Company, Security Section, 1202d AAF Base Unit, was at Accra, British West Africa, on or about 22 October 1944 in a public place, to wit, the Military Police Station, drunk and disorderly in uniform.

Specification 3: In that 1st Lt Burdis Kelley, 168th Military Police Company, Security Section, 1202d AAF Base Unit did at Accra, British West Africa, on or about 22 October 1944 wrongfully strike Long John, a native, on the chest with his fist.

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

3. The accused was the commanding officer of the Security Section, 168th Military Police Company (R. 6, 60, 65). At all pertinent times he was in uniform (R. 11, 30, 41, 53).

The evidence for the prosecution is as follows:

The Anis Bar is a "public place" located in Accra, Gold Coast, British West Africa, and is across the street from the military police station (R. 7, 11, 25, 30, 41, 49). Anis Karam is its proprietor (R. 48). The events related by the witnesses occurred on Sunday afternoon, 22 October 1944 (R. 7, 10, 11, 29, 41, 52, 60, 65, 66). Except for Anis Karam, the prosecution's witnesses were enlisted men.

About 1:00 p.m. the accused entered the Anis Bar, seated himself at a table with T/5 Lamberson and Private Garrison, and proceeded to drink beer with them, consuming about three or four bottles (R. 8, 9, 11, 12, 23, 29, 30, 40, 41). There were a number of enlisted men of the United States Army in the place and also several English enlisted men and three Italian prisoners of war (R. 12, 30, 31, 41). One witness estimated that about 25 "military personnel" were present (R. 12).

About 2:45 p.m. Mooney Lagos, a native woman, came to the accused's table and put her arm around his neck. He placed his arm around her waist and also "was more or less rubbing up and down her arms". They conversed together (R. 9, 12, 13, 30, 31, 42). In the course of their conversation she told accused that someone had taken her bracelet (R. 9). Subsequently, she searched several enlisted men's pockets, one of the searches being conducted at accused's table (R. 13, 14, 22, 31, 32, 42). After further conversation at the table, accused "motioned her out toward the door" with the thumb of his left hand (R. 14, 32, 33, 42, 43). In a few moments she returned with a military policeman, who reported to accused (R. 14, 33, 43). Thereupon, she and the military policeman conducted another search of some of the enlisted men (R. 14, 33). Then every enlisted man present was searched at the door by the military policeman (R. 14, 33, 43). After the search, Private Doran, who had asked the military policeman whether he could go back into the place and had received no answer, returned to his table (R. 14, 15). Accused summoned Doran, who walked to accused's table and stood at attention. Accused asked Doran, "What's the idea of all these bright remarks?" or "What's all these bright remarks you are making?" Doran replied that he had not made any bright remarks. Accused said, "You did, Goddam you, Doran. If I hear any other remarks like that, I will put you where you can't say anything." Doran said, "Yes, sir," and,

after having been dismissed by accused, returned to his own table (R. 15, 23).

Shortly thereafter, in the presence of a number of enlisted men, accused and Anis Karam had an argument near the door of the bar (R. 15, 16, 49). In reply to a question by Anis as to what was going on or what the trouble was, accused said that "the lady" had lost her bracelet and that he had searched all the "American personnel" in the place. Anis told accused that he should have summoned the Gold Coast Police, whereupon accused said that he would search any American soldier wherever and whenever he saw fit. Accused also said that he wanted to search Anis, to which Anis replied that accused could not do so. Anis "raised his finger", at which accused grabbed his hand, shoved it down, and, according to Doran, exclaimed, "Goddam you, don't point your finger at me. I will break your fucking arm." According to Anis, accused said, "You fucker, we will search you by force. I will broke (sic) your neck if you say anything to me". Accused also threatened to put the Anis Bar out of bounds unless Anis cooperated (R. 16, 24, 49, 50). Accused shouted at Anis in a "very loud and rough" tone of voice, and appeared very excited. Anis did not appear excited and "just stood there" (R. 16, 24, 27, 50).

Several witnesses testified that accused was drunk while at the Anis Bar (R. 15, 23, 30, 34, 38, 43, 49). His eyes were described as "a little bleary" (R. 15), "beady and glassy" (R. 34), "very glassy" (R. 43), and "red" (R. 50). Anis described his face as red and bloated (R. 50). According to Doran, accused's speech was thick, although he could be understood without difficulty, and he walked without assistance (R. 15, 23, 27).

After his encounter with accused, Anis went to the military police station, seeking but not obtaining advice about the matter (R. 49). Doran saw accused walk from the Anis Bar over to the military police station and go inside. Accused had no hat and was walking in an unmilitary manner, contrary to his usual bearing (R. 17, 28).

Anis met accused outside the station, apparently after Anis' brief interview therein. Accused brought him into the station and asked him what he had said to the military policeman. When Anis replied that he had said nothing, accused said, "Look here, you fucker, we will put your place off limits." Anis then left (R. 50).

Subsequently, accused was seen standing outside the military police station with Mooney Lagos, another native woman (whose name according to defense witnesses was Comfort), and Long John, a native boy. Several enlisted men were present. There was "quite a bit of loud talk and hollering" (R. 17, 18, 19, 25, 35, 44). Accused, Long

John, and the two women went into the station (R. 17, 35, 44).

Shortly thereafter, the enlisted men heard a commotion inside, during which a woman "hollered". Looking through the screen door, they saw Comfort putting on her pants (R. 17, 18, 25, 26, 35, 36, 45, 47). Accused remarked that he could not find the bracelet and that the woman "must have the goddam thing up her snatch" (R. 19, 36, 45). When Long John said that she had it and had taken it home, accused told him to shut up and, in a very rough and loud voice, shouted "Goddam you, you are no fucking good. Get the hell out of here" (R. 18, 19, 36, 45). Thereupon, accused struck Long John on the chest with his right hand. Accused's hand was about half closed and he hit the boy with his knuckles, the blow being of such force that it caused Long John to fall back against the wall and onto a bench (R. 18, 36, 45). The boy got to his feet and stood quietly, looking surprised and scared. Accused repeated that Long John was "no fucking good", told him to "get the hell out of" the place, and shoved him out the door (R. 18, 19, 36, 45).

Accused then summoned the enlisted men and told them that he understood that they intended to "burn" his "ass" (R. 19, 20, 37, 45). He asked them whether they had any statements to make (R. 20, 37, 45). All except Private Doran replied that they did not wish to make a statement (R. 20, 37, 45). Doran said that he had no statement to make "at the present time" (R. 20, 37, 46). Accused "went into a rage", and in an angry tone of voice shouted at Doran, "Goddam you, get behind that counter and make a statement under protest" (R. 20, 37, 46). Doran answered, "No, sir" (R. 20).

Accused then dismissed the enlisted men with the exception of Doran, remarking that it "seems like he has more to say" (R. 20, 21, 38, 46). As the men were leaving, accused called them back and said that he was "doing this" for their "protection" (R. 20, 21, 38, 46). Two of the men testified that they knew of no reason for needing protection (R. 38, 46). After their departure, accused gave Doran two more orders to make a statement, which Doran refused to do. Accused then ordered Doran to come to his office at a designated time. As Doran left, accused "called him down" for bending slightly at the waist during a salute. Doran saluted again and left (R. 21).

With reference to accused's condition in the military police station, witnesses testified as follows: He was sitting on a high stool, leaning over, his arms on the counter, his head down and swaying unsteadily (R. 20, 37, 45, 46). In the words of one witness, "He like to have fallen off when he talked to us" (R. 46). His face was very flushed and his eyes were red and "very, very bleary." His speech, while understandable, was thick (R. 20, 37, 46). In the opinion of witnesses, he was drunk (R. 20, 46).

4. Sergeant William A. Blythe testified for the defense as follows: Accused was his commanding officer. On the afternoon in question, witness was on duty in Accra and was in the Anis Bar at about 3:10 p.m. for approximately ten minutes. He saw accused seated at a table with Private Garrison, and he also saw Mooney Lagos. About fifteen enlisted men were in the place. Accused told witness that Mooney Lagos had lost her bracelet and ordered witness either to search the men at the Anis Bar or arrest them. There was no disturbance. Accused and witness went to the military police station, where accused ordered the enlisted men to disrobe and be searched. One of the men, a private first class, objected to being searched and wanted to see "his officer" about it. Accused told him that if he wished to object, he could write a statement. Long John said that Comfort had the bracelet. Long John works at the military police station. Accused told Long John that he was lying and he shoved Long John twice in the chest, with the result that the boy "sat down on the bench rather hard." This was the only disorder which witness saw (R. 52-59).

Sergeant Vernon J. Delatte was also on duty and saw accused at the Anis Bar and at the military police station. There was no "brawling" or "loud talking" at the Anis Bar, and no disturbance except "a little excitement over a bracelet". At the police station there was a great deal of excitement and some enlisted men were being searched. One of them objected for "a small time", but eventually was searched. Some native women were present (R. 60-64).

Second Lieutenant Edward T. Egan, 168th Military Police Company, saw accused at the military police station at about 5:00 p.m. Accused "bawled out" and used profanity toward the proprietor of the Anis Bar and was "rather excited" (R. 65-66).

The defense witnesses testified that accused was not drunk (R. 52, 55, 60-63, 66). His eyes were clear and "natural", he spoke clearly and in an ordinary tone of voice, and he stood and walked "straight" (R. 54, 58, 63, 64). While at the military police station accused asked Delatte whether he thought that accused was drunk, to which Delatte replied, "No" (R. 64, 65).

Accused declined to testify or make an unsworn statement (R. 5a). His "rights" were explained to him <u>before</u> the introduction of evidence by the prosecution. At the close of the defenses's testimony, the defense counsel stated that the defense closed its case. Although the explanation of accused's rights was not given at the proper time, no prejudice resulted.

5. From the foregoing summary, it is apparent that as to certain aspects of the case, there is a conflict in the testimony. The court chose to believe the witnesses for the prosecution, and there is nothing in the record of trial to justify our disturbing their factual conclusions. Second Lieutenant Egan's testimony related to a time of day subsequent to the events referred to by the prosecution's testimony, and, if anything, tended to some extent to support the prosecution's case by showing that as late as 5:00 p.m., accused engaged in another unseemly verbal attack against Anis Karam.

The evidence for the prosecution shows that accused was drunk and disorderly in uniform in the Anis Bar, a public place, in the presence of enlisted men of our Army and the British Army and of three Italian prisoners of war. He used profane and threatening language toward Private Doran, and shortly thereafter used profane, vile and threatening language toward the proprietor. His attitude was conspicuously and inexcusably rude, insolent, and pugnacious. In the military police station, also a public place, he used obscene language toward Anis Karam, committed an entirely unwarranted battery upon the native boy, Long John, and, in a rage, cursed at Doran and attempted to terrorize him into making a written statement.

In enumerating examples of conduct constituting a violation of Article of War 95, Winthrop includes the following:

> "* * * cruel, or unduly violent, treatment of soldiers"; "Demeaning of himself by an officer with soldiers * * *"; "Drunkenness of a gross character committed in the presence of military inferiors, or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself * * *"; "Engaging in unseemly altercations or broils with military persons or civilians, breaches of the peace, or other disorderly or violent conduct of a disreputable character in public" (Winthrop, Military Law and Precedents, 2nd ed. rep., pp. 715-718).

Under the tests thus enumerated, it is clear that accused's conduct in the Anis Bar and in the military police station amounted to violations of Article of War 95, as alleged.

6. Counsel for the defense moved to strike the words "drunk and" from Specification 2 (R. 5B, 51). In general, his argument appears to be that there was only one drunkenness, which lasted throughout the period involved, and that to charge drunkenness twice was an unreasonable multiplication of charges. In our opinion the court ruled correctly in denying the motion. Being drunk and disorderly in uniform in a public place is an offense, and if later the accused is drunk and disorderly in uniform in another place,

he commits a second offense. The fact that he has not sobered up from the original intoxication and become drunk a second time does not mean that all his activities should be considered as one transaction. Under the defense counsel's theory, a person might remain drunk for a week, visit a number of different cities, engage in disorders in each of them, yet be subject to only one charge of drunkenness because no period of sobriety intervened between brawls.

The defense counsel also moved to strike Specification 3 because the battery therein described was part of the disorderly conduct included in Specification 2. The court denied the motion (R. 51). In our opinion the court ruled correctly. The accused was chargeable with assault and battery as a separate offense, and there was sufficient evidence in addition to the assault and battery to sustain the allegations of drunk and disorderly conduct set forth in Specification 2. Both Specifications were drawn under Article of War 95, under which a sentence of dismissal is mandatory, and no prejudice resulted, even if the ruling be deemed erroneous (See CM 233763, Lowther, 20 BR 111, 117).

Without objection by the defense, hearsay testimony was admitted concerning the assault and battery on Long John (R. 67). No prejudice resulted, inasmuch as the offense was clearly proved by other competent evidence.

For some reason the court struck from the record all testimony relating to the disrobing of the native women in the police station (R. 59), and such testimony has been omitted from this opinion and has not been considered by the Board of Review.

7. War Department records show that accused is 36 years old and married. He is a high school graduate. He served as an enlisted man in the Regular Army from 1924 until commissioned, and attained the rank of first sergeant. He was appointed second lieutenant, Army of the United States, 7 September 1942, entered upon active duty 3 October 1942, and was promoted to first lieutenant 14 April 1943.

8. The court was legally constituted and had jurisdiction. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is mandatory under the provisions of Article of War 95.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Fredrick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ-CM 271286 1st Ind

Hq ASF, JAGC, Washington 25, D.C. FEB 28 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 Burdis Kelley (0-494604), 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 and sentence and to warrant confirmation thereof. Lieutenant Kelley has served continuously in the Army since 1924 and has held noncommissioned officer grades, including that of first sergeant. His character, ability, and leadership have been attested by officers under whom he has served. His record discloses no prior misconduct. Although the conduct of the accused upon the occasion under consideration was inexcusably vulgar and disgraceful, it is my opinion that in view of his long service and previous good record, he may be of further value to the service as an officer. Accordingly, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $50 pay per month for six months and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Sentence confirmed but commuted to reprimand and forfeiture of $50 per month for six months. G.C.M.O. 129, 9 Apr 1945)

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

SPJGH
CM 271311

30 JAN 1945

UNITED STATES v. First Lieutenant ROBERT W. APPEL (0-564078), Air Corps.	CENTRAL AFRICAN DIVISION AIR TRANSPORT COMMAND Trial by G.C.M., convened at Wadi Seidna, Anglo-Egyptian Sudan, 7 November 1944. Dismissal.

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 Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Robert W. Appel, 1209th AAF Base Unit, Central African Division, Air Transport Command, for the purpose of obtaining air transportation by the United States Army Air Forces, Air Transport Command, for two packages, did, at Wadi Seidna, Anglo-Egyptian Sudan, on or about 26 August 1944 wrongfully make and use a certain paper, to wit:

TALLY OUT (Packing or Loading List)	Serial No. . . . . Reg. No. . . . . . No. of sheets. . . Sheet No. . . . .
Warehouse	Date: 25 August 1944
Consignee: Quartermaster Office	Carrier. . . . .
Destination: Payne Field, Base Ordnance O.	B/L No. . . . .
Att: Capt. J. W. GORMAN	Car No. . . . .
Date shipped: 24 August 1944	Authority. . . . .

U.S. Nos. on Packages	Number and Kind of Packages	CONTENTS	Gross Weigh (Pounds) Unit	Total
2	boxes	Spare Parts		

I certify that the above items must be shipped by air because no other transportation is available.

/t/ ROBERT W. APPEL
1st Lt., AIR CORPS,
QUARTERMASTER

1 pc 32 #
1 pc 35 #

which said paper, as he, the said First Lieutenant Robert W. Appel, then knew, contained a statement that the contents of said two packages were spare parts, which statement was false in that the contents of said two packages were not spare parts, and was then known by the said First Lieutenant Robert W. Appel to be false.

Specification 2: In that First Lieutenant Robert W. Appel, * * *, did at Wadi Seidna, Anglo-Egyptian Sudan, on or about 26 August 1944, knowingly and wrongfully use transportation by air, furnished by the United States Army Air Forces, Air Transport Command, for the purpose of shipping privately owned property from Wadi Seidna, Anglo-Egyptian Sudan, to Cairo, Egypt.

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

3. Evidence for the prosecution:

In August 1944 accused was Purchasing and Contracting Officer of the 1209th Army Air Forces Base Unit, stationed at Wadi Seidna, Anglo-Egyptian Sudan. While serving at that station he had met and become friendly with a local merchant by the name of Edward Djerdjian, seeing him frequently at parties and on at least two occasions borrowing money from him, 5 pounds one time and 10 pounds the other time (R. 66; Pros. Ex. 11).

During the first week of August 1944 Djerdjian asked the accused if the latter "could arrange to get a personal package to his

(Djerdjian's) brother in Cairo", Egypt (R. 33; Pros. Ex. 11). Accused replied, "It is a tough assignment you are giving me, but I will see if I can do something about it" (R. 36). On or about 15 August Djerdjian delivered to the accused two packages, wrapped in jute, and requested the accused to have them delivered to his brother, Arsene Djerdjian, in Cairo (R. 36-39). Accused did not know what the packages contained. He was told by Djerdjian that they contained "personal effects", but he noticed that they were "quite heavy" (R. 34, 41; Pros. Ex. 11).

On 26 August the accused took the two packages and a tally-out sheet (Pros. Ex. 1) to the office of the Priority and Traffic Officer at Wadi Seidna and advised the officer in charge, First Lieutenant Edward J. Morris, that "he had some cargo to ship to Cairo" (R. 18, 19; Pros. Ex. 11). Accused first endeavored to persuade Lieutenant Morris to handle the shipment informally by handing the packages to the pilot for personal delivery (R. 20). Lieutenant Morris explained to the accused, however, that in order to ship the packages it would be necessary that they "be airway billed and manifested" (R. 20). The tally-out sheet presented by accused to Lieutenant Morris described the cargo to be shipped as two boxes of "spare parts", weighing 32 pounds and 35 pounds, respectively. It was addressed to the Base Ordnance Officer at Payne Field, Cairo, attention of Captain J. W. Gorman, and was personally signed by the accused as "Quartermaster" (Pros. Ex. 1). Using the data contained on the tally-out sheet, Lieutenant Morris thereupon prepared a priority control record (R. 21; Pros. Ex. 2). Accused then took the tally-out sheet and the priority control record to the Base freight terminal, where an airway bill (Pros. Ex. 3) and lot labels were prepared and affixed to the two packages (R. 30). On the same day, 26 August, the two packages were loaded on an Air Transport Command plane bound for Cairo (R. 31).

On the following day, 27 August, the accused wrote a letter to Captain J. W. Gorman, at Payne Field, Cairo, in which he made reference to the two packages having been shipped to Cairo, marked for the attention of Gorman (Pros. Ex. 8). In the same letter the accused gave Gorman the name of the firm in Cairo to which the cargo was to be delivered and added "This character has been pretty nice to me so when he asked this favor I sorta' felt obligated." When Captain Gorman received the packages he telephoned Arsene Djerdjian and arranged to deliver the packages to him at the M.P. gate at Payne Field (R. 52). Immediately after the packages were delivered to Arsene Djerdjian outside the M.P. gate, the Provost Marshal of the Field arrested Djerdjian and opened the packages (R. 37, 52-54). The packages contained 550 Swiss lighters, 5 fountain pens, a costume suit and a half bottle of epsom salts (R. 42). No spare parts were found in the packages (R. 58). At the time the packages were delivered by Captain Gorman to Djerdjian there was in existence at Payne Field a regulation prohibiting any civilian taking a package off of the Field without having it examined (R. 57).

In a written statement made by the accused under oath on 27 September 1944, introduced in evidence as Prosecution's Exhibit 11 (R. 66) the accused said, among other things:

> "I never intended to ship these packages on Government airway billing but as I had agreed to get them up there for him I felt the obligation to send them in this manner, labelled 'Auto Parts' addressed to Capt. J.W. Gorman, Base Ordnance Officer, Payne Field, from Quartermaster, Lt. Appel, this Base."

In the same statement the accused also said:

> "I have never received any private gain or remuneration from Djerdjian for doing this, before or since doing him this favor."

It was stipulated that the contents of the two packages were confiscated by the Egyptian Government (R. 29).

4. Evidence for the defense:

After having his rights as a witness explained to him by the court, the accused elected to remain silent (R. 71).

It was stipulated that if Captain Wendell B. Barrett, Lieutenant Bascom C. Fearing, Captain Wesley I. Hale and Lieutenant Paul Keller were present in person at the trial they would testify for the defense, in substance as follows:

Captain Barrett. He graduated from OCS with the accused and has had extended service with him, including seven months at Wadi Seidna. The accused has performed his duties in a soldierly and proficient manner at all times, and, aside from his present difficulty, his record has been "outstanding" (R. 68-69).

Lieutenant Fearing. He has served with accused at Wadi Seidna for 16 months, during which time accused has acted as Base Purchasing and Contracting Officer. Throughout this period accused's record has been "impeccable", aside from his present difficulty (R. 69).

Captain Hale. He has been a commissioned officer of the United States Army for 12 years. He was on duty with accused at Wadi Seidna from 7 August 1943 until 1 August 1944. During this period he found accused "to be a conscientious, able officer who did excellent work and whose character and conduct were faultless" (R. 69).

Lieutenant Keller. He succeeded accused as Purchasing and Contracting Officer at Wadi Seidna. He found the records to be in good condition and that the accused "had discharged his duties ably and in a proficient manner" (R. 70).

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

5. The uncontradicted testimony of the witnesses for the prosecution establishes beyond any doubt that the accused did wrongfully make and use a false tally-out sheet for the purpose of obtaining Government transportation by air of two packages, at the time and place, and in the manner, alleged in Specification 1 of the Charge; and did knowingly and wrongfully use Government transportation by air for the purpose of shipping privately owned property at the time and place and in the manner alleged in Specification 2 of the Charge. The doing of these acts was admitted by the accused in the sworn statement made by him to the investigating officer (Pros. Ex. 11). Such conduct on the part of the accused was clearly prejudicial to good order and military discipline and of a nature to bring discredit upon the military service, in violation of the 96th Article of War. The Board of Review is of the opinion, therefore, that the convictions of both Specifications are amply sustained by the record of trial.

6. The records of the War Department show that the accused is 26 and 9/12 years of age and unmarried. He was born and reared in Selma, Alabama, was graduated from high school and for two years before entering the Army was proprietor of a grocery store in Selma, Alabama. He enlisted on 25 March 1941, was commissioned a second lieutenant, Air Corps, Army of the United States, upon graduation from Officer Candidate School at Miami Beach, Florida, on 28 October 1942, and was promoted to first lieutenant on 29 July 1943.

The Staff Judge Advocate's Review (page 3) contains advice that accused's foreign service dates from 27 December 1942.

7. There is attached to the record of trial a clemency petition, signed by all members of the court who tried the case, in which it is recommended that clemency be granted in such form as to insure that the accused be retained in the service as a commissioned officer. Such petition makes reference to accused's previous spotless record, his excellent reputation and the absence of any "evidence or intimation of a bad intention" on the part of the accused.

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

Thomas N Tarry, Judge Advocate.

William H Gambrell, Judge Advocate.

Robert E. Trueblood, Judge Advocate.

03059

SPJGH-CM 271311 1st Ind

Hq ASF, JAGO, Washington 25, D. C. FEB 5 - 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 Robert W. Appel (0-564078), 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. In view however of this officer's previous good record, his excellent reputation among the officers with whom he has served, his extended foreign duty dating from 27 December 1942, the absence of any evidence of private gain sought or obtained by the accused from the acts complained of, the recommendation of the reviewing authority that the sentence be suspended and the considerations mentioned in the clemency petition signed by all members of the court who tried the case, I recommend that the sentence be confirmed but commuted to a reprimand and that the sentence, as thus commuted, be carried into execution.

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

(Sentence confirmed but commuted to reprimand. G.C.M.O. 93, 24 Mar 1945)

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

SPJGN
CM 271315

25 JAN 1945

UNITED STATES	)	FORT LEWIS, WASHINGTON
v.	)	Trial by G.C.M., convened at Fort Lewis, Washington, 4 December 1944. Dismissal and total forfeitures.
First Lieutenant MATTHEW J. COLEMAN, JR. (O-855485), 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 Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that 1st Lieutenant Matthew J. Coleman, Jr., 16th Fighter Control Squadron was at Tacoma, Washington, on or about 18 November 1944, drunk and disorderly in uniform in a public place, to wit: Pacific Avenue, Tacoma, Washington.

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

3. The evidence for the prosecution shows that the accused had dinner with his aunt at the Tacoma General Hospital Faculty House in Tacoma, Washington, on the evening of 17 November 1944. After leaving her at

about 10:50 p.m., he commenced a tour of several drinking establishments. The first was a "beer parlor" at which he consumed three glasses of beer. The second point on his itinerary was the Derby Club. Having been informed by the doorman that entrance would be denied him unless he obtained a "bottle", he purchased some wine at a restaurant. Upon returning and presenting this passport he was admitted. During the next few hours he drank about four glasses of wine and danced "several times" with a woman whose name he did not recall. About 2:30 a.m. they and some of "her friends" adjourned to his third stop of the evening, another club "where they sold whiskey at the bar". Having imbibed "three small drinks", the accused separated from his party and departed alone (R. 38-39; Pros. Ex. 1). As he walked down the street, he met and joined two colored privates named Reed and Walker whom he accompanied to a restaurant (R. 11, 19, 24, 38-39; Pros. Ex. 1). After he had consumed a cup of coffee, they went to a "place" at which the negro soldiers were able to buy a quart of whiskey. The accused and his two companions each had several drinks from the bottle and then proceeded to the bus station (R. 38-39; Pros. Ex. 1). A short time later they left the building and at about 8:30 a.m. started down Pacific Avenue toward a bus stop (R. 13, 38-39; Pros. Ex. 1).

With his arm around the shoulder of Private Reed the accused "staggered" down the street "whooping and hollering" in a "loud voice" (R. 11-12, 14-15, 23-24, 26-27). "Between both of them they were trying to hold each other up" (R. 15). In the immediate vicinity other people were passing by and at the bus station some fifty paces away a large number of people were congregated (R. 14, 21, 25-26). Observing Sergeant Charles E. Burke and Corporal Schayler T. Thornton of the Military Police approach, the accused came to attention, clicked his heels together, and saluted Thornton at about twenty paces (R. 24, 26). At closer range the military policemen noted that the accused's eyes were bloodshot, that his breath smelled of alcohol, that his speech was "very incoherent, like he had a mouthful of mush, or something", and that his officer's trench coat was unbuttoned (R. 12-13, 18-19, 21, 24-25). Sergeant Burke informed the accused that he was under arrest and requested him to get into a military police jeep. The accused was reluctant to enter, made several attempts to walk away, and finally acquiesced only after being asked three or four times (R. 11, 17-19, 28). He offered no resistance or violence, but it was necessary for Sergeant Burke to hold him by the arm "not to restrain him, but to keep him from falling down" (R. 18).

At approximately 9:30 a.m. First Lieutenant Lloyd S. Brooke, the Chief of the Investigations Branch of Fort Lewis, Washington, took the accused to his commanding officer. The accused's speech was still incoherent, and he swayed perceptibly. After being given a "blood alcohol test" he was permitted to sleep until about 2:00 p.m. when a statement was taken from him by Lieutenant Brooke and Captain Robert L. Tuckett. The accused, who appeared to be sober, was fully warned of his rights under Article of War 24 and was specifically instructed that "anything he said would be used in a court-martial if necessary" (R. 32-34, 37, 42). No

threats or promises of any kind were offered (R. 35-36). To the best of Captain Tuckett's recollection the accused did not ask for counsel nor did he object to making a statement (R. 43-44, 46-49). In the last sentence of the document ultimately signed by the accused he admitted that:

> "During the early morning of 18 November 1944, I was intoxicated but I do not remember any unusual occurrence at the time I was stopped by the Military Police or later at the Police Station" (R. 39; Pros. Ex. 1).

4. After being apprised of his rights relative to testifying or remaining silent, the accused took the stand on his own behalf. Throughout his Army career he had never been arrested for drunkenness, court-martialed, or punished under Article of War 104 (R. 52, 62). From November of 1942 to October of 1944 he had served abroad as a communications officer in the Panama Canal Zone. Upon returning to this country he was granted a leave which he spent at his home (R. 51-52). He was due to report back on 18 November 1944 but returned to Fort Lewis a day early. Having signed in, he visited his aunt and made the rounds of several drinking establishments as narrated in his pre-trial statement which was introduced as Prosecution's Exhibit No. 1 (R. 52-57, 64). When he left the last place which was a "joint", he was in a perfectly sober condition (R. 58-59, 64). About 6:00 a.m. he went into a restaurant and ordered a cup of coffee. As he was sitting there, two negro soldiers entered and engaged him in conversation (R. 57-58). When he walked out of the restaurant, they followed him. He permitted them to accompany him because he did not know the location of the bus station to which he wanted to go and "they were familiar with the place" (R. 58). In his own words, with one or two exceptions, "they were the only military personnel I had seen on my leave and I know no one in town other than my aunt and I simply wanted company on my way to the bus station, and some aid" (R. 65). One of the soldiers, who was drunk, stopped to buy a bottle, the contents of which he insisted upon sharing with his companions. The accused and the other soldier, who was sober, both declined and began walking toward the station. The drunk straggled behind halting now and then to renew his offer to pass the bottle around. To "get him to come along" the sober soldier and the accused "made a gesture" of drinking but it "was just a pretense" (R. 59, 64, 68).

Some distance down the street they came to a restaurant and dropped in for more coffee. Upon emerging they continued to the bus station. The accused there again ordered coffee. While drinking it, he was approached by Sergeant Burke who said, "Are you the Lieutenant with these soldiers". The accused replied, "No, I just came into the bus station". When Sergeant Burke repeated his inquiry, the accused said, "We are just going to catch the bus". Sergeant Burke, who wore no insignia, but who identified himself as a military policeman thereupon stated that, "We got a report that there was a commotion", and, requesting the accused

"to wait", went outside (R. 60-61). The accused disregarded these instructions and followed the two negro soldiers out of the building. Seizing the sober one by the arm, he advised him to "leave the other man alone" and recommended that "we had better get up to the main bus station" (R. 62). The sober soldier being amenable to this suggestion, they started toward the station. About fifty paces from the bus corner the accused was arrested by a member of the military police "with a brassard" for being "drunk and disorderly" (R. 63).

When questioned by Lieutenant Brooke and Captain Tuckett, the accused repeatedly demanded counsel. Among other things the accused urged that "he was not familiar with the whole procedure". His wishes were completely ignored. Indeed, Lieutenant Brooke, prior to the interrogation, had informed him that he "had * * * to go over and make a statement" (R. 63-64). The first few lines of Prosecution's Exhibit 1 were exactly as they had been dictated by him, but the rest were abbreviated by Lieutenant Brooke. The document in its final form contained several inaccuracies (R. 64-66, 68-69).

In some twenty-three months of service in Panama the accused had received one rating of "satisfactory", one of "very satisfactory", and five of "excellent" (R. 68-69; Def. Ex. A). While in that country he had often associated with enlisted men (R. 68). Among the "engineer crews" under his supervision there had been many negroes (R. 61).

5. The Specification of the Charge alleges that the accused was "on or about 18 November 1944, drunk and disorderly in uniform in a public place, to wit: Pacific Avenue, Tacoma, Washington". This offense was laid under Article of War 96.

After imbibing a potent mixture of beer, wine, and whiskey during the early hours of 18 November 1944, the accused lapsed into a state of complete intoxication. All of the witnesses who observed him at the time of his arrest and shortly thereafter were agreed that he was drunk (R. 13, 22, 31). His assertion that he was sober is flatly contradicted not only by the other testimony but by his own admission in his pre-trial statement. In shouting in a loud voice while staggering down the street in the uniform of an officer with his arm around an enlisted man, he invited the attention and scorn of the numerous members of the public in the immediate vicinity. Since the inevitable and probable effect of his obnoxious and irrational behavior was to rasp the sensibilities of every decent person present, he was obviously disorderly within the well established meaning of that word.

His attack upon the voluntary character of the pre-trial statement is refuted by the testimony of First Lieutenant Lloyd S. Brooke and Captain R. L. Tuckett. Aside from the accused's own word, there is nothing in the record to indicate that he was denied counsel during the preliminary investigation despite his repeated requests. Even if his contentions were founded on a more tangible basis, they would tend merely to impeach his pre-trial statement which was not essential to proof of the Charges against

him; for the eye witness accounts of Sergeant Burke and Corporal Thornton are more than adequate to sustain his conviction for drunken and disorderly conduct in uniform in a public place.

6. After the court had entered its findings of guilty but before it voted on the sentence, the accused asked permission to make an oral "plea for leniency" "based upon" his past service. After catechizing him and counsel for the defense, the law member denied the request. This ruling was unreasonable, unnecessary, and unduly harsh. No harm could have been done to anyone by allowing the accused to speak, and true justice, which is always tempered with the quality of mercy and forbearance, required that he be granted the fullest opportunity before sentence to present any argument or assertion calculated to persuade the court to the exercise of clemency. Nevertheless, despite the impropriety of the law member's decision, it was not of such a nature as to affect the substantial rights of the accused adversely and consequently cannot invalidate the findings and the sentence.

7. The accused, who is single and about 29 years old, was graduated with a B. A. degree from Reed Institute in 1939. He was employed by the Doernbecker Furniture Company as a machine operator from approximately June of 1933 to September of 1934 and by the Northwestern Electric Company of Portland, Oregon, as a carpenter's helper from 15 June to 15 September 1936 and as a substation operator from 27 January 1941 to 23 March 1942. After enlisted service from 24 March to 2 October 1942, he was commissioned a second lieutenant on 3 October 1942 and promoted to first lieutenant on 11 November 1943. He has been on active duty as an officer since 3 October 1942.

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

Abna E. Lipscomb, Judge Advocate.

Robert J. Gamon, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN-CM 271315 1st Ind.

Hq ASF, JAGO, Washington 25, D. C. FEB 2 1945

TO: The Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Matthew J. Coleman, Jr. (O-855485), Air Corps.

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

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

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but commuted to reprimand. G.C.M.O. 97, 24 Mar 1945)

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

SPJGK
CM 271330

15 JAN 1945

UNITED STATES	)	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND
v.	)	
Second Lieutenant JERRY J. PRESBA (O-821777), Air Corps.	)	Trial by G.C.M., convened at Craig Field, Selma, Alabama, 1 December 1944. Dismissal.

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 Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Jerry J. Presba, 2138th AAF Base Unit, Army Air Forces Pilot School (Advanced - Single Engine), Craig Field, Selma, Alabama, did, at approximately 15 miles northwest of Maxwell Field, Alabama, on or about 2 November 1944, violate the written provisions of paragraph 1 a, Army Air Forces Regulation No. 60-16D, dated 20 September 1944, to which he was subject and which provides as follows:

"1. General:

a. Reckless Operation. No aircraft will be operated 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 that said Second Lieutenant Jerry J. Presba did operate an airplane, to wit: an AT-6, Craig Field No. 714, in a reckless and careless manner by performing acrobatics and other maneuvers over and near a B-24 airplane, a friendly airplane in the air, containing friendly personnel.

Specification 2: In that Second Lieutenant Jerry J. Presba, * * *, did, at approximately 15 miles northwest of Maxwell

Field, Alabama, on or about 2 November 1944, violate the written provisions of paragraph 1 b, Army Air Forces Regulation No. 60-16D, dated 20 September 1944, to which he was subject and which provides as follows:

"1. General:

***

b. Proximity to Other Aircraft. No aircraft will be flown closer than 500 feet to any other aircraft in flight, except when two or more aircraft are flown in duly authorized formation. On authorized formation flights, aircraft will not be flown closer to each other than the distance of one-half the wing-span of the largest aircraft concerned."

In that said Second Lieutenant Jerry J. Presba did pilot an airplane, to-wit: an AT-6, Craig Field No. 714, at a distance less than 500 feet from another airplane, and at a time when the said airplanes were not flown in duly authorized formation.

He pleaded guilty to and was found guilty of the Charge and the 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. The evidence for the prosecution showed that during the morning of 2 November 1944 Lieutenants Thomas A. Prince, John W. Norbeck, and Robert W. Newgren were engaged in an instrument flight in a B-24 airplane when, approximately 15 miles northwest of Maxwell Field, Alabama, flying at an altitude of about 8,000 feet and at a speed of about 180 miles per hour, they observed an AT-6 airplane, No. 714 from Craig Field. This plane made several passes at their plane and performed a slow roll about 50 to 100 feet above and in front of the B-24. The AT-6 plane then flew in close formation with the B-24 at an estimated distance of from one foot to 25 feet from the B-24 for approximately 1-1/2 to two minutes (R. 7-8,9-10,12-13).

In the opinion of the occupants of the B-24 the pilot of the AT-6 was reckless and careless in performing a slow roll within such proximity to their plane (R. 11,13).

There was introduced in evidence without objection a written statement voluntarily signed and sworn to by the accused (R. 16, Pros. Ex. 2), in which the accused admitted that on 2 November 1944 he was a second lieutenant, Air Corps, Army of the United States, and was the pilot of an AT-6 airplane being No. 714 from Craig Field, Alabama, and was practicing chandelles, lazy 8's and barrel rolls when a B-24 flew by. Thereupon the accused made

about three "passes" at the B-24, but in doing so he did not fly any closer to the B-24 than 50 feet. He then did a barrel roll about 100 feet above the B-24 and a ship's length ahead of it, following which he flew formation with the B-24 "about a half a wing span from him". There was also admitted in evidence a copy of the pertinent parts of Army Air Forces Regulation 60-16 (R. 7, Pros. Ex. 1).

4. The rights of the accused having been explained to him, the accused elected to testify under oath (R. 16). He stated that the facts set forth in his statement admitted in evidence were substantially correct, but asserted that in performing the maneuvers he exercised care and that in his opinion at no time was there any "possibility of any serious accident". When he did the roll his speed was 200 miles per hour. When he practised passes at the plane he took the customary caution to keep away from the airplane, and when he flew in formation he flew a minimum distance of a half of a wing span away from the other plane (R. 16-17).

5. The pertinent parts of Army Air Forces Regulations 60-16 read as set forth in the Specifications and as appear in paragraph 2 above. The evidence for the prosecution and the accused's plea of guilty clearly establish that the accused at the time and place set forth in the Specifications willfully and knowingly flew the aircraft that he was piloting closer than 500 feet to the passing B-24, by flying in close formation with the B-24 at a time when no formation flight was authorized. In the same manner it was shown that the accused at the same time and place operated the aircraft that he was piloting in a reckless and careless manner by making "passes" at the B-24 and performing acrobatics in close proximity to it in such a manner as to endanger it and its occupants consisting of other military personnel. While the witnesses called by the prosecution testified that in their opinion from their observation the accused operated the aircraft in a careless and reckless manner, which the accused in his testimony disputed, the determination of this question was ultimately vested in the court as the fact finding body. From the evidence adduced the court was fully justified in finding that the accused piloted his plane at the time in question in a reckless and careless manner in violation of Army Air Forces Regulations as alleged in Specification 1 of the Charge. All of the elements of the offenses charged in both specifications were clearly proved beyond any reasonable doubt.

6. War Department records show the accused to be 22 years of age and single. He graduated from high school and attended the University of California 2-1/2 years. On 26 January 1943 he enlisted in the service and upon completion of his training as a pilot on 7 January 1944 he was commissioned second lieutenant, Air Corps, Army of the United States. On 1 May 1944 he was convicted by a general court-martial of making a false official statement with intent to deceive in violation of Article

of War 96. He became involved in an altercation with a civilian and was stabbed in the back and arm. During the official investigation of his injuries he reported that he had been drinking and had fallen over a hydrant and sustained his injuries in that manner. He pleaded guilty and was sentenced to three months restriction to his post and a forfeiture of $50 pay per month for 12 months.

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

, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JAN 18 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 Jerry J. Presba (0-821777), 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 the Commanding General, Army Air Forces, to The Judge Advocate General dated 11 January 1945 recommending that the sentence be confirmed and carried into execution. I concur in that recommendation.

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

Myron C. Cramer,
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. CG, AAF, 11 Jan. 1945.

(Sentence confirmed. G.C.M.O. 90, 22 Mar 1945)

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

(115)

SPJGK
CM 271426

11 JAN 1945

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. Federal Reformatory, El Reno, Oklahoma.
Private HAROLD CANNON (34640509), Company A, 379th Engineer Battalion.	

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

---

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private, then Private First Class Harold Cannon, Company A, 379th Engineer Battalion, did, at APO 958, on or about 1 August 1944, with intent to do him bodily harm, commit an assault upon Sergeant Alexander J. Gabriel, Company A, 379th Engineer Battalion, by attempting to strike him with a dangerous instrument, to wit, a knife.

Specification 2: In that Private, then Private First Class, Harold Cannon, Company A, 379th Engineer Battalion, did, at APO 958, on or about 1 August 1944, with intent to do him bodily harm, commit an assault upon Sergeant Alexander J. Gabriel, Company A, 379th Engineer Battalion, by striking him on the back with a dangerous instrument, to wit, a carbine.

He pleaded not guilty to and was found guilty of the Charge and the Specifications. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of 5 years. The reviewing authority approved the sentence, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that the accused, a colored soldier, during the late afternoon of 1 August 1944 at APO 958 was looking for Sergeant Alexander J. Gabriel, another soldier of the

same "outfit", who he believed had taken some money from him (R. 11). The two had previously been friendly. The mistaken belief regarding the money was due to the fact that the accused had been drinking heavily. His condition was such that his companions had forcibly put him in his bunk. One had removed his wallet from his clothes for safe keeping. Apparently in his confused mental condition brought on by excessive drinking he thought that Gabriel had his wallet (R. 11, 14-15). He was unsteady on his feet (R. 12). Gabriel described accused as "dead drunk" (R. 51). As accused approached the tent in which Gabriel was asleep on his bunk he had a carbine in one hand and a pocket knife with a blade about two inches in length in the other (R. 18, 23-24, 26, 35). In a manner demonstrated to the court by one witness, but not explained in the record, accused swung the carbine at Gabriel as he lay asleep on the bunk. The witness, another soldier, "pulled" Gabriel off the bunk in time for the carbine to strike the spot where Gabriel's head had been the moment before the blow landed (R. 20). Gabriel then sat upon the bunk and the accused "poked" him in the back with the stock of the carbine. It was a "good blow" (R. 21). Another witness claimed that the first blow struck Gabriel on the back (R. 26). The same witness described the second blow as "Cannon hit him again on the back with the rifle" (R. 27). "*** I wouldn't know how hard it was. I thought it was a lick. *** He had the carbine in one hand ***" (R. 29). Gabriel testified that he was asleep and heard someone yell, "Come on, Gabriel, let's go, get up". He was slow in waking up and the next thing he knew he felt an "excruciating blow across the lower part of" his back (R. 47). All agreed that Gabriel then ran out of the tent. The accused followed Gabriel and threw stones at him (R. 20-21, 23-24, 26-27). That same afternoon, at a time not clearly shown, Gabriel was observed running through one of the tents and through the company street followed by the accused at a distance of fifteen feet. The accused had his pocket knife in his hand (R. 33-34). Sometime thereafter accused was standing in the company street talking to several other soldiers when Gabriel entered the street and approached the group. Gabriel had a carbine in his hands with one finger on the trigger guard. He stopped about five or six feet away from the accused and told him that he would kill him. Accused again claimed that Gabriel had his money and said that he did not believe that Gabriel would kill him. Words passed back and forth. Accused advanced toward Gabriel. Gabriel backed up and warned the accused not to "come on me". Accused continued toward Gabriel until within three feet of him when Gabriel shot him with the carbine (R. 38, 42). One witness testified that when this occurred the accused had his right hand in his trouser pocket and made no attempt to strike Gabriel (R. 38-40). Another witness said that accused drew his hand out of his pocket and held it in front of him with his fist closed but could not say whether the knife was in his hand at that time (R. 44). Both agreed that the accused did not strike at or grab at Gabriel (R. 45).

Gabriel in his testimony made no mention of ever being chased by the accused with a knife in his hand. He told of only one blow being struck while he was on the bunk in the tent, after which he ran out of the tent. With reference to the shooting that took place he stated that he procured a carbine and some ammunition after accused had struck him and waited in his tent for "several hours" until he heard the accused's voice. He went out to look for him and found him with several other soldiers in the company street. He approached them and said, "Cannon, what are you trying to do, kill me?" The accused said something that he could not understand and started toward Gabriel. When he got within six feet of him Gabriel said, "Stop, don't keep coming after me. If you do, you're going to make me shoot you". The accused paused but then continued toward Gabriel and said that he did not believe that Gabriel had the nerve to shoot him. Gabriel backed up. He observed the handle of a knife protruding from the hand of the accused. When the accused got within three feet of Gabriel he "made an effort to either grab the carbine or to stab me ***. He was either going to try to stab me or grab the carbine -- I don't know which". Then it was that Gabriel shot him and the accused fell (R. 49-50).

4. The accused elected to testify and claimed that he was so drunk that he did not remember anything that occurred that afternoon (R. 55-57).

5. The 93rd Article of War provides for the punishment of any person subject to military law who commits an assault "with intent to do bodily harm with a dangerous *** instrument ***".

The proof required of the commission of this offense is set forth in Manual for Courts-Martial, 1928, paragraph 149m, page 180:

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

Does the record disclose such proof in support of the two Specifications? With reference to Specification 1 wherein the accused is alleged to have attempted to strike Gabriel with a knife it appears from the record that this specification alludes solely to the accused's actions immediately preceding the time he was shot by Gabriel. True it is that the accused had a knife in his hand, (1) when he went into Gabriel's tent, (2) when he struck at Gabriel with the carbine, and (3) when he ran 15 feet behind Gabriel through the

company street. None of these episodes however constituted the offense charged as there was no attempt upon any of these occasions to strike Gabriel with the knife. The knife was not used by the accused nor did he attempt to use it in a "manner to produce death or great bodily harm". During the final meeting of the two, the witnesses, with the exception of Gabriel, testified that the accused did not attempt to strike, or strike at, Gabriel. Neither saw any knife in his hand. Gabriel's story was different. He stated that he saw a knife in the accused's hand and the accused either made a grab for the carbine or tried to stab him. It should be borne in mind that Gabriel was vitally interested in justifying his act of shooting the accused and therefore would have a strong motive to color his story of the attack made upon him by the accused. Notwithstanding the position he was in as a witness he would not positively state that the accused attempted to strike him with the knife. His description was in the alternative - that the accused's act was either the lawful, innocent one of trying to grab the carbine or the wrongful, guilty one of the attempted stabbing. Under such circumstances, as the prosecution is required to prove beyond any reasonable doubt all of the elements of the offense charged, the finding of guilty of Specification 1 cannot be sustained. The only witness (Gabriel) who related sufficient facts that might otherwise have sustained a finding that the accused attempted to stab that witness was himself so doubtful about the accused's actions that he could not or would not testify whether he had done one thing or another.

Turning now to the other Specification it is noted that it alleges that the accused committed an assault upon Gabriel with intent to do bodily harm "by striking him on the back" with a carbine. The accused is not charged with the offense of attempting to strike him with the carbine on the head as one witness described and in which he was not corroborated by the other eye witness. The question therefore presented is whether the accused used the carbine in a manner "likely to produce death or great bodily harm" when he struck him on the back with that weapon. One witness said the blow was a "poke", the carbine being held by the barrel with one hand. The other witness said it was a "lick" with the carbine held in one hand. He could not say how hard the blow was. Gabriel did not see the blow struck as he was asleep. He felt it on his back and described it as an excruciating blow. There is therefore no substantial evidence to support a finding that the manner in which the accused used the carbine was likely to produce death or great bodily harm. Although the "instrument" used by the accused was a carbine and a carbine is a weapon which is ordinarily considered dangerous, nevertheless in the law of assaults the "dangerous" character of a weapon or instrument depends upon the manner in which it is used in each particular case. The mere fact that a weapon is susceptible of a use in such a manner as to be dangerous is not enough to justify its characterization as a dangerous weapon. Only if actually used or attempted to be used in

such a manner that it would be likely to produce death or great bodily harm, would it become a dangerous weapon or instrument within the law of assaults. CM 209862, 9 B.R. 143, CM 230478, 17 B.R. 375, CM 236547, 23 B.R. 53.

The finding of guilty of the offense charged cannot therefore be sustained. The accused however is clearly guilty of a lesser included offense - assault with intent to do bodily harm. The accused did commit an assault upon Gabriel and the circumstances clearly show that he intended to do him bodily harm. Such an offense is an offense that is lesser than and included in the offense with which he is charged. The Board is therefore of the opinion that the record of trial is legally sufficient to sustain only a finding of guilty of an assault with intent to do bodily harm at the time and place and under the circumstances set forth in the Specification omitting the word "dangerous".

In view of the above conclusions the record of trial is legally sufficient to support a sentence of confinement not exceeding one year (MCM 1928, par. 104, page 100).

In view of the foregoing, it is the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 1, legally sufficient to support only so much of the finding of guilty of Specification 2 as involves an assault with intent to do bodily harm at the time and place and upon the person alleged in the Specification, and legally sufficient to support the finding of guilty of the charge and only so much of the sentence imposed as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for a period of one year in a place other than a penitentiary or Federal reformatory.

Lucy G. Gore, Judge Advocate.

Earle Hoblum, Judge Advocate.

Herman Mayo, Judge Advocate.

1st Ind.

War Department, J.A.G.O., FEB 7 1945

TO: The Commanding General,
United States Army Forces,
Central Pacific Area,
APO 958, c/o Postmaster,
San Francisco, California.

1. In the case of Private Harold Cannon (34640509), Company A, 379th Engineer Battalion, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 1, legally sufficient to support only so much of the finding of guilty of Specification 2 as involves an assault with intent to do bodily harm at the time and place and upon the person alleged in the Specification, and legally sufficient to support the finding of guilty of the Charge and only so much of the sentence imposed as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for a period of one year in a place other than a penitentiary or Federal reformatory, which holding is hereby approved. Upon disapproval of the findings in accordance with this holding and the reduction of the term of confinement to one year and the designation of a place of confinement other than a penitentiary or Federal reformatory, you will have authority to order the execution of the modified 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 271426).

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 271588

9 FEB 1945

UNITED STATES v. Second Lieutenant ROBERT E. BLACKBURN (O-692853), Air Corps	FOURTH AIR FORCE Trial by G. C. M., convened at Tonopah Army Air Field, Tonopah, Nevada, 1, 2 December 1944. Dismissal, total forfeitures, and confinement for seven (7) years.

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. Accused was tried on the following Charges and Specifications:

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

Specification: In that Second Lieutenant Robert E. Blackburn, Air Corps, Squadron T-4, 422nd Army Air Forces Base Unit, did, without proper leave, absent himself from his organization and station at Tonopah Army Air Field, Tonopah, Nevada, from about 6 October 1944 to 20 October 1944.

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

Specification: In that Second Lieutenant Robert E. Blackburn, Air Corps, Squadron T-4, 422d Army Air Forces Base Unit, having received a lawful order from Colonel Henry, Commanding Officer Army Air Forces Flexible Gunnery School, Las Vegas, Nevada, to proceed from Las Vegas Army Air Field, Las Vegas, Nevada, to Tonopah Army Air Field, Tonopah, Nevada, without any delays enroute and to report thereat for duty, the said Colonel Henry being in the execution of his office, did, at Las Vegas, Nevada, on or about 11 October 1944, fail to obey the same.

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

Specification 1: In that Second Lieutenant Robert E. Blackburn, Air Corps, Squadron T-4, 422nd Army Air Forces Base Unit,

did, at Fort Worth Texas, on or about 4 August 1944, with intent to deceive, wrongfully make and utter to Hillard Auto Rent Company, a certain check, in words and figures as follows, to wit:

Big Spring, Texas, Aug. 4 1944. No

THE FIRST NATIONAL BANK 88-235
In Big Spring

Pay to the order of Hillard Auto Rent Co $ 118.80

One Hundred Eighteen and Eighty/00 Dollars

Robert E. Blackburn
0-692853

he the said Second Lieutenant Robert E. Blackburn, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank in Big Spring, Texas, for the payment of the said check.

Specification 2: Same form as Specification 1, but alleging check dated 5 August 1944, in the amount of $6.60, made and uttered to Hillard Auto Rent Company.

Specification 3: Same form as Specification 1, but alleging check dated 19 September 1944, in the amount of $50.00, payable to the order of cash, made and uttered to Second Lieutenant Louis C. Brizzolara at Tonopah, Nevada.

Specification 4: Same form as Specification 1, but alleging check dated 23 September 1944, in the amount of $40.00, payable to the order of cash, made and uttered to the Mizpah Club at Tonopah, Nevada.

Specification 5: Same form as Specification 1, but alleging check dated 25 September 1944, in the amount of $40.00, payable to the order of cash, made and uttered to the Mizpah Club at Tonopah, Nevada.

Specification 6: Same form as Specification 1, but alleging check dated 18 September 1944, in the amount of $25.00, made and uttered to the Tonopah Club at Tonopah, Nevada.

Specification 7: Same form as Specification 1, but alleging check dated 18 September 1944, in the amount of $25.00, made and uttered to the Tonopah Club at Tonopah, Nevada.

Specification 8: Same form as Specification 1, but alleging check dated 19 September 1944, in the amount of $50.00, payable to the order of cash, made and uttered to the Tonopah Club at Tonopah, Nevada.

He pleaded guilty to the Specification, Charge I, and Charge I, and to the Specification, Charge II, and Charge II, but subsequently changed the plea to the Specification, Charge II, and to Charge II, to not guilty. He pleaded not guilty to all Specifications of Charge III and to Charge III. He was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for seven 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. As to the Specification of Charge I, to which accused had pleaded guilty, the prosecution introduced a duly authenticated extract copy of the morning report of his organization, showing accused "dy to AWOL" on 6 October 1944 and "AWOL to dy" on 20 October 1944 (Pros. Ex. 1).

As to the Specification of Charge II, it is shown by deposition (Pros. Ex. 3) of Captain Cassius M. Inman, Provost Marshal at Las Vegas, Army Air Field, Las Vegas, Nevada, that he learned, as a result of investigation, that accused was in Las Vegas, Nevada, without authority, and he personally read and delivered to accused, on 11 October 1944, a written order (Pros. Ex. 7) issued by authority of Colonel Henry, Commanding Officer of the 3021st AAFBU, Las Vegas Army Air Field, ordering accused "to proceed from Las Vegas Army Air Field, Las Vegas, Nevada, to Tonopah Army Air Field, Tonopah, Nevada, without any delays enroute and report upon arrival to the Commanding Officer thereat for duty." Accused acknowledged receipt of the order in writing in the presence of Captain Inman (Pros. Ex. 3, 7), and stated that he understood it (Pros. Ex. 3). The order was signed by First Lieutenant Marion R. McCann, Adjutant, who was authorized by Colonel Henry to issue it. The order erroneously cited AR 615-290, instead of AR 605-300 (Pros. Ex. 2).

As to Specifications 1 and 2 of Charge III, it appears from a deposition of Charlie Hillard, sole owner of the Hillard Auto Rent Company, Fort Worth, Texas, that accused gave his check dated 4 August 1944, in the sum of $118.80, drawn on The First National Bank, Big Spring, Texas, in payment for rental of an automobile from 17 July through 4 August 1944; and also that accused gave his check dated 5 August 1944, in the amount of $6.60, drawn on the same bank, in payment for rental of an automobile from 4 August through 5 August 1944. Both checks were presented for payment and returned by the bank marked "insufficient funds" and neither check has been paid by accused (Pros. Ex. 4, 5, 6). It was shown by the deposition of Hugh Harrison Hurt, Assistant Cashier of The First National Bank, Big Spring, Texas, that accused's account was $0.64 overdrawn on 4 August 1944 and $0.89 overdrawn on 5 August 1944 (Pros. Ex. 8).

As to Specification 3, Charge III, Second Lieutenant Louis C. Brizzolara identified a check (Pros. Ex. 9) dated 19 September 1944, in

the amount of $50.00, also drawn on The First National Bank, Big Spring, Texas, payable to the order of cash, as one indorsed by the witness for accused, for whom the witness also cashed the check at the Mizpah Club and to whom he gave the money after cashing it. The check was presented to the bank for collection and was returned because of insufficient funds (R. 12-14). Accused had $6.13 on deposit in the drawee bank in Big Spring on 18 September 1944 (Pros. Ex. 8).

As to Specifications 4 and 5, Charge III, the witness Paul Kastner, manager of the Mizpah Hotel Club, in Tonopah, Nevada, testified that he delivered $40.00 to accused in exchange for his check (Pros. Ex. 10) in the sum of $40.00, dated 23 September 1944, payable to cash, and drawn on the same drawee bank, and that the check was returned by the bank because of insufficient funds (R. 14-15). Accused had on deposit in the drawee bank the sum of $5.88 on 23 September 1944 (Pros. Ex. 8). This witness also identified a check (Pros. Ex. 11) in the amount of $40.00, dated 25 September 1944, payable to the order of cash, drawn on the same bank, for which check he delivered accused $40.00 in cash (R. 15). Kastner was acting as agent for Quilici and Pieper, who held the lease for gambling in the Mizpah Club, when he cashed the two $40.00 checks and also when he cashed the $50.00 check indorsed by Lieutenant Brizzolara. All three checks were indorsed by Quilici and Pieper (R. 15; Pros. Ex. 9, 10, 11). On 25 September 1944, accused had on deposit in the drawee bank the sum of $5.88 (Pros. Ex. 8).

As to Specifications 6, 7, and 8, Charge III, it was stipulated between the accused, prosecution, and defense that the witness Jack Buffehr, if present, would testify that he was floor manager of the Tonopah Club, and that on 18 September and 19 September 1944 he cashed the checks described in Specifications 6, 7 and 8, in the amounts of $25.00, $25.00 and $50.00 respectively, and that they were presented for payment and in due course were returned marked "insufficient funds" (R. 17). The three checks were received in evidence without objection (Pros. Ex. 12, 13, 14; R. 17-18). On 1 August 1944, accused's account in The First National Bank, Big Spring, Texas, was $0.14 overdrawn. Between 1 August 1944 and 21 November 1944, there was only one deposit made to accused's account. This was on 6 September 1944, in the amount of $100.00, and evidently represented the last allotment installment hereinafter referred to. On 18 September 1944 his account showed $6.13 on deposit (Pros. Ex. 8).

4. The accused, having been informed of his rights by the law member, elected to testify under oath. He stated that when he went to Las Vegas he knew it was necessary to sign out or "get more authority", and that the day after he got there he bought a ticket to return to Tonopah but did not use it until the 20th of October. He knew that the order given him ordered him to return to Tonppah, and he did not recall the reference to any Army Regulation when the order was read to him (R. 19). About a year before the trial he had made an allotment to the bank in Big Spring of $100.00 per month to a joint account with his wife, and had terminated the allotment 31 August 1944 because he was

going overseas and was going to have a direct allotment made to his wife. However, he did not "change the status" of the joint bank account. The last bank statement he had received was prior to 5 June 1944. He did not know whether his wife had drawn checks on the account "not known to" him. He had not made any deposits at the bank since terminating the allotment, but during the time he wrote the checks he "had reason to believe" he had sufficient money in the bank to cover the checks, due to the fact that on or about 4 or 5 August 1944 he sent an envelope containing $200.00 in cash to the bank at Big Spring and "then later" he deposited $300.00 in cash in an envelope and sent it to the bank at Big Spring. He did not insure or register the envelopes and did not receive a receipt for the deposit. He wrote to the bank about the deposit slip shortly after he was notified by the legal office about the Hillard Auto Rent Company check being returned, but he did not receive a reply from the bank. He had no way of tracing the money and nobody else had any knowledge of his sending it other than several persons whom he had told about it. Although he desired to do so, he had not taken any steps to reimburse the people who had suffered the money losses, as he had not received any pay for three months (R. 19-20).

On cross examination, accused stated that he had maintained a checking account with the bank for about two years; that he did not customarily make deposits by mail, but that when he sent the $200.00 he was in a hurry to go on a leave and "had a ride", and wanted to get the money in because he was not sure at the time whether his account was sufficient to take care of the check to the Hillard Auto Rent Company. He had no personal friends available at the time to get a money order for him. There was no reason why he could not have sent the money along his route or at his destination. There was no particular reason for his sending the $300.00 in cash rather than by money order. He had won the $200.00 at gambling, and the $300.00 was obtained through cashing war bonds and personal loans. The $300.00 had been mailed after he received notice that the two checks to Hillard Auto Rent Company had been dishonored, about 12 September 1944, and he made no inquiry as to the receipt of the money by the bank until he was called into the legal office on 28 October 1944. He had left the base at Tonopah during his day off without a pass or leave, and had caught a bus for Las Vegas. He did not intend to stay away 14 days, and his explanation of his absence for that time was "I can't explain it exactly, it was more or less being someplace having a good time." At the time of his absence he was first pilot of a crew undergoing combat training, and he knew what would happen to the crew because of his being absent for two weeks. It was clear to him that he was being ordered by Colonel Henry through Captain Inman to return to Tonopah, Nevada, and there was no doubt in his mind as to the legality or validity of the order. He had no excuse for not complying with the order to return immediately. He had been in the service four years and had been commissioned one year (R. 21-22).

(128)

SPJGQ-CM 271538

1st Ind.

MAR 2 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 Second Lieutenant Robert E. Blackburn (0-692853), 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. Although the sentence is legal, it is believed that reduction of the confinement to two years will constitute adequate punishment. Accordingly, I recommend that the sentence be confirmed but that the forfeitures be remitted and the period of confinement reduced to two years, 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 the attached letter of the accused, in which he requests clemency.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

4 Incls
1. Record of trial
2. Dft ltr for sig S/W
3. Form of action
4. Ltr fr accused, dated 29 Dec. 1944

(Sentence confirmed but forfeitures remitted and confinement reduced to two years. G.C.M.O. 146, 16 Apr 1945)

to the Mizpah Club, while the proof shows that Paul Kastner cashed the checks as agent for Quilici and Pieper, whose indorsement appears on both checks. However, it appears from the evidence that Paul Kastner was manager of the Mizpah Hotel Club and that Quilici and Pieper had the lease for gambling in the Mizpah Club, so that accused was not misled or prejudiced by the slight variance.

6. War Department records reveal that accused is 24 years of age, is married and has no children. He was committed to an orphan asylum in Indianapolis, Indiana, in 1931, completed two years of high school, and worked as a brick mason in Detroit, Michigan, for about five years prior to enlisting in the infantry of the Regular Army in October 1940. As an aviation cadet he completed advanced pilot training at Altus, Oklahoma, and on 1 October 1943 he was commissioned a Second Lieutenant in the Army of the United States.

7. The court was legally constituted, and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused 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 either Article of War 61 or 96, and is mandatory upon conviction of a violation of Article of War 95.

Fletcher R. Andrews, Judge Advocate

Herbert B. Fredricey, Judge Advocate

[illegible], Judge Advocate

(128)

SPJGQ-CM 271588

1st Ind MAR 2 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 Second Lieutenant Robert E. Blackburn (0-692853), 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. Although the sentence is legal, it is believed that reduction of the confinement to two years will constitute adequate punishment. Accordingly, I recommend that the sentence be confirmed but that the forfeitures be remitted and the period of confinement reduced to two years, 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 the attached letter of the accused, in which he requests clemency.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

4 Incls
1. Record of trial
2. Dft ltr for sig S/W
3. Form of action
4. Ltr fr accused, dated 29 Dec. 1944

(Sentence confirmed but forfeitures remitted and confinement reduced to two years. G.C.M.O. 146, 16 Apr 1945)

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

SPJGH-CM 271591

28 FEB 1945

UNITED STATES v. First Lieutenant HAROLD C. BAILEY (O-567074), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Dodge City, Kansas, 30 November 1944. Dismissal and total forfeitures.

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 93rd Article of War.

Specification 1: In that First Lieutenant Harold C. Bailey, Air Corps, did, at Vernon, Texas, on or about 1 July 1944, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

Denver, Colorado
~~Vernon, Texas~~, 7-1 1944 No.____

NATIONAL
THE FIRST ~~STATE~~ BANK 88-286

Pay to the order of Harold Bailey $2283 00/XX

Twenty-two hundred and eighty three & 00/X Dollars

For Sale of Airplane

James E. Colesson
Captain, AC, O-432016

which said check was a writing of a private nature which might operate to the prejudice of another.

Specification 2: (Finding of not guilty).

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

Specification 1: Nolle prosequi by direction of appointing authority.

Specification 2: Nolle prosequi by direction of appointing authority.

Specification 3: Nolle prosequi by direction of appointing authority.

Specification 4: Nolle prosequi by direction of appointing authority.

Specification 5: Nolle prosequi by direction of appointing authority.

Specification 6: Nolle prosequi by direction of appointing authority.

Specification 7: In that First Lieutenant Harold C. Bailey, Air Corps, did, at Dodge City Army Air Field, Dodge City, Kansas on or about 23 September 1944, with intent to deceive, wrongfully and unlawfully make and utter to the Officers' Mess Fund, Dodge City Army Air Field, Dodge City, Kansas, a certain check, in words and figures as follows, to wit:

Dodge City, Kansas, Sept. 23, 1944

Pay to the Order of OFFICERS' MESS FUND - - - - $10.00

Ten & 00/100 Dollars

For value received, I represent that the above amount is on deposit in the said Bank in my name subject to this check, and is hereby assigned to the payee or holder thereof.

To First National Bank, Childress, Texas
City State

Harold C. Bailey
1st Lt. 0-567074
Address

and by means thereof did fraudulently obtain from the said Officers' Mess Fund $10.00, lawfull money of the United States, he, the said First Lieutenant Harold C. Bailey, then well knowing that he did not have and not intending

that he should have sufficient funds in the First National Bank, Childress, Texas, for the payment of said check.

Specification 8: Nolle prosequi by direction of appointing authority.

Specification 9: In that First Lieutenant Harold C. Bailey, Air Corps, did, at Dodge City Army Air Field, Dodge City, Kansas, on or about 28 September 1944, with intent to deceive, wrongfully and unlawfully make and utter to the Officers' Mess Fund, Dodge City Army Air Field, Dodge City, Kansas, a certain check, in words and figures as follows, to wit:

Dodge City, Kansas, 9 - 28 1944

Pay to the
Order of OFFICERS' MESS FUND - - - - - $10.00

Ten & 00/100 Dollars

For value received, I represent that the above amount is on deposit in said Bank in my name subject to this check, and is hereby assigned to the payee or holder thereof

To First National Bank,)	Harold C. Bailey
Childress, Texas)	1st Lt 0-567074
City State	Address

and by means thereof did fraudulently obtain from the said Officers' Mess Fund $10.00, lawfull money of the United States, he, the said First Lieutenant Harold C. Bailey, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank, Childress, Texas, for the payment of said check.

Specification 10: In that First Lieutenant Harold C. Bailey, Air Corps, did, at Dodge City Army Air Field, Dodge City, Kansas, on or about 28 September 1944, with intent to deceive, wrongfully and unlawfully make and utter to the officers' Mess Fund, Dodge City Army Air Field, Dodge City, Kansas, a certain check, in words and figures as follows, to wit:

Dodge City, Kansas, Sept. 28 1944

Pay to the
Order of OFFICERS' MESS FUND - - - - - $10.00

Ten & 00/100 Dollars

For value received, I represent that the above amount is on deposit in said Bank in my name subject to this check, and is hereby assigned to the payee or holder thereof

To First National Bank, Childress, Texas	Harold C. Bailey, 1st Lt. O-567074
City State	Address

and by means thereof did fraudulently obtain from the said Officers' Mess Fund $10.00, he, the said First Lieutenant Harold C. Bailey, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank, Childress, Texas, for the payment of said check.

Specification 11: Nolle prosequi by direction of appointing authority.

Specification 12: Nolle prosequi by direction of appointing authority.

Specification 13: In that First Lieutenant Harold C. Bailey, Air Corps, did, at Dodge City Army Air Field, Dodge City, Kansas, on or about 2 October 1944, with intent to deceive, wrongfully and unlawfully make and utter to the Officers' Mess Fund, Dodge City Army Air Field, Dodge City, Kansas, a certain check, in words and figures as follows, to wit:

Dodge City, Kansas, Oct. 2 1944

Pay to the Order of OFFICERS' MESS FUND - - - - - $10.00

Ten & 00/100 Dollars

For value received, I represent that the above amount is on deposit in the said Bank in my name subject to this check, and is hereby assigned to the payee or holder thereof

To First National Bank, Childress, Texas	Harold C. Bailey, 1st Lt. O-567074
City State	Address

and by means thereof did fraudulently obtain from the said Officers' Mess Fund $10.00, lawfull money of the United States, he, the said First Lieutenant Harold C. Bailey,

then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank, Childress, Texas, for the payment of said check.

Specification 14: Nolle prosequi by direction of appointing authority.

Specification 15: In that First Lieutenant Harold C. Bailey, Air Corps, did, at Dodge City Army Air Field, Dodge City, Kansas, on or about 5 October 1944, with intent to deceive, wrongfully and unlawfully make and utter to the Officers' Mess Fund, Dodge City Army Air Field, Dodge City, Kansas, a certain check, in words and figures as follows, to wit:

Dodge City, Kansas, 10 - 5 1944

Pay to the
Order of OFFICERS' MESS FUND - - - - - - $10.00

Ten & 00/100 Dollars
For value received, I represent that the above amount is on deposit in said Bank in my name subject to this check, and is hereby assigned to the payee or holder thereof

To First National Bank,) Harold C. Bailey
Childress, Texas) 1st Lt. O-567074
City State Address

and by means thereof did fraudulently obtain from the said Officers' Mess Fund $10.00, lawfull money of the United States, he the said First Lieutenant Harold C. Bailey, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank, Childress, Texas, for the payment of said check.

Specification 16: Nolle prosequi by direction of appointing authority.

Specification 17: Nolle prosequi by direction of appointing authority.

CHARGE III: Violation of the 96th Article of War.
Nolle prosequi by direction of appointing authority.

Specification: Nolle prosequi by direction of appointing authority.

He pleaded not guilty to all Charges and Specifications, other than those withdrawn as above noted. He was found not guilty of Specification 2 of Charge I and guilty of all other Charges and Specifications on which he was tried. No evidence of any previous conviction was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority

approved the sentence, although characterizing it as "inadequate", and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution relative to the offenses of which accused was convicted:

Specification 1 of Charge I.

In May 1944 accused, while stationed at Victory Field, Vernon, Texas, borrowed the sum of $800 from First Lieutenant August N. Keller, advising the latter that it was for use in an "oil deal". Accused promised to repay the loan in 30 days, together with the sum of $80 for the use of the money (R. 36, 38). At about the same time accused obtained the sum of $1200 from one Russell, a civilian, promising to pay to Russell the sum of $1380 on 10 June 1944 (R. 30, 39, 40; Pros. Ex. 16). He represented to Russell that the money obtained from him was likewise to be used in an "oil deal" (R. 40; Pros. Ex. 16).

On or about 1 July 1944 accused wrote out in its entirety a check dated 1 July 1944, payable to the order of himself in the amount of $2,283, drawn against the First National Bank, of Denver, Colorado, and signed the check as follows: "James E. Coleson, Captain, AC, 0-432016" (R. 24; Pros. Exs. 14, 16). On the face of the check he entered the following notation: "For sale of airplane" (Pros. Ex. 14). He thereupon endorsed the check and delivered it to the First State Bank, of Vernon, Texas, with instructions that it be sent through for collection (R. 59, 72; Pros. Ex. 16). The check was returned marked "unknown" (R. 24). With respect to this check, the accused, in a pretrial sworn statement (Pros. Ex. 16), said:

> "With respect to Charge I, Specification 1 - I do not deny having made the check but there was no intent to forge anyone's name to draw money from anyone's bank account or to beat anyone out of any money whatsoever. Prior to making out this check, I had entered into an arrangement with a Major, whose name I do not care to disclose, whereby this money ($2,283.00) would be deposited in the First National Bank, Denver, Colorado, under the name of 'James E. Coleson, Captain, Air Corps, 0-432016'. A careful check was made at the Denver Bank to ascertain whether or not there was any such person on the bank books or having an account with this bank and it was made certain that no such person or name existed at that bank."

Without waiting for the $2,283 check to clear, accused commenced to draw checks on the First State Bank. On 7 July 1944 he issued to Keller a check on that bank in the amount of $880 (R. 34; Pros. Ex. 15), which check after being deposited for collection was returned unpaid (R. 33). The same day that this check was delivered to Keller, 7 July 1944, accused departed from Victory Field, Vernon, Texas, under orders transferring him to Dodge City Army Air Field, Dodge City, Kansas, (R. 82).

Early in July 1944, shortly after his arrival at Dodge City Army Air Field, accused threatened to commit suicide because of his financial difficulties and was placed in the station hospital under guard (R. 35, 36). The provost marshal at that field, Major Albert H. Mead, had known accused as an enlisted man at Brooks Field, Texas, in 1941 (R. 28). Hearing of accused's difficulty, he went to the hospital to see him. He went simply as a friend (R. 21, 22). Upon inquiry as to the nature of his difficulty, accused told Major Mead that he had met a retired Captain by the name of Coleson and an attorney whose name he could not recall; that they had approached him and offered him a participation in an oil deal, assuring him that if he would put up $2400 he would double his money in 30 days; and that for the purpose of this venture he borrowed $800 from Keller and "$1200 or $1400" from "a civilian". Accused further advised Major Mead that Keller was not pressing him for his $800, but that "he had to have $1200 to satisfy the civilian" to whom he had given a check which had been "returned without funds" (R. 22). At the same time, accused advised Major Mead that he had received a check for $2,283 from Coleson and had deposited it (R. 23). This conversation occurred on the same day that accused was placed in the hospital, which was a Sunday, early in July; and on that same day, after the conversation, Major Mead obtained accused's release from the hospital and took him to his (the Major's) home. In the evening of the same day, Lieutenant Keller and Major Leland C. Schubert, who had been accused's commanding officer at Victory Field, arrived by plane from Victory Field and conferred with accused at Major Mead's home. Accused told them the same story he had told Major Mead (R. 23, 26, 35, 36, 42, 44). On the following day, as an act of friendship for accused, Major Mead borrowed $1200 from his own bank and lent it to accused to enable the latter to repay Russell (R. 26). Delivery to Russell of a bank draft representing the money was made by Keller (R. 39). Accused was asked by Major Schubert whether he had any written evidence of his transactions with Coleson, such as "notes or checks or letters", to which he replied that he had torn these up on the preceding day and "that he had flushed them down the commode" (R. 44).

Major Schubert, not being satisfied with accused's story respecting Coleson caused an investigation to be made. He obtained from the First State Bank, at Vernon, Texas, the original of the $2,283 check and, together with Lieutenant Keller, returned to Dodge City Army Air Field for a second meeting with the accused. The second meeting was held approximately one week after the first meeting. In addition to the accused, Major Schubert, Major Mead and Lieutenant Keller were present at the second meeting. Accused was confronted with the original of the $2,283 check and with known specimens of his handwriting. He thereupon "broke down and stated that there was no man named Coleson". He further admitted that his story about the "oil deal" was "all false", that he had gotten in debt because he was "living high" and "had wrecked an automobile and an airplane" and "his living expenses exceeded his income" (R. 44, 46, 47). He further stated that the serial number which he

inserted on the check under "Coleson's" name "just came to him and that he put it down as it came to him", and that after he deposited this check he drew "numerous checks" against it (R. 24). He hoped to "borrow enough money to cover the check before it got back". He endeavored to borrow money from his father and father-in-law but was unsuccessful (R. 25). In resorting to forgery of the check he was "stalling for time" (R. 37).

Specifications 7, 9, 10, 13 and 15 of Charge II:

Accused drew five checks on the First National Bank, of Childress, Texas, dated, respectively, 23 September 1944, 28 September 1944, 28 September 1944, 2 October 1944 and 5 October 1944. Each of these checks was for $10 and was payable to the Officers' Mess Fund, Dodge City Army Air Field. For each of these checks accused received $10 in cash from the payee. Each check was deposited by the payee for collection and was returned unpaid, marked "Insufficient funds" (R. 9, 15-17; Pros. Exs. 1-5). On 23 September 1944 accused's balance in the drawee bank was $3.75; on 28 September 1944 it was $3.50; on 2 October 1944 it was $3.25 and on 5 October 1944 it was $2.50. Between 9 September 1944 and 28 September 1944 the accused had made and uttered at least three other worthless checks drawn on the same bank (R. 11; Pros. Exs. 6-8). On 21, 22, 25 and 26 September 1944 accused was notified of the fact that checks issued by him on the same bank had been returned unpaid (R. 76-77). The Officers' Mess demanded reimbursement from the accused in respect of the five checks introduced as Prosecution's Exhibits 1-5, but because the checks themselves had been delivered to the investigating officer the accused refused to make reimbursement (R. 12-13).

4. Evidence for the defense:

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 briefly reviewed his service in the Army from time of his enlistment at Brooks Field, San Antonio, Texas, in December 1939 until his assignment to duty at his present station on 7 July 1944. He rose to the grade of technical sergeant in the enlisted ranks, was graduated from OCS at Brooks Field in December 1942, was thereafter on duty at Randolph Field, Texas, and at Childress, Texas, until July 1943 and was then transferred to Victory Field, where he was base Intelligence Officer until 7 July 1944 (R. 55-56).

He freely admitted writing the $2,283 check (Pros. Ex. 14) in its entirety, but declared that a Major Timmons, who is "now overseas" and whose first name he does not recall, had promised to assist him by arranging to have the sum of $2,283 deposited in the First National Bank, of Denver, Colorado, in the name of "James E. Coleson" to cover the check. The name James E. Coleson is a "fictitious name". (R. 56, 57, 66). No signature card showing "Coleson's" signature was furnished the bank. Major Timmons handed accused a slip of paper with the name "James E. Coleson" written on it but accused made no effort when writ-

ing the check to simulate the handwriting contained on the slip (R. 70). Accused and Major Timmons had been in this "oil venture" together (R. 58). Accused admitted that in his conversation with Major Mead he had stated that the story about the "oil deal" was fictitious; he declared, however, that he had told Major Mead that he was not going to tell him the truth (R. 64). This last statement was contradicted by both Major Mead and Major Schubert on rebuttal (R. 84-85).

Accused further testified that he issued checks to Keller and Russell on the first State Bank, of Vernon, Texas, against the $2,283 check, but he asserted that a note was attached to the check delivered to Keller advising him that the money was not then available but "would be there in a few days" (R. 60). Keller testified on rebuttal that no such note was attached (R. 82).

Accused admitted that he made and uttered the five checks to the Officers' Mess (Pros. Exs. 1-5), but stated that he thought that he had sufficient funds in the bank on which the checks were drawn to cover the (R. 63). He testified that a Captain Stokes, who was obligated to him, promised by telephone from Childress, Texas, that he would deposit $300 in the bank to accused's credit. In reliance upon that promise he drew the checks in question. After he learned that the $300 had not been deposited he drew no further checks (R. 63). No corroboration of this story was furnished.

The defense introduced evidence showing that accused's efficiency rating at Brooks Field from September 1941 until September 1942, while he was an enlisted man, was "superior" (R. 72; Def. Ex. 1). The defense also introduced evidence showing that in a "Board Analysis of Officer" made in October 1943 and signed by Major Schubert it was stated that the accused "is dependable, resourceful and has the initiative to undertake tasks with which he is unfamiliar" (R. 72; Def. Ex. 2).

5. With respect to the offense of forgery alleged in Specification 1 of Charge I, the accused has admitted that he wrote the check therein described, in its entirety, and that the name "James E. Coleson" signed to the check is fictitious. Despite his protestations of innocence, the evidence, taken as a whole, overwhelmingly indicates that the check was written with intent to defraud. His wholly uncorroborated story attempting to explain his action in signing a fictitious name to a check for $2,283, especially when viewed in the light of the numerous inconsistencies and contradictions contained in his testimony and the number of points on which his testimony was flatly contradicted by the testimony of several witnesses for the prosecution, is incredulous and bizarre. The court properly rejected it (CM 126252, Heppberger; MCM, 1928, par. 124). His admission to Major Schubert, Major Mead and Lieutenant Keller, when confronted with the forged check, that there was no "oil deal" and that he forged the check and deposited it simply to "stall for time" is much more consonant

ith probability and consistent with the admitted facts. The fact hat the accused did not actually receive any cash from the forged heck transaction does not remove the element of fraud involved in t.

Given the intent to defraud, it is clear that forgery may "be ommitted by signing a fictitious name, as where a person makes a check ayable to himself as drawee and signs it with a fictitious name as rawer" (MCM 1928, 149j). To the same effect is Wharton's Criminal Law, Section 870.

The Board is of the opinion, therefore, that the finding of guilty of Specification 1 of Charge I is amply sustained by the evidence.

6. The evidence of accused's guilt of Specifications 7, 9, 10, 13 and 15 of Charge II also is overwhelming. It is established that at the time of making and uttering each of the checks described in these Specifications accused's account in the drawee bank was insufficient to pay the check. It is further shown that within a few days prior to the issuance of these checks accused had been advised four times that checks of his drawn against the same bank were being returned unpaid. The intent to defraud is clearly established. Accused's story that he issued the checks in reliance upon a friend's promise to deposit $300 in his account is unworthy of belief, particularly in view of the four separate notices received by accused just prior to the issuance of these checks that his checks were being returned unpaid. The court rightly disbelieved the story. The evidence compelled findings of guilty of the offenses alleged in these Specifications (CM 236509, Veal, 23 B.R. 31; CM 239984, Hoyt, 25 B.R. 301).

7. The records of the War Department show that the accused is 26 years old and married. He was born and reared in Texas, is a high school graduate and has had one year of college training. In civilian life he was employed for a short time as a machinist, before entering the Army in December 1939. He attained the grade of sergeant in the enlisted ranks, was commissioned a second lieutenant, Air Corps, upon graduation from OCS at Brooks Field, Texas, in December 1942 and was promoted to first lieutenant on 21 September 1943.

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

Thomas N. Jaffey, Judge Advocate.

William H. Crawford, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

SPJGH-CM 271591 1st Ind

Hq ASF, JAGO, Washington, D. C. MAR 22 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 Harold C. Bailey (O-567074), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. There appear to be no mitigating or extenuating circumstances. The reviewing authority, in approving the sentence, properly characterized it as inadequate. It should have included confinement for a term of years. 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 it 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

(Sentence confirmed. G.C.M.O. 175, 6 Jun 1945)

C O P Y

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

SPJGN
CM 271594

29 Dec 1944

U N I T E D S T A T E S	)	ARMY AIR FORCES TRAINING COMMAND
	)	
v.	)	Trial by G.C.M., convened at Buckley Field, Denver, Colorado, 4 December 1944. Dismissal.
	)	
Flight Officer THURMAN T. PRITCHARD (T-700), Air Corps, Section B, 3705th Army Air Forces Base Unit (Technical School).	)	

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

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

2. The Specification of Charge I alleges that the accused "having been duly placed in arrest at Lowry Field, Denver, Colorado, on or about 5 August 1944, did, at Lowry Field, Denver, Colorado, on or about 6 September 1944, break his said arrest before he was set at liberty by proper authority". To this Specification the accused pleaded guilty except the words "duly placed in arrest at" and "his said arrest before he was set at liberty by proper authority", substituting therefor, respectively, the words "restricted to the limits of" and "said restriction by going to Denver, Colorado", of the excepted words not guilty, of the substituted words guilty. He further pleaded not guilty to a violation of Article of War 69 as alleged in the Charge, but guilty of a violation of Article of War 96 (R. 5). He was found guilty of both the Charge and the Specification thereunder as well as Charge II and the Specification thereunder to which he pleaded guilty.

The evidence fails to show that the accused was placed in arrest as alleged and therefore fails to establish a breach of arrest. On the other hand, the accused's qualified plea of guilty to a breach of restriction is sustained by the evidence.

Article of War 69 states that,

"* * * Any person placed in arrest under the provisions of this article, shall thereby be restricted

to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority * * *".

This statement is also contained in Army Regulations 600-355, paragraph 1b.

Army Regulations 600-355, paragraph 7, states that a person in arrest -

"a. Cannot exercise command of any kind.
b. Will restrict himself as prescribed in paragraph 1b.
c. Will not bear arms.
d. Will not visit his commanding or other directly superior officer unless directed to do so.
e. Will make requests of every nature in writing, unless otherwise authorized.
f. Will, unless otherwise directed, fall in and follow in the rear of his organization at formations and on the march."

From a consideration of the above regulations it is apparent that a restriction is only one of a number of elements involved in an arrest. The offense, therefore, of breach of restriction, to which the accused pleaded guilty, is a lesser included offense in the larger offense alleged of breach of arrest. The accused's qualified plea of guilty to the Specification of Charge I and his plea of not guilty of Charge I but guilty of a violation of Article of War 96 was a proper plea. In view of this plea, and the failure of the evidence to establish a breach of arrest the record of trial is legally sufficient to support only so much of the finding of guilty of the Specification of Charge I and Charge I as involves a finding that the accused, at the time and place alleged, did break restrictions by going to Denver, Colorado, in violation of Article of War 96.

3. The court sentenced the accused "To be dismissed the service". Since the accused is a warrant officer his separation from the service by sentence of a court-martial is effected by a dishonorable discharge and not by dismissal. Although the sentence imposed is inappropriate, it has the same effect as one of dishonorable discharge (2 Bull JAG, sec. 408 (2).

4. The court was legally constituted. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Specification, Charge I, and Charge I, as involves a finding that the accused at the

time and place alleged did break restrictions by going to Denver, Colorado, in violation of Article of War 96, legally sufficient to support the other findings; and legally sufficient to support so much of the sentence as involves dishonorable discharge from the service.

(Signed) Abner E. Lipscomb, Judge Advocate.

" Robert J. O'Connor, Judge Advocate.

" Gabriel H. Golden, Judge Advocate.

1st Ind.

War Department, J.A.G.O., Jan 2 1945 - To the Commanding General, Army Air Forces Training Command, Fort Worth 2, Texas.

1. In the case of Flight Officer Thurman T. Pritchard (T-700), Air Corps, Section B, 3705th Army Air Forces Base Unit (Technical School), I concur in the foregoing holding by the Board of Review, and for the reasons therein stated, recommend that only so much of the findings of guilty of the Specification, Charge I, and Charge I, be approved as involves a finding that the accused at the time and place alleged did break restriction by going to Denver, Colorado, in violation of Article of War 96, and that the other findings and so much of the sentence as involves dishonorable discharge from the service be approved. Upon compliance with this recommendation you will have authority to order the execution of the sentence.

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

(CM 271594).

(Signed) Myron C. Cramer,
Myron C. Cramer,
Major General,
The Judge Advocate General.

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

SPJGK - CM 271661

19 FEB 1945

UNITED STATES v. Major JAMES N. KRUEGER (O-16393), Corps of Engineers.	FIFTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Knox, Kentucky, 5, 6 and 12 December 1944. Dismissal.

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

---

1. The Board of Review has examined the record of trial in the case of the 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 Major James N. Krueger, Corps of Engineers, Detachment of Patients, Nichols General Hospital, was, at Louisville, Kentucky, on or about 15 October 1944, in a public place, to wit: The Brown Hotel, Louisville, Kentucky, drunk and disorderly while in uniform.

Specification 2: In that Major James N. Krueger, * * *, was, at Military Police Headquarters, 631 West Magnolia Street, Louisville, Kentucky, on or about 15 October 1944, drunk and disorderly while in uniform.

Specification 3: In that Major James N. Krueger, * * *, did, at Louisville, Kentucky, on or about 15 October 1944, wrongfully strike Private First Class A. H. Rainey, 3562nd Service Unit, Training Detachment, Louisville, Kentucky, on the body with his hand.

Specification 4: In that Major James N. Krueger, * * *, did, at Louisville, Kentucky, on or about 30 October 1944, wrongfully impersonate a Colonel in the United States Army by wearing the insignia of a Colonel.

Specification 5: (Finding of not guilty.)

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

Specification: In that Major James N. Krueger, * * *, did, without proper leave, absent himself from his station at Nichols General Hospital, Louisville, Kentucky, from on or about 16 October 1944, to on or about 19 October 1944.

He pleaded not guilty to and was found guilty of all Charges and Specifications except Specification 5, of which he was found not guilty. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service. The reviewing authority returned the record of trial to the court for reconsideration of the sentence with a view to making it less severe, but the court upon rehearing adhered to the sentence already imposed. The reviewing authority thereupon approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, pertinent to the Charges and Specifications of which the accused was found guilty, is, briefly summarized, as follows:

For the prosecution. Accused was admitted to Nichols General Hospital, Louisville, Kentucky, on 2 October 1944, suffering from an infection of the gums (R. 10, 64). He remained in the hospital from that time until 14 October when he left on a pass (R. 64). On the night of 14 October, which was Saturday, accused, accompanied by his wife and another lady, appeared in the Blue Grass Room at the Brown Hotel in Louisville. The Blue Grass Room is a night club where people go to eat and drink and dance. Approximately one hundred people were there that night (R. 17). Accused was wearing the uniform of an officer of the United States Army and the insignia of rank of a colonel (R. 13). During the course of the evening, he had seven or eight double "shots" of Old Grand-Dad whiskey (R. 22). About 11:45 in the evening, accused's party began to get a little loud and the captain in the Blue Grass Room notified the manager and assistant manager of the hotel. The manager and his assistant took a seat in the rear of the room, but did not take any action at that time (R. 13). Some civilians were sitting at the table next to accused, and he leaned over and started calling them "4-Frs'". The manager or his assistant called the military police (R. 14). No drinks are served after midnight and at about that time accused called for his check. He looked at the check and said he couldn't read the "damn thing" and tore it up (R. 14, Ex. C). Accused requested the waitress to get him some cigarettes which she did, and he thanked her for them. The waitress remained near the table, talking to the lady who was with accused and his wife and accused hit her in the stomach and said, "What the God damn hell are you doing standing there?" He also smashed "at least one or two glasses" on the table (R. 23, 24, 33). After more argument, the head waiter collected the bill which accused paid by personal check in the amount of $30.00. His party then left the Blue Grass Room, and Mr. Harter, the manager of the hotel, made the remark he "didn't appreciate him tearing up checks." Accused called Mr. Harter a "4-F and a punk" and wanted to know what his

position was (R. 15, 26, 37). He then went to the check room and got his coat and came back and grabbed hold of Mr. Harter's necktie, and again called him a "punk" and a "4-F" (R. 26, 29). At about that time the military police arrived.

When the military police arrived, accused was in the lobby of the hotel. In order to go from the lobby to the street entrance of the hotel it is necessary to go down a short flight of stairs. After some conversation, during which accused made frequent reference to "the God damn civilians", he accompanied Lieutenant Brouilette of the Military Police down the stairs to the street entrance. He then wanted to go back upstairs, and when Lieutenant Brouilette remonstrated, started calling the Lieutenant a "damn civilian in military clothes" and "pushed him around a little." Accused had alcohol on his breath and seemed to be in an antagonistic mood. After being pushed, Lieutenant Brouilette directed a military police sergeant to take accused to the station, whereupon accused struck the officer on the head and knocked his hat off. The military police got accused out the door and he jerked away from them. They again took hold of him and attempted to get him in a staff car. All this time he was using abusive language, and he again broke away from one of the military police and struck Lieutenant Brouilette. Accused was then put in the staff car and taken to the Military Police station (R. 40). On the way from the Brown Hotel to the Military Police station, he twice struck the driver of the car, Private First Class A. H. Rainey, on the head with his hand (R. 47, 58, 59). Upon arrival at the police station, accused refused to get out of the staff car, and Captain Potter, who was the senior officer present, was called (R. 51, 52). Captain Potter requested accused to come inside, and after a little hesitation he complied (R. 52). In the Military Police station he continued to use insulting language toward Lieutenant Brouilette and other members of the military police and called one of the sergeants a "son of a bitch" (R. 40, 45, 46, 49, 50). Accused did not have his AGO card and had trouble in identifying himself. He used more abusive and insulting language, and Captain Potter called the Provost Marshal at Fort Knox (R. 53). Accused's wife and the other lady had accompanied him to the Military Police station and Mrs. Krueger informed Captain Potter that her husband was "a very sick man" and a patient at the Nichols General Hospital. This was confirmed verbally by telephone and it was decided to return accused to Nichols General Hospital (R. 55, 56). He was taken to the hospital where the Medical Officer of the Day identified him and permitted him to return to his quarters in Louisville (R. 56).

The witnesses expressed varying opinions as to accused's state of sobriety at the time of the conduct above described. Mr. Harter and Mr. Tillmar, manager and assistant manager, respectively, of the Brown Hotel, each expressed the opinion that after midnight accused was drunk at the hotel (R. 20, 27). Mr. Hauler, hotel house detective, said that while he would not say that accused was drunk, it was obvious that he had been

drinking and that he had never before seen an officer of accused's rank act as accused acted that night (R. 31). John D. Abel, another assistant hotel manager, stated that accused "seemed perfectly normal" to him (R. 37). None of the military personnel who dealt with accused on the morning in question would express the opinion that he was drunk (R. 43, 46, 51, 54, 60, 62). Lieutenant Brouilette's expressed conception of a drunk was one who from use of intoxicants had become mentally irresponsible or no longer knew what he was doing (R. 43). All agreed that accused had good use of himself physically and talked rationally and intelligently except when cursing and berating them and others. Private first class Rainey said that he thought accused "was just in a fighting mood because he was drinking" (R. 60). Captain Frank E. May, who drove accused from military police headquarters to the hospital and thence to accused's apartment, expressed the opinion that accused was "sober" (R. 62). Accused did not return to the hospital until 19 October (Ex. B). He was examined that day by a medical officer who made a diagnosis of acute alcoholism (R. 11).

On 30 October, accused was seen at Churchill Downs Race Track wearing the insignia of rank of a colonel (R. 37, 38, 66). Accused's temporary appointment as colonel, Army of the United States, was vacated and he reverted to his permanent rank of Major, Regular Army, effective 8 July 1944. He received notice of this change on 8 August 1944, just before leaving his overseas station for return to the United States (R. 63, 65).

At the time of voluntarily entering the hospital for treatment (2 Oct 1944), the accused was on terminal leave. By Special Orders No. 208, War Department, 30 August 1944, he was, upon his own application, retired from active service to take effect 31 December 1944, and was granted leave of absence for four months, effective on or about 31 August 1944 (R. 10, 66; Ex. A).

4. For the defense. His right to testify under oath, to make an unsworn statement, or to remain silent having been explained to him by his counsel, the accused waived further explanation by the court and elected to testify under oath. He stated that on the night of 2 October 1944, due to hemorrhages from his gums, he, being at the time on terminal leave, voluntarily entered the Nichols General Hospital, Fort Knox, Kentucky. Arrangements for his entry into the hospital were made by his wife, who gave his name as "Colonel" Krueger, which accounted for his being listed as "Colonel" on the hospital records (R. 64). He later had the error corrected. He "inquired and could find no reason to believe that [he] was on any other status than on leave." On 14 October he left the hospital on pass (neither the pass nor the period of time covered by it appears of record), which he obtained as a matter of routine (R. 64). The surgeon who was attending him approved the pass and told him to return to the hospital sometime the following Monday (16 Oct) for a "check-up." Thinking that he was on leave, he did not return to the hospital on Monday, but intended to return sometime during that week, get a "check-up" and pay his hospital bill (R. 64). He had suffered no hemorrhages

after approximately 7 October (R. 65). On 19 October, the Personnel Adjutant of the hospital visited him at his apartment and advised him that he was being carried as absent without leave on the hospital records. He told the Personnel Adjutant that he thought this was an error, and called Colonel Southard (commanding officer of the hospital). Colonel Southard directed him to return to the hospital, and he was dressing preparatory to doing so when military police arrived at his apartment, took him into custody and returned him to the hospital (R. 64).

The treatment accorded him by the military police on the night of 14 October or the morning of 15 October was rough. One of the military police sergeants grabbed Mrs. Krueger by the shoulder and bruised it. Accused stated that he had no recollection of striking anyone that night but did recall jerking loose from military police who had seized hold of him. He did not like their grabbing him (R. 63, 64, 66). He recalled making some remarks to persons sitting near him in the Blue Grass Room after they had commented on his being with two women but did not recall exactly what he said to them and did not recall doing the other things, except cursing, testified to by the witnesses (R. 66). He felt quite certain that he was overcharged about ten dollars at the hotel, and, since he only had about $25 in cash with him, argued about the correctness of the bill (R. 63).

Since he was "expecting to go into civilian clothes at any time" and had not been in the vicinity of a Post Exchange or other Army installation at which to purchase the insignia of a major since reverting to that grade, he had, upon several occasions, "appeared * * * in uniform with Colonel's Eagles" (R. 64). He procured the proper insignia for his grade and began wearing them immediately after being advised to do so by the commanding officer at Fort Knox (R. 64). This advice or warning from the post commander was communicated to him while he was still in the hospital, which was no longer the case on 30 October (R. 66).

It was stipulated that if Mrs. Maxwell Glenn of Fort Lauderdale, Florida, were present and testified she would testify that she was a guest of the accused and his wife in the Blue Grass Room on the night of 14 October 1944 and remained with them until they all returned to the Krueger apartment, where she joined the accused and his wife in two highballs before repairing to her own apartment; that the accused showed no signs of drunken conduct at any time during the evening and that she so stated while at the Krueger apartment and told accused that he "could be proud of the fact that he refrained from losing his temper with the M.P.s and various employees of the Brown Hotel" (R. 62).

5. The evidence of record is clearly sufficient to establish that accused was both drunk and disorderly at both the hotel and military police headquarters, as alleged in Specifications 1 and 2 of Charge I. It is true that a majority of the witnesses expressed the opinion that accused was not

drunk, but it is obvious from a reading of their testimony that these either had a misconception or no clear conception of the degree of intoxication necessary to constitute drunkenness in a legal sense. The court was not bound to arrive at a verdict based upon the expressed opinions of the witnesses alone, but was entitled, and in duty bound, to consider the evidence as a whole, circumstantial and otherwise, and to base its verdict upon the whole of the evidence before it. When so considered, the record amply sustains the findings on these specifications. It was not essential that accused be grossly drunk in order to be guilty of the offenses alleged as violations of Article of War 96 (CM 261879, Watt; CM 263485, Hunsdon).

The record is likewise legally sufficient to support the findings of guilty of Specifications 3 and 4 of Charge I. Clearly, accused's willful and unwarranted striking of the enlisted man was conduct to the prejudice of good order and military discipline and also conduct of a nature to bring discredit upon the military service, and therefore a violation of Article of War 96. Accused freely admitted at the trial that he frequently appeared in public in uniform, wearing the insignia of rank of a colonel, long after he had ceased to hold that rank; and made no effort to refute the evidence introduced by the prosecution showing him so attired at the time and place alleged in the specification. Appearing in public in a uniform other than the one prescribed for the wearer is a violation of Article of War 96 (par. 104c, MCM, 1928; CM 247753, Davis, 31 B.R. 7).

With regard to Charge II and its specification, the evidence shows that accused, a Regular Army officer, on terminal leave, pending the effective date of his retirement from active duty, voluntarily entered the Nichols General Hospital, an Army installation, on 2 October 1944, for medical treatment, and was immediately hospitalized. On Saturday, 14 October, he was granted a week-end pass, effective until Monday, 16 October. He failed to return to the hospital on that date, and on Wednesday, 19 October, representatives of the Military Police called at the apartment at which he was staying in Louisville and escorted him to the Nichols General Hospital where he remained until his discharge on 27 October. As a patient in the hospital, he was as a matter of course subject to all the valid rules and regulations of the institution as well as to any applicable Army Regulations and statutory provisions. The question presented is whether his hospitalization interrupted his leave and placed him on a duty status, thus making him amenable to a charge of absence without leave under Article of War 61, rather than to one of violation of a regulation or order under the appropriate Article of War.

On 12 September 1944, The Adjutant General (1st Ind AGPO-S-201, Ames, James J., 24 Aug 1944) officially expressed the view that,

"The entry of an officer, regardless of his component, into

an Army hospital during his terminal leave does not automatically terminate the leave nor does it restore him to a duty status."

However, on 19 January 1945, in a memorandum to The Judge Advocate General from the Military Affairs Section, the following contrary views were expressed:

"3. Subparagraphs 10c and 11a, Army Regulations 605-115, 17 June 1944, provide:

'10. Terminal leave.

' * * *

'c. Orders separating officers from active list.--Orders, separating officers from the active list having been published in any case, will not be revoked or amended for the purpose of granting or extending leaves of absence; however, the provisions of paragraph 11a will still apply with respect to any period of temporary duty or hospitalization during terminal leave.

'11. Temporary duty while on leave.--a. General.-- An officer ordered to temporary duty while on leave will be regarded as on duty from the date on which he starts to obey the order. When relieved from such duty or on completion thereof, he reverts to the status of leave and will be credited with the time on duty under such order.'

"4. Although it is undoubtedly within the power of competent authority to provide that the admission of an officer on terminal leave to an Army hospital shall interrupt terminal leave (see JAG 701, 20 Jan 1928) and automatically modify unexecuted self-executing orders relieving such officer from active duty, it does not appear that such power has been exercised unless subparagraphs 10c and 11a, Army Regulations 605-115, 17 June 1944, operate to produce that result. In cases which arose prior to the promulgation of the mentioned subparagraphs this office expressed the view that competent orders relieving an officer from active duty, which were self-executing, effected his relief from active duty on the date specified therein without further action on the part of the officer concerned or the military authorities (SPJGA 1944/13694, 21 Dec 1944), and that the admission to an Army hospital of an officer on terminal leave did not of itself interrupt such leave or modify orders relieving him from active duty (JAG 326.21, 25 Nov 1929; SPJGA 1942/2084, 21 May 1942; 1 Bull. JAG 68).

"Prior to 17 June 1944, there was no provision in Army Regulations 605-115 relating to the effect of admission to an Army hospital on terminal leave. When the current regulations 605-115 were being drafted paragraph 10 was 'rewritten to bring out the intent and clarify' (memorandum (SPGAM 300.3 General (27 March 44)-76) dated

21 March 1944, to The Adjutant General from the Director, Military Personnel Division). The principal change in the pertinent portion of paragraph 10 was the addition to subparagraph 10c of the words:

> '* * * however, the provisions of paragraph 11a will still apply with respect to any period of temporary duty or hospitalization during terminal leave.'

"Although subparagraph 11a does not expressly apply to other than periods of temporary duty ordered while an officer is on leave, it seems clear that in view of the provisions of paragraph 10c, and insofar as is reasonably possible, the rule prescribed in subparagraph 11a for periods of active duty ordered while on leave should be applied in cases involving periods of hospitalization while on terminal leave. Thus an officer hospitalized in an Army hospital while on terminal leave 'will be regarded as on duty from the date' of his admission. Although subparagraph 11a provides that 'When relieved from such duty or on completion thereof, he reverts to the status of leave and will be credited with the time on duty under such order', the application of this portion of the mentioned subparagraph to all periods of hospitalization which commence while an officer is on terminal leave is not clear. It appears, however, that the effect of the quoted provision would be to restore to a leave status an officer released from a hospital whose orders providing for relief from active duty had not yet become effective. It is not clear that the quoted provision was intended automatically to modify orders providing for relief from active duty, and as no express provision of subparagraph 11a of the mentioned regulations relates to periods of terminal leave and provides for delaying relief from active duty, it is not believed that any such modification was intended.

* * *

"The interpretation of subparagraphs 10c and 11a of the mentioned regulations herein adopted is in conformity with the views of the Military Personnel Division, Army Service Forces (Capt. Gates), which is presently drafting changes to the mentioned regulations specifically designed automatically to modify orders relieving an officer from active duty if he is admitted to an Army hospital while on terminal leave, but is in partial conflict with the views of The Adjutant General, who in another case (First Indorsement (AGPO-S-201-AMES, James J. (24 Aug 44)) dated 12 Sep 1944, to the Commanding General, First Service Command) expressed the view that the mentioned subparagraphs do not even have the effect of automatically placing in a duty status an officer who is admitted to an Army hospital while on terminal leave."

On 2 February 1945 (SPJGA 44/13944) in an opinion rendered to the Director, Military Personnel, Army Service Forces, The Judge Advocate General held:

"It is the opinion of this office that under the provisions of subparagraphs 10c and 11a, Army Regulations 605-115, 17 June 1944, the admission of Captain Hal L. Shockley, 0224233, to McGuire General Hospital automatically interrupted his leave and placed him, for the balance of the period which would otherwise have been his terminal leave, in the status of 'sick in hospital', but that the above-mentioned sub-paragraphs did not have the effect of modifying the unexecuted self-executing order which provided for his relief from active duty and that consequently Captain Shockley was relieved from active duty at 2400 28 October 1944."

The Board concurs in the opinion of The Judge Advocate General, despite the conflict with the views of The Adjutant General, in the belief that it properly interprets the language of the amendment to Army Regulations 605-115 (supra) and gives vitality to its purpose. Furthermore, it is eminently proper that the War Department should provide that one on leave who voluntarily accepts hospitalization should by such acceptance subject himself to military control. The Government is vitally interested in the physical welfare of its military personnel for obvious reasons. As pointed out by the Comptroller of the Treasury (12 Comp. Dec. 562, 29 Mar 1906), in adopting the views of the Surgeon General, which had been quoted with approval by the Secretary of War,

"It must be borne in mind * * * that the maintenance of the soldier's physical condition is not merely a personal advantage to himself and to be regarded therefore as exclusively in the nature of an allowance or emolument; it is at the same time an unquestionable benefit to the United States. The soldier is under obligations to his Government to render military service for a specified time. * * * He must, therefore, be kept up to the mark so that he may be able to perform his part of the contract."

From a financial viewpoint, the Government has even a greater interest in an officer than in an enlisted man, both because of the heavier expenditure necessitated to train him and the larger allowances granted him upon retirement, whether because of physical disability, age, or period of service. For more cogent reasons the Government is interested in the maintenance of his health during the period of any terminal leave, pending his retirement, other than, possibly, for disability, since impairment of his health at that time might result in increasing the Government's obligation to him as well as in rendering him less fit for future service. While an officer is on leave he is not compelled to obtain the medical attention which he is authorized by Army Regulations to obtain at Army hospitals; but it is eminently fit and proper that the Government may stipulate that when he does avail himself of this privilege he interrupts his period of leave and returns to a duty status to the end that he may receive treatment of such kind and for such period as his physical condition requires. The

Government so stipulated in subparagraphs 10c and 11a, Army Regulations 605-115, 17 June 1944, which were in full force and effect at the time of accused's admission to the hospital. While, therefore, both the conflict between the views of The Adjutant General and those of The Judge Advocate General as to the status of an officer on terminal leave who is hospitalized and accused's uncontroverted contention that as a result of inquiries at the hospital he had concluded that he was not on a duty status may be considered as mitigating circumstances, they do not alter or affect the conclusion that under Army Regulations accused was legally in such a status and that technically he became subject to a charge of absence without leave under Article of War 61 when he failed to return to the hospital at the expiration of his pass. As accused's absence from 16 October to 19 October has not only been proved but admitted by accused, the Board is of the opinion that the record of trial is sufficient to support the finding of guilty of Charge II and its specification.

6. The Official Army Register shows the service of accused as follows:

> "Maj. A.U.S. 31 Jan. 41; accepted 6 Feb. 41; lt. col. A.U.S. 1 Feb. 42; col. A.U.S. 1 May 43.-- Cadet M.A. 29 July 22; 2 lt. C.E. 12 June 26; 1 Lt. 1 Oct. 31; capt.12 June 36; maj. 12 June 43."

War Department records disclose that this officer is 39 years of age, married and the father of two minor daughters. During his service as an officer 42 efficiency reports upon him have been rendered. Four reports, covering a period of about 7 months, show a rating of superior; 20 reports, covering a period of about 9 years, show general ratings of excellent; 1 report, covering a period of about 3 months, shows a rating of above average; 7 reports, covering a period of about 2 years, show a general rating of average; and 10 reports, covering a period of about 3 years and 9 months, show a general rating of satisfactory. The efficiency reports contain numerous remarks attesting to accused's general efficiency, high intelligence and capability. He has been specially commended on five occasions for his efficiency, once in 1934, twice in 1935, once in 1936, and once in 1938. Five of the efficiency reports rendered on accused contain adverse remarks with reference to accused's financial responsibility. He has served 3 years in the Philippine Islands (1931-34), 9 months in Alaska (1940-41), 8 months in Alberta, Canada (1941-42), approximately 7 months in the European theater (1944), and has exercised a variety of commands and functions in the Army while stationed in the United States. As a result of findings and recommendations made by a Reclassification Board, convened at ETO Reclassification Center No. 1, APO 871, on 2 June 1944, approved by proper authority, the temporary appointment of accused as colonel, Army of the United States, was terminated effective 8 July 1944, and he reverted to his permanent grade of major, Corps of Engineers, Regular Army, effective 9 July 1944. The findings of the Reclassification Board primarily

responsible for this action were, that the accused is a chronic alcoholic and a man who disregards and ignores the ordinary rules of good conduct; that he has been lax in the conduct of his personal financial affairs; and that his word may not always be relied upon. The manner in which accused has conducted his financial affairs has occasioned a very considerable amount of correspondence between his creditors and the War Department, dating as far back as 1931. The Reclassification Board having also recommended that he be removed from the active list of the Regular Army under the provisions of paragraph 12d (5), AR 605-230, 9 June 1943, the accused, under date of 23 July 1944, requested voluntary retirement under the provisions of AR 605-245, 17 June 1941. This application by accused was granted under date of 29 August 1944 and accused was retired from active service to take effect 31 December 1944, the action being announced in paragraph 9, Special Orders 208, War Department, 1944. This action was rescinded under date of 21 December 1944 after accused was convicted by general court-martial in the instant case. Under date of 25 November 1944, after the charges in the instant case had been preferred against him, accused submitted his resignation direct to The Adjutant General of the Army. It was returned to accused with directions to forward it through channels, and was not resubmitted.

7. The court was properly constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of either Article of War 61 or 96.

, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

SPJGK - CM 271661 1st Ind.

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

TO: The Secretary of War. MAR 21 1945

1. Herewith transmitted are the record of trial and the opinion of the Board of Review in the case of Major James N. Krueger (O-16393), 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 and sentence and to warrant confirmation of the sentence. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in a public place while in uniform at two different places during the same morning (Charge I - Specifications 1 and 2), of wrongfully striking an enlisted man with his hand (Charge I - Specification 3), and of wrongfully impersonating a colonel by wearing the insignia of that rank (Charge I - Specification 4), all in violation of Article of War 96; and of being absent without leave for threedays, in violation of Article of War 61 (Charge II and its Specification). He was sentenced to be dismissed the service. The reviewing authority returned the record of trial to the court for reconsideration of the sentence with a view to making it less severe, but upon rehearing the court adhered to the sentence already imposed. The reviewing authority thereupon approved the sentence and forwarded the record of trial for action under Article of War 48. In addition to the misconduct of the accused as set forth above I have been officially advised that accused since his trial absented himself without leave from his organization at Fort Knox, Kentucky on 7 March 1945 and remained absent until 15 March 1945. It is obvious that this officer is unworthy of his commission. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Sentence confirmed. G.C.M.O. 190, 9 Jun 1945)

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

SPJGN
CM 271690

8 FEB 1945

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Venice Army Air Field, Venice, Florida, 5 December 1944. Dismissal, total forfeitures.
Second Lieutenant ALEXANDER F. WILLIAMSON (O-573774), Air Corps.	

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

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

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

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

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

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

Specification 1: In that Second Lieutenant Alexander F. Williamson, Squadron O, 337th AAF Base Unit (CCTS F), being indebted to the First National Bank of Tampa, Florida, in the sum of forty-one dollars ($41.00), which amount became due and payable on or about 3 April 1944, did, at Tampa, Forida, from about 3 April 1944 to about 31 October 1944 dishonorably fail and neglect to pay said debt.

Specification 2: In that Second Lieutenant Alexander F. Williamson * * * did, at Sarasota, Florida, on or about 18 July 1944, with intent to deceive, wrongfully and unlawfully make and utter to J. T. Benefiel, doing business as the Cypress Club, a certain check in words and figures as follows, to wit:

SARASOTA, FLA., July 18 1944 No.___

~~SARASOTA STATE BANK~~
Granite Trust Co., Quincy, Mass.

Pay to the
Order of _____Cash_____ $20.00/100

Twanty -00/100 Dollars

/s/ Alexander F. Williamson

and by means thereof did fraudulently obtain from said J. T. Benefiel, doing business as the Cypress Club, twenty dollars ($20.00) in cash money in payment of said check, he, the said Second Lieutenant Alexander F. Williamson, then well knowing that he did not have and not intending that he should have sufficient funds in the Granite Trust Company, Quincy, Massachusetts, for the payment of said check.

Specification 3: In that Second Lieutenant Alexander F. Williamson * * * did, at Sarasota, Florida, on or about 30 October 1944, wrongfully violate the provisions of Base Regulation No. 35-15, dated 29 September 1944, by going to Sarasota, Florida, without signing the Officers' Register in base headquarters.

Specification 4: In that Second Lieutenant Alexander F. Williamson * * * did, at Venice Army Air Field, Venice, Florida, on or about 1615, 28 October 1944, with intent to deceive Major William H. Borden, his superior officer, officially state to the said Major William H. Borden, that "he had been here all day and had been out on the range working with a detail of prisoners", or words to that effect, which statement was known by the said Second Lieutenant Alexander F. Williamson to be untrue.

Specification 5: In that Second Lieutenant Alexander F. Williamson * * * did, at Nokomis, Florida, on or about 28 October 1944, wrongfully and unlawfully operate a motor vehicle, to wit, a Packard Coupe, at an excessive rate of speed, to wit, about 60 miles per hour, to the prejudice of good order and military discipline.

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

Specification: In that Second Lieutenant Alexander F. Williamson * * * did, without proper leave, absent himself from his organization and duties at Venice Army Air Field, Venice, Florida, from about 0800 28 October 1944, to about 1615, 28 October 1944.

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

Specification: In that Second Lieutenant Alexander F. Williamson * * * did, at Venice Army Air Field, Venice, Florida, on or about 27 October 1944, with intent to deceive V. B. Dixon, Colonel, Air Corps, his superior officer, officially state to the said Colonel V. B. Dixon that "At the present time I am indebted to the Tampa National Bank in the amount of $40.00 due on a note which I have not paid and I am indebted to the Cypress Club in Sarasota in the amount of $80.00. With these

exceptions I am free of all debts and have no outstanding obligations to any individual or organization.", which statement was known by the said Second Lieutenant Alexander F. Williamson to be untrue.

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

Specification: In that Second Lieutenant Alexander F. Williamson * * * having been placed in arrest at Venice Army Air Field, Venice, Florida, on or about 30 October 1944, did, at Venice Army Air Field, Venice, Florida, on or about 14 November 1944, break his said arrest before he was set at liberty by proper authority.

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

3. The evidence for the prosecution shows that the accused on 7 January 1944 borrowed $100 from the First National Bank of Tampa, Florida, and, as evidence of his obligation, executed a promissory note in that sum due 2 February 1944. On the maturity date he repaid only $20 and, in lieu of the balance, signed a new thirty day note for $80. On 2 March 1944 he defaulted but on 8 March 1944 he remitted another $20 and payment of the balance of $60 plus an interest charge of $1 was extended to 3 April 1944. Nothing having been paid by him on this last date, the bank sent him several notices and letters which finally induced him to reduce his obligation by another $20 on 13 July 1944. When during the ensuing weeks he failed to satisfy the remaining portion of his debt, the bank called the matter to his attention by a telegram on 17 August 1944 and, upon receiving no response, appealed to his Commanding Officer, Colonel Vincent B. Dixon, in a letter dated 27 September 1944 reading in pertinent part as follows:

"Lieutenant Alexander F. Williamson, formerly located at Drew Field and we believe now at Venice, does not respond to notices sent him regarding the balance of $41.00 due on his note which we hold.

"We regret to bring so small a matter to your attention but inasmuch as Lieutenant Williamson continues to ignore notices, letters, and telegrams sent to him, we know of no other course than to bring the matter to your attention for such assistance as you may be able to render us in effecting collection" (R. 7, 24; Pros. Exs. 1, 9).

The colonel immediately intervened with the result that on 7 November 1944 the accused paid his past due balance in full by money order (Pros. Ex. 1).

A check in the sum of $20 drawn on the Granite Trust Company of Quincy, Massachusetts, was executed by the accused on 18 July 1944 and was cashed for him on that date by the Cypress Club of Sarasota, Florida (R. 8; Pros. Ex. 2). Since his balance with the drawee bank at the time was only $7.70, the instrument upon presentation was dishonored. Upon being deposited a second time, it was again rejected (R. 9; Pros. Ex. 2). When the Cypress Club demanded reimbursement, the accused stated that "he would come down and pay it", but he failed to keep his promise (R. 9). Although he eventually satisfied the obligation by sending in a money order for the full amount of the check, he did so only after Colonel Dixon confronted him on 27 October 1944 with the following letter from Mr. Jack M. McCarel of the Cypress Club dated 25 October 1944:

> "This letter is written in regards to Lt. Alexander F. Williamson, 0573774.
>
> "We are holding bad checks dated last July amounting to the sum of $80.00. We have talked to him on several occasions offering him reasonable terms to make these checks good. So far, he has completely ignored us.
>
> "Col. Dixon, we would appreciate it very greatly if you could have a talk with Lt. Williamson to see if you could arrange to have him make some effort toward payment of these checks" (R. 10; Pros. Ex. 8).

After discussing his debts with Colonel Dixon, the accused on that day freely and voluntarily signed the following statement:

> "At the present time I am indebted to the Tampa National Bank in the amount of $40.00 due on a note which I have not paid and I am indebted to the Cypress Club in Sarasota in the amount of $80.00. With these exceptions I am free of all debts and have no outstanding obligations to any individual or organization.
>
> I further state that it is my intention to liquidate the above debts as follows:
>
> I will pay to the Cypress Club

$20.00	on Monday,	30 October 1944.
20.00	on	2 December 1944.
20.00	on	2 January 1944.
20.00	on	2 February 1944.

> which will liquidate my indebtedness to the Cypress Club.

I will pay to the Tampa National Bank

$20.00 on 30 October 1944.
20.00 on 2 November 1944.

which will liquidate my indebtedness to the bank.

I further state to the Venice Army Air Field Commander that unless unforseen circumstances of an exceptional nature arise, I will be able to meet all of the payments as outlined above." (R. 21-22, 25; Pros. Ex. 10).

The accused's representation as to his outstanding liabilities was false, for he then owed the American Red Cross at Venice Army Air Field the sum of $100 (R. 23).

Earlier in the month a storm had caused considerable damage to the four small arms ranges at that base. Since there was need of an officer to oversee the work of rehabilitation and since the accused "did not have anything to do at the particular time", Captain Abner I. Rappoport, the assistant to the Supervisor of Ground Training, "talked it over" with him on 27 October 1944 and instructed him to report back the next morning between 8:00 and 8:30" (R. 13). Although he apparently understood the order given him, the accused absented himself from the Venice Army Air Field the following day from 8:00 a.m. to shortly after 4:00 p.m. (R. 14, 16, 18-20; Pros. Ex. 5). At approximately 4:00 p.m. he was observed in his car about two miles north of Nokomis, Florida, proceeding in the direction of Venice. Although he was then in a zone in which the maximum speed was fixed at twenty-five miles per hour, he was traveling at a rate which varied from fifty-five to sixty miles per hour. He was pursued through Nokomis and into Venice by a patrolman and arrested but immediately released (R. 11-12; Pros. Ex. 4). The only explanation offered by the accused was that "he was in a hurry because he was late for work" (R. 11).

At 4:30 p.m. he was seen at the Venice Army Air Field by Private William A. Flowers and Major William H. Borden (R. 16,20). According to the latter, the accused

"approached me directly outside Colonel Hunt's office. . . and asked me whether I wanted to see him. I said, 'No,' but wanted to know whether he was on the field that day prior to that moment. He said he was. I asked him why he didn't report to Captain Rappoport to go out on the ranges. He said that he was out on the range ... He said that he hadn't reported to Captain Rappoport because he hadn't thought it would be necessary, but he had been out on the range that day. He didn't specify what time, but it was previous to the meeting at Colonel Hunt's office. I asked him whether he had been with Captain Rappoport's man, Flowers, or any other man. He

said 'No', he was out on the range with a detail of prisoners. After which I instructed him to report to Captain Rappoport and explain those facts to him" (R. 20, 22).

No prisoners were assigned to detail on the ranges on 28 October 1944 (R. 18).

Regulation No. 35-15 issued by Headquarters Venice Army Air Field on 29 September 1944 stated that:

"1. Officers assigned to the Third Air Force on duty at this Base will sign out or in, as the case may be, whenever they leave the Base during duty hours whether by air or other transportation.

2. Venice and the immediate vicinity are considered the Base and no signing out will be required for trips to Venice, Nokomis, and places not more than ten (10) miles from the Base. For absence in Sarasota, Tampa, etc., officers must sign the register" (R. 21; Pros. Ex. 6).

Although all officers at the base were "held responsible for compliance" with these explicit provisions, the accused, evidently in conformity with the terms of his arrest two days before for speeding, went to the sheriff's office in Sarasota, Florida, on 30 October 1944 without first signing the register (R. 12, 21; Pros. Ex. 7).

As a result of his previous absence without leave, his false official statements, and his failure to make the payments promised in his statement of 27 October 1944, he was placed in arrest in quarters on 31 October or 1 November 1944 and specifically instructed that he was "limited ... to going to the latrine and to the mess hall". This arrangement was shortly thereafter relaxed to permit him to visit his wife in Venice, Florida, between 3:00 and 4:00 p.m. each day (R. 26-27). Although this was the only authorized modification of his arrest, he was seen at the Hotel Venice-Myakka in Venice, Florida, at approximately 10:00 p.m. on the night of 14 November 1944 (R. 27-28).

4. After being apprised of his rights as a witness, the accused elected to remain silent. The only testimony adduced on his behalf was that of his wife, Mrs. Alexander Williamson. According to her, the accused, upon his transfer from Harrisburg, Pennsylvania, to Venice, Florida, had found it necessary to borrow money to pay her traveling expenses. Subsequently she had visited her sick mother in Redlands, California, and her railroad fare there and back to Venice had been paid by him. During the evening of 14 November 1944 she became ill while having dinner with him at the Venice Army Air Field. Because he feared that she "might faint" he insisted upon accompanying her to the Venice-Myakka Hotel. At the time of the trial she was undergoing medical treatment by a Major Winters (R. 30).

5. Specification 1 of Charge I alleges that the accused "being indebted to the First National Bank of Tampa, Florida, in the sum of forty-one dollars ..., did ... from about 3 April 1944 to about 31 October 1944 dishonorably fail and neglect to pay said debt." This offense was laid under Article of War 96.

In executing a new note in February of 1944 and in obtaining a further extension in March of 1944 the accused obviously committed no offense, for in each instance the bank for good and valuable consideration freely and voluntarily accepted a new maturity date which superseded the one originally fixed. Since his default must accordingly be calculated from 3 April 1944, his failure to pay covered a period of approximately seven months interrupted only by his remittance of $20 on 13 July 1944. This delay was not of itself sufficient to constitute a violation of any of the Articles of War. As was said in I Bull. JAG, July 1942, p. 106, sec. 453 (13),

> "The failure of an officer to pay a pecuniary obligation or to keep a promise to do so is not a military offense unless characterized by dishonorable conduct, such as deceit or a fraudulent design to evade payment. CM 221833 (1942)".

Similarly in III Bull. JAG, January 1944, p. 7, sec. 378 (3) it was held that:

> "Unless failure or neglect to pay a debt involves evasion or indifference to just obligations, there is no offense cognizable under the Articles of War."

XIII B.R. 61, CM 220760, Fanning, and XXX B.R. 137, CM 246686, Beasley, are to the same effect.

There is nothing in the record to indicate that the accused had any income other than his pay as a second lieutenant. Against this limited source he was compelled to draw not only for necessaries but for the unusual expenditures for railroad fare made by his wife. To quote from the analogous case of XIII B.R. 61, CM 220760, Fanning, "It may have been a serious error of judgment for accused to incur at this time expenses for his wife's travel to his new station, but the expenses were legitimate". Since, so far as the evidence discloses, the accused had no immediate means for the payment of his debts, and since no proof of bad faith, deliberate evasion, fraud, or deceit has been introduced, his procrastination in satisfying the obligation to the bank cannot fairly be deemed to have been dishonorable. This conclusion is not affected by his omission to liquidate the indebtedness on the precise dates promised in the statement of 27 October 1944 which he had executed in the presence of Colonel Dixon. Aside from the fact that the delay in this instance was for the inconsequential period of five days, the representations were never transmitted to the bank and never relied upon by it. On this point the following language from III Bull. JAG, September 1940, p. 382, is pertinent:

"There was no showing that the false statements were communicated to the bank, or that any specific promise of payment (other than the note) was made to the bank ... The fact that accused falsely stated to his commanding officer that he had paid the debt does not, under the circumstances of the case, render his failure to pay the debt dishonorable within the meaning of A.W. 95 or discreditable within the meaning of A.W. 96. CM 254704 (1944)."

The finding of guilty of Specification 1 of Charge I cannot accordingly be sustained.

6. Specification 2 of Charge I alleges that the accused, did, "with intent to deceive, wrongfully and unlawfully make and utter to J. T. Benefiel doing business as the Cypress Club, a certain check" in the sum of $20.00 drawn on the Granite Trust Company of Quincy, Massachusetts, "and by means thereof did fraudulently obtain ...twenty dollars ..., he, the said /accused/ then well knowing that he did not have and not intending that he should have sufficient funds in the /said bank/ for the payment of said check." This was set forth as a violation of Article of War 96.

"Where, as here, the status of the accused's account results from his own acts, he is properly chargeable with knowledge of it": XXIX B.R. 325, CM 245908, Riley. On the date on which the check for $20 was executed the accused had only $7.70 on deposit with the drawee bank. Since, in the absence of any explanation, he must be presumed to have been familiar with the condition of his account, and since he evidenced bad faith by failing to redeem the instrument for more than three months, the only logical inference which can be drawn is that he intended to work a fraud upon the Cypress Club. Specification 2 of Charge I has been proved beyond a reasonable doubt.

7. Specification 3 of Charge I alleged that the accused did, "on or about 30 October 1944, wrongfully violate the provisions of Base Regulation No. 35-15 ... by going to Sarasota, Florida, without signing the Officers' Register in base headquarters". Specification 5 of Charge I alleges that he did, "on or about 28 October 1944, wrongfully and unlawfully operate a motor vehicle, to wit, a Packard Coupe, at an excessive rate of speed, to wit, about 60 miles per hour, to the prejudice of good order and military discipline." These acts were stated to be in contravention of Article of War 96. The Specification of Charge II alleges that the accused "did without proper leave, absent himself from his organization and duties at Venice Army Air Field, Venice, Florida, from about 0800 28 October 1944, to about 1615, 28 October 1944." This was set forth as a violation of Article of War 61.

These widely differing offenses constitute successive aspects of one continuous transaction. For some reason, best known to himself, the accused absented himself without leave from the post on 28 October

1944. That he was not at his assigned place of duty is established largely by his pre-trial statement introduced as Prosecution's Exhibit No. 5 but in part by proof of his arrest for speeding between Nokomis and Venice, Florida, at about 4:00 p.m. His remark at the time that "he was late for work" reveals that he was aware of his dereliction and was anxious to return to the Field before his absence was detected. The high rate of speed at which he was traveling was necessitated only by the promptings of a guilty conscience and was in direct conflict not only with the local traffic laws but with the national wartime policy of conserving gasoline and tires. Having been arrested for exceeding the speed limit fixed by the civilian authorities for Venice and Nokomis, Florida, he was apparently required to appear at the sheriff's office in Sarasota, Florida, on 30 October 1944. Despite the plain language of Regulation No. 35-15 promulgated by Headquarters Venice Army Air Field, he proceeded to Sarasota without signing the officers' register. The regulation had been issued about a month before on 29 September 1944, and he was chargeable with notice of its contents. Specifications 3 and 5 of Charge I and the Specification of Charge II have been clearly sustained.

8. Specification 4 of Charge I alleges that the accused did on or about 28 October 1944, "with intent to deceive", make a certain false official statement concerning his whereabouts that day to Major William H. Borden, his superior officer, "which statement was known by the said [accused] to be untrue." This offense was laid under Article of War 96. The Specification of Additional Charge I alleges that the accused did, on or about 27 October 1944, "with intent to deceive", make a certain false official statement concerning his outstanding liabilities to Colonel V. B. Dixon, his superior officer, "which statement was known by the said [accused] to be untrue." This act was represented to be a violation of Article of War 95.

Both Major Borden and Colonel Dixon were superior officers of the accused, and both were acting in an official capacity when they interrogated him. The statements of the accused that he had been "out on the range with a detail of prisoners" and that he had only two creditors were obviously false and intended to deceive. They could properly have been pleaded under either Article of War 95 or 96. The making of both as set forth in Specification 4 of Charge I and in Specification of Additional Charge I is established beyond a reasonable doubt.

9. The Specification of Additional Charge II alleges that the accused, "having been placed in arrest ... on or about 30 October 1944, did ..., on or about 14 November 1944, break his said arrest before he was set at liberty by proper authority". This offense was stated to be in contravention of Article of War 69.

Under the terms of his arrest the accused was permitted to leave his quarters only to go to the latrine and to the mess hall and, during the hour between 3:00 and 4:00 p.m., to visit his wife in Venice,

Florida. Although these delimitations upon his activities were carefully and precisely explained to him, he was observed at a hotel in Venice, Florida, on 14 November 1944 at approximately 10:00 p.m. His wife's testimony that he had accompanied her from the post to the hotel because of her sudden illness is not entitled to credence, for, when seen on the night in question, he spent from ten to fifteen minutes "watching a game of cards". Had his only purpose in coming to Venice been to assist his wife, he would have stayed with her until she was improved and then immediately returned to his quarters. The Specification of Additional Charge II has been clearly proved.

10. The accused, who is married, is about 31 years old. After attending Cushing Academy from 1932-1935, he spent one and one-half years at Bates College and one year at Oxford Business College. He was employed from December of 1936 to June of 1937 by Rozzy & Herocks of Boston, Massachusetts, as a sales campaign manager, from June of 1936 to December of 1937 by the Baker Extract Company of Springfield, Massachusetts, as a salesman, and from 1938 to 1939 by the Travelers Insurance Company of Hartford, Connecticut, as an agent. From December of 1938 to October of 1940 he was the owner of a tree moving and landscape business at White Plains, New York. He had enlisted service from 14 October 1940 to 20 January 1943 when he was commissioned a second lieutenant. He has been on active duty as an officer since this last date.

11. 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 1 of Charge I and legally sufficient to support all of the other findings and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Articles of War 61, 69, or 96.

Abner E. Lifsconb, Judge Advocate.

Robert J. Lemmer, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN-CM 271690

1st Ind
MAR 3 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 Second Lieutenant Alexander F. Williamson (0-573774), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specification 1 of Charge I and legally sufficient to support all of the other findings and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures imposed be remitted and that the sentence as thus modified be ordered executed.

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

Myron C. Cramer.

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings of guilty of Specification 1 of Charge I disapproved. Sentence confirmed but forfeitures remitted. G.C.M.O. 151, 16 Apr 1945)

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

SPJGN
CM 271731

2 FEB 1945

UNITED STATES v. Technician Fifth Grade HENRY L. COOPER (35248677), Private WALTER REEVES (33661260), Private HOWARD R. LAWRENCE (35736498), Private EARNEST CROWDER, JR. (33899484), all of the 880th Quartermaster Gas Supply Company.	65TH INFANTRY DIVISION Trial by G.C.M., convened at Camp Shelby, Mississippi, 8 December 1944. All: Dishonorable discharge, total forfeitures and confinement for life. Penitentiary.

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

---

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

2. The accused Technician Fifth Grade Henry L. Cooper was tried upon the following Charge and Specifications:

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Technician 5th grade Henry Cooper, 880th Quartermaster Gas Supply Company, did at Camp Shelby, Mississippi, on or about 18 October 1944, forcibly and feloniously, against her will, have carnal knowledge of Johnnie Lee Craft, a female.

Specification 2: In that Technician 5th grade Henry Cooper, 880th Quartermaster Gas Supply Company, did, at Camp Shelby, Mississippi, on or about 18 October 1944, aid and abet Private Earnest Crowder, Jr., Private Howard

Lawrence, and Private Walter Reeves, feloniously and against her will to have carnal knowledge of Johnnie Lee Craft, a female.

The accused, Private Walter Reeves, was tried upon the following Charge and Specifications:

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Walter Reeves, 880th Quartermaster Gas Supply Company, did at Camp Shelby, Mississippi, on or about 18 October 1944, forcibly and feloniously, against her will, have carnal knowledge of Johnnie Lee Craft, a female.

Specification 2: In that Private Walter Reeves, 880th Quartermaster Gas Supply Company, did, at Camp Shelby, Mississippi, on or about 18 October 1944, aid and abet Private Ernest Crowder, Jr., Private Howard Lawrence, and Corporal Henry Cooper, feloniously and against her will, to have carnal knowledge of Johnnie Lee Craft, a female.

The accused, Private Howard R. Lawrence, was tried upon the following Charge and Specifications:

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Howard Lawrence, 880th Quartermaster Gas Supply Company, did, at Camp Shelby, Mississippi, on or about 18 October 1944, forcibly and feloniously, against her will, have carnal knowledge of Johnnie Lee Craft, a female.

Specification 2: (Disapproved by reviewing authority).

The accused, Private Earnest Crowder, Jr., was tried upon the following Charge and Specifications:

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Earnest Crowder, Jr., 880th Quartermaster Gas Supply Company, did, at Camp Shelby, Mississippi, on or about 18 October 1944, forcibly and feloniously, against her will, have carnal knowledge of Johnnie Lee Craft, a female.

Specification 2: In that Private Earnest Crowder, Jr, 880th Quartermaster Gas Supply Company, did, at Camp Shelby, Mississippi, on or about 18 October 1944, aid and abet

Private Walter Reeves, Private Howard Lawrence, and Corporal Henry Cooper, feloniously and against her will to have carnal knowledge of Johnnie Lee Craft, a female.

Each of the accused pleaded not guilty to, and was found guilty of, the Charges and the Specifications thereunder. All of the accused were sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for the term of their natural lives. The reviewing authority disapproved the finding of guilty of Specification 2 in the case of accused Private Howard Lawrence; disapproved so much of the finding of guilty of each Specification numbered 2 in the cases of the other three accused as involved a finding that they did aid and abet the accused Private Howard Lawrence to have carnal knowledge of Johnnie Lee Craft, a female; approved the sentences imposed upon all four accused; designated the United States Penitentiary at Atlanta, Georgia, as the place of confinement; and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that Miss Johnnie Lee Craft, colored, and the Misses Elouise and Ethel Smith, her cousins, attended a dance at the Service Club at Camp Shelby, Mississippi, on the night of 13 October 1944 (R. 13-15, 24, 35, 37, 47). About 11:30 p.m. they set out for a nearby bus stop accompanied by three "boys" including Private John Lee Blake, who although married and the father of a child, regarded Miss Craft as his "girl friend" (R. 10, 14-17, 23-24, 37, 47). They were followed by a group of soldiers whose original number was variously estimated at from ten to twenty (R. 17, 38). Among the group were Technician Fifth Grade Henry L. Cooper, Private Walter Reeves, Private Howard Lawrence, and Private Earnest Crowder, Jr., the four accused (R. 17-18, 25, 39).

When the three girls and their escorts entered the wooden "hut" which served as a bus stop, the soldiers trailing them also crowded into the enclosure (R. 17, 24, 38, 56; Pros. Ex. A). After some seven minutes Miss Craft and Miss Elouise Smith and their companions walked out leaving Miss Ethel Smith and her friend behind. Some of the soldiers immediately pursued the two departing couples. Observing that they were again being followed, Miss Craft and Private Blake reversed their course and returned to the bus hut. Some of the soldiers continued after Elouise Smith and her escort; the remainder, constituting "quite a number", remained at the heels of Blake and Miss Craft. In the meantime Ethel Smith and her companion had left, taking still a third entourage of soldiers with them (R. 17, 24, 38-39).

Miss Craft and Private Blake seated themselves on a bench in the bus hut. Their pursuers, who had increased in number, waited outside and watched. In about five minutes the accused Reeves entered and placed himself in front of, or beside, Miss Smith. About a dozen others

flocked in after him. Reaching over, he attempted to pull her dress up to the middle of her thigh. She "asked him not to," got up, and sat down on Private Blake's lap (R. 18, 25, 39-40, 48).

Reeves seized her by the throat, "mashed on it" until she could hardly breathe, and, with the assistance of two men, threw her to the floor. Jointly with the accused Cooper he tore her "pants" from her body and, while Cooper and either the accused Lawrence or the accused Crowder seized her legs, spread them apart, and pinned them down, he "topped" her, inserted his penis in her vagina, and had sexual intercourse with her (R. 18-19, 27-28, 31, 40-41). Miss Craft struggled, screamed, and begged for mercy, but to no avail. When Reeves was done, his example was followed successively by Crowder, Lawrence, and finally Cooper. Each completed an act of intercourse with her while her limbs were firmly held by two of the other accused (R. 18-21, 28, 33, 40-43, 49-50, 58). Blake made no attempt to summon help because "there was no one in the company at that time. All the boys were asleep and there were no lieutenants. Some of them was down at the Service Club, and the rest of them at the PX" (R. 28).

Private First Class Clarence E. Mahan, a white soldier, who happened to be passing by the bus hut, observed about thirty-five to forty colored soldiers gathered around it, heard a girl "hollering", and decided to investigate. Crawling up a ladder at the back of the structure, he "stuck [his] head in" and witnessed one of the assaults. Miss Craft was pleading, "Please don't soldier" — "Oh, God help me". A soldier warned her to "Hush your mouth because Lawrence is going to keep this up until you do" (R. 57, 60, 62). Descending to the ground, Mahan walked to the front of the hut, met the accused Crowder, engaged him in conversation for about fifteen minutes, and loudly said, among other things, "I just came off duty from the stockade, and they're holding a man in the stockade for the same thing they are doing here; it better cease" (R. 58, 60). When the bus arrived, Mahan boarded it and, upon being conveyed to the bus station, reported what he had seen to the military police (R. 59, 70).

Meanwhile, when Cooper had "got up", he and the other three accused and all their audience "walked out" leaving Miss Craft prostrate on the floor "breathing hard". Blake returned in a few minutes and, with the aid of a soldier named Burleson, picked her up, guided her across the street, and "leaned her up against the telephone pole". After giving her "a half a dollar" with which to "catch the bus", Blake joined a convoy which was leaving for Atlanta that night. Among those who accompanied him was the accused Reeves (R. 21-23, 29, 32-34, 43, 53). After they had departed, a jeep drew up alongside Miss Craft, and the driver invited her to enter saying, "There's two girls down here, named Elouise and Ethel, and they told me to tell you to come on down". She accepted and was driven to the camp bus station, where she was eventually found by the military police who had been summoned by Private Mahan (R. 43-44, 54, 59, 64). Although she had not up to this point intended to make a

complaint, she now accompanied them to their headquarters and signed a formal statement (R. 54, 59, 64, 69). Upon its completion she was taken to the regional hospital for examination. Her clothes were then "disruffled and dirty" and "torn up a little bit", and she appeared to be "mildly" "nervous and upset" (R. 35-36, 59). In answer to the doctor's question she admitted that she was not a virgin. Nothing was said by her about having been choked, and no lacerations, abrasions, or bruises were discernible on her body. Her sexual organs contained a bloody discharge, the product of menstruation, and also some spermatic fluid, which indicated "recently held intercourse" (R. 35-36, 50-51).

Between 18 October and 25 or 26 October 1944 an anonymous note was received by military police headquarters naming the accused Crowder, Lawrence, and Reeves as her ravishers. Their statements later involved the accused Cooper (R. 66, 69). All four were accordingly placed in "lineups" and, upon being viewed by Miss Craft, were positively identified by her as her assailants (R. 44-45, 55, 64-65, 67). Crowder was apparently easy to remember because he had "two gold front teeth" and "reddish hair" (R. 53, 66).

4. The accused, after being appraised of their rights as witnesses, all elected to remain silent. Two witnesses were called on their behalf. Private David Templeton, Jr., testified that the first Saturday night after 18 October 1944 he was present at a conversation between Miss Craft and the accused Lawrence. Following some small talk, she stated that "I'm going to find out them guys that imposed on me the other night * * * I know one of them * * * Thats one of them in yonder with that red hair". Despite these remarks, she did not accuse Lawrence nor evidence any signs of having recognized him (R. 72-73, 75). When she walked away, Lawrence repeated what she had said to Crowder who immediately declared that, "I know goddam well it wasn't me; I know I ain't raped no girl" (R. 74). Upon having Miss Craft pointed out to him, Crowder followed her and "told her he wanted to talk to her". Her only reply was, "You better go on off; you ain't got nothing to say to me" (R. 73-74).

The other witness for the defense, Private William C. Rodgers, Jr., had spent about an hour and a half with Private Blake on the Saturday night before the trial and had shared most of four quarts of beer with him (R. 75-76, 78-79.) Their conversation was summarized by Private Rodgers as follows:

> "I was talking to him, asking him a few questions on the case, feeling him out to see what I could learn from him. Finally, he broke down and told me that the girl's name is Johnnie Lee Craft. Her real name is Frances, I also learned; not Johnnie Lee. I asked him what was she to him--was she his wife, girl, or what? He said she wasn't anything to him; that if her and him got anything out of this case, [that is 'money

out of the Government'] then she intended to marry him.

* * *

"I asked him why he, being colored--and all of them, the girl and all--why didn't they try to iron it out; it was foolish trying to get money out of the Government. He said no, they didn't see it that way. I asked him, 'Do you really think those are the boys?' He said, 'I'm not sure.' I said, 'Still you aren't going to press charges you aren't sure of?' He said yes, Cooper once did something to him at another camp, at another station, that he always had against him; and he'd sworc that he'd get even with him somehow, and this seemed to be the best chance he had.

* * *

"He said that if he wanted to, he could set Reeves and the other three free, with some knowledge that he had; but in doing that it would also set Cooper free, and before he'd see Cooper come out free he'd rather send them all up.

* * *

"[Miss Craft was] misled by Johnny Blake" (R. 77, 83).

Prior to this discussion Rodgers and Blake had never met. Rodgers' purpose in broaching the subject was to aid Cooper with whom he had become friendly while both were incarcerated in the stockade (R. 75, 80-83).

5. Private Blake, upon being recalled as a witness for the prosecution on rebuttal, admitted that he had spoken to Rodgers on the Saturday before the trial but stated that the conversation had lasted only five or ten minutes and had never touched upon his relationship with Miss Craft nor upon the merits of the case against the four accused (R. 85-87, 89-90). The entire conversation was described by Blake as follows:

"Well, he stopped me. He said--I was talking to another boy; and this other boy, he asked me, he said, 'Blake, what are you doing here so early?' I told him, 'I got a telegram to come back from my furlough.' He said, 'What for?' I said, 'I don't know; I guess for this trial.' He said, 'When is it coming up?' I said, 'I don't know.' Rodgers spoke up. He said, 'I'm a witness on that case too.' He said, 'When is it coming up?' After he told me he was a witness, I told him, 'The way I understand it, it's coming up Friday.' That's all" (R. 89).

Blake had once been a prisoner at Camp Gordon, Georgia, and Cooper had guarded him. Blake, however, was "not mad at anybody" (R. 92).

6. The Specifications numbered 1 of the identical Charges against the four accused allege that each did, "on or about 18 October 1944, forcibly and feloniously, against her will have carnal knowledge of

Johnnie Lee Craft, a female". The Specifications numbered 2 of the identical Charges against the accused Cooper, Reeves, and Crowder, as modified by the action of the reviewing authority, allege that each did on the same day "aid and abet" the other two "feloniously and against her will to have carnal knowledge of Johnnie Lee Craft, a female". These acts were set forth as violations of Article of War 92.

"Rape is the unlawful carnal knowledge of a woman by force and without her consent". Although the record is replete with inconsistencies, all of the substantial and essential elements of the offense have been proved beyond a reasonable doubt. Such conflicts in the evidence as do exist, and they are plentiful, relate to minor circumstantial details and are attributable to the ignorance and low mentality of several of the witnesses. Stripped of these nonessential minutiae, the bald facts are that the four accused followed the prosecutrix into the bus hut, threw her to the floor, and, overcoming her resistance and disregarding her outcry, ravished her one after the other in the presence of a crowd of spectators whose callousness can be described only as brutish. Whether the other three accused aided and abetted Lawrence or whether he aided them as originally alleged in the Specifications numbered 2 of each Charge is of no consequence. These Specifications add nothing to the Specifications numbered 1, for anyone who aids and abets the commission of rape is himself guilty of that crime as a principal to the same extent as the actual perpetrator; III JAG Bull. pp. 61-62, sec. 450. Be that as it may, Lawrence has been shown to have personally had intercourse with the prosecutrix "by force and without her consent" and is therefore himself a perpetrator of rape.

Although the prosecutrix may not have intended to complain and would perhaps have not done so had she not been in effect apprehended by the military police, this circumstance alone can provide no comfort to any of the accused. Prompt complaint to the authorities is a mere evidentiary circumstance pertinent to the issue of consent, and, when the record, as here, shows both the maximum resistance and outcry which could reasonably be expected under the conditions prevailing, the prosecutrix' good faith has been satisfactorily established. Although coping with the overpowering might of at least three of the accused, she never ceased to struggle and her screams were audible at a distance to Private Mahan. This display of opposition to the lust of the four accused effectively refutes any possible imputation of consent. That she did not travel directly to the authorities was probably due to the same benighted intellectual state as characterized her attackers. All of the Specifications of each of the Charges numbered I as approved by the reviewing authority have been sustained.

7. The record shows that the accused Private Earnest Crowder, Jr., age 19, Private Howard R. Lawrence, age 19, Private Walter Reeves,

age 28, and Technician Fifth Grade Henry L. Cooper, age 22, were respectively inducted on 13 November 1943, 19 November 1943, 3 January 1944, and 24 March 1944 for the duration of the war plus six months. The service was entered by Cooper and Lawrence at Fort Benjamin Harrison, Indiana, by Reeves at Roanoke, Virginia, and by Crowder at Baltimore, Maryland. None of the four accused had any prior military record.

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

Abner E. Lipscomb, Judge Advocate.

Robert J. Lamar, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

(Sentence ordered executed, by order of the Secretary of War. G.C.M.O. 74, 22 Feb 1945)

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

SPJGH
CM 271737

23 JAN 1945

UNITED STATES	)	SECOND AIR FORCE
v.	)	Trial by G.C.M., convened at Colorado Springs, Colorado, 4 December 1944. Dismissal and total forfeitures.
Second Lieutenant DAYLON E. CHAFIN (O-774942), Air 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 96th Article of War.

Specification: In that Second Lieutenant Daylon E. Chafin, 222nd Army Air Forces Base Unit, Combat Crew Detachment, did, on or about 20 October 1944, at or near Tucumcari, New Mexico, wrongfully violate paragraph 16a (1), Army Air Forces Regulation 60-16, 6 March 1944, by flying a B-17 type military aircraft of which he was pilot, at an altitude of less than 1000 feet above trees, buildings or other obstruction to flight.

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

Specification: In that Second Lieutenant Daylon E. Chafin, * * *, did, on or about 29 October 1944, at Army Air Base, Ardmore , Oklahoma, with intent to deceive Lieutenant Colonel Francis C. Cartaglia, officially state under oath to him, the

said Lieutenant Colonel Francis C. Cartaglia, that he, the said Second Lieutenant Daylon E. Chafin, had not been in the vicinity of Tucumcari, New Mexico, since 15 August 1944; that he had never buzzed the town of Tucumcari, New Mexico ; that he did not violate flying regulations over Tucumcari, New Mexico and that he only flew within the local area on 20 October 1944, or words and statements to that effect, which statements were known by the said Second Lieutenant Daylon E. Chafin, to be then and there untrue.

He pleaded guilty to Charge I and its Specification; guilty to the Specification of Charge II; not guilty to Charge II, but guilty of a violation of the 96th Article of War. He was found guilty of Charge I and its Specification, guilty of the Specification of Charge II, not guilty of Charge II, but guilty of a violation of the 96th Article of War. No evidence of previous convictions was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. On 20 October 1944, at about 5 or 5:30 in the afternoon, a B-17 bomber flew over the town of Tucumcari, New Mexico. The number of the plane was observed by several persons on the ground and determined to be 0551. The plane was flown over the business and residential sections of the town four or five times at a height of less than one thousand (1000) feet, and variously estimated to be from twenty (20) feet above the tallest buildings to five hundred (500) feet above the ground (R. 7-11; Pros. Exs. 1, 2, 3, 4, 6). A B-17 airplane No. 0551 was based at Ardmore Army Air Field, Ardmore, Oklahoma, on 20 October 1944 (R. 13) and accused, who was stationed at Ardmore Army Air Field (R. 63-64), was the pilot of this plane and made the flight over Tucumcari, New Mexico, on that date (R. 37-52, 54-60, 64, 72, 73, 75-76).

On 29 October 1944, Lieutenant Colonel Francis C. Cartaglia, A.G., acting assistant inspector general, detailed to investigate the low flying incident occurring on 20 October 1944, interviewed several persons in Tucumcari and then went to Ardmore where he interviewed accused (R. 12-13). Accused's rights were fully explained to him and thereafter he made a sworn statement concerning the incident. He told the investigating officer that he had not been in or over the vicinity of Tucumcari, New Mexico, in either automobile, train or military aircraft, since 15 August 1944, when he last visited his home on authorized leave. He further stated that he had not violated flying regulations near or over Tucumcari and that on 20 October 1944 he had not flown out of the local flying area of Ardmore, Oklahoma (R. 13-14; Pros. Ex. 4). On 31 October 1944 the same investigating officer having interviewed accused's crew members and made further investigation which tended to implicate accused in the low flying violation, interviewed him a second time (R. 17-18). At this interview accused was again duly warned of his rights and elected to make a further statement. He told the investigating officer that he did pilot an airplane over the vicinity of Tucumcari, New Mexico, on 20 October 1944, but flew at an altitude of approximately 500 feet; that he did not buzz the town; that he did not fly

over the town, but flew around the edge of it four times. He admitted that he had been briefed on local flying regulations, but could not remember having seen or read AAF regulations prohibiting low flying (R. 17-20; Pros. Ex. 5).

4. Mrs. Dorothy Floeck Woodard, Mrs. Gerald Floeck, Mr. Hershel H. Finley, Mr. St. Clair L. Brady, all flyers, and Mr. Clella W. Cory, President of the Tucumcari Chamber of Commerce, all of whom are residents of Tucumcari, New Mexico, testified for accused by deposition (Def. Exs. A, B, C, D, E). Each of these persons observed a B-17 flying around the outskirts of Tucumcari, not over the town, on the afternoon of 20 October 1944 and the altitude of flight was variously estimated to be from 700 feet to 1200 feet. The testimony of four other witnesses for defense, viz: R. M. Doughty, F. C. Parker, V. W. Paul and P. M. Johnson, all of Tucumcari, established that a large airplane flew over the residential and business districts of Tucumcari on the afternoon of 20 October 1944, but did not in their estimation descend to an altitude of less than 800 feet from the ground at any time (R. 22-37). Two of accused's crew, Second Lieutenant Albert E. Wickland and Flight Officer Harry D. Kennedy, who accompanied accused on this flight 20 October 1944, testified in substance that their airplane was flown in the vicinity of the town of Tucumcari on the date in question, but that it was flown around the town and not over the populated districts. During their flight they passed over the home of accused's sister and were sufficiently low to observe three persons standing outside her house, and some children running around a house across the street. Lieutenant Wickland estimated their altitude to be about 800 feet above the ground and Flight Officer Kennedy estimated it to be about 300 or 400 feet above the town water tower (R. 37-63).

After having his rights as a witness fully explained, accused elected to be sworn and testify in his own behalf (R. 63). With respect to the Specification of Charge I accused testified that Tucumcari, New Mexico, was accused's home town. On 20 October 1944 Ardmore Army Air Field, Ardmore, Oklahoma, was his station, he having been transferred there on 23 August 1944. On 20 October 1944 he made the flight in question and was pilot of the plane. The flight was set up as an instrument training mission for the purpose of training the co-pilot in instrument flying (R. 64). After flying for some time following the take off, the navigator (Lt. Wickland) informed accused that he was outside the local flying area and approximately midway between Ardmore, Oklahoma and Tucumcari, New Mexico. As they had previously been told that no more leave would be granted and he desired to see his home town again, he flew to Tucumcari. He took over the controls as the plane approached Tucumcari and began to let down (R. 64). The plane was flown around and across the town of Tucumcari five times and was flown at times as low as 500 to 600 feet from the ground (R. 65-66). Accused could see people on the streets and members of his family were outside the house and aware of the fact that accused was flying the plane (R. 66-67).

With respect to the Specification of Charge II accused said he was not accustomed to being interviewed by a lieutenant colonel and that he was nervous when Lieutenant Colonel Francis C. Cartaglia first talked with him about the incident. He got the impression that the investigating officer was interrogating him about a violation of local flying or flying outside of the local area. He denied that he had flown over Tucumcari to avoid whatever punishment or discipline might have been imposed upon him for flying outside the local area. Then as the questioning continued it began to dawn upon him that low flying over Tucumcari was probably involved. He was undecided whether to stick to his denial, but finally decided to stick to what he had previously said. When the investigating officer interviewed him the second time and he realized fully what the investigation was about, he told the officer his first statement was erroneous and that he had flown over Tucumcari on the date in question (R. 67-71).

5. The court called as witnesses two of accused's crew, Technical Sergeant William T. Lane, aerial engineer and Corporal Mounford Griffith, ball turret gunner, each of whom flew this mission with accused 20 October 1944. Each of these witnesses testified that accused as pilot of a B-17 type Army aircraft flew over the town of Tucumcari, New Mexico, 20 October 1944 and estimated their lowest altitude in so doing to be about 200 or 300 feet from the ground (R. 72-76).

6. The evidence clearly establishes that the accused deliberately and intentionally flew a B-17 type Army aircraft over the town of Tucumcari, New Mexico, on 20 October 1944 at an altitude of less than 1000 feet above obstructions to flight contrary to paragraph 16a (1) of Army Air Forces Regulations 60-16, dated 6 March 1944. Such evidence fully supports the court's finding of guilty of the Specification, Charge I.

The evidence also demonstrates that on 29 October 1944, when interviewed by Lieutenant Colonel Francis C. Cartaglia, investigating officer, accused, with intent to deceive, told Lieutenant Colonel Cartaglia that he had not been in the vicinity of Tucumcari, New Mexico, since 15 August 1944, and that he did not buzz the town or violate flying regulations by flying low over the town on 20 October 1944. When interviewed again by this officer on 31 October 1944, accused then admitted that he had flown low over the town of Tucumcari on 20 October 1944, and also admitted that his first statement was false. The uncontradicted testimony of all of accused's crew members and numerous persons living in Tucumcari also prove the falsity of accused's first statement to the investigating officer. True, accused recanted two days after making the false statement and told the truth. This is a circumstance for consideration of the confirming authority, but it did not condone or purge the offense. The facts here do not bring this case within the opinion of the Board of Review in CM 231119, Lockwood, 18 B.R. 139. There the alleged false answer was caused by reasonable misunderstanding of the question and a true answer given when the purport of the question was understood. Here the false statement was made willfully and with the intent denounced by Article of War 95. The evidence sustains the court's finding of guilty of the Specification of Charge II.

7. Attached to the record of trial is a petition for clemency, dated 11 December 1944, addressed to the Commanding General, Second Air

Force, Colorado Springs, Colorado, signed by 82 persons who are described in the letter transmitting the petition as "the leading business and professional men" of Tucumcari, New Mexico.

8. Accused is single and will be 21 years of age 23 March 1945. He graduated from high school in 1942 and thereafter was employed for short periods by American Telephone and Telegraph Company, Denver, Colorado, as a lineman constructor and later by Consolidated Steel Corporation of Wilmington, California, as a scaler. He enlisted in the Air Corps 27 February 1943, was later enrolled as an aviation cadet and upon completion of the prescribed course of flight training at Stockton Army Air Field, California, he was commissioned a second lieutenant, Army of the United States, 15 April 1944.

9. 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 conviction of a violation of Article of War 96 and is mandatory upon conviction of a violation of Article of War 95.

Thomas N. Tappy, Judge Advocate.

William H. Gambrell, Judge Advocate.

Robert C. Swetham, Judge Advocate.

(182)

SPJGH-CM 271737 1st Ind

Hq ASF, JAGO, Washington 25, D. C. FEB 8 1945

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Daylon E. Chafin (0-774942), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

3. The accused on 20 October 1944 intentionally flew a B-17 type Army airplane over the business and residential sections of Tucumcari, New Mexico, at an altitude of less than 1000 feet above obstructions to flight contrary to paragraph 16a (1) of Army Air Forces Regulations 60-16, dated 6 March 1944. On 29 October 1944, when interviewed by an officer detailed to investigate this incident, with intent to deceive, accused told this officer that he had not been in the vicinity of Tucumcari, New Mexico, since 15 August 1944, and that he did not buzz the town or violate flying regulations by flying low over the town on 20 October 1944. He was sentenced to dismissal and total forfeitures. There is attached to the record a petition for clemency, dated 11 December 1944, addressed to the Commanding General, Second Air Force, signed by 82 persons who are described in the letter transmitting the petition as the leading business and professional men of Tucumcari, New Mexico. There is also attached to the record a Memorandum for The Judge Advocate General dated 18 January 1944, from Lieutenant General Barney M. Giles, Deputy Commander, Army Air Forces, in which General Giles recommends that for the offense of violating flying regulations the sentence be commuted to a forfeiture of accused's pay in the amount of $75 per month for nine months. Considering the recommendation of General Giles and the fact that the other offense of which accused stands convicted (false official statement) was an outgrowth of the low flying incident, apparently occasioned by accused's immature thoughtlessness, I believe a reprimand and a forfeiture of accused's pay in the amount of $75 per month for nine months would be appropriate punishment for the two offenses involved. Accordingly, I recommend that the sentence be confirmed, but that it be commuted to a reprimand and a forfeiture of accused's pay in the amount of $75 per month for nine months and that the sentence as thus commuted be carried into execution.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

4 Incls
1. Record of trial
2. Memo fr Gen Giles 18 Jan 45
3. Dft ltr for sig S/W
4. Form of action

6

(Sentence confirmed but commuted to reprimand and forfeiture of $75 per month for nine months. G.C.M.O. 117, 5 Apr 1945)

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

SPJGQ
CM 271769

31 JAN 1945

UNITED STATES v. Second Lieutenant JOHN F. REESE (0-566501), Air Corps.	FAIRFIELD AIR TECHNICAL SERVICE COMMAND (Formerly FAIRFIELD AIR SERVICE COMMAND) Trial by G.C.M., convened at Wright Field, Dayton, Ohio, 14 December 1944. Dismissal.

- - - - - - - - - -

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

- - - - - - - - - -

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant John F. Reese, Air Corps, 4020th Army Air Forces Base Unit, did, without proper leave absent himself from his proper station at Wright Field, Dayton, Ohio, from about 4 November 1944 to about 11 November 1944.

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

Specification: In that Second Lieutenant John F. Reese, Air Corps, 4020th Army Air Forces Base Unit, did, without proper leave absent himself from his proper station at Wright Field, Dayton, Ohio, from about 11 September 1944 to about 18 September 1944.

He pleaded guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The only evidence introduced by the prosecution consisted of two duly authenticated extract copies of the morning report of the 4020th AAF Base Unit (Hq ATSC). The first was for 17 November 1944 and showed accused "Dy to AWOL 0730 11 Sept 44," and "AWOL to dy 0730 18 Sept 44" (Pros. Ex. 1). The second was for 6 November 1944, showing accused "Dy to AWOL, 0730, 4 Nov 44," and for 11 November 1944, showing accused "AWOL to dy, 0730, 11 Nov 44" (Pros. Ex. 2).

4. The accused, after having his rights explained to him, elected to take the stand and testify in his own behalf, stating that he was single, twenty-four years of age, and had enlisted in the Regular Army on 3 July 1940. He was made a technical sergeant on 1 September 1941, served as first sergeant, and was commissioned in 1942 from officer candidate school at Miami Beach. He served as Assistant Civilian Personnel Officer, and subsequently worked in the statistical control office of the Central Procurement District in Detroit, and he served as Area Adjutant with additional duties as Civilian Personnel Officer, Civilian Payroll Officer, Motor Transportation Officer, Mail Officer, Communications Officer, and doing some special services work in Cleveland (R. 8-10). On 12 June 1944 accused was assigned as Chief of Services Unit of the administrative branch of the Personal Equipment Branch at Wright Field where, to use his words, "there wasn't much of anything to do, consisted of supervision over the mail unit, two jeeps and an ozalith machine" (R. 10). Accused was dissatisfied with the job and requested more responsibilities and a request by him for transfer was refused. In explaining why he went absent without leave, he stated:

> "It was just that I hadn't any real duties or real responsibility since I had been assigned to the field; actually the job I had in the Lab had been performed by a CAF-2 before I arrived here at the field; just didn't seem right that that was the place, didn't have anything to do, just come in each morning and kill time, just started growing on me, wasn't any work, couldn't do anything, come in and set there, possibly sort a little mail occasionally when it came in" (R. 11).

He submitted his resignation as an officer on 29 September and another officer was assigned to replace him, leaving him with nothing to do. He absented himself without leave for the same reasons on 4 November 1944. He desired to get back into the Regular Army as an enlisted man because he thought he could do more for the war effort than hr was doing (R. 12).

On cross-examination, accused stated that he had gone to Detroit from 11 September to 18 September and had gone to shows, read, and "went around the city". He knew what he was doing and knew better. When he went to Detroit again without leave on 4 November he knew that charges were being investigated against him for the former absence. He knew that his conduct did not merit any substantial assignment of trust for the government. He declined to say where he had been living prior to 11 September 1944 or after he came back on 18 September 1944, and the authorities on the field did not know where to find him other than during the day (R. 13-15).

5. In addition to the morning report entries, which were not questioned, the accused freely and voluntarily admitted his unauthorized absences both by his plea of guilty and by his testimony. The findings of the court were fully warranted by the evidence.

6. Accused is 24 years of age. War Department records reveal that he is a high school graduate and worked as a messenger for the Western Union Telegraph Company and as a steam fitter's helper in Toledo, Ohio, prior to enlistment in the service as a private on 3 July 1940 at Fort Hayes, Ohio. On 28 October 1942 he was commissioned a second lieutenant in the Army of the United States, having graduated from the Army Air Forces Officer Candidate School at Miami Beach, Florida.

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

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ-CM 271769 1st Ind

Hq ASF, JAGO, Washington 25, D. C. FEB 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 John F. Reese (0-566501), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The accused's conduct in absenting himself without leave for seven days each time on two separate occasions within a three month period and without any reasonable justification, together with the fact that he has so absented himself on other occasions and has been inattentive to his duties and unsatisfactory in the performance thereof, demonstrates that he is not suited for commissioned service. 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 foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed. G.C.M.O. 124, 5 Apr 1945)

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

SPJGK
CM 271803

5 JAN 1945

UNITED STATES v. Private JOSEPH H. ROONEY (31432129), Company G, Fourth Replacement Regiment (Infantry), Army Ground Forces Replacement Depot No. 2, Fort Ord, California.	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 2 Trial by G.C.M., convened at Fort Ord, California, 18 December 1944. Dishonorable discharge and confinement for seven (7) years. Federal Reformatory, El Reno, Oklahoma.

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

---

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

2. The evidence is legally sufficient to support the findings of guilty and the sentence. The sole question to be considered is the propriety of designating a Federal reformatory as the place of confinement.

Confinement in a Federal correctional institution or reformatory is authorized only when confinement in a penitentiary is authorized by law (CM 220093, Unckel, CM 222093, Kiser, 13 B.R. 263; CM 224649, Woodall, 14 B.R. 173). Confinement in a penitentiary is not authorized by Article of War 42 for committing a lewd and lascivious act upon a minor female child under the age of fourteen, with the intent of gratifying the sexual desire of the person committing such act, the offense of which accused herein was found guilty. This offense, although punishable by imprisonment for a term of from one year to life under the laws of the State of California, where it was committed, is not recognized as an offense of a civil nature by any statute of the United States of general application within the continental United States or by any law of the District of Columbia (CM 210762, Valerosa, 9 B.R. 345; CM 224649, Woodall, 14 B.R. 173).

3. 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 seven years in a place other than a penitentiary, Federal reformatory or other correctional institution.

Judge Advocate.

Judge Advocate.

Judge Advocate.

1st Ind.
JAN 5 1945

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

TO: Commanding Officer,
Army Ground Forces Replacement Depot No. 2,
Fort Ord, California.

1. In the case of Private Joseph H. Rooney (31432129), Company G, Fourth Replacement Regiment (Infantry), Army Ground Forces Replacement Depot No. 2, Fort Ord, California, 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 seven 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 publish 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 271803).

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 271859

11 JAN 1945

UNITED STATES v. Second Lieutenant CHARLES H. MANNING (O-816136), Air Corps.	ARMY AIR FORCES PROVING GROUND COMMAND Trial by G.C.M., convened at Eglin Field, Florida, 14 December 1944. Dismissal and total forfeitures.

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

---

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Charles H. Manning, Air Corps, did, at Eglin Field, Florida, between 8 September 1944 and 2 November 1944, then knowing or having reason to believe that he had contracted a venereal disease, wrongfully fail to report this fact to his commanding officer without delay, in violation of Army Regulations 40-210.

Specification 2: (Finding of guilty disapproved by the reviewing authority).

He pleaded guilty to the Charge and Specification 1 thereof, but not guilty to Specification 2. He was found guilty of the Charge and both 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 nine months. The reviewing authority disapproved the findings as to Specification 2, approved only so much of the sentence as provided for dismissal and total forfeitures, and forwarded the record of trial for action under Article of War 48.

3. The reviewing authority having disapproved the findings of guilty of Specification 2, only that part of the evidence which relates to Specification 1 will be reviewed. As to Specification 1, the undisputed evidence discloses that from April 1944 to 2 November 1944 the accused, a second lieutenant, Air Corps, and member of the 610th Army Air Forces Base Unit, was stationed at Eglin Field, Florida. He lived in the Bachelor Officers'

Quarters at Airdrome 3. During October 1944 the conduct of the accused aroused the suspicion of his fellow officers since he abstained from using the conventional urinal in the Bachelor Officers' Quarters and had stopped taking showers with the other officers as he had in the past (R. 18, 29, 37). On 15 September 1944 the accused asked a fellow officer, Second Lieutenant Douglas Bryce Welch, about the symptoms of venereal disease (R. 46). On 20 September 1944, accused was taken by Lieutenant Welch to DeFuniak Springs, Florida, for the stated purpose of seeing a doctor to learn whether or not he had a venereal disease. On 23 or 25 September 1944 a similar trip was made (R. 47,49). At this time the accused indicated to Lieutenant Welch that he might have a venereal disease, and stated that he wanted to be sure before "turning himself in" to the military authorities. Lieutenant Welch told accused that he should have "turned himself in to the medical authorities on the field" (R. 49). On or about 31 October or 1 November 1944 the accused's commanding officer, Captain Thomas S. Currie, Air Corps, spoke to the accused about the possibility of his having a venereal disease and when the latter denied that anything was wrong with him Captain Currie ordered him to appear before the flight surgeon for a medical examination (R. 50, 57). Accused was examined on 2 November 1944 by Captain Frank A. Dolce, Medical Corps, and his ailment was diagnosed as syphilis. The accused was found to have involuting primary syphilis and early secondary syphilis. He had a chancre and several other lesions and his sexual organ was noticeably larger than usual (R. 60). The medical officer testified that in the usual case of syphilis, external symptoms (chancre) would have appeared approximately four weeks before the examination (R. 61); this officer also testified that the state of the accused's disease on the date of his examination was contagious (R. 61). The accused was hospitalized and readily submitted himself to medical treatment and has been discharged from the hospital (R. 53, 56, 66). The court took judicial notice of the provisions of Change 2, AR 40-210, dated 16 March 1943, which provides:

> "(1) Duty to report. - Any individual who knows that he has contracted, or has reason to believe that he may have contracted, a venereal disease will report the fact to his commanding officer without delay in order that proper medical treatment may be given. Trial by court martial or other disciplinary action for failure to report is discretionary with the commanding officer. Persons in the military service will not be subjected to trial by court martial or other disciplinary action upon charges of having failed to take prophylactic treatment after illicit sexual intercourse, of having contracted venereal disease, or of having thus become incapacitated for duty." (R. 79)

The accused did not testify and no evidence was introduced by the defense. The legality of accused's conviction of the Charge and Specification 1 thereof is obvious. His plea of guilty is fully supported and confirmed by the undisputed evidence, which shows that the accused at the time alleged in the

Specification and while stationed at Eglin Field, Florida, knowing or having reason to believe that he had contracted a venereal disease, wrongfully and contrary to AR 40-210 quoted above, failed to report his condition to his commanding officer as required. Such conduct clearly constituted a violation of Article of War 96 (CM 240324, B.R. 26, pp. 19, 23).

4. War Department records show that accused is 22 years and 7 months old and single. He did not attend college. He enlisted as an aviation cadet 2 October 1942 and was commissioned a second lieutenant, Air Corps, Army of the United States, 3 November 1943, and ordered to active duty as of that date.

5. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. Dismissal is authorized for a violation of Article of War 96.

Judge Advocate.

Judge Advocate.

Judge Advocate.

SPJGK - CM 271859 1st Ind.

Hq ASF, JAGO, Washington 25, D.C. JAN 30 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 Charles H. Manning (O-816136), 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 as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. Under all the circumstances in this case, it is recommended that the sentence be confirmed but commuted to a reprimand and forfeiture of $25 pay per month for three months.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General.

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

(Sentence as approved by reviewing authority confirmed but commuted to reprimand and forfeiture of $25 per month for three months. G.C.M.O. 99, 24 Mar 1945)

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

SPJGN
CM 271889

3 MAR 1945

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Esler Field, Louisiana, 29 November 1944. Dismissal.
Major THEODORE L. BARBERA (O-396355), Air Corps.	)	

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

---

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: (Finding of Not Guilty).

Specification 2: In that Theodore L. Barbera, Major, 372d Fighter Group, Pollock Army Air Field, Alexandria, Louisiana, did at the vicinity of Chester Street, Alexandria, Louisiana, on or about 9 September 1944, willfully and wrongfully expose himself in an indecent manner to public view by opening the door of his automobile while seated therein without his trousers in the presence and full view of Miss Thelma Lawson, Alexandria, Louisiana.

Specification 3: In that Theodore L. Barbera, Major, 372d Fighter Group, Pollock Army Air Field, Alexandria, Louisiana, did in the vicinity of Chester Street, Alexandria, Louisiana, on or about 12 September 1944,

willfully and wrongfully expose homself in an indecent manner to public view by opening the door of his automobile while seated therein without his trousers in the presence and full view of Mrs. W. I. Rebauche, Alexandria, Louisiana.

Specification 4: In that Theodore L. Barbera, Major, 372d Fighter Group, Pollock Army Air Field, Alexandria, Louisiana, did at the vicinity of Chester Street, Alexandria, Louisiana, on or about 9 September 1944, wilfully and wrongfully expose himself in an indecent manner to public view by opening the door of his automobile while seated therein without his trousers in the presence and full view of Miss Lorene Kelone, Alexandria, Louisiana.

Specification 5: (Finding of not guilty).

The accused pleaded not guilty to the Charge and all the Specifications and was found guilty of the Charge and Specifications 2, 3, and 4. 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 concerning the Specifications of which the accused was found guilty shows that about 7:15 on the morning of 9 September 1944, Mrs. Thelma Lawson was standing on Chester Street in Alexandria, Louisiana, endeavoring to secure bus transportation to Camp Claiborne, Louisiana. While she was waiting for transportation she observed an automobile with an army officer seated in it which was parked in front of an apartment house. In view of her need for transportation to the place of her employment she approached the car and asked the officer if he was going to Camp Claiborne. The officer's reply was "No". The witness observed that "he looked blank and peculiar" (R. 12). She thereupon left the car but then turned back to explain to the officer that her only reason for asking if the officer was going to Camp Claiborne was because she desired transportation to her place of employment. Shortly thereafter as she was walking along the street she heard a car coast along the curb and stop. As she looked back she saw the officer whom she had previously questioned sitting in the car clad in a shirt but without trousers and with his sexual organs exposed. She definitely identified the officer as being the accused (R. 9-12).

On the same morning at about 7 o'clock, as Miss Lorene Kelone was walking along the same street described above, the accused stopped his car by the curb and "started to get out, and he didn't have anything on but a shirt" (R. 26). The witness immediately jumped behind the car and ran across the street and on down the block (R. 26). The witness did not see the accused's sexual organs (R. 27).

On 12 September 1944 at about 7:15 in the morning the accused repeated his conduct of 9 September by appearing without any trousers before Mrs. W. I. Rebauche as she was walking along Jackson Street in Alexandria, Louisiana. After exposing himself to the witness accused departed and she was not certain whether or not his sexual organs were exposed (R. 18-25).

Following the presentation of the above testimony, the prosecution presented as its witness Captain Robert J. Bernucci, Chief of the Neuropsychiatric Section, Station Hospital, who testified that he had given the accused a neuropsychiatric examination on 20 September 1944. He testified further that as a result of this examination he felt that the accused was sane (R. 32). He then qualified this statement by explaining that, "From the legal standpoint he was sane. That doesn't necessarily mean that he had full control of his faculties" (R. 34). The witness was then excused by the court upon the assurance of defense counsel that he would recall Captain Bernucci as a defense witness (R. 35).

4. As a character witness for the accused Lieutenant Colonel Sam Wilkins Westbrook, the accused's commanding officer, testified that he had rated the accused superior on two occasions and had recently recommended the accused for promotion to the rank of lieutenant colonel. He also testified that he had associated with the accused socially and that his actions in society were "fine" (R. 40-42). Lieutenant Colonel James L. Dunn, Director of Administration, testified that the accused's work had been excellent (R. 73-74). The prosecution and the defense stipulated that if Major Ralph G. Taylor, 372nd Flight Group, Pollock Army Air Base, were present he would testify that he had associated with the accused socially on many occasions and that "at all times the accused acted in a gentlemanly manner" (R. 74). By stipulation the accused's "AGO Form 66-2, Officers' Qualification Record" was presented in evidence as Defense Exhibit 1. This record shows that the accused has been given one efficiency rating of very satisfactory, one efficiency rating of excellent, and six efficiency ratings of superior (R. 42).

The accused, after his rights relative to testifying or remaining silent had been explained to him, elected to testify. He explained that he applied for aviation cadet training in April 1939 and was commissioned as a second lieutenant in July 1940. He was assigned to the 20th Pursuit Group and was stationed at Moffett Field but later moved to Hamilton Field, California, where a new squadron was organized. At this time volunteers for Alaskan service were called for and the accused volunteered. He arrived in Alaska in February 1941 where he served as a fighter pilot engaged in intensive training in combat, navigation, and formation flights until 7 December 1943. The day after the Japanese attacked Dutch Harbor he was drafted with the squadron to Cole Bay in the Aleutians, where he spent the next six months in patrol interception work. In October 1942 he became assistant A-3 of the 11th Air Service Command in which capacity he remained until he left Alaska in February

1944. Upon returning to the United States, he was assigned to the 372nd Flight Group of which organization he was deputy group commander, air inspector, and ground flying safety officer. After the incidents involved in the prosecution of this case had arisen, he had been given an opportunity to resign from the service but did not avail himself of such opportunity because he was attached to the Army and wanted to remain in its service (R. 75-80).

Captain Bernucci, after being called as a witness for the defense, testified on the basis of hypothetical questions and personal psychiatric examination of the accused, as follows:

> "We felt that the asocial act was a manifestation of a strong impulsive behavior over which the patient had no control. It was also felt that he should be treated and considered as a sick person" (R. 45-46).
>
> * * *
>
> "It is felt that when this happens, in such an individual, it is some disturbance in his biological makeup; in other words, some disturbance in the individual himself and not his past or his past experiences. We consider such an individual medically ill, consider such an individual sick, even though the illness may be expressed once overtly or it may be expressed periodically. Mentally, we feel that he is ill. Occasionally, this impulse reaches a level when the individual becomes more or less intellectually blinded, or his thought disassociated, or his conscience even may be clouded so that he acts without any forethought and with apparently insensibility to himself or to the feelings of others. Occasionally, fantasy or thoughts dealing with fantastic things appear in the individual and cloud out any organized intellectual thought" (R. 49).
>
> * * *
>
> "Now, this man's disturbance, I feel, is almost identical to that that the neurotic has at times. It is an impulse or feeling that manifests itself either in an overt sexual act or may show itself up in a form of a neurosis" (R. 49).
>
> * * *
>
> "When we testify as to right and wrong, we actually are trying to determine two different things. In the medical sense and in the legal sense. In the legal sense, this man would be considered sane and able to judge right and wrong. Medically, we feel that that is somewhat attenuated; that under impulse or on a strong sexual drive a man may be compelled to do an act over which his intellect has no control, so that actually instead of full responsibility for his act, that responsibility is attenuated because the intellect has no control over this particular act. In other words, the individual may know right and wrong almost concerning everything else and at that particular moment he is so compelled to do something that

even though he knows that this is wrong, he has no control over his acts" (R. 50).

* * *

"Q. Sir, is it a fair statement that when an individual of this type performs an act as has been described, it is as a result of an irresistible impulse?

A. Yes, sir" (R. 50).

* * *

"In my own experience, cases of this type that came before court were referred to me, on sort of a probation, and in a period of three and one-half years not a single one of these cases ever committed the same act again" (R. 51).

Major Paul Rosenfels, formerly Assistant Psychiatrist to the Cook County Court, Chicago, Illinois, and at the present time psychiatrist at the LaGarde General Hospital, New Orleans, Louisiana, testified both upon the basis of hypothetical questions and his personal examination of the accused, as follows:

"I believe that the patient is suffering from a mental disorder of a quite severe degree, and that his behavior is symptomatic of that mental disorder" (R. 63).

* * *

"This individual from a medical point of view is impelled by an emotional drive of which he is not aware. He suffers from a severe psychoneurosis or mental disorder which has existed since childhood and which only manifested itself in its present clinical form when the stresses and strains of his external life situation brought these tendencies to the fore" (R. 63).

* * *

"We believe that this individual is a good candidate for mental treatment; that with psychiatric therapy he stands an excellent chance of being restored to an efficient condition; state; that he can do service in the Army, that he should be returned to full duty under medical supervision" (R. 64).

* * *

"I don't know just what you mean by irresistible impulse. I know that this is a term in use in legal science and the legal interpretation would have to be left to others than myself. In my professional work I do not use the term irresistible impulse. However, I will say, as I have already said, that he suffers from emotional conflicts over which he can exercise no effective control" (R. 65).

Major Rosenfels also testified that he had served as a member of a board of officers who had examined the accused and that their diagnosis had been as follows:

"Diagnosis: Psychoneurosis, hysterical character, moderate; as manifested by: marked contrast between his capacity for vocational and marital adjustment; severe unconscious feelings of inferiority toward women; anticipation of indulgence from others; narcissistic character organization; episodes of exhibitionism which are the outlet for emotional conflict; depression of mood; chronic tension; lack of insight" (Incl. 1; R. 67).

In explaining the board's finding that "The patient was not psychotic at the time of the alleged offense and was legally able to adhere to the right and refrain from the wrong" he stated,

"Oh yes, the Board found that according to that statement, which is a routine statement which this particular Board includes under all cases of this kind. When testifying before a court-martial, however, I do not, personally, now, choose to make statements about the law which is outside my field, and which in a sense defeats the medical purpose of the testimony" (R. 68).

Then in reply to the question "Sir, medically speaking at the time of the alleged offense was the accused able to adhere to the right and refrain from the wrong?" he replied:

"No more able to adhere to the right as we define it here and to avoid expressing his symptoms than a man with acute appendicitis is able to alter the course of his acute appendicitis by an act of will" (R. 69).

He explained further the apparent inconsistency between the board's legal concept of sanity and his medical concept of sanity, as follows:

"I appreciate, sir, that there may seem to be an apparent contradiction, and that apparent contradiction is because we introduced the word 'legally' into the opinion of the Board. There is such a thing as a legitimate contradiction now between a legal view of sanity and a medical view of sanity, which I believe arises from the fact that our concepts of sanity are derived from English law of one hundred years ago and do not reflect the modern advances in psychiatric thinking. So that I believe that this individual is in fact unable to control his behavior" (R. 72).

5. Specifications 2 and 4 allege that the accused did in the vicinity of Chester Street, Alexandria, Louisiana, on or about 9 September 1944, "willfully and wrongfully expose himself in an indecent manner to public view * * *". Similarly Specification 3 alleges the same offense as having been committed at approximately the same place on 12 September 1944.

Since the evidence shows very clearly that the accused made three indecent exposures of his person at the times and places alleged, the only serious question requiring discussion arises as to his mental accountability for those offenses. The character of the medical testimony raises a serious doubt as to whether the accused was "so far free from mental defect, disease and derangement as to be able concerning the particular acts charged * * * to adhere to the right" and requires careful examination of the law of mental accountability as applied in military law.

A. LEGAL TESTS FOR INSANITY PRIOR TO 1843

During the early history of the common law the madman charged with murder was not acquitted by reason of insanity but a special verdict might be rendered reciting that the accused was insane and thereafter he might be pardoned by the king. There was the same need of a royal pardon for homicide by misadventure or in self defense (Pollock & Maitland's History of English Law, Vol. 2, p. 478). During this early period only a few of the psychoses were known and recognized and consequently we find that insanity was generally regarded as a visitation from the Almighty, while many thought that the insane were under demoniacal influences. In fact, it was not until the late 18th and early 19th centuries that the medical profession began to study insanity with any degree of thoroughness (The History of Insanity as a Defense to Crime in English Criminal Law, 12 Cal. L. Rev. 105). During this early period various legal tests were promulgated as legal guides in determining criminal accountability. Among them were "The wild beast" test which relieved the criminally insane from accountability only if he were "totally deprived of his understanding and memory, and [did] not know that he [was] doing no more than an infant, than a brute, or a wild beast" (Rex v. Arnold, 16 How. St. Tr. 695, 765); the "count twenty pence" test (1 Hale, P.C. 29); and the test of "disability of distinguishing between good and evil" (Hawkins' Plea to the Crown, Vol. 1, p. 1). Clearly these harsh tests exempted only the most obvious lunatics and imbeciles. The gradual amelioration, however, of criminal law and the development of the science of medicine led to a more humane approach to the problems of criminal justice and resulted in 1843 in the famous opinion in the McNaughten case.

B. THE McNAUGHTEN CASE - THE RIGHT AND WRONG TEST

The landmark in the history of the law of insanity which we refer to as the McNaughten case arose as the result of the general dissatisfaction over the acquittal of Daniel McNaughten upon the ground of insanity. McNaughten was tried for the murder of Edward Drummond, Secretary to Sir Robert Peel. The evidence in the case showed that McNaughten had mistaken Drummond for Peel. It further showed that McNaughten had been laboring under the insane delusion that Sir Robert Peel had injured him. After McNaughten had been acquitted, the House of Lords, under its power to require opinions of its judges on abstract questions of law, propounded five questions to the Court of the House of Lords. To the five

questions the court answered, as follows:

1. Insane Delusion

As to "those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land".

2. Presumption of Sanity

"* * * the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction * * *".

3. Right and Wrong Test

"* * * to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong".

4. Insane Delusion (continued)

As to persons laboring "* * * under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment".

5. Medical Testimony - The Hypothetical Question

In reply to the question "Can a medical man conversant with the disease of insanity, who never saw the prisoner pre-

viously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime? or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?" the judges answered that "* * * we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the questions to be put in that general form, though the same cannot be insisted on as a matter of right".

Within the same year "the right and wrong test", as set forth in answer number 3, was judicially employed (Rex. v. Higginson, 1 Car. & K. 129). In that case the court held that a feeble-minded defendant whom the jury had found to know the difference between right and wrong was legally accountable for murder. Similarly, the various jurisdictions within the United States followed the lead of the McNaughten opinion by adopting some form of the "right and wrong test". In fact, since 1843 no English or American court has demanded a more exacting standard of proof of insanity than is required by the McNaughten opinion.

C. IRRESISTIBLE IMPULSE TEST

The McNaughten opinion was, however, soon subject to much criticism. Learned men of the sciences contended that the right and wrong test as the sole determining test of mental accountability was inadequate and untrustworthy; that it failed to take into account the obvious facts of nature; and that it failed to comprehend the complex pathology of insanity. It was also asserted that experience had shown that "* * * in all lunatics, and in most degraded idiots, whenever manifestations of any mental action can be adduced, a feeling of right and wrong may be proved to exist" (Bucknell on Criminal Lunacy, p. 59). To meet such criticisms and to supplement the inadequacy of the right and wrong test, the theory of "irresistible impulse" was advanced. Under this theory a person may, because of disease, defect, or derangement of the mind, be incapable of restraining himself from some particular act although knowing it to be wrong. As early as 1878 Sir James Stevens, in drafting a criminal code for England, sought, but without success, to supplement the right and wrong test by introducing the irresistible impulse test into the statutory law of that jurisdiction (History of Insanity in Criminal Law, 12 Cal. L. Rev. 104, 119). The reluctance

of the courts and the legislative bodies both in England and in this country to accept the more difficult concept involved in the irresistible impulse test has at times been marked by reactionary intolerance. One state has gone so far as to abolish insanity completely as a defense only to have its legislative enactment declared unconstitutional (State v. Strasburg, 60 Wash. 106, 110 Pac. 1020). One court, dogmatically refusing to recognize the existence of an irresistible impulse, charged the jury, as follows:

> "The law says to men who say they are afflicted with irresistible impulse, 'if you cannot resist an impulse in any other way, we will hang a rope in front of your eyes and perhaps that will help'" (Riddle, J. in charging the jury in Rex v. Creighton, 1908, 14 Can. Crim. Cas. 349).

Other judges have usurped the function of the alienists. Thus one justice states that,

> "For myself I cannot see how a person who rationally comprehends the nature and quality of an act, knows that it is wrong and criminal, can act through irresistible innocent impulse" (State v. Harrison, 1892, 36 W.Va. 729, 15 S.E. 982, 18 L.R.A. 224).

On the other hand, other jurists with marked humility have concurred with Mr. Justice Holmes that courts,

> "* * * too, need education in the obvious - to learn to transcend /their/ own convictions and to leave room for much that /they/ hold dear to be done away with short of revolution by the orderly change of law".

Such praiseworthy humility before the problems of a complicated science is splendidly exemplified in the case of Parsons v. State (1886, 81 Ala. 577, 60 A. Rep. 193) in which Mr. Justice Sommerville stated that:

> "It will not do for the courts to dogmatically deny the possible existence of such a disease, or its pathological and psychical effects, because this is a matter of evidence, not of law, or judicial cognizance. Its existence, and effect on the mind and conduct of the patient, is a question of fact to be proved, just as much as the possible existence of cholera or yellow fever formerly was before these diseases became the subjects of common knowledge, or the effects of delirium from fever, or intoxication from opium and alcoholic stimulants would be. The courts could, with just as much propriety, years ago, have denied the existence of the Copernican system of the universe, * * *".

The controversy in this field of the law has been extensive. In 1910 Colonel John H. Wigmore, then President of the American Institute of

Criminal Law and Criminology, appointed a committee composed of four physicians and five lawyers to resolve the difficult problem of determining the relation of insanity to criminal responsibility. In 1916 this committee, which had been in continual existence since its appointment, brought in a unanimous resolution recommending a bill on criminal responsibility, as follows:

> "When Mental Disease a Defense. No person shall hereafter be convicted of any criminal charge when at the time of the act or omission alleged against him he was suffering from mental disease and by reason of such mental disease he did not have the particular state of mind that must accompany such act or omission in order to constitute the crime charged" (Insanity and Criminal Responsibility, 30 Harvard Law Review, 535, 536).

The code of France provides that "There can be no crime, or offense if the accused was in a state of madness at the time of the act". Justice Somerville in Parsons v. State states that,

> "For some time the French tribunals were inclined to interpret this law in such a manner as to follow in substance the law of England. But that construction has been abandoned, and the modern view of the medical profession is now adopted in that country".

Similarly the criminal code of Germany contains a provision, which is said to have been the formulated result of a very able discussion both by the physicians and lawyers of that country. The German code provides as follows:

> "There is no criminal act when the actor at the time of the offense is in a state of unconsciousness or morbid disturbance of the mind, through which the free determination of his will is excluded" (14 Encyc. Brit. (9th Ed.), p. 112).

Although the English courts have persistently adhered to the right and wrong test of the McNaughten opinion to the exclusion of the so-called irresistible impulse test, the various jurisdictions within the United States have been divided (Wharton's Criminal Law, 12th Ed., Sec. 408). Miller on Criminal Law states that,

> "Some judges have used the term [insanity] in contradistinction to the 'right and wrong' test; others use it as illustrative of that test; others insist that the 'right and wrong' test properly interpreted includes the element of irresistible impulse; and still others deny that such a form of insanity exists".

A majority of American jurisdictions, however, seem to reject the irresistible

impulse tests (see Wharton's Criminal Law, 12th Ed., sec. 408, and cases therein cited). Indeed, the New York Penal Code recognizes the defense of insanity only when the defendant "was laboring under such a defect of reason as either (1) not to know the nature and quality of the act he was doing, or (2) not to know whether the act was wrong" (Penal Code, N.Y., 21, see People v. Taylor, 138 N.Y. 398, 34 N.E. 275).

D. MORAL LAW AS DISTINGUISHED FROM LEGAL LAW

Mr. Justice Cardozo in discussing the meaning of right and wrong as those words are employed in testing sanity, has stated that:

> "As propounded in these cases, it meant a capacity to distinguish right from wrong, not with reference to the particular act, but generally or in the abstract. Sometimes it was spoken of as a capacity to distinguish between 'good and evil' * * *. Wrong was conceived of as synonymous not with legal but rather with moral wrong. Lord Mansfield told the jury in Bellingham's Case: 'It must be proved beyond all doubt that at the time he committed the atrocious act, he did not consider that murder was a crime against the laws of God and nature'. That became for many years the classic definition. It was followed by Lord Lyndhurst in Reg. v. Oxford (9 C. & P. 533). Its phraseology, as we shall see, has survived with little variation in charges and opinions of our own day" (People v. Schmidt 1915, 216 N.Y. 324).

As has been pointed out, however, by Justice Bartlett in People v. Carlin, 194 N.Y., 448, 87 N.E. 805, "it is not enough that /the accused/ has views of right and wrong that are at variance with those that find expression in the law. The variance must have its origin in some disease of the mind" (see Hotema v. United States, 186 U.S. 413, 22 S.Ct. 895, 46 L.Ed. 1225).

If we accept moral responsibility as the basic test of legal accountability "* * * both the right and wrong test and the irresistible impulse test ought to be recognized. If free will and self-restraint be destroyed by mental disease, knowledge of right and wrong is entirely useless. Will is as necessary an element of criminal intent as are reason and judgment" (Criminal Responsibility of the Insane and Feeble-Minded, 9 Journal of Criminal Law and Criminology, p. 497). As Stevens said, "Legal punishment connotes as far as possible moral infamy".

E. THE IRRESISTIBLE IMPULSE TEST DISTINGUISHED FROM MORAL AND EMOTIONAL INSANITY

The theory of the irresistible impulse test must be carefully distinguished from the so-called moral or emotional insanity which some

courts have described as a perverted condition of a person's moral nature. It is recognized that a person may become so morally degenerate either from bad associations and surroundings or from continued unrestrained indulgence in vice that his conscience will no longer restrain him. Such moral degeneration does not excuse a person from criminal responsibility. Neither does so-called emotional insanity or temporary frenzy or passion arising from excitement or anger which is not the production of a mental disease. There is danger of being misled by the decisions dealing with these subjects as the terms have sometimes been carelessly used. Each case must be examined to see whether the irresistible impulse under consideration arose from a mental disease or merely from a moral depravity or callous nature (Clark & Marshall Crimes, 4th Ed. Sec. 87; Miller on Criminal Law, p. 130; 22 BR 1, 52).

F. MENTAL ACCOUNTABILITY IN THE FEDERAL COURTS

The early United States District Court decisions seem to follow the McNaughten opinion and to restrict mental accountability to the so-called right and wrong test (see United States v. Holmes, 1858, Federal Case No.15382; Cinteau's case, 1882, 10 Fed. 161; United States v. Faulkner, 1888, 35 Fed. 730; and United States v. Young, 1885, 25 Fed. 710). As far back, however, as 1873 the Supreme Court of the United States in Mutual Life Insurance Company v. Terry, 15 Wallace 580, gave its blessing to a modification of the old rule. Mr. Justice Hunt stated that:

> "We hold the rule on the question before us to be this * * *. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is compelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable" (Underscoring supplied).

This attitude toward the "irresistible impulse" theory has been reaffirmed and clarified in various decisions as follows: Insurance Company v. Rodel, 95 U.S. 232, 24 L. Ed. 433; Manhattan Life Insurance Company v. Broughton, 109 United States 121, 27 L. Ed. 878; Davis v. United States 165 U.S. 375; 41 L. Ed. 750; see also United States v. Chisholm, 153 Fed. 808 (C.C. S.D. Ala. 1907). All of these authorities are cited and discussed in Smith v. United States, 36 F. (2) 548 (App. D.C. 1929), which is probably the leading Federal opinion on the subject. The opinion states in part, as follows:

> "Laying aside the objectionable negative style of the charge, we think it erroneous in point of law, in that it

ignores the modern well-established doctrine of 'irrestible impulse'. The English rule, followed by the American courts in their early history, and still adhered to in some of the states, was that the degree of insanity which one must possess at the time of the commission of the crime in order to exempt him from punishment must be such as to totally deprive him of understanding and memory. This harsh rule is no longer followed by the federal courts or by most of the state courts. The modern doctrine is that the degree of insanity which will relieve the accused of the consequences of a criminal act must be such as to create in his mind an uncontrollable impulse to commit the offense charged. This impulse must be such as to override the reason and judgment and obliterate the sense of right and wrong to the extent that the accused is deprived of the power to choose between right and wrong. The mere ability to distinguish right from wrong is no longer the correct test either in civil or criminal cases, where the defense of insanity is interposed. The accepted rule in this day and age, with the great advancement in medical science as an enlightening influence on this subject is that the accused must be capable, not only of distinguishing between right and wrong, but that he was not impelled to do the act by an irresistible impulse, which means before it will justify a verdict of acquittal that his reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong".

G. MENTAL ACCOUNTABILITY UNDER MILITARY LAW

The Manual for Courts-Martial has provided military justice with a test for determining mental accountability which is free from dogma, which is independent of any conventional legal or medical definition of insanity, and which is designed to determine, according to the facts of the individual case, the existence of a controlling mental defect, disease, or derangement. The Manual states that,

"* * * A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right" (MCM, 1928, par. 78).

The Manual for Courts-Martial, 1921, on this point provides that in determining the issue of mental responsibility for a crime, the courts-martial having such responsibility should ballot upon the following questions:

"(2) Was the accused at the time of the commission of the alleged offense so far free from mental defects, mental disease, or mental derangement as to be able, concerning the particular acts charged, both (1) to distinguish right from wrong and (2) to adhere to the right?

"This question will be balloted upon as to each specification, and if answered negatively or a tie vote the court will acquit the accused as to such specification" (MCM, 1921, par. 219 (g)).

Similarly, Winthrop states that:

"To constitute a defence on the ground of insanity, it may be made to appear, * * *, on the other hand, that, though aware of the nature and consequence of his act, as well as of its wrongfulness or its illegality, he was prompted by such an uncontrollable impulse as not to be a free agent" (Winthrop's Military Law and Precedents, Reprint 1920, p. 294).

It seems clear that the test for mental accountability as set forth in the Manual combines both the concept of the right and wrong test and the concept of the irresistible impulse test and is sufficiently all-inclusive to encompass the problems involving insane delusion as presented in the McNaughten opinion. Upon the military justice test the ultimate triers of the facts are not concerned with complicated definitions or with conventional forms of so-called insanity but rather with the following all-important questions:

(a) Was the accused at the time of the alleged offenses "so far free from mental defect, disease or derangement as to be able concerning the particular acts charged" to distinguish right from wrong? (fifth sub-paragraph, paragraph 78a, p. 63, MCM, 1928).

(b) Was the accused at the time of the alleged offenses "so far free from mental defect, disease and derangement as to be able concerning the particular acts charged * * * to adhere to the right" (fifth sub-paragraph of paragraph 78a, p. 63, MCM, 1928).

(c) Was the accused at the time of his trial sufficiently sane "intelligently to conduct or cooperate in his defense?" (first subparagraph of paragraph 63, MCM, 1928).

If either of the first two questions is answered in the negative the accused should be found not guilty by reason of mental disease, defect or derangement. If the third question is answered in the negative he should

not be tried. The above principle has been consistently recognized in military law (see 1 BR 39, 46; 8 BR 57; 11 BR 281, 297; 13 BR 389; 14 BR 339; 15 BR 281; 18 BR 301, 312; 23 BR 115). For example, in 13 BR 389, Riesenman, the accused was shown to be an intelligent individual, able to conduct his own defense and to recognize right from wrong as to the particular acts charged. Since, however, the evidence showed that he was suffering from mental disease, defect, or derangement which rendered him unable, concerning the particular acts charged, to adhere to the right, the findings of guilty were disapproved. In a much older decision, The Judge Advocate General summarized this controlling principle, as follows:

> "Men, under the influence of disease, may know the right, and yet be powerless to resist the wrong. The well-known exhibition of cunning by persons admitted to be insane, in the perpetration of an illegal act, would seem to indicate comprehension of its evil nature and legal consequence, and yet the power of self-control being lost from disease, there can be no legal responsibility" (CM 116694, James).

H. THE BURDEN OF PROOF

The Manual for Courts-Martial directs that:

> "Where a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused cannot legally be convicted of that offense * * *" (MCM, 1928, par. 78).

This provision, which is similar to the provision of the 1921 Manual, places the burden of ultimate persuasion on the issue of mental responsibility upon the prosecution and recognizes the fundamental principle that all men are deemed innocent until proven guilty beyond a reasonable doubt (see MCM, 1921, par. 219). On this point the United States Supreme Court has made the following authoritative pronouncement:

> "* * * Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime * * *.
>
> * * *
>
> "If insanity is relied on and evidence given tending to establish that unfortunate condition of mind, and a reasonable well-founded doubt is thereby raised of the sanity of the accused, every principle of justice and humanity demands that the accused shall have the benefit

of the doubt" (Davis v. United States, 160 U.S. 469).

It is clear, therefore, that when by the introduction of any substantial evidence the issue of mental responsibility is injected into a court-martial trial, the burden rests with the prosecution to prove, as an instance to the ultimate issue of guilt, that the accused was "so far free from defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right". If the prosecution fail to establish such proof beyond a reasonable doubt, the court should acquit the accused.

I. RESULT OF A FINDING OF NOT GUILTY BY REASON OF MENTAL DEFECT, DISEASE, OR DERANGEMENT

Such an acquittal by reason of mental defect, disease, or derangement does not adjudge the accused to be insane but only indicates that a reasonable doubt exists as to his mental accountability for the particular offense charged. Accordingly, before the accused may legally be incarcerated in an institution for the insane, he must be examined by a special board of medical officers in accord with Army Regulations in order to determine whether or not his mental disorder is of a type requiring such incarceration. If the court erroneously applies the test of the Manual for determining mental accountability and wrongfully finds the accused guilty and if the Board of Review and The Judge Advocate General hold the record of trial legally insufficient to sustain such findings of guilty, the reviewing or confirming authority may order a rehearing or such other action as may be appropriate (par. 4, AW 50½).

J. THE MILITARY JUSTICE TEST AS APPLIED TO THE EVIDENCE

All of the medical testimony in the present case bearing on the question of the accused's mental accountability tends to show that he was suffering at the time of the alleged offenses, from some form of mental disease, defect, or derangement, and that as a result thereof he was unable, concerning the particular acts charged, to adhere to the right. Although both medical witnesses stated that the accused was legally sane each demonstrated by his testimony that he was more the physician than the lawyer, and that he was laboring under a concept of law which is foreign to military justice.

Although Captain Bernucci went out of his field to testify that "in the legal sense, this man [the accused] would be considered sane and able to distinguish right from wrong", he added that "medically, we feel that this is somewhat attenuated * * * because the intellect has no control over this particular act". He then further explained that although "the individual may know right from wrong * * * at that particular moment he is so compelled to do something that even though he knows that his act is wrong, he has no control over his acts". He further testified that the accused was "mentally * * * ill" and that the acts described were the result of an "irresistible impulse".

Major Rosenfels similarly testified that the accused was not "psychotic according to standard medical diagnostic terminology". He stated categorically, however, that he "believed that the patient is suffering from a mental disorder of a quite severe degree, and that his behavior is symptomatic of that mental disorder". In reply to the question, "Sir, medically speaking, at the time of the alleged offense, was the accused able to adhere to the right and refrain from the wrong?" he replied,

> "No more able to adhere to the right as we defined it here and avoid expressing his symptoms than a man with acute appendicitis is able to alter the course of his acute appendicitis by an act of will" (Underscoring supplied).

In an effort to explain the apparent contradiction between his statement that the accused was legally sane but medically insane, he erroneously stated that "* * * our concepts of sanity are derived from English law of one hundred years ago * * *". The only witness to describe the accused's appearance at the time of one of the alleged offenses, testified that he "looked blank and peculiar". The substance of all the medical testimony is that the accused was, at the time of the alleged offenses, suffering from a mental illness or "defect" and that as a result thereof he was unable concerning the particular acts charged "to adhere to the right".

Even the Trial Judge Advocate and his Assistant who prosecuted this case appear to have been moved by the force of the medical testimony, for in a plea for clemency which is attached to the record, they state that they "* * * feel that were this case tried anywhere from three to five years in the future, the accused would have been acquitted by reason of the changing concept of sanity". By this statement, as well as by the tenor of their cross-examination of the medical witnesses, they reveal that they have failed to recognize that military justice has a flexible and adaptable test for determining mental accountability which is free from dogma, which is independent of any conventional medical or legal definition of insanity, and which is designed to determine, according to the facts of the individual case, the existence or non-existence of a controlling mental defect, disease, or derangement.

Military justice has recognized that its standard must allow for progress and change in the field of medical science and must not dogmatically deny the possible existence of peculiar mental diseases or their pathological and physical effects. It has also recognized that:

> "'There must be two constituent elements of legal responsibility in the commission of every crime, and no rule can be just and reasonable which fails to recognize either of them: (1) capacity of intellectual discrimination; and (2) freedom of will.' These are tests of responsibility in criminal cases because without such powers a man is not morally accountable" (Parsons v. State, Op. Cit).

Since the substance of the medical testimony raises a reasonable doubt as to whether the accused at the time of the alleged offenses was "so far free from mental defect, disease, or derangement as to be able concerning the particular act charged * * * to adhere to the right", and since there is no other evidence in the record of sufficient clarity to overcome that reasonable doubt, the prosecution, in the light of the controlling principles above analyzed, has failed to discharge it's burden of proof on the vital issue of the accused's mental accountability. Accordingly the findings of guilty and the sentence must be disapproved.

6. The records of the War Department show that the accused is approximately 26 years of age. He graduated from high school and attended Saint John's University for two years. Thereafter he was employed for ten months as an usher and typist at Lowe's Kings Theatre in Brooklyn, New York. He entered the military service as an Air Corps cadet on 4 November 1939. He was commissioned a second lieutenant, Air Corps, on 27 July 1940, promoted to the grade of first lieutenant 1 November 1941, promoted to the grade of captain on 3 October 1942, and promoted to his present grade of major on 22 June 1944. His record shows one efficiency rating of excellent, and two ratings of superior while he was on duty in Alaska.

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

Abner E. Lipscomb, Judge Advocate.

Robert J. Glover, Judge Advocate.

Samuel Morgan, Judge Advocate.

CM 271889

1st Ind
16 APR 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 Theodore L. Barbera (0-396355), Air Corps.

2. I do not concur in the opinion of the Board of Review and, for the reasons hereinafter set forth, am of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

3. The accused was found guilty of exposing himself to public view in an indecent manner on three different occasions upon the streets of Alexandria, Louisiana, in violation of Article of War 95. The findings in the case and the present divergent views thereon do not turn upon any deficiency or conflict in the evidence regarding the commission of the offenses charged, but arise solely out of the evaluation of the expert, opinion evidence of two psychiatrists as to whether the accused was so far free from mental defect, disease or derangement as to have been able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right.

4. In the opinion of the Board of Review the medical testimony raises a reasonable doubt as to whether the accused, at the time of the alleged offenses was "so far free from mental defect, disease or derangement as to be able concerning the particular act charged * * * to adhere to the right" and, since there is no other evidence in the record of sufficient clarity to overcome such doubt, the prosecution has failed to discharge the burden of proof which rested upon it.

In my opinion the decision of this matter rests not so much upon a determination of whether the medical testimony created a reasonable doubt of the accused's sanity as upon whether, in the first instance, it was sufficiently persuasive to impair the presumption of his sanity. Although little is required to raise the issue of insanity, the evidence on such issue must disclose more than a mere doubt to overthrow the existing presumption. I cannot agree with the view that the medical testimony adduced in this case created any reasonable doubt, nor, assuming that there was some doubt occasioned by such testimony, that there is no other evidence sufficient to overcome it.

5. Subsequent to the commission of the offenses alleged and, at the direction of the accused's commanding officer, the accused was examined by Captain Robert J. Bernucci, Chief of the Neuropsychiatric Section, Station Hospital, Camp Livingston, Louisiana, for the purpose of determining his mental status. Later, and over a period of 18 days, the accused was under observation at La Garde General Hospital, New Orleans, Louisiana, for the same purpose, after which a board of three medical officers, including Major Paul Rosenfels, Assistant Chief of Service, made a written report of their findings. Although the report of Captain Bernucci to the accused's commanding officer and the findings and recommendations of the board of medical officers are attached to the record of trial, it does not appear that they were introduced in evidence; nor is any explanation given for this omission nor for their inclusion in the record. As a consequence, only such facts regarding the reports as were elicited from both psychiatrists when they testified for the defense, were before the court.

In addition to testimony of the psychiatrists quoted in the opinion of the Board of Review the following excerpts are deemed pertinent:

When called by the prosecution Captain Bernucci testified as follows:

"Q. From your examination, what is your opinion as to his sanity at the time of the commission of the alleged offenses?

"A. I feel that he was sane..."; and,

"A. ...From the legal standpoint he was sane. That doesn't necessarily mean that he had full control of his faculties."

* * * *

"Q. (by a member of the court) In other words, the man is entirely rational and there is nothing emotionally or sexually unstable insofar as the examination is concerned?

"A. No, sir. This is considered an emotional disturbance. It has nothing to do with sanity at all."

Major Rosenfels appeared only as a witness for the defense and, among other statements in explanation of his opinion that the accused "is suffering from a mental disorder of a quite severe degree", stated:

".....there are compelling forces behind human conduct besides reason, and one of these is emotion. This individual from a medical point of view is impelled by an emotional drive of which he is not aware..... The outstanding stress and strain is the marriage into which he entered and for which he was not emotionally prepared..... he contracted for emotional responsibilities which he was not prepared to carry out..... his unconscious and concealed emotional immaturity from which he suffers prevented him from carrying out a mature marital relationship. Within this situation then of emotional stress he has undergone a process which you would call regression, which is a return to a primitive and childish way of acting..... The sexual drive in the normal individual are (sic) channelized and directed toward mature goal but in individuals with emotional conflicts of this type, they may get no discharge, no resolution, through mature channels, they may become dammed up, held back, and express themselves through an infantile mechanism of this type....."

* * * * *

"I don't know just what you mean by irresistible impulse..... In my professional work I do not use the term..... However, I will say, as I have already said, that he suffers from emotional conflicts over which he can exercise no effective control."

In explanation of a finding of "Psychoneurosis, hysterical character....." made by the board of medical officers he stated:

"Hysterical symptoms include a wide variety of phenomena but most characteristically extremes of emotional expression are called hysterical, like hysterical laughing and crying. This individual shows a massed hysterical tendency which determines his behavior although on the surface he shows a facade which is well-controlled, competent, congenial, underneath he has an immature emotional organization with extravagant and severe emotional swings which we sought to identify by the term 'hysterical character'....."

Asked to explain the further finding of "narcissistic character organization" made by the medical board, Major Rosenfels stated:

"Narcissism is self-love. When the so-called libido or sexual interest fails to mature, in the usual fashion, and becomes directed outward toward those of the opposite sex, the individual may stop his development at a stage

of self-love..... Self-love is characteristic, again, of small children. In this particular patient, we note an emotional tendency toward preoccupation with the self, over-evaluation of himself in certain ways and a lack of capacity for a mature giving relationship with a woman."

The underscoring in this testimony has been supplied to plainly indicate the constant trend of Major Rosenfels' rationale. The clear import of his view is that the emotional conflicts arising from the accused's immature sexual development are sufficient evidence of a "mental defect, disease or derangement" of his mind to constitute a defense for public, indecent exposures. Captain Bernucci frankly stated that "This is considered an emotional disturbance. It has nothing to do with sanity at all."

Whatever may have been the purpose of the disjunctive use of the words "mental defect", "disease", and "derangement" in the sanity test of the Manual for Courts-Martial, it must be conceded that the defense of irresistible impulse is limited solely to one who has a diseased mind and that "diseased mind" does not comprehend a flighty, capricious and undisciplined mind which manifests no other weakness than the odd quirk of impelling occasional, indecent behavior.

In order that a person may be exempt on the ground of irresistible impulse, the impulse must be the result of disease of the mind, and it must be irresistible, or, in other words, the disease must exist "to such an extent as to subjugate the intellect, and render it impossible for the person to do otherwise than yield thereto." The act must have been the product of the disease solely. (Clark and Marshall Crimes, 4th Edition, par. 86)

According to the Federal rule to justify a verdict of acquittal the "reasoning powers must be so far dethroned by a diseased mental condition as to deprive the accused of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong." (Smith v. United States, 35 F. 2d. 548)

Captain Bernucci testified that, in his opinion, the accused was sane. The board of medical officers (of which Major Rosenfels was a member) found the accused "legally able to adhere to the right and refrain from the wrong at the time of the commission of the alleged offenses". All agree that he was not "psychotic". The confusion arises merely in the efforts of both psychiatrists to explain away the significance of those findings by an amazing differentiation between their duty at the time the accused was examined and their responsibilities as witnesses for the defense. Major

Rosenfels referred to the findings in the report of the board of medical officers as a "routine" statement which is included in all cases of this kind and he demurred to commenting "about the law which is outside (his) field" when testifying in the court-martial. Such a distinction is specious. Both medical experts were engaged on each occasion to report fully upon the mental condition of the accused and they cannot justify their vacillation on the ground that the interjection of the legal aspect at the trial confused them. Major Rosenfels joined in the use of the term "legally" in the report of the medical board and it is assumed that its use was intentional and significant. Captain Bernucci was constrained to apologize for his explanations and admitted that they "may sound a little far-fetched".

The most incongruous portion of Captain Bernucci's testimony is found in the following excerpts:

> "I might say that in dealing with these people, it appears that there is some rebellion or reaction towards the overpowering strictness of their super-ego. In other words, the individual casts aside the censuring power of his conscience and acts upon impulse." (Underscoring supplied) And,

> "I think the humiliation and the experience this man has had will be a deterring influence in the future..... the possibility of him doing this or committing this same act again is not very possible..... he is going to be more careful about his actions in the future than he has been in the past, and he is going to be able to use his intellect whereas in the past the impulse was great enough to push the intellect into the background."

Finally, when asked:

> "Then you feel that at this time the impulse could be held in check?"

he replied:

> "I do."

Major Rosenfels stated that the accused was no more able to refrain from the irresistible impulse to indecent exposure "than a man with acute appendicitis is able to alter the course of his appendicitis by an act of will"; but he nevertheless recommended his restoration to full duty while undergoing "psychiatric therapy" and was positive that punishment of his misbehavior would not aid him. While not as sanguine as Captain Bernucci with regard to the

accused's future conduct, he was of the opinion that: "He regrets his behavior. He doesn't know what happened to him, except that he has a feeling that it will never happen again."

Thus it appears that both of the medical experts, while expressly avowing their ignorance of the legal tests for insanity, were not hesitant in expressing their personal views with regard to the accused's accountability to organized society under the law, and in doing so, modified their original views with regard to his legal responsibility by holding him immune from punishment by their standards because of emotional stresses and conflicts.

As to such emotional outbursts the law is clear:

> "Whenever irresistible impulse is relied upon as a defense, care must be taken to distinguish between insane irresistible impulse - that is, irresistible impulse resulting from disease of the mind - and mere moral perversion and passion. The expression 'moral insanity' is often used, but strictly speaking, it is not insanity at all. It is merely a perverted or abnormal condition of the moral system, where the mind is sound. It is well settled that there is no exemption from responsibility merely because of moral insanity, or because of ungovernable passion, sometimes called 'emotional insanity'" (Clark and Marshall Crimes, 4th Edition, par. 87).

The accused elected to testify and detailed the extent of his military services. The defense also offered proof of the accused's superior abilities as an officer and his genteel conduct socially. He had been recommended for promotion to Lieutenant Colonel. Indeed, for all the evidence discloses he was a perfectly normal, healthy and sane person in every respect except for the misconduct of which he stands convicted.

The common man does not readily believe that occasional and impulsive misconduct of a particular character by one who, in every other respect, demonstrates sane conduct and ordinary behavior, springs from such defect, disease or derangement of the mind as hopelessly deprives him of the will to refrain from doing what he knows is wrong and in this he has the respectable company of many medical and juridical authorities. He may be persuaded, in a particular case, to believe that expert, opinion evidence has proved such derangement in such circumstances; but no rule of law should compel him to adopt or adhere to such a conclusion when other evidence in the case may reasonably and logically persuade otherwise. Moreover, members of military courts, as well as juries in civil life, bring into their deliberations their own common sense founded upon knowledge of the everyday behavior and experiences of men in the routine affairs of

life, and they are not only entitled to use this knowledge in weighing the evidence but are specifically charged to do so.

An apt expression of these views is contained in a recent decision from which the following excerpts are quoted:

> "A complete reconciliation between the medical tests of insanity and the moral tests of criminal responsibility is impossible. The purposes are different; the assumptions behind the two standards are different. For that reason the principal function of a psychiatrist who testifies on the mental state of an abnormal offender is to inform the jury of the character of his mental disease. The psychiatrist's moral judgment reached on the basis of his observations is relevant. But it cannot bind the jury except within broad limits. To command respect criminal law must not offend against the common belief that men who talk rationally are in most cases morally responsible for what they do.
>
> "The institution which applies our inherited ideas of moral responsibility to individuals prosecuted for crime is a jury of ordinary men. These men must be told that in order to convict they should have no reasonable doubt of the defendant's sanity. After they have declared by their verdict that they have no such doubt their judgment should not be disturbed on the ground it is contrary to expert psychiatric opinion. Psychiatry offers us no standard for measuring the validity of the jury's moral judgment as to culpability. To justify a reversal circumstances must be such that the verdict shocks the conscience of the court" (Holloway v. United States, United States Court of Appeals, No. 8822, decided 26 February 1945).

6. For the reasons stated I recommend that the sentence be confirmed and carried into execution.

7. Consideration has been given to recommendations for clemency, submitted by the trial judge advocate, the assistant trial judge advocate, defense counsel and the assistant defense counsel, which recommendations accompany the record of trial.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Sentence confirmed. G.C.M.O. 172, 6 Jun 1945)

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

SPJGQ-CM 271956

28 FEB 1945

UNITED STATES v. Captain KIRBY L. SWINNEY (O-276381), Coast Artillery Corps.	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 1 Trial by G.C.M., convened at Fort George G. Meade, Maryland, 21 December 1944. Dismissal.

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

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

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

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

Specification 1: In that Captain Kirby L. Swinney, Convoy Officers Detachment, did, without proper leave, absent himself from his organization at Camp Kilmer, New Jersey from about 1200, 3 November 1944, until about 1800, 3 November 1944.

Specification 2: In that Captain Kirby L. Swinney, Convoy Officers Detachment, did, without proper leave, absent himself from his organization at Camp Kilmer, New Jersey from about 0800, 12 November 1944, until about 1500, 12 November 1944.

Specification 3: In that Captain Kirby L. Swinney, Convoy Officers Detachment, did, while enroute from Camp Kilmer, New Jersey to Fort George G. Meade, Maryland absent himself without proper leave from about 1400, 13 November 1944 until about 0130, 20 November 1944.

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

Specification: In that Captain Kirby L. Swinney, Convoy Officers Detachment, was at Camp Kilmer, New Jersey on or about 4 November 1944, found drunk while on duty as a convoy officer.

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

Specification 1: In that Captain Kirby L. Swinney, Convoy Officers Detachment, having received a lawful order from Lieutenant Colonel Thomas D. Maher, to report for duty at 0800, 12 November 1944, the said Lieutenant Colonel Thomas D. Maher being in the execution of his office, did, at Camp Kilmer, New Jersey, on or about 0800, 12 November 1944, fail to obey the same.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Accused pleaded not guilty to the Charges and Specifications. He was found guilty of Charges I and II and the Specifications thereof, guilty of Charge III and Specification 1 thereof, and not guilty of Specifications 2 and 3 of Charge III. No evidence of previous conviction was introduced. Accused was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that in October 1944, accused was stationed at Headquarters, Army Ground Forces Replacement Depot Number 1, Fort George G. Meade, Maryland. On 29 October 1944, orders were issued assigning him to an overseas shipment (No. GM-555 (a)-A) as a convoy officer. Lieutenant Colonel Thomas D. Maher was the convoy commander and Major Virgil G. Martin the assistant convoy commander (R. 10, 21, 30, 31, 32; Ex. A). On 30 October the shipment proceeded to a staging area at Camp Kilmer, New Jersey. In addition to various staff duties, accused had supervision of the processing, activities, and administration of a group of companies in the shipment. Accused and the other convoy officers were billeted together in the officers' quarters of the area (R. 7, 8). The convoy officers were not allowed to leave the shipment without permission of the convoy commander (R. 7, 21).

With regard to Specification 1, Charge I, it appears from the evidence that on 2 November, accused obtained a 24-hour pass to visit New York City. The pass expired at noon, 3 November, at which time he was due back at his station (R. 7, 8). Officers going on pass were required to sign out, stating the time of departure and the destination, and they were required to sign in upon their return (R. 8, 22). Accused left on pass at noon of 2 November (R. 8).

At 1 p.m., 3 November, the shipment formed for the regular clothing and equipment inspection, conducted by the convoy officers. Accused was not present at the formation. So far as Major Martin knew, accused did not return until about 6 p.m. of the third; at least, that was the first time Major Martin saw him on that day. Shortly thereafter, accused remarked to Major Martin that he had gone to headquarters to sign in, but had found the building empty. In fact, the building was empty, because at 4:30 that afternoon the headquarters were moved to another building about two blocks away (R. 8).

The evidence relating to the Specification, Charge II (drunk on duty on 4 November), shows that on 4 November, while accused was still on duty as a convoy officer, Major Martin saw him about 9 a.m., in the room used as an office for the staff (R. 9, 20, 25). Accused was seated in a chair which Major Martin had previously used. Accused said something to the effect that if he had Major Martin's chair, he would move. According to Major Martin's testimony, accused's speech was very incoherent and there was a strong odor of alcohol about him. When he stood up, he seemed to weave, and as he walked around the table, he was in a very unsteady condition (R. 9). In Major Martin's opinion he was drunk and in no condition to be with troops (R. 9, 18). Major Martin sent him to his quarters (R. 9).

Specification 1, Charge III (failing to report for duty at 8 a.m., 12 November) and Specification 2, Charge I (absence without leave from about 8 a.m. until about 3 p.m., 12 November) are so closely related as to call for consideration together.

On the morning of 11 November, Major Martin held a meeting of the captains of the convoy personnel, including accused. Major Martin informed the officers present that the unit would be alerted at 8 a.m., Sunday, 12 November, and that Colonel Maher had ordered all convoy captains to be present for duty at that time (R. 10, 29). Between 5 and 6 p.m., 11 November, Lieutenant Colonel Maher approved a pass for accused, repeated the information previously given by Major Martin, and told accused to be sure to be back by 8 a.m. the next day (R. 21, 22, 26, 28).

On 12 November, apparently at or shortly after 8 a.m., the staging area officials held a meeting of convoy officers and unit commanders (R. 10). Accused was not present and was not in his quarters when Lieutenant Colonel Maher and others searched there. Colonel Maher was around the area all day and did not see accused until about 5 p.m. (R. 10, 11, 22, 23). About 11 a.m. Major Martin searched accused's quarters and did not find him there (R. 11). Major Martin did not see accused until 3 p.m., at which time accused was lying on his bed in quarters, apparently asleep (R. 11). Major Martin looked at the sign-in register at 2 p.m., at which time there was nothing to indicate that accused had signed in. He looked at it again at 6 p.m., and it

was initialed by accused as of 5 p.m. (R. 11). Prior to 5 p.m., accused had not reported to Major Martin for duty (R. 12).

After having been advised of his rights, accused made, signed, and swore to a written statement (R. 32-33; Ex. E), the substance of which, in so far as it relates to Specification 1, Charge III, and Specification 2, Charge I, is as follows: Accused admitted that he was informed on 11 November that the shipment would be alerted at 8 a.m., 12 November, and that all officers were to be available for duty at that time. He spent the evening of 11 November at the Pennsylvania Hotel in New York City, where friends visited in his room until about 2:30 a.m., Sunday, the twelfth. After their departure, he lay upon the bed, leaving the light on, and intending to get up in a few minutes and go to the Pennsylvania station across the street to catch a train for New Brunswick, New Jersey (near camp). He fell asleep and did not wake up until after twelve noon. He then went to the station and caught a train, arriving at the staging area at Camp Kilmer at about 4 p.m., at which time he went to his quarters.

The evidence concerning Specification 3, Charge I (absence without leave from 13 November 1944 to 20 November 1944), shows that on 13 November accused was relieved from his assignment with the shipment and was ordered to return to Fort Meade, reporting to the Commanding General, Army Ground Forces Replacement Depot Number 1. Accused was told that a train left New Brunswick shortly after 2 p.m., and Government transportation was available to take him to the bus station. So far as the witnesses knew, he took that train (R. 12, 17-21, 25-27, 29; Ex. B).

At the time accused was ordered to return to Fort Meade, there was handed to him an envelope, with letter enclosed, which he was to deliver to Major Alexander O. Froede immediately upon arrival (R. 12, 29, 30; Ex. C). Not until 9:40 a.m., 21 November, did accused report to Major Froede or deliver the aforementioned communication (R. 31). The sign-in register showed that accused had signed in as arriving at 1:30 a.m., 20 November (R. 31, 32; Ex. D). Major Martin testified to his belief that Fort Meade is about three or three and one-half hours from Camp Kilmer by train (R. 17).

In his statement already referred to (Ex. E), accused corroborated the testimony of the witnesses for the prosecution concerning his orders to return to Fort Meade. He left New Brunswick by train at about 2:15 p.m., 13 November, and arrived at Baltimore, Maryland, about 5:30 p.m. Since he had an hour to catch the next bus, he decided to eat. He had a couple of drinks, a sandwich, and a beer. Thereupon a civilian insisted on buying him another drink and then gave him still another, this last from a bottle which the civilian had. Realizing that he should get to the bus station, accused left the bar. When he arrived at the Camden Street station he began to feel dizzy and as though he were going blind. He walked to a bench to sit down. That was his "last coherent thought."

His next "sane moment", when he "had control of his faculties and recollections" was at about 10 p.m., Sunday, 19 November, when he found himself in a hotel room in Baltimore. His legs seemed to be paralyzed and he could not stand. He was fully dressed except that his tie and collar were loosened at the neck. His "field coat" and almost all of his money had disappeared. After approximately an hour and a half he was able to walk to the street and get a taxi to the Camden Street station, where an enlisted man assisted him in getting his bag and placing it on the bus. He arrived at Fort Meade about 12:30 a.m., 20 November, and immediately went to bed in his quarters, where he remained during that day, being unable to walk by reason of the paralyzed feeling of his "limbs" and the dizziness and blindness that "assailed" him whenever he attempted to get up.

4. Accused testified with reference to the Specification of Charge II (drunk on duty on 4 November). In substance his testimony is as follows: On the afternoon of 3 November he came back from pass, had lunch at the Victory Grill Room, an officers' lunch room at Camp Kilmer, and stayed there for about an hour and a half (R. 34, 35, 37). Then he went to his quarters. In the evening he was at the officers' club from about 8 to 11 o'clock, and had four or five, possibly six, bottles of beer (R. 34, 35). From the officers' club he went to his quarters, where he read and went to sleep (R. 35). No hard liquor is sold at the officers' club, the Victory Grill, or elsewhere on the post. Beer is sold at the officers' club. It is not sold at the Victory Grill (R. 35). Between the time of his return to camp on the afternoon of the third, and nine o'clock the following morning, accused did not have a drink of "whiskey or hard liquor" (R. 35). He was on duty as convoy officer on 4 November, and remembered seeing Major Martin at shipment headquarters (R. 37). After returning to his quarters that morning, he talked with two lieutenants for a couple of hours, advising them about what to take overseas (R. 35-36). He did not go to bed during the morning. He lunched with Colonel Maher and accompanied him to the "PX" after lunch (R. 36).

5. The evidence clearly proves the absence without leave alleged in Specification 1, Charge I. Due back at camp at noon, accused was not present at a 1p.m. formation, and Major Martin did not see him until 6 p.m. Accused told Major Martin that he had gone to headquarters to sign in upon his return, but had found the place empty. Inasmuch as the headquarters were not moved until around 4:30 p.m., it is obvious that accused arrived at some later time, and the allegation of his return "about" 6 p.m. was sustained.

The testimony, together with the statement made by accused, proves the absence without leave alleged in Specification 2, Charge I. Even if his explanation about falling asleep be true, it does not constitute a defense.

The evidence likewise shows that accused was absent without leave, as alleged in Specification 3, Charge I, from 13 to 20 November. According to his statement, he was prevented from returning to Fort Meade by some sort of an attack which came upon him suddenly after he had partaken of a few drinks, and which kept him in a coma for six days. The court was not required to, and evidently did not, believe this story.

With reference to the Specification, Charge II, Major Martin's testimony is sufficient proof of drunkenness on duty. Although accused in his testimony does not directly deny the drunkenness as alleged, his testimony appears calculated to create that impression. Under these circumstances, the evidence is conflicting, and we cannot say that the court erred in believing Major Martin as against accused.

The prosecution's evidence relating to Specification 1, Charge III, clearly proved the order to report for duty at 8 a.m., 12 November, as alleged, and the failure to obey it. As we stated in commenting on Specification 2, Charge I, the fact that he overslept, if true, would not amount to a defense.

6. War Department records show that accused is 43 years old. He was born in Mississippi and his home is in Jackson, Mississippi. He is married and has two daughters, aged about 21 and 20. In 1924 he was graduated from the University of Mississippi with the degree of Bachelor of Engineering. Since his graduation, he has been engaged in engineering, including highway, bridge, and airport construction, and sanitary engineering. He served as a trumpeter in the United States Marine Corps from July 1918 to October 1919. From 1930 to 1935, he held a commission as second lieutenant, Corps of Engineers Reserve, and from 1939 to 1940, he was a captain, Corps of Engineers, National Guard of the United States. He was appointed captain, Army of the United States, on 31 August 1942, and entered on active duty on 6 September 1942.

7. The court was legally constituted and had jurisdiction. 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. The sentence to dismissal is mandatory under the provisions of Article of War 85 and is authorized by Articles of War 61 and 96.

Fletcher R. Andrews, Judge Advocate.

Herbert A. Frederick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ - CM 271956 1st Ind.

MAR 3 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 Captain Kirby L. Swinney (O-276381), Coast Artillery Corps.

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

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Sentence confirmed. G.C.M.O. 155, 17 Apr 1945)

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

SPJGH-CM 271991

13 FEB 1945

UNITED STATES	)	SECOND AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Great Bend, Kansas, 1 December 1944. Dismissal, total forfeitures and confinement for one (1) year.
	)	
First Lieutenant JOHN B. BOYD (O-1643540), Signal 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 61st Article of War.

Specification: In that First Lieutenant John B. Boyd, Signal Corps, 582d Materiel Squadron, 76th Service Group, did, without proper leave, absent himself from his station at Army Air Field, Great Bend, Kansas from about 19 September 1944, to about 13 October 1944.

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

Specification 1: In that First Lieutenant John B. Boyd, Signal Corps, 582d Materiel Squadron, 76th Service Group, did, at Army Air Field, Great Bend, Kansas, on or about 8 September 1944, with intent to defraud, wrongfully and unlawfully make and utter to Flight Officer George W. Roope, formerly of 30th Bombardment Squadron, 19th Bombardment Group, (now of 231st Army Air Forces Base Unit), a certain check, in words and figures as follows, to wit:

THE FARMERS

FORT PAYNE, ALABAMA
~~GREAT BEND, KANS~~ Sept 8 1944 No.
FIRST
THE ~~FARMERS~~ NATIONAL BANK
83 - 1368

PAY TO THE ORDER OF Cash $ 25 00

Twenty Five DOLLARS

/s/ John B Boyd
1st Lt Sig C 01643540

in payment of an indebtedness to the said Flight Officer George W. Roope, of the value of Twenty Five Dollars ($25.00), he, the said First Lieutenant John B. Boyd then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Fort Payne, Alabama for payment of said check.

Specification 2: Same allegations as Specification 1.

Specification 3: Same allegations as Specification 1 except check dated, made and uttered on or about 12 September 1944.

Specification 4: Same allegations as Specification 1 except check dated, made and uttered on or about 12 September 1944.

Specification 5: Same allegations as Specification 1 except check dated, made and uttered on or about 12 September 1944.

Specification 6: Same allegations as Specification 1 except check dated, made and uttered on or about 12 September 1944.

Specification 7: Same allegations as Specification 1 except check dated, made and uttered on or about 14 September 1944.

Specification 8: In that First Lieutenant John B. Boyd, Signal Corps, 582d Materiel Squadron, 76th Service Group, did, at Army Air Field, Great Bend, Kansas, on or about 14 September 1944, make and utter to Second Lieutenant Audel H. Hicks, 93rd Bombardment Squadron, 19th Bombardment Group, a certain check, in words and figures as follows, to wit:

Sept 14 1944
(Date)

First National OF Fort Payne, Ala.
(Write Name Of Your Bank On Above Line) (Town Name)

PAY TO THE
ORDER OF Cash $ 100 00 xx

One Hundred ---------- 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 subject to this check.

/s/ John B Boyd
1st Lt Sig C O-1643540

The said First Lieutenant John B. Boyd did thereafter wrongfully fail to maintain a sufficient bank balance for the payment of said check.

Specification 9: Same allegations as Specification 8 except check dated, made and uttered on or about 12 September 1944, in the amount of $25.

Specification 10: Same allegations as Specification 8 except check dated, made and uttered on or about 8 September 1944, in the amount of $25.

Specification 11: Same allegations as Specification 8 except check dated, made and uttered on or about 8 September 1944, in the amount of $25 to Flight Officer John T. Doganges.

Specification 12: Same allegations as Specification 8 except check in the amount of $25 and uttered to Flight Officer John T. Doganges.

Specification 13: Same allegations as Specification 8 except check dated, made and uttered on or about 8 September 1944, in the amount of $25 to Flight Officer John T. Doganges.

Specification 14: Same allegations as Specification 8 except check dated, made and uttered on or about 8 September 1944, in the amount of $25 to Flight Officer John T. Doganges.

Specification 15: Same allegations as Specification 8 except check dated, made and uttered on or about 10 September 1944, in the amount of $25 to Flight Officer John T. Doganges.

Specification 16: Same allegations as Specification 8 except check in the amount of $10 and uttered to Flight Officer John T. Doganges.

Specification 17: Same allegations as Specification 8 except check dated, made and uttered on or about 12 September 1944, in the amount of $150 to Flight Officer John T. Doganges.

Specification 18: Same allegations as Specification 8 except check dated, made and uttered on or about 8 September 1944, in the amount of $25 to Flight Officer John T. Doganges.

Specification 19: Same allegations as Specification 8 except check dated, made and uttered on or about 9 September 1944, in the amount of $60 to Flight Officer John T. Doganges.

Specification 20: Same allegations as Specification 8 except check dated, made and uttered on or about 10 September 1944, in the amount of $20 to Flight Officer John T. Doganges.

Accused pleaded guilty to Charge I and its Specification and not guilty to Charge II and all of its Specifications. He was found guilty of Charge I and its Specification, guilty of so much of each one of Specifications 1 to 7 inclusive of Charge II as involves the failure to maintain a sufficient bank balance to pay each check described therein, guilty of Specifications 8 to 20 inclusive of Charge II and guilty of Charge II. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence introduced by the prosecution is hereinafter summarized under appropriate headings indicating the Charges and Specifications to which the particular evidence is pertinent.

a. Charge I and its Specification:

Extract copies of the morning reports of appropriate organizations were properly received in evidence and showed that accused absented himself without leave from his station at Army Air Field, Great Bend, Kansas, from 19 September 1944 to 13 October 1944 (R. 20; Pros. Exs. 1, 2).

b. Charge II, Specifications 1-20 inclusive:

On the following dates accused drew the following checks on The First National Bank of Fort Payne, Alabama, and uttered them to the following persons, viz:

Spec.	Date of Check	Amount of Check	Check Uttered to	Check Uttered for	References
1	8 Sep 44	$25	See next par.	Cash or to pay gambling debts	(Pros. Ex 16)
2	8 Sep 44	$25	" " "	"	" " "
3	12 Sep 44	$25	" " "	"	" " "
4	12 Sep 44	$25	" " "	"	" " "
5	12 Sep 44	$25	" " "	"	" " "
6	12 Sep 44	$25	" " "	"	" " "
7	14 Sep 44	$25	" " "	"	" " "
8	14 Sep 44	$100	2d Lt. Audel H. Hicks	To pay gambling debt	(R 21; Pros. Ex 3)
9	12 Sep 44	$25	"	"	(R 24; Pros. Ex 5)
10	8 Sep 44	$25	"	"	(R 23; Pros. Ex 4)
11	8 Sep 44	$25	F/O John T. Doganges	"	(R 30; Pros. Ex 6)
12	14 Sep 44	$25	"	To pay gambling debt	(R 30, 31; Pros. Ex. 7)
13	8 Sep 44	$25	"	"	(R 30, 32; Pros. Ex 8)
14	8 Sep 44	$25	"	"	(R 30, 33; Pros. Ex 9)
15	10 Sep 44	$25	"	"	(R 30, 34; Pros. Ex 10)
16	14 Sep 44	$10	"	—	(R. 30, 34; Pros. Ex. 11)

Spec.	Date of Check	Amount of Check	Check Uttered to	Check Uttered for	References
17	12 Sep 44	$150	F/O John T. Doganges	Part cash & part to pay gambling debt	(R. 30, 36; Pros. Ex 12)
18	8 Sep 44	$25	"	To pay gambling debt	(R. 30, 36; Pros. Ex 13)
19	9 Sep 44	$60	"	Part cash & part to pay gambling debt	(R. 30, 37; Pros. Ex 14)
20	10 Sep 44	$20	"	To pay gambling debt	(R. 30, 38; Pros. Ex 15)

Of the first seven checks listed above (Specs. 1-7 incl), Flight Officer George W. Roope cashed four of them for accused and won the other three in a dice game where they were being circulated in place of cash. Of the four checks cashed for accused by this flight officer, the proceeds of at leave three of them were wagered by accused in a dice game. All of these seven checks were returned unpaid by the drawee bank after presentment for payment and they had not been redeemed by accused at the time of trial (Pros. Ex. 16).

The next three checks listed above (Specs. 8-10 incl) were all returned unpaid by the drawee bank after presentment for payment and had not been redeemed by the accused at the time of trial. Lieutenant Hicks had indorsed two of these checks and cashed them at the Officers' Club from which he later redeemed them after they had been returned by the drawee bank (R. 22-25).

The last ten checks listed above (Specs. 11-20 incl) were also returned unpaid by the drawee bank after presentment for payment and had not been redeemed by the accused at the time of trial. All of these ten checks had been cashed by Flight Officer Doganges, or by someone acting for him, at various places including the Officers' Club and local banks from which he later redeemed them after they had been returned unpaid by the drawee bank (R. 30-39). Flight Officer Doganges testified that all of these ten checks were given to pay gambling debts incurred by accused in dice games but that almost all of them also involved the payment of some unspecified amount of cash to accused (R. 39).

It was stipulated in writing by the prosecution, defense and the accused that if the cashier of the First National Bank of Fort Payne, Alabama, were present he would testify that (a) accused had an account at that bank, (b) the bank statement attached to the stipulation represented the condition of accused's account from 30 June 1944 to 21 October 1944, and (c) the checks drawn on that bank and described

in Specifications 1 to 20 inclusive, of Charge II were dishonored by the bank when presented for payment because the balance on deposit in accused's account was insufficient to pay them (R. 45; Pros. Ex. 17). The bank statement revealed that accused's balance was 46 cents on 28 August 1944. A deposit of $125 on 12 September 1944, less withdrawals made the same day reduced the balance to $75.40 as of the close of business on that day. On 14 September 1944 the balance fell to $25.34 and on the next day it was further reduced to 31 cents at which figure it remained until at least 21 October 1944 (Pros. Ex. 17).

4. After accused's rights as a witness had been explained to him, he elected to remain silent.

The defense introduced evidence to show that accused was competent and qualified in signal maintenance work and that he had completely organized a signal maintenance section at his field within a period of six weeks (R. 50, 51). While he served as communications supply officer of the 76th Group his work had been performed satisfactorily (R. 49). Accused's W.D., A.G.O. Form No. 66-2 card was introduced in evidence and revealed that his first performance rating had been very satisfactory and that thereafter he had received five ratings of excellent (R. 52; Def. Ex. A).

5. The prosecution's evidence, plus accused's plea of guilty, amply sustains the court's findings of guilty of Charge I and its Specification.

The accused was found guilty, under each of the twenty Specifications of Charge II, of failing to maintain a sufficient bank balance to pay each of the checks therein described when presented for payment to the drawee bank. The evidence fully establishes that accused issued these twenty checks totaling $715 over the period from 8 September 1944 to 14 September 1944, the checks being issued either to pay gambling debts or to procure cash to finance further gambling activities. The balance in accused's bank account was woefully insufficient to pay these checks when they reached the drawee bank in the ordinary course of business and all of them were dishonored for that reason. The fact that certain of these checks may have been given to pay gambling debts does not alter accused's guilt of the offenses charged (CM 249006, Vergara, 32 B.R. 5, 3 Bull. JAG 290). The evidence amply sustains the court's findings of guilty under Charge II and Specifications 1-20 inclusive, thereof.

6. Accused is 25 years of age. He graduated from high school in 1939 and for two years thereafter was employed in clerical capacities. He was inducted into military service on 16 June 1941 and on 23 March 1943, after graduation from the Signal Corps School, Fort Monmouth, New Jersey, he was commissioned a second lieutenant. On 20 December 1943 he was promoted to first lieutenant.

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

Thomas M. Jaffey, Judge Advocate.

William H. Bamberger, Judge Advocate.

Robert C. Mueller, Judge Advocate.

SPJGH-CM 271991

1st Ind
MAR 1 1945

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

TO: The Secretary of War

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of First Lieutenant John B. Boyd (O-1643540), Signal Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation 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 and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 136, 11 Apr 1945)

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

SPJGN
CM 272067

25 JAN 1945

U N I T E D S T A T E S	)	INFANTRY ADVANCED REPLACEMENT TRAINING CENTER
v.	)	Trial by G.C.M., convened at Camp Gordon, Georgia, 20 December 1944. Dismissal, total forfeitures and confinement for five (5) years.
Second Lieutenant LESTER C. LANGFORD (0-1823312), Infantry.	)	

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

---

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Lester C. Langford, Third Training Regiment, Infantry Advanced Replacement Training Center, Camp Gordon, Georgia, did, at Camp Gordon, Georgia, on or about 1 November 1944, wrongfully and unlawfully make and utter to Second Lieutenant Albert M. Lowenstein, Third Training Regiment, Infantry Advanced Replacement Training Center, Camp Gordon, Georgia, a certain check, in words and figures as follows, to wit:

Glenville, W. Va. November 1 1944 No._____

Kanawha Union Bank

Pay to the order of Lt. Albert Lowenstein $125.00

One Hundred Twenty five and no/100 - - - - - Dollars

For_____ - /s/ Lester C. Langford
2nd Lt. Inf. AUS 0-1823312

The said Second Lieutenant Lester C. Langford, then well knowing that he did not have and not intending that he should have sufficient funds in the Kanawha Union Bank, Glennville, West Virginia, for the payment of said check, such conduct being of a nature to bring discredit upon the military service.

Specification 2: Same as Specification 1 but alleging check made and uttered to Second Lieutenant Albert M. Lowenstein, drawn on same bank at same place, dated 1 November 1944, in the amount of $125.

Specification 3: Same as Specification 1 but alleging check made and uttered to Second Lieutenant Ernest M. McFarland, drawn on same bank at same place, dated 1 November 1944, in the amount of $40.

Specification 4: Same as Specification 1 but alleging check made and uttered to Second Lieutenant Ernest M. McFarland, drawn on same bank at same place, dated 1 November 1944, in the amount of $200.

Specification 5: Same as Specification 1 but alleging check made and uttered to Second Lieutenant Vick Costellos, drawn on same bank at same place, dated 6 November 1944, in the amount of $50.

Specification 6: Same as Specification 1 but alleging check made and uttered to Second Lieutenant Philip Blecher, drawn on same bank at same place, dated 6 November 1944, in the amount of $55.

Specification 7: In that Second Lieutenant Lester C. Langford, Third Training Regiment, Infantry Advanced Replacement Training Center, Camp Gordon, Georgia, did, at Macon, Georgia, on or about 23 August 1944, with intent to defraud wrongfully and unlawfully make to "Cash" and utter to the First National Bank and Trust Company in Macon, of Macon, Georgia, a certain check, in words and figures as follows, to wit:

Glenville	West Va	Aug 23, 1944
City	State	Date

Kanawha Union Bank Glenville W. Va.
Name of Bank Branch City State

Pay to the
order of Cash $ 40.00

Forty and no/100 - - - - - - - - - - - - - - - Dollars

Club No. _____

Serial No. 0-1823312

Organization Co D, 4th T.B. Cp. Wheeler

/s/ Lester C. Langford
2nd Lt. Inf.

endorsed on the revers side as follows:

Pay to the order of any Bank, Banker, or Trust Company. All Prior Endorsements Guaranteed. The First National Bank & Trust Company in Macon, Macon, Georgia. Sep 4 1944 64-67. Pay to the order of Any Bank, Banker or Trust Company. All prior Endorsements Guaranteed. Trust Company of Georgia 64-10 Atlanta, Georgia 64-10 and other endorsements which are illegible.

and by means thereof, did fraudulently obtain from the First National Bank & Trust Company in Macon of Macon, Georgia, $40.00, he the said Second Lieutenant Lester C. Langford, then well knowing that he did not have and not intending that he should have sufficient funds in the Kanawha Union Bank, Glenville, West Virginia, for the payment of said check.

He pleaded not guilty to and was found guilty of the Charge and all Specifications thereunder. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for 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 on 4 May 1943 had opened a checking account with the Kanawha Union Bank, Glenville, West Virginia; that on 25 July 1944 such account contained a balance of $6.10; that no deposits were subsequently made and that thereafter all of the checks described in the Specifications and hereinafter mentioned were presented to such bank and payment thereof refused by it because of "insufficient funds" (R. 26; Ex. H). The bank never sent the accused a statement of his account and his father had never made a deposit to the account (Id.).

On 23 August 1944 the accused, representing that he had sufficient funds in the account, drew and cashed a check thereon for $40 with the First National Bank and Trust Company, Macon, Georgia. The check was presented to the drawee bank for payment which was refused and the check has never been redeemed by the accused (R. 26; Exs. G, I). On 1 November 1944 the accused engaged in a card game with certain officers among whom were the payees of the checks described in Specifications 1-4 inclusive. During the game he borrowed funds from them for which he issued the checks described in such Specifications. Similarly on 6 November 1944, after another card game, he issued the checks described in Specifications 5 and 6 (R. 8-14, 14-19, 19-22; Exs. A-F). These six checks, aggregating the sum of $595, were either cashed or deposited by their respective payees with the Georgia Railroad Bank and Trust Company, Augusta, Georgia, and, after presentation in due course to the drawee bank for payment, were returned unpaid because of "insufficient funds" and the payees thereof, without reimbursement by the accused, were required to comply with their indorsement thereon (Id., R. 23-26).

4. The accused, after explanation of his rights as a witness, testified concerning Specification 7 only. After he had received information that payment of the check described in Specification 7 had been refused, he had requested the bank in Augusta, Georgia, to re-deposit it upon the assumption that his father, pursuant to request, would deposit the sum of $100 in the account. Such requested deposit was not made and the accused finally on 9 November 1944, after being placed in arrest, learned that the check had not been paid and, since he was in arrest, he was unable to collect monies owed to him with which to redeem it. He had received no statement from his bank but attempted to remember the status of his checking account (R. 27-30).

5. Specifications 1 through 6 allege that the accused on two named dates wrongfully and unlawfully made and uttered six checks, aggregating the sum of $595 and drawn upon a named bank, to four different persons when he knew that he did not have and without intending that he should have sufficient funds upon deposit for the payment thereof in the drawee bank. Specification 7 similarly alleges the making and uttering of another check in the sum of $40 and also alleges that such check was fraudulently made and uttered and the face amount thereof fraudulently secured from the bank cashing it. All of the Specifications are laid under Article of War 96 of which they are clearly violative (MCM, 1928, par. 152b; Dig. Op. JAG, 1912-40, Sec. 453 (24); 32 BR 5-15). It is also well settled that one is chargeable with notice of the condition of his bank account and that, upon proof of the return of a check because of insufficient funds upon deposit to pay it, the duty is imposed upon the drawer of the check, when charged with conduct discreditable to the military service, to show that his issuance of the check resulted from an honest mistake unaccompanied by his own carelessness or neglect (22 BR 279, 32 BR 95).

The evidence for the prosecution shows conclusively that the accused on 25 July 1944 had upon deposit the small sum of $6.10 in his

checking account which remained thereafter wholly unsupplemented. The accused was charged with knowledge of such inadequacy but nevertheless he thereafter on 23 August 1944 drew a check of $40 upon such account and cashed it after falsely representing that his account was ample to pay it. The acquisition of the proceeds of the check was therefore fraudulent and such intent is inexorably compelled and in no wise dispelled by the accused's testimony because, according to him, he did not even request his father to make a deposit in the depleted bank account until after the check had first been returned unpaid. The other six checks, totaling $595, were subsequently issued against the still unreplenished account for pre-existing debts, which fact only prevents their issuance from being fraudulent, but brands their issuance nevertheless as conduct to the discredit of the military service. The evidence, therefore, establishes the accused's guilt beyond a reasonable doubt of the acts alleged in all of the Specifications and fully supports the findings of guilty of the Charge and all Specifications thereunder.

6. The accused is about 28 years old, married and has three children. War Department records show that he attended high school for four years, graduating in 1937. From 1 September 1937 to 1 November 1938 he was employed as a laborer and truck driver by a road construction company and from the latter date until 10 May 1940 he was a salesman of heating systems and refrigerators. He has had enlisted service from 13 January 1941 until 21 January 1943 when he was commissioned a second lieutenant upon completion of Officers' Candidate School and has had active duty as an officer since the latter date.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and all Specifications thereunder 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 Glenmor, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN-CM 272067 1st Ind.

Hq ASF, JAGO, Washington 25, D. C. FEB 7 - 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 Lester C. Langford (0-1823312), 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 thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted, that the period of confinement be reduced to two years, that the sentence as thus modified be ordered executed, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

3 Incls.
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 and confinement reduced to two years. G.C.M.O. 153, 17 Apr 1945)

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

SPJGQ-CM 272083

9 MAR 1945

UNITED STATES	)	FOURTH AIR FORCE
v.	)	Trial by G.C.M., convened at March Field, California, 14 and 15 November 1944. Dismissal and confinement for ten (10) years. Disciplinary Barracks.
Captain JAMES A. VAUS, JR., (0-1042196), Coast Artillery Corps.	)	

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

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

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

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

Specification 1: In that Captain James A. Vaus, Jr., CAC, 603rd Antiaircraft Artillery Group, did, at Los Angeles, California, on or about 26 April 1944, feloniously take, steal, and carry away one Model 40 BJ Victor Animatophone Projector, Serial Number 84337-34867X, of the value of about $288.34, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Captain James A. Vaus, Jr., CAC, 603rd Antiaircraft Artillery Group, did, at Los Angeles, California, on or about 1 May 1944, wrongfully and knowingly sell one Model 40 BJ Victor Animatophone Projector, Serial Number 84337-34867X, of the value of about $288.34, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Captain James A. Vaus, Jr., CAC, 603rd Antiaircraft Artillery Group, did, at Los Angeles, California, on or about 9 May 1944, with intent to deceive, wrongfully and without proper authority, sign and utter to the Folmer Graflex Company, Los Angeles, California, War Production Board Preference Rating Certificate Number 1742673, dated 9 May 1944, and War Department Purchase Order Number SF 1328, dated 9 May 1944, and by means thereof did obtain one 4 X 5 Speed Graphic Camera, Number 329149, with Graflex Flash Synchronizer and Kalart Range Finder fitted thereto, and one 4 X 5 Speed Graphic Camera, Number 330068, with Graflex Flash Synchronizer and Kalart Range Finder fitted thereto, which said cameras were used by the said Captain James A. Vaus for his own personal gain and benefit.

Specification 2: In that Captain James A. Vaus, Jr., CAC, 603rd Antiaircraft Artillery Group, did, at Los Angeles, California, on or about 9 May 1944, with intent to defraud, wrongfully certify on U. S. Government Tax Exemption Certificate Number W 1,045,033, dated 9 May 1944, that he had purchased for the exclusive use of the United States Government four Kalart Range Finders and four Flash Synchronizers from Folmer Graflex Corporation, Los Angeles, California, and by such certification did unlawfully obtain a tax exemption of $35.00 on the said purchased articles, he, the said Captain James A. Vaus, Jr., well knowing and not intending that the said purchased articles should be for the exclusive use of the United States Government.

Specification 3: In that Captain James A. Vaus, Jr., CAC, 603rd Antiaircraft Artillery Group, did, at Los Angeles, California, on or about 10 May 1944, with intent to deceive, wrongfully and without proper authority, sign and utter to Paul Cox, 1640 East Mountain Street, Pasadena, California, War Production Board Preference Rating Certificate Number 1742673, dated 10 May 1944, and War Department Purchase Order Number SF 1573, dated 10 May 1944, and by means thereof did obtain one Model 40 BJ Victor Animatophone, Serial Number 90957-42549X, which said Animatophone was used by the said Captain James A. Vaus for his own personal gain and benefit.

Specification 4: In that Captain James A. Vaus, Jr., CAC, 603rd Antiaircraft Artillery Group, did, at Los Angeles, California, on or about 17 January 1944, with intent to deceive, wrongfully utter to Ralke Company, Los Angeles, California, War Production Board Preference

Rating Certificate Number 1232416, signed by Captain Edward G. Faircloth, and by means thereof did obtain one Model 40 B Victor Animatophone, Serial Number 89289-39908X, which said Animatophone was used by the said Captain James A. Vaus, Jr., for his own personal gain and benefit.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous conviction was introduced at the trial. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

CHARGE I, Specifications 1 and 2:

On 17 June 1943 First Lieutenant Clifton A. Klenzing, contracting and purchasing officer of the 37th Coast Artillery Brigade (AA), (R. 24; Pros. Ex. 1) executed a War Department purchase order directed to Victor Animatograph Corporation, Davenport, Iowa for 2 Model 40 B Victor SOF Aphone and Liftops and 2 unit J speakers. (R. 24; Pros. Ex. 2). The order technically described what were commonly known as Model 40 BJ Victor sound projectors, the "B" indicating the projection machine and amplifier and the "J" designating the speaker, both component parts of one complete machine (R. 16, 25).

The purchase was to be made from the Welfare Enlisted Men's Fund (R. 28) under the direction of the commanding general and for the purposes of entertaining enlisted men of the brigade (R. 27).

As a result of the purchase order Lieutenant Klenzing received from the Victor Animatograph Corporation two projecting machines, one of which bore the serial number 84337-34867 (R. 26) and upon receipt of the invoice (R. 25; Pros. Ex. 3), which erroneously designated the last two of the serial numbers but which error was corrected (R. 25, 26), the machines were paid for out of government funds in October 1943 (R. 27; Pros. Ex. 4) at the unit price of $288.34 (Pros. Ex. 2 and 3).

The projectors thereupon were placed in use by the Special Service Officer of the brigade for the entertainment of enlisted men (R. 27).

On 26 February 1944 First Lieutenant Robert C. Bradfield was assigned to the 37th Coast Artillery (AA) Brigade as Special Service Officer, took over the projector No. 84337-34867 on memorandum receipt (R. 7) and it thereafter remained in his control as such officer until 26 April 1944 when it was discovered to be missing (R. 8, 9).

Headquarters of the brigade was located on Flower Street, Los Angeles, California in April 1944 (R. 6) and both the accused, who was then communications officer, and Lieutenant Bradfield had offices in the headquarters building. There was a freight elevator in the rear of the building operating between the accused's office and the ground floor where it opened into an alley between Flower and Figueroa Streets (R. 9). Although a thorough search of the building was made, including the accused's office, the projector was not found (R. 15).

On or about 15 April 1944 Mr. Edward Breitbard, a civilian residing in San Diego, California, was interested in purchasing a projector and, while visiting in Los Angeles, read a newspaper advertisement offering a new 40 BJ Projector for sale. Upon calling the telephone number given in the advertisement the person answering identified himself as "Captain Vaus" and as a result of subsequent negotiations Mr. Breitbard agreed on about 25 April 1944 to purchase a projector from "Captain Vaus" for $350.00. According to the arrangements he was to send a check for that amount post-dated to the first of the ensuing month and Captain Vaus was to ship the projector by United Parcel Service (R. 29, 30). The check was sent accordingly, was cashed and returned to Mr. Breitbard. A photostatic copy of the check was admitted in evidence, without objection (R. 30; Pros. Ex. 5). Mr. Breitbard received the projector by shipment through United Parcel Service (R. 31). The receipt given by United Parcel Service to the accused for this shipment, which discloses that the transaction took place on 28 April 1944, and the shipping label which was attached to the projector at the time of delivery were received in evidence (R. 32; Pros. Ex. 7; R. 109, Pros. Ex. 28). Mr. Breitbard also received a bill of sale from the vendor and it was admitted in evidence (R. 31; Pros. Ex. 6). It was stipulated and agreed that the endorsement on the check (Pros. Ex. 5) and the signature on the bill of sale (Pros. Ex. 6) are the signatures of the accused (R. 33).

Mr. Breitbard had possession of the projector until the latter part of April 1944 when he turned it over to an officer of the 37th Coast Artillery (AA) Brigade (R. 32). When shown a projector at the trial he identified it as the projector which he had purchased from Captain Vaus both by its serial number, which was 84337-34867, and by the mark upon it made by the shipping label (R. 32; Pros. Ex. 7) which had been attached to it (R. 31, 32).

Lieutenant Bradfield and Captain Klenzing likewise identified the same projector at the trial as the projector which had been in the custody and control of the Special Service Officer of the brigade from the time of its purchase until its disappearance in April 1944. This they were able to do not only by the serial number but by special brigade markings which had been placed upon the machine and which, though somewhat obliterated, were still apparent (R. 6-8, 17, 28). The projector was then admitted in evidence, without objection (R. 33; Pros. Ex. 8).

Charge II, Specifications 1 and 2:

On 9 May 1944 the accused tendered to Miss Maurine McKasson, secretary of the Folmer Graflex Corporation of Los Angeles, California, at the office of the company, a War Production Board Preference Rating Certificate (R. 36; Pros. Ex. 10) and a War Department Purchase Order (R. 36; Pros. Ex. 11) for the purchase of 4 Speed Graphic Cameras, size 4X5 with f. 6.3 lenses, 4 Kalart range finders and 4 Graflex flash synchronizers (R. 34). At the same time and place he presented a United States government tax exemption certificate (R. 35, 36; Pros. Ex. 12). Delivery of the ordered equipment was effected on or about 24 May 1944 at which time the accused received and receipted for the equipment listed upon a charge ticket (R. 37; Pros. Ex. 13). This charge ticket described 4, 4x5 Speed Graphic Cameras with flash synchronizers and range finders fitted thereto and listed the serial numbers of the cameras, among which were Nos. 330068 and 329149. It was stipulated and agreed that the signatures on the preference rating certificate, the purchase order, the exemption certificate and the charge ticket are the signatures of the accused (R. 37).

The accused paid for the articles listed on the charge ticket by check in the sum of $604.64 (R. 39, 87; Pros. Ex. 14) which amount was the difference between the sum of the invoices and a credit of $35.00 allowed because of the exemption certificate (R. 41, 82, 83, 85, 87, 88; Pros. Ex. 14, 15).

On about 27 or 28 May 1944 Mr. William M. McConnell, a resident of Los Angeles, California, read an advertisement in a local newspaper in which "Speed, Graphic, 4x5, r. 4:5 lens, Kalart Range Finder, Flash Gun and Sync." were offered for sale. It was likewise indicated that "no priority" would be required to effect the sale. Upon calling the telephone number listed in the advertisement Mr. McConnell was answered by one who identified himself as "Captain Vaus". Arrangements were made for a meeting and as a consequence Mr. McConnell purchased from the accused a camera with range finder and flash synchronizer attached for the cash price of $250.00 which was paid to the accused in currency (R. 46, 47). Mr. McConnell produced the camera in court and testified that its serial number was 330068. He did not have the range finder and flash synchronzier at the time but testified that they were part of the camera when he purchased it (R. 47). The camera was admitted in evidence (R. 47; Pros. Ex. 16).

On or about 2 June 1944 Mr. Bob Russell Anderson, a resident of Los Angeles, California got in touch with the accused through arrangements made by Anderson's partner after the partner had read an advertisement in the newspaper and telephoned to the accused regarding the purchase of a camera. In response the accused brought a camera to Mr. Anderson's home and, after inspecting it, Mr. Anderson bought it, giving the accused a check in the sum of $250.00 in payment thereof (R. 48, 49; Pros. Ex. 17).

At the time of the sale the accused told Mr. Anderson that the registration tag was still on the camera and that it would be a good thing if he sent it in to the company so that the camera would be registered (R. 50). It was stipulated and agreed that the endorsement on said check is the signature of the accused (R. 49). The camera together with the range finder and flash synchronizer was likewise produced in court and the serial number was found to be 329149. It was thereupon admitted in evidence (R. 49, 50; Pros. Ex. 18).

Charge II, Specification 3.

On 10 May 1944 the accused tendered to Mr. Paul Cox, a motion picture equipment distributor doing business in Los Angeles, California, a War Production Board Preference Rating Certificate (R. 65; Pros. Ex. 19) and a War Department Purchase Order (R. 65; Pros. Ex. 20) for four Model 40 BJ Victor Animatophones. Mr. Cox testified that he would not have delivered the ordered equipment to the accused without receipt of a preference rating certificate and War Department purchase order (R. 65); and, furthermore, that the accused stated the equipment was being purchased by the Headquarters of the 37th AAA Brigade for individual organizations of the brigade (R. 67). The preference rating certificate and the purchase order were forwarded to the Victor Animatophone Corporation and, in due course, the projectors so ordered were received and were delivered to the accused on separate occasions (R. 64, 67). On 3 June 1944 Mr. Cox delivered two of the projectors to the accused, taking a receipt therefor. One of the projectors listed on the receipt, or delivery slip, was No. 90957-42549 (R. 64; Pros. Ex. 21), and the net price of this projector was $295.00 which amount the accused paid to Mr. Cox in cash (R. 64). It was stipulated and agreed that the signatures on the preference rating certificate, the purchase order and the delivery slip are the signatures of the accused (R. 65).

On or about 4 June 1944 Mr. Ted Wells, employee of Columbia Studios in Los Angeles, California, read a newspaper advertisement offering a sound projector for sale. He called the telephone number indicated in the advertisement and the person answering, who identified himself as "Captain Vaus", stated that he would sell a projector to Mr. Wells and arranged to meet him at Western and Beverly Streets, in Los Angeles. Although Mr. Wells was unable to identify the accused as the person with whom he later dealt, he did, in pursuance of the arrangements, meet an officer at the designated place and purchased a "Model 40 BJ projector" from him paying a cash price of $400.00, of which $310.00 was paid by check and $90.00 in currency (R. 68-70). The check so tendered and received by the officer making the sale was admitted in evidence (R. 70; Pros. Ex. 22). It was stipulated and agreed that "what purports to be a photostatic copy of the signature of Captain James Vaus on the reverse side of the check is in fact a photostatic copy of his signature" (R. 70).

Subsequent to this purchase, Mr. Wells sold the projector, and the buyer, in turn, sold it to another so that Mr. Wells was unable to produce the machine in court. He had not made any notation of the serial number of the machine while it was in his possession and his testimony regarding the serial number of the projector which the subsequent buyer had given to him over the telephone was rejected (R. 71, 72). During an adjournment of the trial, however, he located the subsequent purchaser of the projector which he had owned and identified it as such by a photographic jack which he had attached to the projector a few days after he had bought it and which was still on the machine (R. 88, 89). He then examined the serial number of the projector and found it to be 90957-42549X (R. 89).

The WPB Preference Rating Certificates described in Specifications 1 and 3 of Charge II, although issued to different vendors, each bear the same number, viz: 1742673 but the one issued to Folmer Graflex Corporation (Pros. Ex. 10) is marked "original -..." and the one issued to Paul Cox (Pros. Ex. 19) is marked "Duplicate...". First Lieutenant Robert C. Bradfield testified that since 28 February 1944 he has been the Special Service Officer of the 37th AAA Brigade and as such was authorized to issue WPB preference rating certificates (R. 6, 9, 12). Only two other officers had been authorized to issue such certificates and the accused was never authorized to do so (R. 10, 14). (See also, War Department Memorandum No. W 210-26-43, 14 September 1943, "Procedure for Assigning Preference Ratings etc", introduced out of order by agreement (R. 22; Def. Ex. A)). Although the certificates were not kept under lock and key (R. 10) a register was maintained in which an entry was made immediately upon the issuance of a certificate (R. 9, 11). During the period Lieutenant Bradfield had custody and control of the certificates and register, certain certificates were found missing among which was No. 1742673 (R. 13).

Charge II, Specification 4.

In January 1944 Captain Edward Faircloth (now retired) was Special Service Officer of the 37th AAA Brigade and as such on 17 January 1944 signed a WPB Preference Rating Certificate No. 1232416 (R. 75; Pros. Ex. 23) at the request of the accused who had prepared the certificate and sent it by messenger to Captain Faircloth for his signature. He made no inquiry as to the purpose of the certificate, assuming that it was legitimate, and he signed it without question (R. 95, 96). The accused was, at the time, communications officer of the brigade (R. 98).

On or about 17 January 1944 the accused entered into negotiations with Mr. Carl H. Balke, a motion picture equipment dealer with offices in Los Angeles, California, for the purchase of a motion picture projector. In pursuance thereof the accused presented to Mr. Balke the WPB preference rating certificate signed by Captain Faircloth (Pros.

Ex. 23) which covered the purchase of "1 Model 4 BJ SOF Animatophone" (R. 73). This certificate "formed the basis for the purchase" of the projector desired and was required before any order could be accepted and fulfilled (R. 74). Upon receipt of the certificate Mr. Ralke "extended the order" to the factory of the Victor Animatophone Corporation and in due course Mr. Ralke received an invoice from the Company covering the projector ordered and indicating that it was shipped on 31 March 1944 to Special Service Officer, 37th AAA Brigade, Los Angeles, California (R. 75, 76; Pros. Ex. 25). Captain Faircloth had signed the preference rating certificate as such officer (Pros. Ex. 23). Mr. Ralke, in turn, billed the Headquarters, 37th AAA Brigade by invoice dated 7 April 1944 and indicating the purchase was on order of "Captain Voss" (sic) (R. 74, 76; Pros. Ex. 23). Both invoices described the article sold as a Model 40 B SOF Animatophone with "J" speaker and listed the serial number of the machine as 89289-39908X. In response to this invoice Mr. Ralke received from the accused his personal check in the full payment of the sum of $288.34 (R. 74, 75; Pros. Ex. 23).

In the early part of April 1944, a Model 40 BJ Victor projector was received by Lieutenant Bradfield, then Special Service Officer of the brigade, at his office. The package in which it was received came direct from the factory, was addressed to the Special Service Officer of the brigade, and indicated that the contents consisted of a Victor projector. He opened the package, saw that it contained a Victor projector and speaker, and upon examination of the enclosed invoice noted that it, like the package, was addressed to the Special Service Officer of the brigade. He had not ordered or purchased such a machine and upon inquiry established that his office had not obligated any funds for its purchase. He thereupon telephoned to Mr. Ralke and as a result it was discovered that the machine belonged to the accused, who claimed it, took the invoice and sent two of his men to Lieutenant Bradfield's office for the projector (R. 91). Lieutenant Bradfield had not noted the serial number of the projector but stated, at the trial, that it was the same type of machine as Prosecution's Exhibit 8 (R. 92).

On or about 13 April 1944, as a result of answering a newspaper advertisement offering a camera and projector for sale, Mr. Arthur Anderson, a partner of Automatic Screw Machine Company, made arrangements with the accused whereby the accused brought a Model 40 BJ Victor projector to Mr. Anderson's office (R. 78). Mr. Anderson examined the machine and asked whether a priority was required for its purchase to which the accused answered in the negative, stating that the projector was surplus army equipment. Mr. Anderson thereupon purchased the machine for $475.00 and gave the accused a company check in that amount (R. 79, 80; Pros. Ex. 26). At the same time, the accused gave Mr. Anderson a receipt which acknowledged payment in full for "one complete Model 40 BJ Victor Animatograph" (R. 80; Pros. Ex. 27). It was stipulated and agreed that the endorsement on the check and the signature on the receipt are the signatures of the accused (R. 80).

Mr. Anderson had been subpoenaed to bring the projector into court but was unable to do so because it had been sold. He was unable to recall the serial number of the projector and had been unable to obtain access to the machine since its sale because of the absence of the purchaser (R. 80, 81, 90).

On or about 26 August 1944 Major James C. Clark, Inspector General's Department, became acquainted with the accused during the course of an investigation conducted under orders of the Commanding General, Fourth Air Force (R. 101). This proceeding was prior to the filing of any charges against the accused (R. 104). In an interview between Major Clark and the accused, after the accused was properly warned of his rights, he was sworn and examined, the questions and answers being transcribed by a stenographer and signed by the accused. The original signed statement is apparently in the office of the Inspector General at Washington but an unsigned copy was produced and used at the trial by both the prosecution and the defense in the examination of Major Clark although it was neither offered nor received in evidence. Upon interrogation by the prosecution, Major Clark proceeded to testify from his independent recollection of the interview fortified by an inspection of the copy of the statement to refresh his memory. Defense counsel objected on the ground that "we are entitled to see the statement if it was made" (R. 103, 104). There was no other showing that the original statement was unavailable. The law member ruled that Major Clark's testimony was inadmissible for the reason "that there were no charges preferred at the time," evidently meaning at the time when the statement was made (R. 105). After a lengthy argument in which defense counsel indicated his agreement with the reason assigned by the law member for rejection of the statement and any evidence of its contents, the law member reversed his ruling and permitted testimony regarding the accused's statements at the interview touching the offenses charged (R. 105-109). Defense counsel made no further objection to receiving such testimony and made no motion to strike any part of it (R. 109-113). Defense counsel asked for permission to examine the copy of the statement and the prosecution agreed (R. 104).

Major Clark thereupon testified that in the interview accused admitted taking a projector from Headquarters of the 37th AAA Brigade between 5 and 6 a.m. on 26 April 1944 as alleged in Specification 1 of Charge I. This he had accomplished by transferring it to his automobile by means of an unguarded elevator shaft in the building. He later removed the brigade identification marks from the projector and, having made contact with Mr. Breitbard through a newspaper advertisement offering the projector for sale, he shipped the projector to him on 28 April 1944 and received a check for $350.00 from him in payment for it as alleged in Specification 1 of Charge I. The accused identified the shipping receipt (Pros. Ex. 28), the check (Pros. Ex. 5) and the bill of sale (Pros. Ex. 6) (R. 109, 110).

With regard to Specifications 1 and 2 of Charge II the accused admitted his signatures on Prosecution's Exhibits 10, 11, 12 and 13 and that he used the first three for the purpose of making purchases from the Folmer Graflex Corporation purportedly for the use of the government and that he obtained a tax exemption credit in the purchase (R. 110, 111). One of the machines so purchased he sold to Mr. Bob Anderson receiving a check (Pros. Ex. 17) in payment therefor, which check he admitted endorsing (R. 111, 116). The other machine so acquired he sold to Mr. McConnell receiving $250.00 in cash therefor (R. 111).

The accused likewise admitted signing Prosecution's Exhibits 19 and 20 and tendering them to Mr. Paul Cox, signing the statement received from him (Pros. Ex. 21) and thereafter selling the projector so purchased to Mr. Ted Wells, receiving a check and cash therefor and endorsing the check (Pros. Ex. 22) (R. 112, 117). He likewise admitted obtaining a WPB preference rating certificate from Captain Faircloth (Pros. Ex. 23) by the use of which he obtained a Victor Animatophone from the Ralke Company which projector he subsequently sold to the Automatic Screw Company. He recognized the invoices from the Ralke Company (Pros. Ex. 24) and the Victor Animatograph Corporation (Pros. Ex. 25) and admitted receiving the equipment listed thereon. Subsequently he sold the Victor Animatophone so received to the Automatic Screw Company receiving payment therefor by check in the sum of $475.00 (Pros. Ex. 26) and he admitted endorsing the check and receiving the amount in payment for the projector (R. 112, 115, 118).

Defense counsel before cross examination of Major Clark asked for a recess to enable him to examine the copy of the accused's statement and the request was granted (R. 113).

Upon reconvening defense counsel made the following statement:

> "If the court please, in the interest of saving time, rather than cross examine this witness, I think the purpose could be accomplished if I could read from this statement of Captain Vaus to this Investigating Officer the matters which seem to apply so that the whole portion of the statement relating to the matter will be in the record. It is the purpose of my suggestion to get the matter in the record" (R. 113).

He thereupon announced further that "in respect to the testimony of this witness in relation to Charge I, Specifications 1 and 2,... I do not wish to read into the record any portion of the statement made by Captain Vaus" (R. 114), but thereafter cross examined the witness respecting his testimony as to Charge II, and its Specifications, read into the record questions and answers contained in the statement numbered 293 to 301, 302 to 309, 320 to 321, 323 to 325 and 374-375, inclusive (R. 115-118) and at one time directed the witness to take the statement in question and refer to portions of it (R. 116).

From the evidence thus introduced it was shown that the accused admitted he had no authority, written or oral, for the purchase of any cameras, moving picture projectors or photographic equipment (R. 115, 116) or for the issuance of any WPB preference rating certificates, War Department purchase orders, or government tax exemption certificates (R. 112) and was aware of the fact that, he had, by the unauthorized use of such instruments, violated OPA, WPB, Treasury and Army Regulations (R. 116). It also appears that the accused obtained the War Department purchase order forms from the stock of forms in the supply room, the tax exemption certificate form from the Quartermaster's office and the WPB preference rating certificate forms from the Special Service Officer, sometimes sending for them and at other times he "went down and helped himself" (R. 115).

The portions of the statement read into the record likewise show admissions of the accused that he sold a Graflex camera to Bob Anderson and that he identified the check (Pros. Ex. 17) as one received in payment therefor; that he recalled the sale to Ted Wells by identifying his endorsement on the check received in part payment for a projector (Pros. Ex. 22) the balance being paid in cash; and that he sold a projector to the Automatic Screw Machine Company and received and indorsed a check (Pros. Ex. 26) in payment (R. 116-118).

Neither the prosecution nor the defense offered the accused's statement in evidence.

4. For the defense, Lieutenant Colonel Judson L. Crary, Headquarters 37th AAA Brigade, testified that he has known the accused since October 1942 and, although he was not the accused's "superior officer" and had no supervision over his work, he considered him an efficient officer (R. 51, 52).

Chief Warrant Officer Frederick W. Lieckel, Assistant Communications Officer, Headquarters 37th AAA Brigade, has known and worked under the accused since April or May 1944. In his opinion the accused is the best communications officer he has ever seen (R. 54, 55).

The accused, having been advised of his rights, elected to remain silent (R. 118, 119).

5. At the outset, it is appropriate to state that, although the trial judge advocate apparently had available, in the files of the Inspector General's Department at Washington, a signed and sworn statement of the accused, reliance was placed solely on the independent recollection of the contents of said statement which the officer who conducted the investigation had at the time of trial. If, as the evidence of Major Clark purports to show, this statement constituted a confession by the accused of all the offenses charged, then its introduction in evidence would as conclusively have shown the guilt of the accused as the other evidence of record indubitably proves the corpus delicti of the offenses alleged.

It is fundamental that a writing is the best evidence of its own contents and that, when available, such writing must be produced to prove the contents. However, if a writing is lost or destroyed, or if it is otherwise satisfactorily shown that the writing cannot be produced, then the contents may be proved by a copy or by oral testimony of witnesses who have seen the writing (Par. 116a, MCM 1928).

The best evidence rule clearly applies to a statement of the accused which has been reduced to writing (CM 210985 Bonner, 9 BR 383; CM 215351, Nadrowski, 10 BR 383).

It does not appear that the original, signed statement was unavailable to the trial judge advocate, who, when asked: "Is that statement available?" answered: "That I do not know", and in the absence of any explanation it cannot be presumed that it was unavailable.

It is further provided that "an objection to proffered evidence of the contents of a document based on any of the following grounds may be regarded as waived if not asserted when the proffer is made: It does not appear that the original has been lost, destroyed, or is otherwise unavailable..." (par. 116a, MCM 1928).

As soon as it became apparent to defense counsel that the prosecution proposed to elicit testimony from Major Clark based upon his independent recollection of the contents of the written statement of the accused, it was his privilege to object and demand production of the original statement (CM 215351, Nadrowski, supra). An objection was made though ineptly phrased, containing no demand for the production of the original document and assigning none of the allowable reasons why secondary evidence should be rejected. It is apparent that defense counsel sought merely to inspect the copy of the statement with which Major Clark had refreshed his memory and at no time demanded production of the original.

The law member nevertheless sustained the objection, initially, upon the amazing ground that, since the accused had not, at the time of making the statement, been officially charged with any offense, he could not be heard to confess one; but, upon argument he vacillated and finally reversed the ruling and allowed Major Clark to testify.

Thereafter defense counsel not only made no further objection to the independent recollection of the witness nor a motion to strike his evidence, but asked and was granted a recess with leave to examine the copy of the accused's statement; read into the record, subsequently, certain portions of the statement and indicated portions which he did not wish to read; and directed the witness to take the statement and refer to it during the cross-examination.

A careful examination of the record of Major Clark's direct examination and cross examination discloses that defense counsel voluntarily

submitted and apparently relied upon such portions of the copy of the accused's statement as he deemed favorable to the accused in the light of Major Clark's testimony and this procedure leads to the reasonable inference that he arbitrarily excluded from the record such portions as he considered unfavorable. Under the circumstances the copy of the statement should have been wholly excluded or introduced in its entirety. If the court was to consider the correctness of the witness' recollection of the contents of the statement it was entitled to see all of the instrument and, in lieu thereof, should not have been afforded the opportunity of seeing any. The reason appears in redirect examination of Major Clark in which he stated that his independent recollection was not based solely upon the limited number of questions and answers selected by defense counsel but upon various other portions of the statement not read into the record and which were separated from one another not only, physically, by several pages of other interrogation but, in point of time, by the lapse of intervening days.

It was incumbent upon the defense counsel, if he objected to secondary evidence, to persist in excluding all evidence independent of the original, signed statement or, if secondary evidence was offered, to demand that the copy of the statement be introduced. While there is a conflict of authority as to whether there are degrees of secondary evidence, that is, whether one kind is admissible when another having more probative value is accessible, the majority rule is that a copy is a higher degree of secondary evidence than testimony of witnesses, and, when obtainable, bars the evidence of such testimony. It is universally conceded, however, that where a proper case is made for the introduction of secondary evidence, any kind of secondary evidence is competent which is admissible by other rules of law, unless it is shown by the nature of the evidence itself or is made to appear by the objecting party that other and more satisfactory evidence is known to the other party and can be produced by him (32 C.J.S. sec. 784, pp. 708, 709).

In view of all that transpired, it must be held that the accused waived the right of exclusion of secondary evidence of his original sworn statement and by his acceptance and introduction of only portions of a copy thereof with knowledge that the full and complete copy was available, likewise waived the right to object to the oral testimony of Major Clark. Moreover, no substantial right of the accused has been violated by the reception of this evidence, because except as noted, every element of the offenses charged has been shown beyond reasonable doubt by other competent evidence.

Thus it is clearly apparent from such independent evidence that the accused on 28 April 1944 sold to a civilian for the sum of $350.00 a moving picture projector which was the property of the United States and which was found to be missing on 26 April 1944 from Brigade Headquarters where it was stored and where the accused had his office. Both opportunity of access to the machine and unexplained possession of

the article very shortly after its disappearance justifies the inference that it was stolen by the accused, and the inference of theft is strengthened by evidence that the Brigade identification marks upon the projector had been removed prior to the sale (Charge I, Specifications 1 and 2).

It is doubtful, however, whether the court was justified in finding the value of this projector to be $288.34. The measure to be applied is the market value of the article when stolen. No such testimony appears in the record. It was shown that the projector was purchased by the government on 30 September 1943 for $288.34, and the price obtained by the accused on sale in April 1944 was $375.00. In the absence of anything further it cannot be lawfully determined that the market value of the projector on 26 April 1944 was $288.34. The projector was before the court, however, and under all the circumstances the court would have been justified in finding the value to be "over $50.00" and the record is, therefore, legally sufficient to sustain such a finding as to each specification.

With regard to the remaining charge and its specifications the record, exclusive of the admissions and confessions of the accused, conclusively shows a deceitful scheme on his part whereby, on various occasions, within a period of six months, by the unauthorized use of government priority certificates and purchase orders, he acquired photographic equipment and moving picture projectors from three different dealers and subsequently sold such articles at a personal profit.

In each instance the purchases were purportedly on behalf of the government. In addition to tendering to each dealer a WPB preference rating certificate each of which showed upon its face that the contract was being placed by the 37th AAA Brigade, or some unit thereof, for governmental purposes, he fortified these false representations in two instances by presenting, at the same time, War Department purchase orders likewise indicating that the purchases were for and on behalf of the "Signal Section" and "Signal Fund", respectively, of the brigade, and on one occasion, in addition, offered a government tax exemption certificate certifying that the purchase was for the exclusive use of the United States government.

The Special Service Officer of the Brigade testified that the accused had no authority whatever to issue WPB preference rating certificates and defense counsel introduced into the record those portions of the copy of the accused's statement in which he admitted he had no authority, written or oral, for the purchase of any cameras, moving picture projectors and photographic equipment or for the issuance of any WPB preference rating certificates, War Department purchase orders or tax exemption certificates.

The motive and purpose of the accused in thus wrongfully executing and using government preference rating certificates is so plainly evident that detailed and exact proof of the fact that he could not otherwise obtain the articles which he secured would have been specious.

It is a matter of common knowledge that, because of the imperative need of critical materials for the production of war materiel, the manufacture and delivery of numerous articles ordinarily obtainable by the public has been curtailed under executive orders and the rules and regulations of the War Production Board in pursuance thereof. Such orders, rules and regulations are contained in the Federal Register and the courts shall take judicial notice thereof (44 U.S.C., sec. 307). It is equally well known that the only way in which to obtain articles produced under WPB limitation orders is by the presentation of either a preference rating certificate, or some other evidence of priority right.

The manufacture and delivery of certain photographic and projection equipment and accessories was, on 15 September 1943, placed under such a limitation order (C.F.R. Title 32, Ch. 9, sec. 3291.145 as amended 19 August 1944; Fed. Reg. 22 August 1944, Vol. 9, p. 1944) and it will be presumed that the accused, acting under the necessity imposed by this restriction, used the preference rating certificates, as alleged, for the purpose of obtaining the cameras, motion picture projectors, and accessories. Moreover, there is direct evidence that the articles in question could not have been otherwise obtained. Thus, both Mr. Cox and Mr. Ralke testified that the accused could not have obtained the equipment described in Specifications 3 and 4, Charge II, without the preference rating certificates; the charge ticket from the Folmer Graflex Corporation (Specification 1, Charge II) and the invoice from Victor Animatograph Corporation (Specification 4, Charge II) disclose that the articles were furnished upon army priorities; and, most significant of all, are the facts that, in the newspaper advertisement whereby the accused offered for sale the cameras which he had obtained from the Folmer Graflex Corporation by use of a false priority certificate, it was stated that no priority certificate would be required of the purchaser and that in negotiating for the sale to Mr. Anderson of the projector which the accused had obtained from the Ralke Company by a false priority certificate he informed the prospective buyer that no priority certificate would be required of him. Thus it is reasonable to infer that the accused was fully aware of priority regulations governing the purchase of cameras and projectors and assumed that all prospective buyers were equally cognizant of them.

Indeed, it is upon this situation that the plan and purpose of the accused was based. By false priority certificates and war purchase orders he was enabled to secure equipment for which individuals without priority rights were willing, because of the scarcity of the commodities, to pay prices far in excess of the ceiling prices fixed for

manufacturers and dealers and in this he was eminently successful. The evidence shows beyond reasonable doubt that he sold, to four individuals, at a profit of approximately $100 in each instance, the cameras and projectors which he is alleged to have obtained by the wrongful means alleged in Specifications 1, 3 and 4 of Charge II. It likewise shows that he wrongfully tendered a government tax exemption certificate and obtained an exemption of $35.00, as alleged in Specification 2, Charge II, upon the transaction alleged in Specification 1, Charge II.

The Specifications in question were not artfully drawn and unnecessarily allege elements not essential to the offenses charged. It is apparent from a reading of the Specifications that they are intended to charge and do charge the wrongful execution and use of government certificates. If they were designed to cover other offenses they fall short of doing so. Insofar as these offenses are concerned the further allegations that they were perpetrated "with intent to deceive" or "with intent to defraud" and that certain property was thereby obtained are superfluous and therefore surplusage. Their inclusion did no harm however and evidence offered in support of them merely served to show the motive and purpose of the accused for the misuse of the unauthorized documents. The reprehensible acts set forth in each of these Specifications clearly constituted conduct to the prejudice of good order and military discipline and tended to bring discredit upon the military service in violation of Article of War 96.

6. Records of the War Department disclose that the accused was born in Los Angeles, California, is 26 years of age and unmarried. He was graduated from Belmont High School in 1937, majored in mathematics at Los Angeles City College for 1 year and at Wheaton College, Wheaton, Illinois for 1 year. He attended the Bible Institute of Los Angeles for 2 years. In civilian life he was a supervisor in a department store in Los Angeles, and in 1941-1942 he was assistant to the manager of the University of California. He was inducted on 8 January 1942. On 31 July 1942 he was commissioned as a second lieutenant, Army of the United States while attending the Antiaircraft Artillery School at Camp Davis, North Carolina and was assigned to duty with the 37th Coast Artillery Brigade (AA) at Los Angeles, California. On 24 December 1942 he was promoted to first lieutenant and, on 20 January 1944, to captain.

7. The court was legally constituted and had jurisdiction of the person and of the subject matter. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 2 of Charge I except the words "of the value of about $288.34," substituting therefor the words "of a value in excess of $50", and legally sufficient to support

all other findings and the sentence and to warrant confirmation thereof. The sentence imposed is authorized upon conviction of a violation of either Article of War 94 or Article of War 96.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Fredrick, Judge Advocate.

[illegible], Judge Advocate.

(260)

SPJGQ-CM 272083 1st Ind MAR 23 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 Captain James A. Vaus, Jr. (0-1042196), Coast Artillery Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 2 of Charge I except the words "of the value of about $288.34," substituting therefor the words "of a value in excess of $50," and legally sufficient to support all other findings and the sentence and to warrant confirmation of the sentence. Despite the moral turpitude and traits of criminal character involved in these offenses, it is my opinion that the confinement appears to be excessive. I therefore recommend that the sentence be confirmed but that the confinement be reduced to five years, and that the sentence as thus modified be carried into execution. I further recommend that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement.

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

Myron C. Cramer

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 confinement reduced to five years. G.C.M.O. 202, 9 Jun 1945)

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

SPJGK
CM 272108

24 JAN 1945

UNITED STATES v. First Lieutenant SCOTT D. SMITH (0-566771), Air Transport Command.	ALASKAN DIVISION AIR TRANSPORT COMMAND Trial by G.C.M., convened at Edmonton, Alberta, Canada, 29 November 1944. Dismissal, total forfeitures, and confinement for two years.

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 93rd Article of War.

Specification 1: In that First Lieutenant Scott D. Smith, 554th Army Air Force Base Unit, Air Transport Command, Memphis, Tennessee, did, at 1460th Army Air Force Base Unit, Air Transport Command, Army Post Office 476, Care of Postmaster, Minneapolis, Minnesota, on or about 1 August 1944, feloniously embezzle by fraudulently converting to his own use the sum of $50.00 in Canadian money, value $45.45 lawful money of the United States, property of Exchange 722-1, a governmental agency of the United States, intrusted to him by the said governmental agency.

Specification 2: In that First Lieutenant Scott D. Smith, * * *, did, at 1460th Army Air Force Base Unit, Air Transport Command, Army Post Office 476, Care of Postmaster, Minneapolis, Minnesota, on or about 10 August 1944, feloniously embezzle by fraudulently converting to his own use the sum of $100.00 in Canadian money, value $90.90 lawful money of the United States, property of Exchange 722-1, a governmental agency of the United States, intrusted to him by the said governmental agency.

Specification 3: In that First Lieutenant Scott D. Smith, * * *

did, at 1460th Army Air Force Base Unit, Air Transport Command, Army Post Office 476, Care of Postmaster, Minneapolis, Minnesota, on or about 19 August 1944, feloniously embezzle by fraudulently converting to his own use the sum of $85.00 in Canadian money, value $77.27 lawful money of the United States, property of Exchange 722-1, a governmental agency of the United States, intrusted to him by the said governmental agency.

Specification 4: (Finding of not guilty).

CHARGE II: Violation of the 96th Article of War. (Finding of guilty disapproved by reviewing authority.)

Specification 1: (Finding of not guilty).

Specification 2: (Finding of guilty disapproved by reviewing authority).

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

He pleaded not guilty to all Chargesand Specifications, and was found not guilty of Specification 4, Charge I, and Specification 1, Charge II, and guilty of the Charges and all other Specifications. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of ten years. The reviewing authority disapproved the findings of guilty of Charge II and Specifications 2 and 3 thereof, approved the sentence, but reduced the period of confinement to two years, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, relating to the Charge and Specifications of which the accused now stands convicted (Charge I - Specifications 1,2, and 3), is, briefly summarized, as follows:

At all times pertinent to the issues involved, as well as at the time of trial, the accused was in the military service (R. 9, 143).

On the respective dates that he is alleged to have embezzled Post Exchange funds, the accused was Post Exchange officer at the 1460th Army Air Forces Base Unit, Alaskan Division, Air Transport Command, APO 476, c/o Postmaster, Minneapolis, Minnesota, formerly designated as Station No. 7, and otherwise known as Fort Nelson, Alberta, Canada. He was assigned to duty as such officer on 23 February 1944 and continued to serve in such capacity until relieved on 29 August 1944(R. 8, Exs. 1,2,3,4). After

approximately 14 July 1944, First Sergeant Charles A. McNelis was general manager of the Post Exchange, Corporal Frank A. Filicomo was its senior clerk, and Private Arnold D. Rogers was assisting Sergeant McNelis with the bookkeeping (R. 10,66,96). Corporal Filicomo, as senior clerk, looked after cash on hand in the Post Exchange and each morning counted the cash receipts of the previous day, made out "daily sales slips", and delivered the cash and sales slips to Sergeant McNelis or to Private Rogers, both of whom occupied an office in a separate building from that in which the Post Exchange was housed (R. 48,66). On one occasion, "near the end of July," Corporal Filicomo discovered a shortage in the cash and found a note or memorandum in the cash box, which, he stated, was in the handwriting of accused and conveyed the information that $50 had been removed from the cash box by accused (R. 67,68). This memorandum was not introduced in evidence. Its contents were supplied by the oral testimony of Corporal Filicomo over the timely objection urged by defense counsel that it was secondary evidence and that no proper foundation had been laid for its use. Corporal Filicomo had previously stated that he delivered the memorandum to Private Rogers with the cash and sales slips on the day that he discovered it and had not himself made any search for it (R. 67). The objection by defense counsel was overruled and the evidence admitted upon the representation by the trial judge advocate that a proper foundation, i.e., proof of its loss and that diligent and unsuccessful search had been made for it, would be subsequently laid when Private Rogers should be called as a witness (R. 67-68). Private Rogers was called as a witness and testified later during the trial but was not questioned on the point (R. 96-105). Defense counsel did not renew his objection or make motion to strike the evidence after Private Rogers had testified. Private Rogers stated that the $50 shortage occurred "some date late in July" and that there was a notation with the daily sales slips, in the handwriting of Corporal Filicomo, stating that $50 had been taken by accused (R. 105). Sergeant McNelis stated that on 7 or 9 August he spoke to accused about this $50 item, "about getting it", but "instead of securing the $50 Lieutenant Smith (accused) borrowed another $100.00 from the Post Exchange money" (R.13). When Sergeant McNelis "broached" the subject of the $50 to accused, the latter said, "Mac, I need another $100.00." At the time, money belonging to the Post Exchange fund was lying on a table in their presence and other money of the same fund was close at hand in the open safe. Accused took from this money $100 and put it in his pocket (R.14). On or about 19 August accused again told Sergeant McNelis that he needed money, whereupon Sergeant McNelis handed him $85 from exchange funds which he was then engaged in counting (R. 15). Accused had only requested $70, but this sum could not be composed from the bills available, so he took $80 in $20 bills and requested change for taxi fare. In response to this latter request, Sergeant McNelis gave him an additional $5 in $1 bills (R.15).

The regular July inventory, begun on 25 July and completed, after having been taken a second time, on or about 28 July, having disclosed a shortage of approximately $600, the accused delivered $400 to Sergeant

McNelis with instructions to spread it over about three days sales (R. 16, 17,18).

4. For the defense.

Upon having his right to testify under oath, to make an unsworn statement, or to remain silent explained to him, the accused elected to testify under oath. He stated that he was 28 years of age, married, and had one adopted child, and that his wife was about to give birth to a child of their own (R. 143). He attended Southern Indiana Preparatory School for three years and Notre Dame University for almost two years, after which he did construction work in a steel mill (R. 144). He had never had any merchandising or bookkeeping training or experience. He had been in the Army for three years, during two of which he had been a commissioned officer. On or about 1 July 1943, he was transferred to Fort Nelson and given approximately nine jobs, including that of general supply officer (R. 145). In February 1944 an additional duty was assigned to him, to wit: Post Exchange officer. His primary duty assignment at the time was that of Air Corps Supply Officer, and in addition, he was Signal Supply Officer, Air Corps Property Officer, and Service or Mess and Billeting Officer (R. 147; Pros. Ex. 3). Being unfamiliar with either merchandising or bookkeeping, he neither checked the Post Exchange books nor took an inventory at the time he assumed duties as Post Exchange officer. He merely accepted the word of his predecessor that everything was in order (R. 146). His other duties prevented his devoting more than from 45 minutes to an hour each day to supervision of the Post Exchange, and he was neither familiar with the stock on hand nor in position to have first-hand knowledge of the manner in which the business was being conducted (R. 154,162). The enlisted men who were working under him were inexperienced and were chosen because of their availability rather than on the basis of their qualifications (R. 148). About the middle of July 1944, Sergeant McNelis, who had been made manager of the Post Exchange only a few days previously, reported to accused that "he was missing the sum of about three hundred dollars." Not understanding how this could be true, accused directed Sergeant McNelis to let the matter go until the regular monthly inventory was taken. The inventory developed that a shortage actually existed, the amount thereof, as reported to accused by Sergeant McNelis, being approximately $480 (R. 149). Accused did not know when or how the shortage had arisen, but, being the accountable officer, felt that he was responsible; so he delivered to Sergeant McNelis $435, a portion of which he borrowed from three civilians, with instructions to put it in the sales account (R. 149,150,151). He did not instruct Sergeant McNelis to spread the amount over three days' sales (R. 156). He had neither taken any money from the Post Exchange nor received any merchandise for which he had not paid prior to the time that he turned the $435 over to Sergeant McNelis (R. 150,152,156). He withdrew the sum of $50 from Post Exchange funds on or about 1 August, $100 on or about 9 August, and $85 on or about 19 August, and in each instance used the money to repay a

civilian from whom he had borrowed part of the $435 and who was then preparing to return to the United States (R. 150).

On cross-examination accused stated that he did not know the names of the three civilians from whom he borrowed and to whom he repaid the $50, the $100, and the $85 (R. 158); and admitted that he borrowed $196 of the $435 from two enlisted men (R. 158-159), and that there had been some days on which he had drunk liquor during duty hours in the back part of the Post Exchange (R. 163). After accused had answered the question with reference to drinking liquor, defense counsel objected. The law member ruled that the objection came too late, whereupon defense counsel moved to have accused's answer stricken. This motion was denied (R. 163).

Under examination by the court, accused stated that he did not report the shortage in July to the commanding officer because he (accused) was hoping to be transferred to the United States and "didn't want anything to happen" (R. 165).

5. The accused, as exchange officer, was legal custodian of all exchange property and funds of his particular exchange (par. 20a, AR 210-65, 1 July 1944), and therefore held such property and funds in a fiduciary capacity. As a matter of law, he could not, in his personal capacity, borrow these funds from himself in his official capacity (CM 244621, Morrison, 28 B.R. 355, III Bull. JAG, Mar 1944, p. 99; CM 254947, III Bull. JAG, Aug 1944, p. 344). He admitted that he withdrew from exchange funds the three several sums of money as alleged in Specifications 1, 2, and 3 of Charge I, and made personal and unauthorized use thereof, facts which are also clearly established by other evidence of record. In so doing, he was guilty of embezzlement as charged (CM 254947, supra; CM 192530, Dig. Op. JAG 1912-1940, sec. 451 (18)).

The testimony of Corporal Filicomo as to the contents of the memorandum found in the cash box at the time the initial shortage of $50 was discovered was secondary evidence introduced without a proper foundation having been laid for its introduction, and no foundation for its introduction was subsequently laid (par. 116a, MCM, 1928), but, in view of accused's admission that he did withdraw and use the $50, this objectionable evidence as well as the improper reference to accused's drinking while on duty could not have prejudiced him in any substantial right (AW 37).

While not objected to, the testimony of Private Rogers that there was a notation with the daily sales slips, in the handwriting of Corporal Filicomo, stating that accused had taken the $50, was likewise secondary evidence and was also hearsay, but its admission in evidence was also harm-

less in view of accused's admissions.

6. War Department records disclose that this officer is 28 years of age and separated from his wife. He is a high school graduate, and before entering the service was employed as an inspector by a company engaged in manufacturing ordnance for the Army. He entered the service on 21 February 1942, attained the grade of corporal, and upon graduating from Officers' Candidate School, was appointed a Second Lieutenant, Army of the United States, on 28 October 1942. He was promoted to the grade of first lieutenant, Army of the United States, Air Corps, on 30 April 1943 (to terminate upon relief from duty with Army Air Forces), and reaffirmed or reappointed First Lieutenant, Army of the United States, Air Corps, on 13 July 1943.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and 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 93.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK - CM 272108 1st Ind.

Hq ASF, JAGO, Washington 25, D. C., FEB 6 - 1945

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 Scott D. Smith (O-566771), Air Transport Command.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted, that a United States penitentiary 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 the above recommendation into effect, should such action meet with approval.

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 143, 13 Apr 1945)

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

SPJGK
CM 272197

12 JAN 1945

UNITED STATES v. Private JOHN A. DEZAN (35098322), 1559th Army Air Forces Base Unit, Southwest Pacific Wing, Pacific Division, Army Air Forces, Air Transport Command.	PACIFIC DIVISION AIR TRANSPORT COMMAND Trial by G.C.M., convened at APO 929, 11 November 1944. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private John A. Dezan, 1559th AAF Base Unit, APO 929 did at APO 929 on or about 28 August 1944 wrongfully use morphine, a narcotic drug.

Specification 2: In that Private John A. Dezan, 1559th AAF Base Unit, APO 929, did, at APO 929 on or about 9 October 1944, have in his possession twenty (20) morphine syrettes, containing in all about ten (10) grains, more or less, of a habit forming drug, to wit: morphine, said drug not having been ordered by a medical officer of the Army.

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

3. In the opinion of the Board the record of trial is legally sufficient to support the findings of guilty of Specification 2 of the Charge and the Charge but insufficient to support the finding of guilty of Specification 1 of the Charge, for the reasons hereinafter set forth.

Specification 1 alleges that the accused did on or about 28 August 1944 "wrongfully use morphine". In support of this allegation Private V. J. Lang testified that on the date and at the place alleged in the Specification, the accused took from his pocket what proved to be a syrette, punctured his arm with the needle thereof, and by squeezing the syrette, injected its contents in his arm (R. 7). He referred to the contents as "morphine" but stated that his knowledge of the contents was based upon what another soldier told him the following day. The other soldier in turn based his knowledge upon what he was told by another soldier (R. 8) when he took the empty syrette to the dispensary for examination (R. 9-10). The witnesses observed a knot or bump on the accused's arm which the accused said was a mosquito bite (R. 7, 9, 10). The defense counsel did not object to the foregoing testimony. Forty-two days later twenty syrettes of morphine were found in accused's possession, as alleged in Specification 2. (R. 12). No testimony was offered to establish that the syrette used on 28 August was similar to those so discovered.

4. The accused having been advised of his rights elected to remain silent.

5. All of the elements of the offense charged were clearly established and proved by the evidence of record except the most important one, namely: That the contents of the syrette was morphine. The only evidence adduced tending to prove that fact was hearsay and therefore inadmissible. The witness Lang said that another soldier had told him that the syrette contained morphine. The other soldier did not know of his knowledge. He was so told by still another soldier. So we find the evidence was hearsay upon hearsay. If this improper evidence is stricken from the record, as it should have been, there is no remaining evidence of record to show the contents of the syrette. The mere fact that forty-two days later twenty syrettes of morphine were found in accused's possession does not supply the necessary basis for the inference that the substance used by him was morphine. Therefore the accused may not legally be found guilty on such a record of using morphine, wrongfully or otherwise. Defense counsel's failure to object to hearsay evidence will not cure the error committed. CM 178446.

By reason of the above holding the sentence of confinement is legally excessive. Specification 2 charging the possession of a habit forming drug will not legally support a sentence of confinement in excess of one year (MCM, 1928, par. 104a, page 100; CM 264800). The record of trial

is therefore legally sufficient to support only a sentence of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for a period of one year.

(On Leave), Judge Advocate.

Judge Advocate.

Judge Advocate.

SPJGK
CM 272197

1st Ind.

War Department, J.A.G.O., JAN 23 1945

TO: Commanding General, Pacific Division, Air Transport Command, APO 953, c/o Postmaster, San Francisco, California.

1. In the case of Private John A. Dezan (35098322), 1559th Army Air Forces Base Unit, Southwest Pacific Wing, Pacific Division, Army Air Forces, Air Transport Command, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 1 of the Charge and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeitures of all pay and allowances due or to become due and confinement at hard labor for one year, which holding is hereby approved. Upon the disapproval of the finding of guilty of Specification 1 of the Charge and the reduction of the term of confinement to one year, you will have authority to order the execution of the modified 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 272197).

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 272306

13 JAN 1945

UNITED STATES v. Private MARVIN A. GRAHAM, JR. (34802958), 380th Ordnance Medium Automotive Maintenance Company, Camp Shelby, Mississippi.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Shelby, Mississippi, 21-22 December 1944. Dishonorable discharge, total forfeitures, and confinement for thirty (30) years. United States Penitentiary, Atlanta, Georgia.

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

---

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

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

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

Specification: In that Private Marvin A Graham Jr, 380th Ordnance Medium Automotive Maintenance Company, did, at Camp Shelby, Mississippi, on or about 11 September 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Ponchatoula, Louisiana, on or about 6 October 1944.

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

Specification 1: (Finding disapproved by reviewing authority.)

Specification 2: In that Private Marvin A Graham Jr., * * *, did without proper leave, absent himself from his Company at Camp Shelby, Mississippi, from about 26 June 1944, to about 15 July 1944.

Specification 3: In that Private Marvin A Graham Jr., 380th Ordnance Medium Automotive Maintenance Company, did, without proper leave, absent himself from his station at Camp Shelby, Mississippi, from about 21 July 1944 to about 27 July 1944.

Specification 4: In that Private Marvin A Graham Jr., * * *, did, without proper leave, absent himself from his station at Camp

Shelby, Mississippi, from about 26 August 1944 to about 31 August 1944.

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

Specification 1: In that Private Marvin A Graham Jr., 380th Ordnance Medium Automotive Maintenance Company, having been duly placed in arrest in quarters at Camp Shelby, Mississippi, on or about 26 June 1944, did on 26 June 1944 break his said arrest before he was set at liberty by the proper authority.

Specification 2: In that Private Marvin A Graham Jr., 380th Ordnance Medium Automotive Maintenance Company, having been duly placed in confinement in the Post Stockade, Camp Shelby, Mississippi, on or about 18 July 1944, did, at Camp Shelby, Mississippi, on or about 21 July 1944, escape from said confinement before he was set at liberty by proper authority.

Specification 3: In that Private Marvin A Graham Jr., * * *, having been duly placed in confinement in the Post Stockade, Camp Shelby, Mississippi on or about 29 July 1944, did, at Camp Shelby, Mississippi on or about 26 August 1944, escape from said confinement before he was set at liberty by proper authority.

Specification 4: In that Private Marvin A Graham Jr., * * *, having been duly placed in confinement in the Post Stockade, Camp Shelby, Mississippi, on or about 4 September 1944, did, at Camp Shelby, Mississippi, on or about 11 September 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private Marvin A Graham Jr., * * *, did, at Camp Shelby, Mississippi, on or about 11 September 1944, by force and violence and by putting him in fear, feloniously take, steal, and carry away from Private Samuel D'Agostino, 51st Quartermaster Depot Company, property of Private D'Agostino, the sum of eleven dollars ($11.00), lawful money of the United States.

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

Specification: In that Private Marvin A Graham Jr., * * *, did, at Camp Shelby, Mississippi, on or about 11 September 1944, feloniously take, steal, and carry away one carbine,

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

SPJGK
CM 272306

13 JAN 1945

UNITED STATES v. Private MARVIN A. GRAHAM, JR. (34802958), 380th Ordnance Medium Automotive Maintenance Company, Camp Shelby, Mississippi.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Shelby, Mississippi, 21-22 December 1944. Dishonorable discharge, total forfeitures, and confinement for thirty (30) years. United States Penitentiary, Atlanta, Georgia.

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

---

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

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

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

Specification: In that Private Marvin A Graham Jr, 380th Ordnance Medium Automotive Maintenance Company, did, at Camp Shelby, Mississippi, on or about 11 September 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Ponchatoula, Louisiana, on or about 6 October 1944.

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

Specification 1: (Finding disapproved by reviewing authority.)

Specification 2: In that Private Marvin A Graham Jr., * * *, did without proper leave, absent himself from his Company at Camp Shelby, Mississippi, from about 26 June 1944, to about 15 July 1944.

Specification 3: In that Private Marvin A Graham Jr., 380th Ordnance Medium Automotive Maintenance Company, did, without proper leave, absent himself from his station at Camp Shelby, Mississippi, from about 21 July 1944 to about 27 July 1944.

Specification 4: In that Private Marvin A Graham Jr., * * *, did, without proper leave, absent himself from his station at Camp

Shelby, Mississippi, from about 23 August 1944 to about 31 August 1944.

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

Specification 1: In that Private Marvin A Graham Jr., 380th Ordnance Medium Automotive Maintenance Company, having been duly placed in arrest in quarters at Camp Shelby, Mississippi, on or about 26 June 1944, did on 26 June 1944 break his said arrest before he was set at liberty by the proper authority.

Specification 2: In that Private Marvin A Graham Jr., 380th Ordnance Medium Automotive Maintenance Company, having been duly placed in confinement in the Post Stockade, Camp Shelby, Mississippi, on or about 18 July 1944, did, at Camp Shelby, Mississippi, on or about 21 July 1944, escape from said confinement before he was set at liberty by proper authority.

Specification 3: In that Private Marvin A Graham Jr., * * *, having been duly placed in confinement in the Post Stockade, Camp Shelby, Mississippi on or about 29 July 1944, did, at Camp Shelby, Mississippi on or about 26 August 1944, escape from said confinement before he was set at liberty by proper authority.

Specification 4: In that Private Marvin A Graham Jr., * * *, having been duly placed in confinement in the Post Stockade, Camp Shelby, Mississippi, on or about 4 September 1944, did, at Camp Shelby, Mississippi, on or about 11 September 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private Marvin A Graham Jr., * * *, did, at Camp Shelby, Mississippi, on or about 11 September 1944, by force and violence and by putting him in fear, feloniously take, steal, and carry away from Private Samuel D'Agostino, 51st Quartermaster Depot Company, property of Private D'Agostino, the sum of eleven dollars ($11.00), lawful money of the United States.

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

Specification: In that Private Marvin A Graham Jr., * * *, did, at Camp Shelby, Mississippi, on or about 11 September 1944, feloniously take, steal, and carry away one carbine,

value about $48.00, one raincoat, value about $4.03, one khaki shirt, value about $1.83, and one waist belt, value about $.25, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that Private Marvin A Graham Jr, * * *, did without proper leave, absent himself from his station at Camp Shelby, Mississippi, from about 25 October 1944 to about 28 October 1944.

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

Specification: In that Private Marvin A Graham Jr., * * *, having been duly placed in confinement in the Post Stockade, Camp Shelby, Mississippi on or about 7 October 1944, did, at Camp Shelby, Mississippi on or about 25 October 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private Marvin A Graham Jr., * * * did, near Leakesville, Mississippi, on or about 25 October 1944, by force and violence and by putting him in fear, feloniously take, steal, and carry from the presence of Mr. Gabe S. Haik, one 1937 Oldsmobile coupe, value about two hundred dollars ($200.00), and from the person of Gabe S. Haik, one Elgin pocket watch, value about fifty dollars ($50.00), and the sum of about one hundred twenty-five dollars ($125.00), lawful currency of the United States, all the property of Mr. Gabe S. Haik.

He pleaded guilty to the Specification of Charge I except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", to the excepted words, not guilty, to the substituted words, guilty. He pleaded not guilty to Charge I but guilty of a violation of the 61st Article of War. He pleaded guilty to the remaining Charges and Specifications, and the Additional Charges and their Specifications. He was found guilty of the Specification of Charge I except the words "desert" and "in desertion", substituting therefor respectively the words "absent himself without leave from" and "without leave", of the excepted words, not guilty, of the substituted words, guilty. He was found not guilty of Charge I, but guilty of a violation of the 61st Article of War. He was also found guilty of the remaining Charges and Specifications and the

Additional Charges and all of their respective Specifications. Evidence was introduced of a previous conviction by a Special Court-Martial on 9 November 1943 of a violation of the 69th and 96th Articles of War for "misuse of a 1941 Ford sedan, property of the United States furnished for military service, and breach of arrest before he was set at liberty by proper authority". In the instant case he was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for thirty (30) years. The reviewing authority disapproved the finding of guilty of Specification 1 of Charge II, approved only so much of the finding of guilty of the Specification of Additional Charge II as involves a finding that the accused did at the time and place alleged, by force and violence and by putting him in fear, feloniously take, steal, and carry away from the presence of Mr. Gabe S. Haik the 1937 Oldsmobile alleged, of the value alleged, and from the person of Gabe S. Haik the currency alleged, in the amount alleged, and one Elgin pocket watch of some value not in excess of $15, all of the ownership alleged, approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Notwithstanding the accused's pleas of guilty to all of the Charges and Specifications of which he was found guilty by the court the prosecution introduced evidence in support thereof consisting almost entirely of extracts of morning reports and stipulations of facts and of what witnesses would testify to if called. All were admitted without objection. The prosecution's evidence may be chronologically summarized as follows:

The accused was in the military service of the United States (R.44) in the grade of a private stationed at Camp Shelby, Mississippi, where the occurrences hereinafter related took place. On 26 June 1944 the accused then in arrest in quarters absented himself without leave from his organization (Morning Report, Ex. A) and was apprehended and returned to military control on 15 July 1944 (Stipulation, Ex. B) - Specification 2 of Charge II, Specification 1 of Charge III.

On 18 July 1944 he was confined at the stockade at Camp Shelby. On 24 July 1944 he escaped from confinement while being taken under armed guard to the dispensary on a sick call (Morning Report Ex. C, Stipulation Ex. D). He was returned to military control on 27 July 1944 (Stipulation Ex. E) - Specification 3 of Charge II; Specification 2 of Charge III.

On 29 July 1944 he was again confined in the stockade and escaped from confinement on 26 August 1944 (Morning Report Ex. F) by slipping out of a latrine while under armed guard (Stipulation Ex. G). He was again apprehended and returned to military control on 31 August 1944 (Stipulation Ex. H) and again confined in the stockade on 4 September 1944 (Morning Report Ex. I) - Specification 4 of Charge II; Specification 3 of Charge III.

On 11 September 1944 he again escaped from confinement while under armed guard (Morning Report, Ex. I) - Specification 4 of Charge II; Specification 3 of Charge III. On this occasion he snatched the carbine away from his guard and by means of the carbine forced the guard to accompany him a short distance from the camp. Accused asked the guard if he had any money. The guard said he had none, but shortly thereafter the guard's helmet liner was knocked off by a low-hanging branch and his wallet containing $13 fell to the ground. The accused picked up the wallet and removed $11 of the $13 and returned the wallet and the remaining $2 to the guard. This money was taken while accused had the carbine pointed at the guard. At the same time accused took from the guard his raincoat, his khaki shirt, and his web waist belt. These articles together with the carbine had been issued to the guard for his use in the Army (Stipulation, Ex. J) - Charge V and its Specification. On 6 October 1944 accused was again apprehended (Stipulation, Ex. K) and returned to military control (Stipulation, Ex. L), and on 7 October 1944 was again confined in the stockade (Morning Report, Ex. M) - Charge I and its Specification. The carbine was subsequently recovered from the place where the accused had secreted it near his home (R. 45).

On 25 October 1944, while working in a pit in a lumber yard under armed guard, accused again escaped from confinement (R. 35-37; Morning Report, Ex. M; Stipulations, Exs. N,O). - Additional Charge I and its Specification; Additional Charge II and its Specification. He was returned to military control on 28 October 1944 (Stipulation, Ex. P).

In support of Additional Charge III and its Specification there was introduced in evidence a stipulation (R. 38; Ex. Z), that if Mr. Gabe S. Haik were called as a witness he would testify that:

> "On 25 October 1944 I was the owner of a 1937 Oldsmobile coupe. On that day as I was driving from McLain, Mississippi, to Leakesville, Mississippi, on Highway No. 24, I saw a soldier carrying a rifle appear on the highway. He motioned to me to stop my car. I brought my car to a stop and three other soldiers appeared and got into the car with me. I continued on my way with the four soldiers in the car. After I had driven on for several miles, I was made to drive down a side road. The four soldiers made me stop my car and get out of it about 200 yards down this side road. They forced me to go off into the woods along this side road. One of the soldiers slapped me when I started to call for help. They took over $300 in cash and change from my person, as well as a stainless steel finger ring and an Elgin pocket watch and watch chain. One of the four soldiers was pointing the rifle

at me during this time. They then tied my hands and feet up with my necktie and my belt and left me in the woods. They also gagged me. Before they left me, one of the soldiers removed the gag, and when I started to shout for help one of them slapped me and another threatened to kill me. They drove away from where they left me in my 1937 Oldsmobile coupe.

"At about 2:00 A.M. on 28 October 1944, I was found lying in the woods and taken to a hospital in Hattiesburg, Mississippi. I had rolled over and somehow freed myself of the bonds that tied me. How I did it I do not know. I was too dazed to remember.

"On 18 November 1944, I positively identified two soldiers whose names I have been told are Private Marvin A. Graham, Jr., and General Prisoner Bernard F. Wilson, as two of the four soldiers who held me up and took my car, my money, my ring, and watch and chain on 25 October 1944. I also identified a third soldier as having been possibly involved in the robbery. I was told that his name is General Prisoner Henry S. Davidson. This identification was made in the presence of Captain Kenneth S. Coile, Detachment Corps Military Police, Camp Shelby, Mississippi. I also identified an Elgin pocket watch and chain with knife attached as mine and the same ones that were taken from me by the four soldiers. I also identified a rifle as being one of a similar make and type that was held by a soldier while I was being robbed. There is no doubt in my mind whatsoever about the two soldiers, Private Marvin A. Graham, Jr., and General Prisoner Bernard F. Wilson, being two of the four soldiers who robbed me."

By further stipulation it was shown that Mr. Haik's Elgin watch had an approximate value of $15 (R. 39, Stipulation Ex. AA) and that his 1937 Oldsmobile coupe had a reasonable present market value of $200 (R. 40, Stipulation, Ex. AC).

After accused was apprehended following the alleged robbery of the automobile, he voluntarily led his captors to the place where he had left the carbine (R. 45,51) and then to the place where Mr. Haik had previously been tied up, but, by the aid of one of accused's accomplices, had been released (R. 47,51).

By further stipulation (EX. AP)it was shown that if the prison officer were called as a witness he would testify that the accused was not given any permission or authority to be absent from the Camp Shelby stockade on the four various occasions when he escaped from confinement.

There was also introduced in evidence a written statement voluntarily signed by the accused at the instance of the investigating officer on 10

November 1944 (R. 41, EX. AD) in which the accused described the manner in which he escaped from his armed guard on or about 24 October 1944. He and three companions traveled by foot some distance from the camp and then waited on the highway for an automobile to pass. Mr. Haik came along in his coupe and the four of them got in. After traveling a few miles accused's companions forced the driver, Mr. Haik, to stop the car, pushed him out of the car and carried him into the nearby woods. Upon their return from the woods the four continued in the automobile to Mobile, Alabama, where the car ceased to run. They then proceeded to the home of the accused where they stayed until the following morning. His parents convinced him that he should "turn himself in". About the same time the military police arrived and he was taken to Mobile and put in jail.

4. The accused having been advised concerning his right to testify, to remain silent, or to make an unsworn statement, elected to make an unsworn statement to the court (R. 64). In his statement he reiterated that he pleaded guilty to all of the charges except Charge I and Specification 1 of Charge II. He did not intend to desert the service. He was guilty, however, of robbery although he had no intention of harming Mr. Haik. He would not have committed this robbery had it not been for the fact that he was tired of walking. He gave as his reason for absenting himself without leave and escaping from confinement fear resulting from the beatings that he received from his guards. He claimed that he was beaten with a "soap sock". He would like to go overseas and fight for his country.

5. The accused pleaded guilty to all of the offenses of which he was subsequently found guilty. Although it was not legally necessary to introduce evidence to prove the commission of the numerous offenses to which the accused had pleaded guilty such a practice has been adopted and followed by courts-martial. In accordance with this practice the prosecution introduced in evidence the morning report of the accused's organization to show the various absences without leave, a stipulation that the accused had no authority to absent himself at the times alleged in the Specifications, and a stipulation that he was returned to military control by apprehension or otherwise at the times alleged. As all of the absences took place when the accused was either in arrest in quarters or a prisoner in confinement in the stockade, but temporarily permitted outside of its confines under armed guard, each absence involved either a breach of arrest or an escape from confinement. The accused's status as under arrest or in confinement was shown by stipulation and was reflected in the morning reports. The evidence of record thus described in conjunction with the plea of guilty was therefore legally sufficient to support the findings of guilty of -

Charge I and its Specification (AWOL)
CHARGE II and its Specification (AWOL)

Charge III and its Specifications (Escapes)
Additional Charge I and its Specification (AWOL)
Additional Charge II and its Specification (Escape)

The findings of guilty of Charge IV and its Specification (Robbery of $11.00) was legally supported by the summarized testimony admitted in evidence by stipulation (Ex. J) which showed that the accused at the point of a gun took $11.00 away from his guard. At the same time and in the same manner he took and carried away from the guard his raincoat, shirt and belt. He had previously taken his carbine away. All of these articles were articles of equipment owned by the United States and issued to the guard for military use. The stealing of such articles violates the 94th Article of War. The record does not show the value of these articles, but, being Government issue, the court could have taken judicial notice of their value. The plea of guilty cures any error or omission in this regard. The record was therefore legally sufficient to support the findings of guilty of Charge V and its Specification charging the accused with stealing these articles.

The findings of guilty of Additional Charge III and its Specification as approved by the reviewing authority was legally supported by the accused's written statement admitting his participation in the robbery of the automobile, his plea of guilty, and the stipulated testimony of Mr. Haik in which he described how he was robbed of his automobile, his watch, and his money, and in which he positively identified the accused.

6. The Charge Sheet shows the accused to be 20 years of age. Without previous military training he was inducted into the service on 13 April at Mobile, Alabama.

7. 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 as approved by the reviewing authority and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of robbery recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Title 18, paragraph 163, of the United States Criminal Code.

(On Leave), Judge Advocate.
Carle Stephens, Judge Advocate.
Thomas W. Mayer, Judge Advocate.

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

SPJGK
CM 272457

29 JAN 1945

UNITED STATES	10TH MOUNTAIN DIVISION
v.	Trial by G.C.M., convened at Camp Swift, Texas, 23 November 1944. Confinement at hard labor for six months (suspended) and forfeiture of $18.66 per month for six months.
Private THOMAS B. SMITH (32850590), Company B, 126th Mountain Engineer Battalion.	

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

---

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

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

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

Specification: In that Technician Fifth Grade Thomas B. Smith, Company F, 86th Infantry, Camp Swift, Texas, acting through Sam Bert Galyean, 126 South First Street, Grand Junction, Colorado, his designated agent, did, at Grand Junction, Colorado on or about 9 April 1944 unlawfully sell to Floyd Partridge, 255 Pitkins Street, Grand Junction, Colorado, one United States Carbine, Caliber .30 M-1, number 4715817 of the value of $51.00, issued for use in the military service of the United States.

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

Specification 1: In that Technician Fifth Grade Thomas B. Smith, * * *, did, at Camp Hale, Colorado, on or about 8 May 1944, feloniously take, steal and carry away one Pistol Automatic, Caliber .45 Model 1911A1, number 1108639 complete with holster, of the total value

of about $41.75, property of the United States, furnished and intended for the military service thereof.

Specification 2: (Finding of not guilty.)

Specification 3: (Withdrawn by direction of the appointing authority.)

He pleaded not guilty to all Charges and Specifications. Specification 3 of Charge II was withdrawn by direction of the appointing authority. He was found guilty of Charge I and its Specification, and Charge II and Specification 1 thereof, and not guilty of Specification 2 thereof. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of eighteen months. The reviewing authority approved only so much of the sentence as provided for confinement at hard labor for six months and forfeiture of $18.66 per month for six months, and suspended the execution of the sentence in so far as it related to confinement at hard labor. The sentence was published in General Court-Martial Orders Number 1, Headquarters 10th Mountain Division, 2 January 1945.

3. The legal sufficiency of the record to support the findings of guilty depends upon the evidence adduced through the depositions of four civilian witnesses, residing in Grand Junction, Colorado. Without them, the record of trial merely shows the loss of the carbine described in the Specification of Charge I and the automatic pistol, described in Specification 1 of Charge II, without directly or indirectly connecting accused with their theft. The facts so adduced will be briefly summarized.

In the first part of April 1944, while Company F, 86th Infantry, was engaged in D Series Exercises at Camp Hale, Private First Class Robert J. White, of that company, became sick and "passed out". At the time he was carrying a .30 caliber M-1 carbine, Number 4715817, which had been duly issued to him. When he recovered he inquired about his carbine but was unable to locate it (R. 7,8). The first aid man who took care of White had turned the carbine over to the company supply sergeant, who, in turn, had placed it in a "weasel" (R. 8,9). Accused, a cook in this company, had access to this "weasel" in the performance of his duties, as it was used to transport supplies and kitchen equipment (R. 9,10). Neither a carbine nor a pistol was authorized for or issued to accused (R. 10).

Early in May 1944 Private First Class Billy Phelps, while bivouacking with Company F, 86th Infantry, hung his .45 caliber pistol, No. 1108639, outside his snow shelter (R. 16). The next morning it was gone. The accused was present with the company at that time (R.16).

After receiving the oral testimony, summarized above, the court adjourned on 23 November 1944 to await the receipt of the depositions of four witnesses, residing in Colorado, Lloyd Partridge, Guy Wright, Alvin Cass Ricks, and Sam Bert Galyean. When the court reconvened on 30 December 1944, these depositions were offered in evidence and were objected to by the defense on the grounds that they were not signed by the witnesses. In accordance with paragraph 98c of the Manual for Courts-Martial, 1928, the interrogatories had been submitted on W.D. A.G.O. Form No. 118, which provides a space, just above the certificate of the officer designated to take the depositions, for the signature of the witness. In lieu of the signatures of the four witnesses, there appear in three instances that of Paul W. Wilson, and in one that of Norma J. Benson. Defense's objection was sustained, and upon the refusal of defense counsel to follow out the suggestion that the defense enter into a stipulation that the witnesses if present would testify as set forth in the depositions, the law member ruled that the depositions would not be received in evidence. A motion for a finding of not guilty was then overruled by the President of the court, and upon objection to his ruling the court was closed. Upon reconvening, the President announced that his ruling had been sustained, but that it was the further ruling of the court that the trial judge advocate take steps to have the depositions placed in proper order. To allow sufficient time for compliance with this ruling, the case was continued.

Court was reconvened on the second day thereafter, 2 January 1945, at which time the President read the following official communication from the appointing and reviewing authority:

> "1. At the trial of the above named enlisted man by the General Court-Martial of this command, of which you are president, the court refused to admit in evidence certain depositions offered by the prosecution and adjourned the trial, directing the trial judge advocate to have the depositions put in 'proper order'.
>
> "2. These depositions were taken on written interrogatories after proper notice to the defense counsel by Capt P. B. Mountjoy, CE, Intelligence Officer, Manhattan District Engineers, Grand Junction, Colorado. The witnesses were Lloyd Partridge, Guy Wright, Alvin Ricks and Sam Bert Galyean and were offered in evidence as Prosecution's Exhibits Nos. 5, 6, 7 and 8, respectively. In each instance Capt Mountjoy was requested to take the deposition of one of the foregoing witnesses, and each witness properly identified himself by name and address in answer to the first question in his deposition. However, the witnesses did not sign their depositions, but instead the Partridge, Wright and Galyean depositions were signed by one Paul W. Wilson and the Ricks deposition was signed by one Norma J. Benson. It is evident that Capt Mountjoy was confused as to the manner in which

depositions should be completed and that he believed he was required to have someone witness the taking of the depositions and sign the depositions as evidence of that fact. Wilson and Benson obviously were such witnesses.

"3. Although WD AGO Form No. 118, on which these depositions were taken, provides space on which the witnesses whose depositions were taken should sign their names to assure the proper transcription of their answers, there is no requirement in law that a deposition be signed in this manner. If the witness named in the introductory portion of the deposition properly identifies himself under oath as the same person, and the officer taking the deposition certifies in the form provided at the end of the deposition that the deposition of the 'above named' witness was duly taken by him, all of the requirements of law are met and the deposition is entitled to be admitted in evidence. All of these requirements were met in the present case and the four depositions, rejected by the court, could, therefore, have been received in evidence.

"4. You will reconvene the court at the earliest practicable date and have the rejection of the depositions reconsidered in the light of the foregoing. This direction is not intended as a criticism of your action since it would assure more normal and orderly procedure, but the exigencies of the situation in which this command now finds itself require that action be as expeditious as is legally proper. The question now under consideration is purely one of law upon which the reviewing authority is authorized to issue directions to the court under the authority of page 50, Manual for Courts-Martial."

The depositions were then admitted in evidence, over the objection of defense counsel, who made the following statement:

"The defense will have to have on record that it has objected to the depositions and has been overruled. The defense has objection to the deposition, as such. The overruling was done by the direction of the appointing authority, which is his prerogative."

4. Two legal problems are presented: (1) the right of the appointing and reviewing authority to direct the reception of the depositions in evidence; and (2) the admissibility of the unsigned depositions.

(a) Action of appointing and reviewing authority.

Paragraph 5a, Manual for Courts-Martial, 1928, page 4, circumscribes the power of the appointing authority as follows:

"An officer who has power to appoint a general court-martial may determine the cases to be referred to it for trial and may dissolve it; but he can not control the exercise by the court of powers vested in it by law (underscoring supplied). He may withdraw any specification or charge at any time unless the court has reached a finding thereon."

While the action of the court in accepting or rejecting testimony is not binding upon the reviewing authority, there is no authority granted in the Articles of War or in the Manual for Courts-Martial to the appointing or reviewing authority during the course of a trial to direct or instruct a court to receive testimony. To permit such a procedure would be to authorize the usurpation of the powers vested in the court by the act of Congress, establishing the Articles of War. Article of War 31 clearly defines the method to be followed in ruling on objections to the admissibility of evidence during the course of a trial. Rulings by the law member in this connection are final; those by the president of the court, acting in his absence, are final, unless there is objection by any member. In the event of such objection, the matter will be considered in closed court, and the correctness of the president's action determined by a majority vote of the membership of the court present at the time (MCM, 1928, par. 51).

The basic objection to the procedure followed by the appointing authority is admirably brought out in the following extract from an opinion rendered by the Attorney General of the United States to the Secretary of War on 25 February 1881 (17 O.A.G. 54), in connection with a request made by a trial judge advocate for the views of the Secretary of War as to the admissibility of testimony in a contemplated trial before a general court-martial convened by the President:

"Unless the questions now proposed by you have occurred in the administrative course of business in the War Department there is no occasion for any reply by me, and my opinion would be extra-official. On careful reflection it appears to me that the judge advocate is not empowered to call for the opinion of the Secretary of War as to the admissibility of evidence to be tendered to the court-martial. He is to conduct the proceedings upon his own responsibility, and under the direction of the chief of his bureau. An opinion of the Secretary of War, rendered to him in response to his questions, might be treated as mandatory upon the court-martial. This court, although limited in its jurisdiction, is authorized to decide all questions in relation to the cases properly before it, and in the first instance its authority is exclusive. When the court has concluded its labors, its proceedings may come before the President for approval. At that time, if the

President chooses, questions such as are here proposed may properly be submitted for the opinion of the Attorney General, as they may be of importance, in the view of the President, in connection with his revision of the decision. He may also consult the Secretary of War and other Cabinet officers upon the same subject. Opinions given in advance, which it is reasonably to be feared might be treated by the court-martial as a direction, might become extremely embarassing.

"It is also to be considered, that the opinion requested would be given without hearing the parties concerned, to whom it may be a vital matter, as cases not infrequently turn upon questions of admissibility of evidence."

The Board is of the opinion that the convening and reviewing authority acted upon an erroneous conception of the authority vested in him by paragraph 64, page 50, of the Manual for Courts-Martial, which deals with general matters affecting pleas. The pertinent paragraph, apparently relied upon by the convening authority (the provisions of which are in no way affected by this opinion), is as follows:

"Notwithstanding the action of the court on special pleas or other similar objections, the trial may proceed in the usual course as long as one or more specifications and charges remain as to which a plea to the general issue may be made or stands. For example, when pleas in bar are sustained to all but one specification and charge, to which the plea is not guilty, the trial on that specification and charge may continue. But where, as a result of the action of the court on special pleas or other similar objections, the trial can not proceed further, the court adjourns and submits the record of its proceedings as far as had to the reviewing authority. If the reviewing authority disagrees with the court, he may return the record to the court with a statement of his reasons for disagreeing and with instructions to reconvene and reconsider its action with respect to the matters as to which he is not in accord with the court. To the extent that the court and reviewing authority differ as to a question which is merely one of law, such as a question as to the jurisdiction of the court, the court will accede to the views of the reviewing authority; and the court may properly defer to such views in any case. The order returning the record should include an appropriate direction with respect to proceeding with the trial. If the reviewing authority does not wish to return the record, he will take other appropriate action."

There is nothing in the language of the paragraph to indicate that there was any intention to give the convening or reviewing authority power to rule upon the admissibility of testimony during the pendency of a case. The first part of the paragraph declares that "pleas in court-martial procedure include plea to the jurisdiction, plea in abatement, plea

in bar of trial, and pleas to the general issue", and that the "first three are known as special pleas" (par. 64, supra). The right of the convening authority to act is confined to instances where as a result of the court's action on "special pleas or other similar objections", the trial cannot proceed further, the court adjourns and submits the record of its proceedings to the "reviewing authority." Taken in connection with the context of the paragraph, it is clear that the term, "other similar objections", refers to pleas to the general issue or an objection that may be assimilated to a plea. Certainly it may not be argued logically that an objection to the admissibility of testimony is an objection "similar" to a "special plea" as that term is defined. It will further be noted that the court did not adjourn and submit the record to the reviewing authority, but that the record of trial shows merely that the reviewing authority acted upon his own initiative.

Nor do the provisions of paragraph 74 of the Manual indicate that the appointing or reviewing authority has any power over the acceptance or rejection of testimony; rather, by expressly designating a procedure for seeking advice from the appointing authority under certain circumstances it emphasizes the limitations of the control of the appointing authority over a court-martial. That paragraph provides as follows:

> "If at any time during the trial it becomes manifest to the court that the available evidence as to any specification is not legally sufficient to sustain a finding of guilty thereof or of any lesser included offense thereunder, but that there is substantial evidence, either before the court or offered, tending to prove the guilt of the accused of some other offense not alleged in any specification before the court, the court may, in its discretion, either suspend trial pending action on an application by the trial judge advocate to the appointing authority for directions in the matter or proceed with the trial. In the latter event a report of the matter may properly be made to the appointing authority after the conclusion of the trial.
>
> "Instances of occasions for applying this rule would be where in a trial for the larceny of a watch the proof shows that the article taken was a compass; and where in a trial for the wrongful sale of property (A.W. 84) the proof shows that the accused negligently lost the property."

The Board is compelled to conclude that there was an unauthorized interference on the part of the appointing and reviewing authority with the functions of the court, which in itself constituted prejudicial error. The views expressed by the Attorney General of the United States in his previously quoted opinion, applies with equal force to the trial court in the present instance:

"This court, although limited in its jurisdiction, is authorized to decide all questions in relation to the cases properly before it, and in the first instance its authority is exclusive."

To paraphrase his language, it is only when the court has completed its labors that the case is presented for approval to the reviewing authority, who is then vested with authority to act. Any instruction theretofore given by the appointing or reviewing authority on the admissibility of evidence has the effect of being a mandate which is not merely not authorized, but at least inferentially prohibited.

(b) Admissibility of depositions.

There is no specific provision in the Manual requiring that depositions be signed by the witness, but at page 89 there appears the following statement:

"All interrogatories are entered upon the form (W.D., A.G.O. Form No. 118) as indicated by the notes and instructions thereon."

The printed instructions on this form do not contain any specific statement that the depositions are to be signed, but on the last page of the form, near the bottom thereof, there does appear the following:

"(Witness sign here) _____ .

_____"

Immediately succeeding this is the following certificate:

"I certify that the above deposition was duly taken by me, and that the above-named witness, having been first duly sworn by me, gave the foregoing answers to the several interrogatories, and that he prescribed the foregoing deposition in my presence at _____, this ___ day of 19___. /underscoring supplied./

(Name) _____

_____
(Grade and Organization)

_____
(Official character, as summary court, notary public, etc.)"

The quoted sections, in the opinion of the Board, constitute a definite instruction that the depositions must be signed, as shown, first, by the use of the specific direction, "Witness sign here"; and, secondly, by the language of the certificate, which requires the official taking the deposition to attest to the fact that the witness "prescribed" the deposition in his presence. Both provisions would be superfluous if a different interpretation were placed on them. The Manual for Courts-Martial was prescribed by the President of the United States under the power vested in him by an act of Congress "for the government of all concerned" (Ex. O. 4773, Nov. 29, 1927). There appears to be no reason for disregarding these clear expressions of the intention that a deposition must be signed by the deposing witness, contained in a form expressly prescribed by the Manual, which has the full force of law upon those governed by its provisions.

In addition, there are other basic reasons for requiring the signature of a witness to his deposition. It is inherent in the use of this method of procuring testimony that a witness is examined in the absence of representatives of the parties to the proceedings. Consequently, if the testimony of the witness is not signed by him, there is normally no one, other than the attesting officer or the stenographer, who can question the accuracy of the answers. Wigmore on Evidence, Third Edition, Section 805, expresses the following views:

> "(1) Since the writing is to stand as the witness' own words, and since there is always an indefinable coefficient of error in transcription, there should be given a final opportunity for correction by the reading over to or by the witness of the writing as completed. It has been customary in statutes to make special provision for this.
>
> "(2) The witness' signature may be regarded either as necessary to constitute the writing his by adoption, or as symbolically equivalent to a knowing assent to its tenor (thus dispensing with the reading over), or as an additional means of identifying the person of the witness. Whatever the legal theory, it is usually treated as a technical requirement indispensable under the statutes." (Underscoring supplied.)

That the normal requirement as to signing by the witness applies in courts-martial, when depositions are permitted, is confirmed in the following extract from Winthrop's Military Law and Precedents, Second Edition, page 356:

> "Where the Interrogatories have been forwarded directly, or through military channels, to an officer or other person, as a commissioner or agent to take or cause to be made the deposition, such officer will proceed to meet or communicate

with the witness as soon as practicable, and to take or procure in writing his sworn answers seriatim to the interrogatories as propounded by the parties or party. These, being signed and duly certified as sworn to, are, with such documents or other writings as may have been called for from the witness or referred to in his answers, appended to the Interrogatories, and the Deposition thus made up, being authenticated by the certificate of the officer, & as duly taken, is, together with the order or orders, if any, exhibiting the authority of the officer, forwarded by mail or otherwise to the headquarters of the proper commander for transmission to the court, or directly to the president of the same, as may have been stipulated or directed." (Underscoring supplied.)

In the absence of a specific provision for the taking of testimony by deposition, such a procedure would not be proper in a trial by a court-martial. In holding that depositions would not be competent evidence in a case where the officer preferring the charges objected to their use, the Attorney General (2 O.A.G. 344, June 4, 1830) declared:

"The 37th article of the rules and articles for the better government of the navy, and the 74th article of the rules and articles for the government of the army, seem to contemplate exclusively the examination of witnesses before the court. The 74th article of the latter code, by providing, under certain restrictions, and in cases not capital, that depositions may be taken, negatives their allowance in other cases; and the existence of the provision sufficiently proves that, without it, such testimony would not be competent, even in those minor cases. English writers on this subject insist upon the propriety, in trials before naval and military courts martial, of adhering to the rules of evidence established in the common law courts of criminal jurisdiction, and these would not authorize the course proposed in the case under consideration."

That Federal courts have no power to order the taking of testimony by deposition in criminal cases is a ruling of long standing. In the most recent case in which this question was presented, Luxenberg v. United States (45 Fed. (2d) 497, Nov. 17, 1930) (writ of certiorari refused by United States Supreme Court, 283 U.S. 820), the court held:

"Assignment 4 is to the refusal to order the taking of depositions of defendant's witnesses residing out of the state. It is urged that the West Virginia statute in regarding to taking depositions controls. We cannot accept

this view. Congress has made provision for service and attendance of witnesses in criminal cases. It was early determined that no power existed in the Federal courts to order the taking of depositions in criminal cases. United States v. Thomas, Fed. Cas. No. 16,476. They were unknown and unauthorized at common law. 8 R.C.L. pp. 86 and 1134." (Underscoring supplied.)

On December 26, 1944, the Supreme Court of the United States transmitted to the Attorney General of the United States the Rules of Criminal Procedure for the District Courts of the United States, prescribed by that court pursuant to the act of 29 June 1940 (c. 445, 54 Stat. 688), with the request that he report these rules to Congress, as required by the act. These rules were duly reported to Congress on 3 January 1945. Rule 16 provides for the use of depositions under certain circumstances, and contains the following pertinent stipulations:

"(d) HOW TAKEN. A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions. [Underscoring supplied.]

* * *

"(f) OBJECTIONS TO ADMISSIBILITY. Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions."

The Federal Rules of Civil Procedure, which became effective on 16 September 1938, and which are published in Title 28, U.S.C.A., following section 723c, contain the following pertinent rules:

"Rule 30. Depositions Upon Oral Examination. * * *

(e) The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32 (d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part."

"Rule 31. Depositions of Witnesses Upon Written Interrogatories.

* * *

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the

manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him."

"Rule 32. Effect of Errors and Irregularities in Depositions.
(d) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained."

It follows that if and when the Rules of Criminal Procedure become effective and only then depositions may be taken in behalf of a defendant in a criminal case in the manner prescribed in and objection to their reception in evidence shall be governed by the foregoing rules, and unsigned depositions will not be admissible, except under the conditions expressed in Rule 30.

Paragraph 111, Manual for Courts-Martial, 1928, lays down the following rule with regard to the reception of evidence:

"So far as not otherwise prescribed in this manual or by act of Congress, the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States will be applied by courts-martial."

Upon the adoption of the proposed Rules of Criminal Procedure it is clear, therefore, that in a criminal trial a deposition will have to be signed by the deposing witness, just as is required in the Federal courts at the present time in a civil trial. By virtue of paragraph 111 of the Manual (supra) it will properly follow that a similar rule will apply to depositions to be used before a court-martial, assuming there is no other expression of the executive or legislative will. It would be an anomalous situation if, at the present time, when depositions may not be used in criminal cases in the Federal courts, and may be used in civil cases only when signed by the deponent (subject to the exceptions set out in the rules), unsigned depositions would be admissible in a trial before a court-martial. The Board of Review does not feel justified in giving its approval to such an illogical conclusion.

5. For the above stated reasons the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and the sentence.

, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

SPJGK - CM 272457 1st Ind.

Hq ASF, JAGO, Washington 25, D.C. JAN 31 1945

To: The Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private Thomas B. Smith (32850590), Company B, 126th Mountain Engineer Battalion.

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

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

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings and sentence vacated, by order of the Under Secretary of War, G.C.M.O. 77, 24 Feb 1945)

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

SPJGH
CM 272571

6 FEB 1945

UNITED STATES	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND
v.	
Second Lieutenant JAMES W. FOSTER (0-533217), Air Corps.	Trial by G.C.M., convened at Kingman Army Air Field, Kingman, Arizona, 23 November 1944. Dismissal.

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 Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lieutenant James W. Foster, Section B, 3018th Army Air Forces Base Unit, Kingman Army Air Field, Kingman, Arizona, did, at Kingman, Arizona, on or about 28 October 1944, drink intoxicating liquor with Sergeant David L. Lee, Section C, 3018th Army Air Forces Base Unit, Kingman Army Air Field, Kingman, Arizona, and Sergeant Chelber M. Kulseth, Section C, 3018th Army Air Forces Base Unit, Kingman Army Air Field, Kingman, Arizona, to the detriment of good order and military discipline.

Specification 2: (Finding of not guilty).

Specification 3: In that 2nd Lieutenant James W. Foster, * * *, did, at Kingman Army Air Field, Kingman, Arizona, on or about 28 October 1944, wrongfully and without authority appropriate to his own use about four gallons of gasoline, the property of the United States.

He pleaded not guilty to the Charge and to all Specifications thereof. He was found guilty of Specifications 1 and 3, not guilty of Specification 2, and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Shortly after midnight on 28 October 1944 the accused visited the Gateway Bar, Kingman, Arizona (R. 9, 29; Ex. 1). Present there at that time were three sergeants, a corporal and a WAC private (R. 8, 29; Ex. 1). The accused and one of the sergeants each bought a bottle of liquor (R. 9, 18, 42; Ex. 1) and the accused had a drink of liquor with the above-mentioned enlisted personnel who were seated at the bar, one of whom was Sergeant Chelber M. Kulseth. After fifteen or twenty minutes the accused suggested that they go to a Sergeant Lee's house and two of the sergeants and the WAC private went with him in his automobile (R. 10, 31; Ex. 1). The accused was sober at this time (R. 10).

Sergeant Lee and his wife were at home and the entire party, including the accused, had a drink there (R. 11, 26, 42, 46). The accused and Sergeant Kulseth left to get the accused's wife and returned with her, the accused having at least one more drink with Sergeant Lee (R. 32).

Shortly thereafter the accused drove two of the sergeants and the WAC private back to the Kingman Army Air Field. Just outside the post gate the car ran out of gasoline - about one-thirty or two in the morning (R. 12, 19, 32; Exs. 1, 2, 4). The accused suggested that they get some gasoline from the "turret maintenance shed" and he and Sergeant Kulseth went to the post gatehouse where the latter telephoned the "shed" (R. 12, 33, 49, 97; Exs. 2, 4) and asked a Corporal Rhodes to come down in a "turret truck" (R. 33; Ex. 4). The accused and the sergeant then returned to the automobile and on the arrival of Corporal Rhodes they pushed it into a parking space (R. 12, 33; Ex. 4). The accused then told the other sergeant, Sergeant Gadde, to go with Sergeant Kulseth to the "turret maintenance shed" and get some gasoline (R. 20-22, 33, 99, 104; Ex. 4). Both sergeants worked at the "turret maintenance shed" (R. 22, 41). They were driven to the "shed" by Corporal Rhodes in the "turret truck" and there obtained a red five-gallon G.I. gas can with approximately four gallons of Government gasoline in it (R. 13, 27, 33, 43; Ex. 4). The two then returned to the automobile by taking a "turret truck" that was parked at the "shed" and the accused put the gasoline into his automobile (R. 14, 27, 34; Exs. 2, 4) after being told that it was obtained from the "turret maintenance shed" (R. 25).

All these events attracted the attention of the guard on duty at the gatehouse and he, the sergeant of the guard, and the O.D. proceeded

to investigate. On their arrival at the automobile they noticed a wet spot on the ground just below the gasoline tank, stains on the fender, and they found a five-gallon Government gasoline can in a "turret car" with a small amount of gasoline in it (R. 52, 56).

The four occupants were taken to the gatehouse and questioned by the O.D. The accused stated that the gasoline was obtained from the car of one Sergeant Fisher (R. 15, 35, 60; Ex. 4) and suggested that a test be made to ascertain whether it was Government or civilian gasoline (R. 61).

The accused was "drunk" but not to "a great degree" in the opinion of most of the witnesses who observed his activities at the post gate (R. 17, 36, 53, 58).

The accused signed and swore to an affidavit which was admitted in evidence (R. 71; Ex. 1) and in which he stated that he had a drink at the Gateway Bar and "several drinks" at Sergeant Lee's home; that he had driven the three enlisted personnel to the post and had run out of gasoline; that he did not remember what happened the "rest of the night" but that he had read the affidavits made by Sergeants Gadde and Kulseth and that "so far as I possibly can remember the statements in which (sic) they made are true and all statements made by Sgt. GADDE and Sgt. KULSETH regarding my participation in this incident is (sic) hereby admitted by me." Both of the mentioned affidavits were received in evidence by the court (R. 73, 75; Exs. 2, 4) and contained a summary of the night's activities recited above.

4. The accused, after being warned of his rights, elected to be sworn and testify. He did not remember suggesting to either of the sergeants that they obtain gasoline for his automobile; he admitted he took gasoline from them and put it in his automobile but he did not know where it came from, nor did he ask Sergeant Kulseth to make a telephone call in his presence or suggest it. He did tell the O.D. that the gasoline was obtained from Sergeant Fisher because that was the impression he had from the conversation between the O.D. and the two sergeants (R. 76-91). He stated that he had read the affidavit of Sergeant Kulseth hurriedly when he signed his own affidavit admitting that the statements contained in the former were true and that he did not mean to admit thereby that he had suggested that the sergeants get gasoline in the "turret maintenance shed."

5. The evidence establishes that the accused had one drink with Sergeant Chelber M. Kulseth in the Gateway Bar and at least one with Sergeant David L. Lee in the latter's home. This constitutes a violation of the 96th Article of War.

As to Specification 3 the testimony shows that the accused suggested that gasoline be obtained from the "turret maintenance shed";

that he directed Sergeant Gadde to go with Sergeant Kulseth to the shed and get the gasoline; that about four gallons of gasoline were taken from this shed; that it was "government" gasoline in a "G.I." can; and that the accused put it in the gas tank of his automobile and was told at this time that it came from the "turret maintenance shed." This evidence establishes a clear case of appropriating Government property to the accused's own use and the finding of guilty is clearly warranted.

The accused after being warned of his rights voluntarily signed and swore to an "affidavit" in which he stated that he had read the "affidavits" of Sergeant Gadde and Sergeant Kulseth and that so far as he could remember they were "true" and that "all statements made by Sgt. GADDE and Sgt. KULSETH regarding my participation in this incident is hereby admitted by me." The officer who obtained the statement from the accused read to him the draft affidavit made by Sergeant Gadde before the accused signed his affidavit. A typewritten signed copy of Sergeant Gadde's affidavit stated by the officer who obtained it to be identical with the draft that was read to the accused was admitted in evidence, the officers being unable to locate the draft. The draft affidavit of Sergeant Kulseth was read to the accused by this same officer and was admitted in evidence. While no objection was made to the reception in evidence of the accused's affidavit, objection was made to the admission of Sergeant Gadde's affidavit and the draft affidavit of Sergeant Kulseth but the court adopted the view that they were part of the accused's affidavit and were incorporated by reference therein. In their totality these three documents constituted a complete confession. It is not necessary to decide to what extent the admission of the two documents to which the accused referred was error, if it was error, because they were merely cumulative. Both Sergeant Gadde and Sergeant Kulseth testified completely on all issues of the case and the purported confession added nothing either to the proof they supplied or the weight to be given to their testimony.

6. The records of the War Department show that the accused will be 24 years of age on 7 June 1945. He was graduated from high school and was apparently unemployed until he enlisted in the Army on 2 February 1941. On 3 December 1942 he was appointed a flight officer with the rating of pilot and on 4 September 1943 he was commissioned a second lieutenant, Army of the United States. The accused testified that he is married.

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

Thomas N. Tobey, Judge Advocate.

William H. Bamberger, Judge Advocate.

Robert C. Drewecker, Judge Advocate.

SPJGH-CM 272571 1st Ind

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

TO: The Secretary of War FEB 9 1945

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 James W. Foster (0-533217), Air Corps.

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

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

(Sentence confirmed. G.C.M.O. 111, 31 Mar 1945)

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

SPJGQ
CM 272582

23 JAN 1945

UNITED STATES v. General Prisoner B. D. RUSHING (34830125), (formerly Private, Unassigned, Attached, Headquarters Detachment, Reception Center, Fort McPherson, Georgia,) and General Prisoner LIBRADO A. CHIRIBEL (38217243), (formerly Company B, 23d Signal Light Construction Battalion.)	FOURTH SERVICE COMMAND Trial by G.C.M., convened at Fort McPherson, Georgia, 18 and 29 December 1944. Dishonorable discharge and confinement for five (5) years as to each. Disciplinary Barracks.

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

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

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

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

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

As to Rushing:

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

Specification: In that General Prisoner B. D. (Initials Only) Rushing (formerly Unassigned, Attached, Headquarters Detachment, Reception Center, Fort McPherson, Georgia) having been duly placed in confinement in the Post Stockade, Fort McPherson, Georgia, on or about 9 September 1944, did at Fort McPherson, Georgia, on or about 3 December 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that General Prisoner B. D. (Initials Only) Rushing * * * did, at Fort McPherson, Georgia, on or about 3 December 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Senoia, Georgia on or about 5 December 1944.

As to Chiribel:

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

Specification: In that General Prisoner Librado A. Chiribel (formerly Company "B", 23rd Signal Light Construction Battalion, Camp Murphy, Florida), having been duly placed in confinement in the Post Stockade, Fort McPherson, Georgia, on or about 25 October 1944, did, at Fort McPherson, Georgia, on or about 3 December 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that General Prisoner Librado A. Chiribel * * * did, at Fort McPherson, Georgia, on or about 3 December 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Senoia, Georgia, on or about 5 December 1944.

Each of the accused pleaded not guilty and was found guilty of all Charges and Specifications and sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years. The reviewing authority approved the sentence imposed upon Chiribel but disapproved that of Rushing, ordering a rehearing as to this accused. Upon rehearing, Rushing pleaded not guilty and was found guilty of all Charges and Specifications and sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for twenty years. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for five years. The United States Disciplinary Barracks, Fort Leavenworth, Kansas was designated as the place of confinement for each of the accused and the record of trial, including the record of rehearing as to Rushing, was forwarded for action under Article of War 50½.

3. With respect to the accused, Chiribel, the record of trial is insufficient to sustain the finding of guilty of the offense of desertion set forth in Charge II and its Specification. This accused at the time of commission of the offense, was a general prisoner under an executed dishonorable discharge (R. 12, 21; Ex. 2). It has long been established that a dishonorably discharged general prisoner cannot be legally guilty of desertion on a date subsequent to that on which he was separated from the service. (Dig. Op. JAG 1912-1940, Sec. 416 (11); CM 199224, Hoppert, 3 B.R. 335; CM 199970, Thompson, 4 B.R. 209; CM 200520, Tompkins, 4 B.R. 345; CM 200589, Reed, 4 B.R. 347). The basis for this rule lies in the express wording of Article of War 58, which describes as a deserter "any person subject to military law who deserts * * * the service of the United States". A dishonorably discharged general prisoner is no longer in the military service and therefore cannot be a deserter within the meaning of the Article. The rule and the reasoning set forth in CM 252812, Scott, Bull. JAG, June 1944, page 233, relied on by the Staff Judge Advocate, relate to charges under Article of War 64, and in view of the

differences of language between that Article and Article of War 58, have no application with respect to the latter.

Since the table of maximum punishments is inapplicable to general prisoners under executed dishonorable discharge, however, the sentence as to Chiribel remains legal despite the failure of the record to sustain the finding of guilty of desertion (Par. 104a, MCM 1928).

5. For the reasons stated the Board of Review holds the record of trial, as to the accused, Chiribel, legally insufficient to support the findings of guilty of Charge II and the Specification thereof. With this exception, the record of trial is legally sufficient to support the findings as to each accused and to support the sentence of the accused Chiribel and the sentence, as approved by the reviewing authority, of the accused Rushing.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ - CM 272582 1st Ind

Hq ASF, JAGO, Washington 25, D.C. JAN 25 1945

TO: Commanding General.
Fourth Service Command
Atlanta, Georgia

1. In the foregoing case of General Prisoners B. D. Rushing and Librado A. Chiribel, I concur in the holding by the Board of Review and for the reasons stated therein recommend with respect to the accused, Chiribel, that the findings of guilty of Charge II and its Specification be disapproved. Upon compliance with this recommendation, under the provisions of Article of War 50½, you will have authority to order the execution of the sentence as to each of the accused.

2. 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 272582)

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 272588

24 JAN 1945

UNITED STATES	13TH ARMORED DIVISION
v.	Trial by G.C.M., convened at Camp Bowie, Texas, 28 December 1944. Dismissal, total forfeitures and confinement for six (6) months.
First Lieutenant ROBERT H. McGOVERN (O-1548497), Ordnance Department.	

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 93rd Article of War.

Specification 1: In that First Lieutenant Robert H. McGovern, Ordnance Department, 135th Ordnance Maintenance Battalion, did, at Camp Bowie, Texas during the month of October 1944, feloniously embezzle by fraudulently converting to his own use the sum of $14.00, lawful money of the United States, entrusted to him by officers of the 135th Ordnance Maintenance Battalion for the purpose of paying their dues for the month of October to Camp Bowie Officers' Club.

Note: And two additional specifications identical in form with Specification 1, except as follows:

Specification 2: Embezzlement of $14 during the month of November 1944.

Specification 3: Embezzlement of $1.25 during the month of December 1944.

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

Specification 1: In that First Lieutenant Robert H. McGovern, * * *, did, at Camp Bowie, Texas, on or about 15 April 1944, borrow from Martin Kalman (then Corporal, a member of 135th

Ordnance Maintenance Battalion), the sum of $200.00, this to the prejudice of good order and military discipline.

Note: And two additional specifications identical in form with Specification 1, except as follows:

Specification 2: 28 April 1944.

Specification 3: 22 June 1944.

Specification 4: In that First Lieutenant Robert H. McGovern, * * *, being indebted to Martin Kalman (then Corporal, a member of 135th Ordnance Maintenance Battalion), in the sum of $351.76, since on or about 15 July 1944, did, at Camp Bowie, Texas, from that date dishonorably fail and neglect to pay said debt.

Specification 5: In that First Lieutenant Robert H. McGovern, * * * did, at Camp Bowie, Texas, on or about 27 November 1944, borrow from Private William H. Sandown, Headquarters Company, 135th Ordnance Maintenance Battalion, the sum of $800.00, this to the prejudice of good order and military discipline.

He pleaded not guilty to Specification 4 of Charge II and guilty to the remaining Specifications and to the Charges. His plea of guilty to the Specifications of Charge I and to Charge I was subsequently changed to a plea of not guilty which change was recognized by the Court (R. 37) He was found guilty of all Specifications and Charges. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to confinement at hard labor for 6 months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution showed that the accused was at the times set forth in the Specifications and at the time of the trial in the military service of the United States in the grade of a first lieutenant, and a member of the 135th Ordnance Maintenance Battalion, stationed at Camp Bowie, Texas (R. 8, 14, 25).

CHARGE I and its Specifications:

In December 1944 the Exchange Officer of the Camp Bowie Officers' Club reported that the officers of the 135th Ordnance Maintenance Battalion had not paid their monthly dues of $1.00 each for the three months of October, November, and December (Pros. Exs. B,C). According to camp regulations (Pros. Ex. D) the commanding officer of each unit in the camp was requested to collect from each officer of his command present on duty $1.00 per month as club dues and transmit by check the total amount thus collected to the cashier of the Camp Bowie Exchange not later than the 5th of each month together with a roster of the officers present and absent showing whose dues

have been paid, and the month for which the dues were paid. During this period the accused was the adjutant of the 135th Ordnance Maintenance Battalion and was "the custodian of the Camp Bowie Officers' Club Fund" (R. 11).

By stipulation (Pros. Ex. E) admitted in evidence (R. 12) it was established that the accused received the sum of $14.00 during October 1944 from the officers of the 135th Ordnance Maintenance Battalion for the purpose of paying their dues for that month to the Camp Bowie Officers' Club; that he received a similar sum for the same purpose during November 1944; and that he received $1.25 for the same purpose during December 1944.

The office manager of the Camp Bowie Exchange collected officers' club dues. For the months of October, November, and December the 135th Ordnance Maintenance Battalion owned $35, $35 and $42, respectively, for dues (R. 13).

On 16 December 1944 the accused was presented with a bill for the delinquent dues and was asked if he had the money. Accused said it was in the battalion safe. The accused opened the safe. It contained $19.75 attached to a roster for the month of December which showed the payment of dues for December totaling $18.00 (R. 17,18).

CHARGE II and its Specifications.

By written stipulation admitted in evidence (R. 21; Pros. Ex. F), to which were attached certain documents referred to in the stipulation (Pros. Ex. G, H, I, J, K, L, M, N, O) it was agreed that if Martin Kalman (formerly corporal in the 135th Ordnance Maintenance Battalion) were present in court he would testify as follows:

> "In the middle of April, 1944, while I was a patient at the Station Hospital, Camp Bowie, Texas, Lieutenant McGovern sent a letter to me requesting that I lend him the sum $200.00 and said he would repay the said sum $100 on May 1st and $100.00 on June 1st. I gave him the $200.00 and he in turn gave me two post-dated checks, each for $100.00, one dated May 2nd, 1944 and the other June 1st, 1944.
>
> "A few days later he sent me another letter requesting that I should not deposit the check dated May 2nd, and that he would pay the entire sum of $200.00 on June 1st.
>
> "The early part of May, 1944 Lt. McGovern called to see me at the Station Hospital and told me that his family was in a lot of trouble and requested that I lend him an additional $200.00, which I did, and gave him my check for $200.00 and he in turn gave me two $100.00 checks dated the same day, and he asked me to hold the four checks and put them through at the rate of $100.00 a month starting June 1st, 1944.
>
> "I left the hospital on May 19th in order to go to New York

on an emergency furlough. While at home I received a letter from Lt. McGovern requesting that I send him an additional $400.00, which I refused to do. When I returned to Camp Bowie, Lt. McGovern wrote me a little note stating that he is due to receive a leave and that this will be his last prior to his going overseas, and requested that I lend him the sum of $300.00 so that he may go home and see his family. Being sympathetic, I gave him the sum of $200.00 and he issued two $100.00 checks to me dated the same day and requested that I put them through at the rate of $100.00 per month.

"Before leaving on my furlough on May 19th Lt. McGovern requested that while in New York I should buy him some merchandise. I bought the merchandise while in New York and brought it back with me to Texas and delivered it to Lt. McGovern, and he in turn issued his check to me for $51.76 in payment for the said merchandise. This brought up the total sum due me to $651.76.

"I deposited the first three checks, each for $100.00, which cleared the bank, reducing his indebtedness to $351.76. The other checks, although I deposited them in accordance with instructions, have failed to be honored by the bank. On each occasion they were returned marked 'Insufficient Funds'."

Private William H. Sandown, Headquarters Company, 135th Ordnance Maintenance Battalion, testified that on 23 November 1944 the accused stated to him that he had borrowed some money for the purpose of assisting his father; that the person from whom he had borrowed the money had called for repayment of the loan; and that, as he did not have the money with which to repay the loan, he desired to borrow sufficient money to repay it and thereby save his military record. The accused stated he would arrange to make an allotment of $100 per month to Sandown starting January 1, 1945, and continuing until the debt was settled. In accordance with the request Sandown loaned the accused $800 on or about 1 December 1944 and the accused arranged for the allotment as agreed (R. 25-26).

4. Having been advised concerning his right either to testify, to make an unsworn statement, or to remain silent (R. 28), the accused elected to testify. With reference to Charge I and its Specifications, he stated that the officers would "gripe" about paying their Officers' Club dues and because of his inability to collect them from the officers he did not make any payments to the Officers' Club during October and November. He did collect some money from the officers which he used for other purposes such as for orderly fees and for shoe polish for the officers. Some of it he spent for his own use (R. 29). He was unable to state how much money he had collected during October as dues (R. 34) and how much he had converted to his own use. He admitted that he did convert some of it (R. 35). He claimed that he did not intend to defraud anyone. As a result of this claim, at the instance of the law member, the accused's plea of guilty of

Charge I and its Specifications was changed to one of not guilty (R. 37). The accused further contended that he collected both Officers' Club dues and orderly fees from the officers, but frequently had to pay money out of his own pocket for orderly fees and shoe shining supplies and would reimburse himself from any collections. He did not know how much in dues he collected in October or in November. Prior to October he frequently paid the Officers' Club dues out of his own pocket because of his difficulties in collecting them (R. 38-39). He felt that the payment of the dues was his own personal responsibility (R. 40). He had been detailed as the officer to make the collections (R. 41). All delinquent club dues have now been paid. They were paid by the officers and the officers have been reimbursed by the accused (R. 42-43). Two receipts dated 22 December 1944 were admitted in evidence (R. 43; Def. Exs. E,F) showing the payment by the accused of $21.00 and $14.00 of Officers' Club dues of the 135th Ordnance Maintenance Battalion for the months of November and October, respectively.

With reference to the Specifications of Charge II relating to his transactions with Martin Kalman, he stated that he never refused to pay the debt but had offered to make an allotment of $50 per month to Kalman. Kalman, however, insisted upon payment in full (R. 29-30).

The accused stated further that he had served in the Army over 10 years. During 29 months of this time he was a commissioned officer. All discharges received by him were honorable and rated his character as "Excellent" (Def. Exs. A, B, C). His ratings as a commissioned officer were "very satisfactory" and "excellent" (Def. Ex. D).

5. With reference to Charge I and its Specifications the change of the pleas of guilty to pleas of not guilty has the legal effect of compelling the prosecution to prove beyond any reasonable doubt all of the elements of the offenses charged. Embezzlement is the offense charged in each of these specifications. Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come. The gist of the offense is a breach of trust.

The accused admitted that he had been detailed to collect from the officers of his organization their monthly dues for the Officers' Club. Camp regulations required that the officer thus appointed to collect the dues should account for these collections to the cashier of the Post Exchange by check not later than the 5th of each month together with a statement showing which officers had paid their dues and the month or months to which the dues applied. By stipulation it was established that accused had collected from unnamed officers of that organization dues totaling $14.00 during October, $14 during November, and $1.25 during December. Accused did not make up any statement for October and November and did not pay over any of the money collected.

When demand was made upon him in December for all of the dues collected by him he stated that the money was in the company safe. When the safe was opened the money collected for October ($14.00) and for November ($14.00) was not there. The only money (pertinent to the case under discussion) found in the safe was $19.75, to which was attached a statement prepared by the accused showing the collection for December dues of $18.00. The court was therefore justified in finding the accused guilty of the charge of embezzlement of the $14.00 collected by him for October dues and the $14.00 collected by him for the November dues. Accused's failure to account for the October and November collections when called upon to do so was sufficient to support the inference that he had fraudulently appropriated it. He admitted that he had used at least a part of the money for his own use. He contended that he also used a part of it for the benefit of the officers. He claimed he could not tell how much he had used for either purpose. His uncorroborated explanation regarding his alleged and unauthorized expenditures for the benefit of the officers was rejected by the court. He was intelligent enough to know that the money was paid to him for the sole purpose of being used as dues and that he had no right to use it for any other purpose. He was also intelligent enough to know that regardless of what he did with the money he should have kept a record of his collections and disbursements. His conduct and his testimony were not only consistent with guilt but also strongly support the findings of guilty of these two specifications.

Wharton's Criminal Law, 12th Edition, paragraph 1293, provides:

> "1293. Goods embezzled and ownership must be accurately stated. Unless the pleader is relieved from this exactness by special statute, the goods and ownership must be set out and proved with the same exactness as in larceny. *** Some specific sum must be proved to be embezzled ***."

With reference to the Specifications (1 and 2 of Charge I) alleging embezzlement of the two sums of $14.00 it was clearly established that amounts embezzled were the exact amounts set forth in the Specifications. These specifications did not, nor did the evidence, show the names of the officers who actually entrusted their money to the accused.

Is the failure to allege or to show the exact officers who created the embezzled funds fatal? It is the opinion of the Board of Review that it was neither necessary to allege nor to prove the names of the officers who actually paid their dues to the accused, so as to create the two funds of $14.00 each. According to the camp regulations the accused was required to accumulate the dues during the month and then once a month account to the cashier of the Post Exchange for it. He was required (but failed) to keep a record of the names of those who paid. In this legitimate and permissible manner there

was created each month a fund belonging to the officers of the 135th Ordnance Maintenance Battalion of which the accused was the custodian. He embezzled the entire fund thus created in October and in November. The allegation and proof of ownership as the "officers of the 135th Ordnance Maintenance Battalion" was sufficient under the circumstances.

Upon reviewing the evidence with reference to the alleged embezzlement of $1.25 entrusted to the accused for the purpose of paying dues for December (Spec. 3 of Charge I) we find that when demand was made upon the accused on 16 December for the dues collected by him for December the safe contained $19.75 in cash attached to a statement prepared by the accused showing a collection for that month of $18.00. There was therefore no failure to account for the December dues. While accused had not transmitted the funds to the proper official by 5 December, as required by regulations, the presence of funds in the safe, earmarked as and in excess of the proved December collections, negatives any inference of embezzlement or misappropriation. The stipulation that accused had collected $1.25 for December does not convey any suggestion of misuse of that sum, for adding this amount to $18.00, which is the only other sum proved to have been collected for December, makes a total of only $19.25, fifty cents less than the amount in the safe. Similarly, in view of these established facts, the admission by accused in general terms that he had used some of the collected funds for his personal purposes does not imply that he had used any of the December collections improperly. In consequence, the finding of guilty of this Specification can not be sustained.

With reference to Charge II and its Specifications it was clearly established by the evidence and admitted by the accused in his testimony and by his plea of guilty that he borrowed a total of $600 through three loans of $200 each upon three different occasions from Martin Kalman when the latter was an enlisted man in the service of the United States (Specifications 1, 2 and 3) at the times and place alleged in the Specifications. In a similar manner it was established that on 27 November 1944 accused also borrowed $800 from William H. Sandown, an enlisted man in the same military organization (Specification 5). The borrowing of money by an officer from an enlisted man is prejudicial to good order and military discipline and therefore violates the 96th Article of War (CM 246905, 30 B.R. 209; CM 233817, 20 B.R. 149). The findings of guilty of Specifications 1, 2, 3 and 5 and of Charge II is therefore amply supported by the evidence and the pleas of guilty. Specification 4 of Charge II of which accused was also found guilty alleges that accused, being indebted to Martin Kalman, then a corporal of his organization, in the sum of $351.76 since 15 July 1944, did from that date dishonorably fail and neglect to pay said debt. As has been often stated, the mere failure on the part of an officer to pay a debt does not constitute a violation of Article of War 96. It must be shown that the failure to pay was coupled with conduct that was dishonorable, such as deceit, evasion, or fraud. It was admitted that the accused owed Kalman $351.76 and that he owed this amount since 15 July 1944. The only issue involved is whether his failure to pay was dishonorable so as to bring discredit upon the service. Kalman's testimony

of depositing accused's post dated checks in his bank in accordance with the instructions given him by the accused which were returned marked "insufficient funds", Sandown's testimony that the accused borrowed $800 from him supposedly to pay Kalman, which sum was more than ample to take care of the balance due Kalman; the accused's failure to pay Kalman when he was thus able to do so; and the numerous broken promises of payment made by the accused, together constitute sufficient evidence of a dishonorable evasion of the payment of the debt in question, from which the court might and did justifiably and reasonably infer that the accused dishonorably failed to pay said debt.

6. War Department records show the accused to be 28 years and seven months of age, married, and the father of two children. He attended high school for three years but did not graduate. He enlisted in the service on 24 May 1936 and served honorably until 1 August 1942 when, in the grade of first sergeant, he was discharged and commissioned a second lieutenant, Ordnance Department, Army of the United States. On 22 April 1944 he was promoted to first lieutenant.

7. The court was legally constituted. 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 finding of guilty of Specification 3 of Charge I, and legally sufficient to support the findings of guilty of the remaining specifications and the charges and the sentence and to warrant confirmation of the sentence. Dismissal is authorized for a violation of Article of War 93 or Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK-CM 272588 1st Ind

Hq ASF, JAGO, Washington 25, D. C., FEB 2 1945

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 Robert H. McGovern (O-1548497), Ordnance Department.

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 3 of Charge I, legally sufficient to support the findings of guilty of the remaining Specifications and the Charges and the sentence and to warrant confirmation of the sentence. I recommend that the finding of guilty of Specification 3 of Charge I be disapproved and that the sentence be confirmed but that the forfeitures and confinement be remitted and 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 the above recommendation into effect, should such action meet with approval.

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Finding of guilty of Specification 3 of Charge I disapproved. Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 140, 11 Apr 1945)

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

SPJGH
CM 272589

25 JAN 1945

UNITED STATES v. Private RAYMOND F. SKIRVIN (35160115), Company B, 16th Armored Infantry Battalion.	13TH ARMORED DIVISION Trial by G.C.M., convened at Camp Bowie, Texas, 18 December 1944. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

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

---

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

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

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

Specification: In that Private Raymond F. Skirvin, Company "B", 16th Armored Infantry Battalion, did, at Camp Bowie, Texas, on or about 7 November 1944, desert the service of the United States and did remain absent in desertion until he was apprehended by military authorities at Fort Worth, Texas, on or about 14 November 1944.

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

Specification: In that Private Raymond F. Skirvin, * * * , having been restricted to the limits of Camp Bowie, Texas, did, at Camp Bowie, Texas, on or about 7 November 1944, break said restriction by going to Fort Worth, Texas.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of the following previous convictions was introduced: (1) conviction by a summary court-martial on 28 November 1943 of two days' AWOL, for which he was sentenced to confinement for one month and forfeiture of $32 for one month; and (2) conviction by a special court-martial on 22 August 1944 of seven days' AWOL, for which he was sentenced to confinement for six months and forfeiture of $19.44 per month for a like period. In the instant case he was sentenced to dishonorable discharge, total forfeitures and confinement for ten (10)

years. The reviewing authority approved only so much of the findings of guilty of Charge I and its Specification as involves a finding of guilty of absence without leave, for the time alleged, in violation of Article of War 61; reduced the period of confinement to five (5) years; and forwarded the record of trial for action under Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification and the sentence, as approved by the reviewing authority. The only question requiring consideration here is whether or not the record of trial is legally sufficient to support the findings of guilty of Charge II and its Specification.

4. The Specification of Charge II alleges that the accused, "having been restricted to the limits of Camp Bowie, Texas, did, at Camp Bowie, Texas, on or about 7 November 1944, break said restriction by going to Fort Worth, Texas". The only evidence that the accused was under any restriction is contained in the following testimony of his company commander, Captain George S. Geyer (R. 7, 8):

"Q. Why was this furlough disapproved?
A. Because Private Skirvin was restricted to the Battalion area at the time [referring to a time prior to 7 November 1944].

* * *

Q. Was the accused still under restriction at that time [referring to 7 November 1944]?
A. He was."

This testimony states only a legal conclusion that accused was "restricted". It is not sufficient to prove that the accused was actually under a lawful restriction. There is no showing as to the name or other description of the officer issuing the order of restriction, his authority to issue such order, the date of such order or the limits set by such order, either as to time or as to space. Nor is there any evidence that the order ever came to the notice of the accused.

On a charge of breach of restriction, proof that the accused was duly restricted is a necessary element of the prosecution's case; and the determination of this ultimate question as to whether the accused was duly restricted is for the court, upon a consideration of the competent evidence introduced at the trial. Where, as here, there is no evidence upon which to base a valid finding, no valid finding can be made.

The Board of Review is of the opinion, therefore, that the findings of guilty of Charge II and its Specification are not supported by the record of trial.

5. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge II and its Specification, but legally sufficient to support the findings of guilty of Charge I and its Specification and the sentence, as approved by the reviewing authority.

Thomas N. Tatty, Judge Advocate.

William H. Gambrell, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

SPJGH
CM 272589 1st Ind

Hq ASF, JAGO, Washington 25, D. C. JAN 26 1945

TO: The Secretary of War

1. In the case of Private Raymond F. Skirvin (35160115), Company B, 16th Armored Infantry Battalion, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that the findings of guilty of Charge II and its Specification be vacated.

2. This case is submitted for the action of the Secretary of War in order to avoid the delay which would be involved in transmitting the approved holding overseas for the action of the reviewing authority.

3. Inclosed is a form of action designed to carry into effect the recommendation hereinbefore made, should such action meet with approval.

Myron C. Cramer

2 Incls
1. Record of trial
2. 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 as approved ordered executed, by order of the Secretary of War. G.C.M.O. 73, 17 Feb 1945)

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

SPJGQ
CM 272610

1 FEB 1945

UNITED STATES v. Private STANLEY J. ARMAS (39038188), attached unassigned to Squadron S, 302nd AAF Base Unit (SW), Third Air Force Staging Wing, Hunter Field, Georgia.	THIRD AIR FORCE Trial by G.C.M., convened at Hunter Field, Georgia, 16 December 1944. Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center.

- - - - - - - - - -

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 Private Stanley J. Armas, then Corporal, attached unassigned to Squadron S, 302nd AAF Base Unit (SW), Hunter Field, Georgia, did, at Hunter Field, Georgia, on or about 16 November 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: shipment overseas, and did remain so absent in desertion until he surrendered himself to military authorities at Hamilton Field, California, on or about 22 November 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for five (5) 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. 933, Headquarters Third Air Force, Tampa, Florida, 30 December 1944.

3. The evidence introduced by the prosecution established the following state of facts:

The morning report of Squadron S, 302d AAF BU (SW), to which accused was attached, unassigned, showed accused from 7 days ordinary furlough to AWOL as of 16 November 1944 (R. 13; Ex. B). By stipulation between the Trial Judge Advocate, the Defense Counsel, and accused, it is shown that he surrendered himself to military authority in uniform on 22 November 1944 at Hamilton Field, California (R. 13; Ex. C).

The accused was a member of a combat crew destined for overseas service (R. 6), he and the other members of the crew having reported to Hunter Field, Georgia, as a replacement group for overseas duty (R. 9). Since the bombardier of the crew was in need of certain dental work requiring "about eleven days", the commanding officer of the plane requested leaves and furloughs for himself and the other crewmen (R.8,9). The accused was given a 7 day furlough with permission to go to Richmond, California (R. 5, 12). The dates of the furlough were 9 November to 16 November inclusive (R. 5, 12). The plane commander took the men to the combat crew center and obtained ATC and commercial airline priorities for those who needed them, including accused (R. 6, 7, 8). He instructed the accused and two other men who were going to California with respect to the importance of getting back on schedule, and told them that if they could not return in time, they should turn around en route so as to return by the expiration date of their furloughs (R. 8). Some reluctance was encountered in obtaining permission for the men to visit California, but the plane commander persuaded the appropriate authorities to grant such permission (R. 8). The accused was present when the information that the bombardier's dental work would take eleven days was received and was aware of this situation (R. 10). The accused obtained a reservation on ATC for this trip to California, it being contemplated that he would make the reservation for his return trip on his arrival in California (R. 10). He and the others were advised to make commercial reservations as well, as a precaution against possible failure of the ATC reservations (R. 10, 11). Before departure on furlough, it was the custom of the command to give written instructions to combat crew members and "to guard the distance they can go, according to the length of their furloughs" (R. 7, 12). Pursuant to this custom, a mimeographed form was presented to the accused which he acknowledged by signing his name thereto (R. 12; Ex. A). This form is quoted in full:

"COMBAT CREW CENTER
Hunter Field, Georgia

Date: Nov. 8 1944

I understand that I may not expect an extension to my leave or furlough. I further fully understand that practically immediately upon return within time I shall be ordered out on hazardous duty and important service, and my failure to return within time may result in breaking up my trained combat crew and my avoiding hazardous duty and important service.

The portion of the 28th Article of War reading: 'Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter' has been read and explained to me, and I fully understand its provisions and penalties to which I am subject for violation thereof; that is, if I fail to return within time I may be held to have quit my organization or place of duty with the intent to avoid hazardous duty or to shirk important service and consequently may be deemed a deserter, and subjected to the death penalty.

Witnessed this 8 day Nov. 1944

SIGNED: Patrick H. Raspburry — SIGNED: Cpl. Stanley J. Armas 39038188
T/Sgt (Name)(Rank or Grade)(ASN) 36602652 (Name)(Rank or grade)(ASN)"

Despite the provisions of the first paragraph of the form, extensions of furloughs were sometimes granted (R. 13).

The accused left on furlough, and on 15 November 1944, one day before the date of his scheduled return, his commanding officer received a telegram from him sent from Richmond, California, requesting an extension on the ground that one of the members of the accused's crew was temporarily grounded (R. 5, 6, 7). The request was denied by "reply" sent two hours after the receipt of the telegram and accused was instructed to return to his station (R. 6, 7). He reported to his station on 26 November 1944 (R. 6). The other members of the crew who were authorized to visit California returned to their station on time (R. 7, 9). A replacement for the accused was obtained, but the bombardier was ordered to the hospital with the result that the crew was subsequently split up (R. 9, 10).

4. The accused, having been duly advised of his rights, was sworn and testified (R. 15). He stated that before he left Hunter Field, the bombardier had suggested to the members of the crew that

they wire for extensions of their furloughs inasmuch as his dental work would consume eleven days (R. 15). He took an ATC plane with the intention of going to California, but was put off at Dallas (R. 15). Having only $23 (R. 17), he lacked sufficient funds to continue his journey by commercial plane, and after an unsuccessful attempt to obtain passage in another ATC plane at Amarillo, he decided to spend his furlough with his brother in that city (R. 15, 16). This was on 11 November 1944 (R. 16). On 12 November, he telephoned his wife at their home in California and learned that she was ill (R. 16). He thereupon decided to go on to California and made the rest of the trip by automobile, having obtained a lift from a civilian (R. 16). He arrived at his home in the morning of 15 November whereupon he wired his commanding officer for an extension of his furlough, stating in the telegram that the bombardier was temporarily grounded (R. 16, 18). On the same day he received a telegram denying his request for the extension, and he then called Hamilton Field to secure transportation back to his station (R. 16). Later in the day his wife, who was pregnant, became quite ill and he stayed with her until 22 November. By this time she seemed improved and he turned himself in at Hamilton Field (R. 16, 17). He returned to Hunter Field by ATC plane which was grounded several times by the weather, and arrived on 26 November (R. 17, 20, 21). At the time he left on his furlough, the accused took nothing with him except his shaving outfit (R. 17). Since he had only $23, he was unable to exercise his commercial airline priorities and was unaware that there was any way he could have obtained money from the government for transportation purposes (R. 17, 21). He admitted knowing that Hunter Field was a "staging area getting men ready to go overseas", but denied that he at anytime desired or intended to avoid overseas service or that he absented himself for that purpose (R. 18, 19, 20). The only reason why he did not return immediately upon receiving notice of the refusal of his request for extension was because of the illness of his wife (R. 18). He did not believe that his absence would result in his missing shipment with his crew since he understood that the bombardier's dental work would take several days beyond the scheduled date of expiration of their furloughs (R. 18, 19). As for the certificate relative to furlough procedure which he had signed, he stated that it was presented to him at a time when he was in a hurry to get away and hence he had not read it (R. 15, 17).

The testimony of the accused was corroborated by that of the bombardier and the plane commander who both stated that the bombardier had told the men that they might be able to obtain an extension of their furloughs because of the anticipated delay in having his teeth fitted (R. 22, 23). Both also testified, however, that the plane commander had "countermanded" this advice, telling the men not to wire for extensions since they could not be granted. All the men were present at the time (R. 22, 23).

5. The Specification alleges that the accused absented himself without leave "with intent to avoid hazardous duty, to wit: shipment overseas". In past cases under Article of War 28, overseas shipment has ordinarily been described in the specifications as "important service", the term more clearly appropriate where the departure for overseas duty is the act in question. However, under wartime conditions it would seem permissible to describe it as either, and as long as the Specification leaves no doubt that it is overseas movement which the accused is charged with intent to avoid, it may without prejudice be described as "hazardous duty" or "important service". (See CM ETO 2432, 3 Bull. JAG 335, August 1944, where it was held that the two may be pleaded in the conjunctive, the prosecution being free to prove either or both at the trial.)

There have been many recent decisions of the Board of Review relative to the requirements of proof of intent to shirk important service or to avoid hazardous duty which must be met if a conviction of desertion within the definition of Article of War 28 is to be sustained. Although the question in each case is largely one of fact, certain well defined legal standards have been developed on the subject. If the "important service" or "hazardous duty" in the individual case is embarkation for overseas duty, the proof must show that the accused was about to depart for such duty and that he absented himself with the specific intent to avoid it (CM 265447, Hodge, and cases therein cited). Where, as in the great majority of cases, there is no direct evidence of the requisite intent, a proper inference thereof may be raised by evidence establishing that the accused knew, or had reason to know and accordingly believed, that his embarkation for overseas duty was "imminent" and that his absence would result in avoiding such embarkation (CM 265447, Hodge; CM 262347, Moore; CM 230826, McGrath, 18 BR 53; CM 227459, Wicklund, 15 BR 299). What constitutes imminence of departure may vary with the facts of the individual case. However, the term does not include mere preparatory service, such as shipment to a staging area, with a view to ultimate overseas service (CM 268240, Closson; CM 268622, Sfer; CM 264327, Pattillo; CM 266441, Mugan; CM 265477, Hodge). Nor is the fact that the accused's organization was in a staging area preparatory to overseas movement and later actually embarked, sufficient in and of itself to raise an inference that he knew of the imminence of departure and intended by his absence to avoid the movement (CM 225512, Henning; 14 BR 281; CM 226374, Collins; CM 224765, Butler, 14 BR 179; CM 227459, Wicklund, 15 BR 299).

Facts that have been considered persuasive include actual embarkation of the organization without the accused (CM NATO 1566, Donohue; CM 227845, Sapp, 15 BR 379; CM 228400, McElroy, 16 BR 161), though embarkation the next day is not conclusive (CM 230826, McGrath, 18 BR 53), knowledge by the accused of the presence of his name on a particular shipping list in embarkation orders (Donohue, supra;

CM 262836, Parmelee), and activity directly and unequivocally in preparation for immediate departure, such as loading the organization's combat equipment on shipboard (CM 228619, Hammock, 16 BR 275; CM ETO 2473, Cantwell).

It is apparent that, in the absence of direct evidence of the accused's intent, the evidence must leave no reasonable doubt that the departure is actually immediately impending and that the accused knew, or had reason to know and accordingly believed, this to be the situation, in order to justify an inference that his absence was designed to avoid overseas movement.

The facts of this case fail to measure up to this standard. The evidence leaves no doubt that the purpose of the crew's presence at Hunter Field, a staging wing, was to prepare to proceed overseas, and that early movement was contemplated, and that these facts were made known to the accused. However, it was equally clear that there would be some delay in actual departure and that such departure would not occur immediately upon the expiration of the seven days' furlough granted the accused. He knew that the dental work required by the bombardier was expected to take eleven days. It was not unreasonable for him to assume that final preparations thereafter would consume some brief period before actual departure. No orders fixing the time for the movement had been issued, and a tone of uncertainty as to the actual time pervaded the circumstances of the case. Furloughs were granted for travel to distant points, including California. The accused was told to apply for an extension of his furlough if he should need it, and then told not to do so, as it would not be granted, but rather for reasons of policy than for any disclosed specific purpose. He was required, along with all his crew mates, to sign a mimeographed statement that he understood that his furlough would not be extended and he would be ordered out on hazardous duty and important service practically immediately upon his return, and that failure to return might be held a violation of the 28th Article of War. However, outside of any consideration of the unconvincing and inconclusive character of such routine and stereotyped warnings, however seriously intended by their authors, the signing of this document preceded the actual discussion of a possible extension of furloughs, as the pilot found it necessary to refer thereto after the furloughs were issued and after the bombardier had suggested such extensions. The effect of the certificate was offset by other circumstances, and rendered inconclusive.

The most serious evidential element tending to support an inference of the intent specified was the delay by the accused to turn himself in until two days after the date on which the bombardier's dentistry was expected to be completed, but in the absence of any

evidence that the movement was to occur immediately on that sole event and that the accused was so advised, that circumstance does not justify an inference of his intent to avoid movement overseas with his crew, since, on the whole, his conduct, without reference to his testimony, is wholly inconsistent with that inference, but reflects rather his effort to extend his authorized absence briefly but still rejoin his crew in time for its departure.

Finally, against the inference that he believed that his absence would avoid his movement overseas, there stands the fact that it did not avoid it. Not only had no such orders then been issued for the departure of the crew, but the record reveals that, for reasons unrelated to the absence of the accused, it was "split up" and never did depart, at least two of its members still being on hand to testify at the trial a month later.

The circumstances not only do not preclude every reasonable hypothesis except that of the existence of the guilty specific intent requisite to conviction, but they tend to repel the hypothesis of guilt and to suggest other and innocent motives for his absence.

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.

6. The accused is 21½ years of age, and married. He enlisted at San Francisco, California, on 3 February 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 absence without leave by the accused at the time and place specified, terminated by surrender to military control at the time and place alleged, in violation of Article of War 61, and legally sufficient to support the sentence.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

(326)

SPJGQ - CM 272610 1st Ind

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

TO: The Secretary of War FEB 2 - 1945.

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 Stanley J. Armas (39038188), attached unassigned to Squadron S, 302nd AAF Base Unit (SW), Third Air Force Staging Wing, Hunter Field, Georgia.

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 surrender 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 record of trial is legally sufficient to sustain the sentence.

4. Inclosed is a form of action suitable to carry into effect these recommendations, should such action 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

(So much of findings of guilty of the Charge and Specification vacated as involves findings of guilty of an offense other than absence without leave in violation of Article of War 61, by order of the Under Secretary of War. G.C.M.O. 76, 24 Feb 1945)

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

SPJGN
CM 272624

8 FEB 1945

UNITED STATES	)	ARMY AIR FORCES EASTERN TECHNICAL TRAINING COMMAND
v.	)	
First Lieutenant JAMES P. WATERS (0-732309), Air Corps.	)	Trial by G.C.M., convened at Boca Raton, Florida, 22 December 1944. Dismissal and total forfeitures.

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 First Lieutenant James P. Waters, Air Corps, Section B, 3501st Army Air Forces Base Unit, was, at Delray Beach, Florida, on or about 3 December 1944, drunk in uniform in a public place, to wit: The Arcade Tap Room.

Specification 2: In that First Lieutenant James P. Waters, Air Corps, Section B, 3501st Army Air Forces Base Unit, did, at Delray Beach, Florida, on or about 3 December 1944, unlawfully break and enter Weinerman's Men Shop, 329 East Atlantic Avenue, Delray Beach, Florida.

Specification 3: In that First Lieutenant James P. Waters, Air Corps, Section B, 3501st Army Air Forces Base Unit, did, at Delray Beach, Florida, on or about 3 December 1944, wrongfully take and carry away without the consent of the owner one men's wallet, saddle tan, of the value of $5.00, one men's fitted case, brown, imitation leather, of the value of $7.50, one men's wallet, brown,

Swank make, of the value of $6.50, one men's wallet, dark brown, Swank make, of the value of $5.00, all of the total value of Twenty-Four Dollars ($24.00), the property of M. N. Weinerman.

The accused pleaded guilty to Specification 1 and to the Charge but not guilty to the other two Specifications. He was found guilty of the Charge and all Specifications thereunder and sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for a period of two years. The reviewing authority approved only so much of the sentence as provided for dismissal from the service and total forfeitures of all pay and allowances due or to become due and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that, while in Delray Beach, Florida, on 2 December 1944, the accused commenced drinking sometime in the afternoon and continued until about 1:00 a.m. the following morning (R. 8-9). Between the hours of 10:00 and 11:45 p.m. he participated in the celebration of a civilian couple's twenty-fifth wedding anniversary and became so heavily intoxicated that he "could just make the bar". He was in such an addled condition that Mr. William Kraus, the proprietor of the Arcade Tap Room, ordered that no more liquor be served to him (R. 6-7).

At about 1:05 or 1:10 a.m. the anniversary party terminated. The celebrating couple entered their car and, with the accused perched on the "running board", drove to the vicinity of the Florida State Bank. There the accused alighted, parted from his companions, and staggered away with a "kind of a jag" (R. 9-10). A few minutes later he was observed in front of a drug store by Assistant Chief of Police James Grantham and Officer Elmer B. Deese who were driving by on patrol. They "swerved the car around and threw the lights on him". Upon recognizing him they continued on their way, for they "knew he was all right". At a point apparently not far distant they again stopped and observed that he was standing in front of Weinerman's Men's Store. Driving on, they completed their circuit and returned along the same street (R. 11, 16, 20, 22).

The accused was still standing before the window of Weinerman's Men's Store. Grantham pulled over to the curb and asked him "what he was doing [there] at that hour of morning". When the accused replied that he was "just 'jagging' around town", Grantham ordered him to "start 'jagging' on home to the Colony Hotel." As the accused walked away in compliance with these instructions; Grantham noticed several packages lying in front of the store window. Both policemen got out of the car to make a closer examination, and for the first time they saw that there was a hole in the display window about two or three feet in diameter (R. 11, 13, 19-22). Grantham immediately called to the accused who responded by starting to run. Setting out in pursuit, Grantham quickly caught up with his quarry after a short dash of approximately thirty-five to forty yards (R. 12, 14, 16, 18, 20).

Having been seized by the back of his shirt, the accused "jerked away" and fell down. As he did so four articles were precipitated from his "shirt bosom." Rising to his feet, he "swung" at Grantham twice, but the blows missed their mark. Grantham slapped the accused's face, and the "scuffle" ended (R. 12-13, 16-19). Examination of the items disgorged from the accused's shirt revealed that three of them were leather wallets and that the fourth was a "military kit" or "fitted case." Two of the wallets had a value of $5.00 each and the third a value of $6.50. The kit was worth $6.00 (R. 13-14, 23-26; Pros. Exs. 1, 2, 3, 4).

No one had seen the actual breaking of the display window, but one of the fragments of glass found on the floor of the show case window contained the "latent impression of the left thumb of a human being". This was identical with a print subsequently taken of one of the accused's thumbs (R. 15-16, 19, 21, 27-30; Pros. Exs. 5, 6, 7, 8, 9).

4. After being full apprised of his rights relative to testifying or remaining silent, the accused took the stand on his own behalf. His testimony and that of the other witnesses for the defense established three salient points. There were that:

1. His reputation for honesty and fair dealing was good (R. 7, 26, 31, 36).

2. His combat record was outstanding (R. 31, 36-37, 39, 41).

3. He was too drunk on the night of 2-3 December 1944 to know what he was doing (R. 32-34, 36-38, 40-43).

About eleven months had been spent by the accused overseas. His assignment had been that of "lead bombardier" whose duties were described by him as follows:

> "He picks the target and is the first to drop his bombs; when the others in the group see a bomb drop from the lead plane, they salvo on his bombs" (R. 31, 36, 39).

He had participated in thirty missions, including raids on Munich, Schweinfurt, and Berlin, and had led the "whole Eighth Army Air Force on D Day" (R. 31, 37, 39-41). For his excellent and meritorious services he had been awarded the Distinguished Flying Cross with one cluster, the Air Medal with five clusters, and the European Theatre of Operations Ribbon with two stars, "denoting important engagements—one for operations on D Day" (R. 41).

Although he had never been in any trouble before, he had acquired the habit of using liberal quantities of intoxicants while overseas (R. 34, 40). He was so drunk early on the morning of 3 December 1944

that he recollected nothing of what occurred (R. 40-43). When seen at 2:15 a.m. by First Lieutenant Walter M. Kline, he was "hysterical." His remarks made no sense; all that could be understood was that he wanted Lieutenant Kline "to call Bill Kraus" (R. 37). According to Major Samuel C. Karlan, the Chief of the Neuro-Psychiatric Section at Boca Raton Army Air Field Station Hospital,

> "Observation of [the accused] does not indicate the presence of any of the criminal or antisocial traits usually present in men convicted of burglary or similar crimes. Examination of the history of the alleged offense and all the available evidence, indicates that it was committed because of the influence of alcohol. It is believed that the degree of intoxication was so great that the officer did not know the nature of the act which he was doing." (R. 32).

Although Major Karlan was of the opinion that the excessive use of alcohol had the same effect as mental disease or derangement, he also believed that, under existing law, drunkenness would not be a defense in "civilian courts" (R. 33).

To the three issues enumerated above Lieutenant Kline added a fourth by quoting Assistant Chief of Police James Grantham as saying that,

> "he had taken some of [the merchandise] from [the accused's] shirt and that he had found some of it when he went down to the gas station in the early morning, after daylight, that is, in front of the gas station where he had been tussling with [the accused], ... they must have fallen out of the accused's shirt" (R. 35, 37).

Grantham did not, however, state what items had fallen from the accused's shirt (R. 37).

5. Specification 1 of the Charge alleges that the accused was, "on or about 3 December 1944, drunk in uniform in a public place ...". This violation was laid under Article of War 96.

Although Assistant Chief of Police Grantham was of the opinion that the accused "acted like a sober man", two witnesses for the prosecution who touched upon the subject testified to the contrary. One described the condition of the accused as "very drunk"; the other asserted that the accused was able to "just make the bar and that was all" (R. 6, 9). The accused has himself testified that he was "drunk that night". Even if his plea of guilty be disregarded, this evidence, coupled with proof of the fact that he was then in uniform and in a drinking establishment which was obviously a public place, was sufficient to sustain Specification 1 beyond a reasonable doubt.

6. Specification 2 alleges that the accused did, "on or about 3 December 1944, unlawfully break and enter Weinerman's Men's Shop...". Specification 3 alleges that on the same day he did "wrongfully take and carry away without the consent of the owner one men's wallet, ... of the value of $5.00, one men's fitted case, ... of the value of $7.50, one men's wallet, ... of the value of $6.50, one men's wallet, ... of the value of $5.00, all of the total value of Twenty-Four Dollars ($24.00), the property of M. N. Weinerman." These offenses were also set forth as violation of Article of War 96.

It is not disputed that the accused broke a hole in the front window of Weinerman's Men's Shop and removed three wallets and a "fitted case" from among the objects displayed. The only question presented by the record is whether his aggravated intoxication at the time will exonerate him from responsibility for the offenses described in Specifications 2 and 3. Paragraph 126 of the Manual for Courts-Martial, 1928, provides that:

> "It is a general rule of law that voluntary drunkenness, whether caused by liquor or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense."

In short, drunkenness of a degree resulting in the impairment of the mental faculties is a defense only to offenses of which a specific intent is an essential and designated element. When, as here, a mere "wrongful" or an "unlawful" violation is alleged, proof of aggravated intoxication is wholly irrelevant except on the issue of clemency, for clearly acts falling in these two categories may be committed merely by reason of inadvertence, heedlessness, or lack of understanding as well as malice or criminal intent. Misconduct which is the result of negligence or befogged mentality may not constitute any one of the crimes known to the common law but notwithstanding it may be prejudicial "to good order and military discipline". In the instant case the accused was probably too drunk to be capable of either burglary or larceny but he is charged with neither. Specifications 2 and 3, while containing most of the language traditionally employed in describing those offenses, pointedly omit all reference to intent and so allege only acts which constitute disorders under Article of War 96 rather than common law felonies under Article of War 93. Specification 2 has been proved beyond a reasonable doubt, and, with the exception of the value of the fitted case which has been shown to be $6.00 and not $7.50 as pleaded, the same is true of Specification 3. Under the circumstances this variance is immaterial.

7. The accused who is single and about 27 years old was graduated from high school in 1934 and was employed from 1937 to 1942 by Bond

Store Inc., as a salesman. After enlisted service from February of 1942 to 22 January 1943, he was commissioned a second lieutenant on 23 January 1943 and promoted to first lieutenant on 27 April 1944. During overseas service covering a period of eleven months he participated in thirty missions, in twenty-one of which he was the lead bombardier, and was awarded the Distinguished Flying Cross with one cluster and the Air Medal with five clusters.

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

Abner E. Fibscomb, Judge Advocate.

Robert J. Connor, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN-CM 272624

1st Ind
FEB 28 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 First Lieutenant James P. Waters (0-732309), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be suspended during good behavior.

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

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 133, 9 Apr 1945)

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

SPJGQ-CM 272638

9 MAR 1945

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Venice Army Air Field, Venice, Florida, 21 December 1944. Dismissal.
First Lieutenant GILMORE R. HARRISON (0-1639137), Signal Corps.	)	

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

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

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

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

Specification: In that First Lieutenant Gilmore R. Harrison, 598th Engineering Squadron, 382nd Service Group (Special), did, at Venice Army Air Field, Venice, Florida, on or about 20 November 1944, wrongfully, knowingly and wilfully apply to his own use and benefit a 1/4 ton 4 x 4 truck of the value of $1,061.00, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that First Lieutenant Gilmore R. Harrison, 598th Engineering Squadron, 382nd Service Group (Special), did, on or about 20 November 1944, wrongfully appear on a public street in Venice, Florida, without his proper insignia of rank or branch of service.

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

Specification: In that First Lieutenant Gilmore R. Harrison, 598th Engineering Squadron, 382nd Service Group (Special),

was, at Venice, Florida, on or about 18 October 1944, drunk and disorderly in uniform in a public place, to-wit: The Worthington Apartments.

ADDITIONAL CHARGE: (Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found not guilty of the Specification of the Additional Charge and the Additional Charge, and not guilty of Charge III, but guilty of a violation of Article of War 96. He was found guilty of all other Specifications and Charges. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows, with reference to the Specification, Charge I, and the Specification, Charge II, that at about 2:15 a.m. on 20 November 1944, a jeep failed to stop at the main gate of the Venice Army Air Field, Venice, Florida, after the guard at the gate had called for it to halt. The guard was unable to identify the jeep or the person driving it (R. 7). The Sergeant of the Guard gave chase to the jeep and caught up with it after it had stopped on Harbor Drive between a nurses' home and a hospital (R. 8-10). Accused was alone in the jeep. He was taken before and left in the custody of the Officer of the Day by the Sergeant of the Guard, at which time accused said to the Officer of the Day, "Lieutenant, you have a duty to do; do it" (R. 8, 9, 11). Accused was wearing a summer uniform consisting of shirt, pants and officer's cap with braid, but wore no insignia of any kind on his cap or collar (R. 8-9, 11). He handed his insignia to the Officer of the Day (R. 11). The testimony varied as to whether accused wore a field jacket at the time (R. 9, 11). Accused had been drinking, but was not staggering nor disorderly, and was very respectful (R. 8-9, 11-12). The jeep was an army vehicle, license no. 2047638, and was returned to the motor pool the next day (R. 8, 11). It was stipulated that the fair market value of the 4 X 4 1/4 ton truck, United States Registration number W-2047638, was $1,061.00 on or about 19 and 20 November 1944 (Ex. P-2; R. 13).

After normal duty hours it was necessary to secure a trip ticket from the Base Officer of the Day, which was to be returned to the vehicle's organization after use. There was no such trip ticket given to nor returned by accused, and the Group Transportation Officer could find no authority for accused's use of the jeep on this occasion (Ex. P-1; R. 12-13).

As to the Specification, Charge III, the evidence for the prosecution shows that at about 1:30 a.m. on 18 October 1944, Mrs. Diana Klein, wife

of an Army captain, was awakened from her sleep at her residence on the second floor of the Worthington Apartments in Venice, Florida, by someone standing over her bed about twelve inches from her. She did not realize it was a stranger at first, thinking it to be her husband. After a few minutes she asked who it was, and the person then said, "I made a mistake." When he did not move she said, "Well, get out", whereupon the person said, "I'm sorry. I'm in the wrong apartment." Although she asked him again to get out, he did not leave until she called to her husband, whereupon the stranger closed the bedroom door and walked out. He did not touch or molest her. Mrs. Klein was very frightened. She had been awakened from a sound sleep. She asked the intruder to leave at least five times. The door to the apartment was unlocked. Because of the darkness, Mrs. Klein could not identify the intruder, but could smell a little alcohol on his breath and knew that he was stockily built, with high forehead, and wore a khaki uniform (R. 19-21).

Also during the early morning of 18 October 1944, First Lieutenant John B. Griffin, a resident of the first floor of the Worthington Apartments, was awakened by his wife calling to him that someone was in the living room. From his bedroom the witness saw a man standing in the living room, holding a match in front of his face and looking around the room. Lieutenant Griffin yelled, "What the hell are you doing there?", whereupon the person turned and "ran out of the door." Lieutenant Griffin opened the front door and saw him run down three steps in the lobby leading to the outside door. Mrs. Griffin called Lieutenant Snoddy, a neighbor across the hall (R. 22-23). The intruder fell down on the floor, stayed there a few minutes mumbling to himself, and finally raised himself to a sitting position, but Lieutenant Griffin could not understand what he was saying in answer to questions asked him, except that he said "382nd." He had on a khaki uniform, with bar and collar insignia, and the witness thought he was a second lieutenant in the Air Corps. The person acted as though he were under the influence of intoxicating beverages, but the witness could not smell liquor on his breath (R. 23). The witness would not say that the intruder was drunk, but he could have been drinking. "He looked like he passed out." The witness called the military police, but they arrived after the intruder had left and did not find him. He could not identify the intruder (R. 23-25).

First Lieutenant Robert D. Snoddy came from his apartment across the hall at the call of Mrs. Griffin and saw the intruder fall down on the floor. He asked the intruder his name, but was unable to remember what name was given. However, he understood the intruder to say that he was from the 382nd and was a first lieutenant. Lieutenant Snoddy got him out the door and gave directions as to how to get back to the base. The person could walk. A week or so later, Lieutenant Snoddy saw the accused at the Officers' Club one Saturday night and

asked him if he were not the officer who was in the Worthington Apartments a week or so before, whereupon the accused admitted that he was, and stated that he had expected someone to approach him about the matter, and also that he did not know how he got into the Worthington Apartments that night. Accused admitted going into the Klein and Griffin apartments. He did not live in the Worthington Apartments (R. 26-31).

4. The defense recalled Lieutenant Snoddy to the stand, and in attempting to impeach his testimony in minor respects, introduced, as "an exhibit to his testimony," a sworn written statement previously signed by the witness (R. 37-38; Def. Ex. A). This statement shows that accused admitted, while talking to Lieutenant Snoddy in the Officers' Club, that he was drunk at the time he entered the Worthington Apartments and did not know why he entered the apartment. The statement also reveals that Lieutenant Snoddy, on the night in question, "Surmised that he was drunk and tumbled into the apartment by mistake" (Def. Ex. A).

After having his rights explained to him by the law member, the accused elected to make a sworn statement with reference to Charge III and its Specification, and to remain silent at to Charges I and II and their Specifications (R. 39). He stated that on the night of 17 October 1944, after having a few drinks, he left the Officers' Club about the time it closed, walking with a Mr. DeVogel. He and DeVogel were "playing tag" and accused ducked behind the wall of the Worthington Apartments, hiding from DeVogel, whom he did not see thereafter until later in the evening at the barracks. Accused felt the need of going to a latrine, and since the Worthington Apartments locked like a hotel from the outside he went inside the "vestibule" and up four or five steps. Realizing it was not a public hotel he turned and came back down the steps, and leaned against the wall, wondering if there was a latrine there and what he should do next. While leaning against the wall, his foot slipped and he fell to a kneeling or sitting position on the floor, then got up and stood on the step. He did not enter any apartment while there. Two people came up behind him and one said in almost a whisper, "It's an officer". One person said to accused, "Go out that door and go to your right," whereupon accused said "Yes, Sir," and left (R. 39-41). Accused further stated that Lieutenant Snoddy talked with him later at the Officers' Club, on which occasion accused admitted having been in the vestibule of the Worthington Apartments but denied having been in the Klein or Griffin apartments. Lieutenant Snoddy told him he was "going to go after him" if he did not apologize to Mrs. Klein and Mrs. Griffin (R. 41-42). While in the Worthington Apartments accused did not see anyone enter or leave the building (R. 46).

On cross-examination accused said that he was 27 years old; that he had taken "approximately between five or ten" drinks on the night he was in the apartment, but that he was not drunk. He did not see anyone while he was in the vestibule of the apartment, because his back was toward the two persons during the time he was there (R. 44).

First Lieutenant Harland W. Eliot testified that he had acted as squadron commander of accused's organization for 15 days at one time, and had known accused about three months, and that accused was very well liked by both officers and enlisted men in the organization (R. 46-47).

First Lieutenant Keith A. Otto testified that he had been responsible for the training of accused, and, so far as he knew, nothing had ever been said against accused's reputation and he had never heard accused discussed by any other officer (R. 47).

Accused's qualification record, W.D. A.G.O. Form No. 66-2, was introduced into evidence, and showed that accused had been given six performance ratings of "excellent" by five different officers (Def. Ex. B; R. 48).

5. The evidence shows beyond doubt that at the time and place alleged in the Specification of Charge I, the accused wrongfully, knowingly, and willfully applied the Government vehicle to his own use and benefit as alleged. He drove the jeep through the main gate at about 2:15 a.m., failed to stop when ordered by the guard to do so, and secured no trip ticket as required. He was not wearing his insignia, appeared to have been drinking, and told the Officer of the Day to perform his duty, evidently meaning that he should place accused in arrest or report him. The Group Transportation Officer could find no authority for the use of the jeep by accused. This chain of evidence was not consistent with any finding except guilty. There is no variance between the testimony, referring to a jeep, and the Specification, describing the vehicle as a 1/4 ton 4 X 4 truck, as the term "jeep", in common parlance, denotes the military vehicle specified. This identity is recognized in the stipulation in the case, concerning value.

The evidence is also clear that, as alleged in the Specification of Charge II, accused did not wear insignia while driving the jeep on a public street on the night alleged. Although the circumstances and the fact that he actually had his insignia with him tend to minimize the gravity of the offense, in the absence of a lawful excuse for his failure to wear them, the evidence is sufficient to warrant the findings of guilty.

As to the Specification, Charge III, although Mrs. Klein and Lieutenant Griffin could not positively identify the accused as the man in their apartments, their descriptions of the intruder, the admission of accused himself that he was in the building, the testimony of Lieutenant Snoddy that accused admitted having entered the Klein and Griffin apartments, the fair inference that the officer seen in the vestibule was the same person who ran from Lieutenant Griffin's apartment, and the fact that all of the incidents took place about the same time and that nobody else was seen about the building, leave no doubt of the

correctness of the court's conclusion that accused actually entered both the apartments as well as the vestibule or lobby of the building. The testimony of the witnesses as to their observations and opinions upon the extent of the inebriation of accused was somewhat indecisive, but, taken in conjunction with his actions and admissions, leaves no doubt that accused was drunk. Although the private apartments which accused entered were not public places, the lobby and hallways, which were open to and used in common by residents of the apartment house and their friends and guests, were public places within the commonly accepted meaning of the term as applied to the offense specified. (See CM 213442, Due, 10 B.R. 271). The court was therefore warranted in finding that accused was drunk in a public place.

The court was also correct in finding that accused was disorderly in a public place. Black's Law Dictionary defines "disorderly conduct" as follows:

> "A term of loose and indefinite meaning (except as occasionally defined in statutes), but signifying generally any behavior that is contrary to law, and more particularly such as tends to disturb the public peace or decorum, scandalize the community, or shock the public sense of morality."

In the case of Miles v. Weston, 60 Ill. 361, 365, the court said:

> "The reason why night-walking and lurking about the premises of peaceable inhabitants in the night time, is disorderly conduct, is because such conduct can not, in general, be for any but a bad purpose, and it tends to the annoyance and discomfort of peaceable citizens, who have a just right to be exempt from such disturbance."

Under the principles set forth above, accused's actions in prowling through the apartment hallways and opening the doors to private apartments during the night, while in a drunken condition, constituted disorderly conduct in violation of Article of War 96.

The court was evidently of the opinion that the acts of accused were not of such disgraceful or aggravated nature as to show conduct unbecoming an officer and a gentleman in violation of Article of War 95, and accordingly found accused guilty of a violation of Article of War 96 instead. Such finding was proper under the circumstances.

6. Attached to the record of trial is a letter from Major Alfred B. Strickler, individual defense counsel, requesting clemency because of the length and efficient quality of accused's service, and because of attached letters from Major Harold F. Griffey and Lieutenant Colonel Edward W. Thomson, accused's squadron and group commander, respectively. These commanding officers consider accused conscientious

and responsible, well-liked by fellow officers and enlisted men, and a trustworthy and efficient officer of value to the military service. Lieutenant Colonel Thomson states that he has officially requested the return of accused to his assignment with the group.

In another letter attached to the record, Colonel V. B. Dixon, Commanding Officer, Venice Army Air Field, expresses the opinion that clemency is not justified and that little consideration should be given the recommendations therefor, especially in view of a previous statement by Lieutenant Colonel Thomson that accused had been drunk on practically every weekend.

7. War Department records show that accused is 28 years old, is married, and has one minor child. He is a high school graduate. From 1935 to 1940 he worked as a sales clerk in a variety store, and from 1940 to 1942 he managed a small cleaning and pressing business in Rocky Ford, Colorado. He served as an enlisted man from 23 May 1942 until he was commissioned a second lieutenant in the Army of the United States on 16 November 1942 upon graduation from the Eastern Signal Corps School, at Fort Monmouth, New Jersey. On 27 July 1943 he was promoted to first lieutenant, Army of the United States, Air Corps, and on 24 April 1944 to first lieutenant, Army of the United States, Signal Corps.

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 94 or Article of War 96.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ - CM 272638 1st Ind

27 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 First Lieutenant Gilmore R. Harrison (0-1639137), Signal Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation thereof. From papers accompanying the record of trial it appears that the accused has been drunk on practically every weekend since his assignment to his present organization several months ago. 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 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

(Sentence confirmed. G.C.M.O. 187, 9 Jun 1945)

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

SPJGH
CM 272642

21 FEB 1945

UNITED STATES v. Second Lieutenant PERCIVAL DEE BAILEY (0-767727), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Roswell Army Air Field, Roswell, New Mexico, 22 December 1944. Dismissal, total forfeitures and confinement for two (2) years.

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 Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Percival Dee Bailey, Air Corps, 3030th Army Air Forces Base Unit, did, at Roswell, New Mexico, on or about 19 August 1944, while having a lawful, living wife, Vernadee Sage Bailey, wrongfully, unlawfully and feloniously contract a bigamous marriage with Katherine W. Short, without being first legally divorced from his lawful, living wife, Vernadee Sage Bailey.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was considered. He was sentenced to dismissal, total forfeitures and confinement for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. On 20 January 1937, the accused then 18 years of age, married Vernadee May Sage, also aged 18, in Richland, New York (R. 6; Pros. Exs. 1, 3). On 19 August 1944 the accused married Katherine W. Short at Roswell, New Mexico (R. 7; Pros. Exs. 2, 3). It was stipulated by the prosecution, defense and the accused that Vernadee Sage Bailey was alive on 19 August 1944, the date accused married Katherine W. Short (R. 8).

Sometime between the 21st and the 23d of August 1944, the accused was summoned to the Personal Affairs Office to discuss a letter that had been received from Mrs. Vernadee Bailey, Syracuse, New York, in which she complained that the accused was not supporting her or their children as he had promised to do. The accused during the course of his discussion with the Personal Affairs Officer admitted Vernadee Bailey was his wife and stated that their relations were not harmonious and that he was trying to obtain a divorce (R. 9).

A statement, made by the accused to the assistant trial judge advocate on or about 24 November 1944 and sworn to by him on 27 November 1944, was received in evidence without objection (R. 12; Pros. Ex. 3). In it accused admitted his marriage to Vernadee May Sage and his subsequent marriage to Katherine W. Short. He stated that when he left New York in 1938 or 1939 he consulted a lawyer in Pulaski, New York, whose first name he did not remember, with reference to a divorce and signed "papers so it [the divorce] would not be contested in court." He further stated that his wife had filed two actions for a divorce, both in New York, but he never received any formal notice of the commencement of these actions nor had he been informed by the lawyer he consulted or by anyone else that she successfully prosecuted either action to a conclusion. He had retained a lawyer in California, Milan E. Ryan, who took some steps toward getting him a divorce before he entered the Army. He later attempted to file an action when he was at Marana Army Air Field and although there had been more or less continuous effort on his part to obtain a divorce apparently it came to naught. About nine and one half months prior to trial his wife had instituted an action for divorce and about four months prior thereto he telephoned Mr. Ryan and was told that her petition had been granted. He then married Miss Short. However, Mr. Ryan apparently had not answered the telephone when the accused called because accused subsequently received a letter from Mr. Ryan stating that he had no such phone call from accused. Accused believed when he married Miss Short that he had been divorced although he had received no copy of the divorce decree.

The prosecution then introduced in evidence without objection a letter from Milan E. Ryan to First Lieutenant Lawrence F. Hartz, trial judge advocate, dated 20 October 1944 (R. 19; Pros. Ex. 7). Mr. Ryan

therein stated, among other things, that at one time he had had considerable correspondence with an attorney in New York with reference to a divorce sought by the accused's first wife, Vernadee Bailey; that as far as he could ascertain from that correspondence no divorce resulted, although they threatened to file an action and that it was very possible that she did file suit and obtain a divorce but that he knew nothing of it (Pros. Ex. 7). The accused stipulated that if Milan E. Ryan were in court he would testify in accordance with this letter but the accused expressly refused to concede the truth of this testimony (R. 18).

4. After accused's rights as a witness had been explained to him he elected to testify under oath in his own behalf. He testified that he married Miss Sage while they were attending school and that just before their first child was born he discovered that she had married him because of his money and his family. When confronted with this she admitted it but, to preserve the family name, they continued to live together, although not as man and wife. About a year later she told him that she was going to have another child and that he was not its father. To avoid a scandal he agreed to remain at home until the child was born and then he planned to go West. Thereafter he signed a waiver permitting her to get a divorce and when he started for California in December 1938 or January 1939 he understood she would proceed with the divorce. She had money to finance a lawsuit because he had given her $20,000 (R. 20-22).

In California he worked for General Motors and Douglas Aircraft. Within a year he married one Lela L. Autler thinking that he had been divorced. When his wife caused trouble at work for him because of this marriage he retained a lawyer, Milan E. Ryan, and procured an annulment of the Autler marriage. He entered the Army, apparently as an aviation cadet, but he corresponded with Judge Ryan and both of them made every effort to effect a settlement with his wife. Despite this, she complained to the commanding officer of Marana Army Air Field about his failure to support her and the children and as a consequence of this complaint he made an allotment of $80 or $90 to her. She refused it, however, and returned it to the Office of Dependency Benefits. In February of 1944 he saw Judge Ryan about the divorce but it did not materialize when he rejected her lawyer's terms. Subsequently he saw Judge Ryan again and on this occasion he signed "a servicemen's waiver" and a power of attorney, the latter for the purpose of retaining New York counsel, if necessary. Approximately one week before his marriage to Miss Short he telephoned Judge Ryan's office and spoke to some individual whom he thought was Judge Ryan and who indicated familiarity with accused's matters. He told this person that he wanted to remarry and asked him about the status of the divorce proceedings. The reply was that accused had been divorced. Later on, when he received a letter from Judge Ryan stating that he had received no such call he

voluntarily showed this letter to the trial judge advocate. He had heard from his mother and father prior to his entry into military service that Vernadee Bailey had remarried (R. 41, 42) and subsequent to July 1944, he understood that she had obtained a divorce apparently because of information written to him by his parents (R. 23-26, 30, 38, 39). He subsequently testified that the sole basis for his belief that he had been divorced was the information he received during the telephone conversation with an individual whom he thought was Judge Ryan (R. 43, 44).

On cross-examination and examination by the court the accused stated that he knew in July of 1944 that he was not divorced, having been so advised at that time by Judge Ryan. His association with the latter began in 1940 and from then to the present he had talked with him personally about forty times and on the telephone about ten times but he could not recognize his voice. The telephone call was collect, had been made from the residence of Miss Short in her presence, and she had been fully advised of his prior marriage. It was customary for him to call Judge Ryan collect and he would be billed for the charges. No bill for this call had been presented to him as yet, but on redirect examination he stated that Judge Ryan was still retained by him and still working on his case. The day before the trial was the first time that he had tried to get a record from the telephone company of the call but because the charges had been reversed "the slip" had gone to Los Angeles. On redirect examination he stated he did not know that such a record would be necessary until very recently (R. 26-35, 42, 45).

The accused never checked with the Clerk of Oswego or Onondago Counties, New York, to determine whether a divorce had been granted and he was never served with notice of any divorce action brought by his wife. He knew that the divorce action he initiated in July of 1944 had never been completed (R. 34).

On 23 August 1944 he talked with the Personal Affairs Officer about a letter from Vernadee Bailey in which she requested support for the children. He did not remember whether he had said at that time that he had been divorced. He did admit that he "had been the husband of Vernadee Bailey" but "there wasn't very much said on that, because the sole import of the letter was that she was requesting support for the children." During this interview he did not mention his recent marriage to Miss Short (R. 45-46).

The accused's instructor, who had known him for two or three months, testified that he was "above average" as a student and a pilot and he was "the most eager student" the witness had in his class (R. 47).

A classmate of the accused, a lieutenant who had known him for about one year, testified that the accused's reputation for truth and veracity was "of the very best" (R. 50).

5. Bigamy has long been recognized as an offense under Article of War 96 without reference to state laws (CM 245278, Yagel, 29 B.R. 153; CM 256886, Wilber, 36 B.R. 373). It is committed when one party enters into a contract of marriage while a former marriage of that party still exists undissolved and the spouse of that marriage remains alive (Dig. Op. JAG, 1912-40, sec. 454 (18); Wilber case, supra). The evidence here fully establishes the essential elements of the offense alleged and the only question is whether or not accused has presented a valid defense thereto.

In a majority of the civil jurisdictions in this country it is no defense to a charge of bigamy that the individual had an honest but erroneous belief, based on reasonable grounds, that the first marriage had been dissolved. A minority of the jurisdictions, however, recognize such a defense. It appears that the minority view, most salutary for an accused, has been adopted by The Judge Advocate General at least when the second marriage is performed in a jurisdiction where such a defense is recognized (Dig. Op. JAG, 1912-40, sec. 454 (18); CM 245510, Carusone, 29 B.R. 195).

To support such a defense accused testified that he had received letters from his parents indicating his first wife had obtained a divorce and that while in Roswell, New Mexico, and in Miss Short's presence he talked on the telephone with some individual whom he assumed to be Judge Ryan, his California lawyer, who advised him that his wife had obtained a divorce in New York. Accused produced no evidence to corroborate his testimony. Indeed, he stated that he subsequently discovered that he had not in fact talked to this lawyer on the telephone but produced no corroborating evidence either as to the phone call itself or as to the person to whom he had spoken in the small law firm. Furthermore, the accused's testimony is contradicted by his own statement made a few days after his marriage to Miss Short and when he was being questioned about a letter received by military authorities from Vernadee Bailey in which she complained of accused's failure to support her and their children. At that time accused's bigamous situation was not under investigation and during the questioning accused admitted he was married to Vernadee Bailey but that he was attempting to secure a divorce. In view of the foregoing the court was justified in disbelieving accused's testimony and in concluding that his defense had not been established by sufficient credible evidence.

However, even if accused's testimony commanded full credence, it was insufficient as a matter of law to establish his defense, assuming, without deciding, that the minority rule is here applicable. A belief that the first marriage has been terminated is no defense unless it is an honest belief based upon reasonable grounds or unless accused has exercised "reasonable diligence to ascertain the truth" of the facts on which his belief is founded (Dig. Op. JAG, 1912-40, sec. 454 (18); CM 245510, Carusone, 29 B.R. 195). Accused admitted that his belief

was based solely upon the information he received during a telephone conversation with a person whom he thought to be, but who was not, his lawyer. He apparently did not rely upon the information he stated he received from his father and mother probably because, as his testimony also shows, he was told by them before he entered military service that Vernadee Bailey had remarried which information, if it had been given him, was clearly erroneous. Without other basis for his belief than a telephone conversation with a person whose voice he could not identify but whom he thought to be his lawyer and without obtaining any verification from the court supposedly awarding the decree, accused promptly entered upon his second marriage. In our opinion these facts fall far short of establishing that accused had reasonable grounds upon which to base his belief or that he exercised reasonable diligence to ascertain the truth of the facts on which he based his belief. The evidence is sufficient to sustain the finding of guilty of the Specification.

6. War Department records show that the accused will be 27 years of age on 14 June 1945. He is married and has one child. He denies paternity of his wife's second child. He completed three years of high school and thereafter worked for Douglas Aircraft and General Motors. He entered the Army as an aviation cadet and was commissioned a second lieutenant, Army of the United States, on 8 February 1944, following his graduation from Army Air Forces Pilot School, Fort Sumner, New Mexico, and was ordered to active duty the same date.

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

Thomas N. Tappy, Judge Advocate.

William H. Trambell, Judge Advocate.

Robert C. Trewithan, Judge Advocate.

SPJGH-CM 272642 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAR 6 1945

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 Percival Dee Bailey (0-767727), Air Corps.

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

3. Consideration has been given to the inclosed letters from accused's father, Dr. Percival D. Bailey and Lynn N. Peterson, Esq., both requesting clemency.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

5 Incls
1. Record of trial
2. Ltr fr PD Bailey, 18 Jan 45
3. Ltr fr LN Peterson, 30 Jan 45
4. Dft ltr for sig S/W
5. Form of action

(Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 157, 24 Apr 1945)

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

SPJGK
CM 272733

15 JAN 1945

UNITED STATES	FOURTH AIR FORCE
v.	Trial by G.C.M., convened at Lemoore Army Air Field, Lemoore, California, 16 December 1944. Dismissal.
Second Lieutenant HOWARD D. BURHAM (0-766850), 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 Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Howard D. Burham, 461st Army Air Force Base Unit, did, without proper leave, absent himself from his organization and proper station at Lemoore Army Air Field, Lemoore, California, from about 14 November 1944, to about 22 November 1944.

He pleaded guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction was introduced of making an untrue official report that he had engaged in a formation flight, in violation of Article of War 96, for which he was sentenced to forfeiture of $75 pay per month for a period of five months. In this case 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 accused having been fully advised as to the meaning and effect of such a plea, entered a plea of guilty to the Charge and Specification. The record contains no evidence for the prosecution. The accused did not testify, but through his defense counsel made an unsworn statement as follows:

"He has been in the Military Service since September, 1942, entering the Service as an Aviation Cadet, receiving his commission as Second Lieutenant at Pecos, Texas on February, 1944. He served as a flying instructor at Douglas, Arizona for a period of about six months and then was sent to Lemoore Army Air Field. While at

Douglas, Arizona he received a court-martial and a sentence of a fine for a period of six months for a violation of the 96th Article of War. After arriving at Lemoore Army Air Field, he received word of a situation at Albuquerque, New Mexico that required his personal attention. The situation was such that it caused him much mental anxiety and clouded his better judgement. He further wishes to state that a reason for making this statement as an unsworn statement is that if subjected to cross-examination, it would place him in such a position of revealing details of the situation at Albuquerque and making public such items as involving the honor of persons not directly subject to Military Law and placing their honor in jeopardy." (R. 6).

While it is true that the plea of guilty admits the facts set forth in the Specification and supports the finding of guilty (CM 228148, Green, 16 B.R., p. 94), it has always been deemed to be a better practice for the prosecution to present a prima facie case against accused by competent evidence notwithstanding the plea (CM 236359, Tindell, B.R. 22, p. 390).

4. War Department records disclose that this officer is 24 years of age, married and has one daughter. He was born in Washington, Iowa, is a high school graduate and attended Washington Junior College for one and one-half years. Immediately before entering the service, he was engaged as a meter reader and electrician's helper by Iowa Southern Utilities Company, Washington, Iowa. He entered the service as an aviation cadet on 17 April 1943, was appointed a second lieutenant, Army of the United States, Air Corps, on 8 February 1944, and entered on active duty the same day.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK - CM 272733 1st Ind

Hq ASF, JAGO, Washington 25, D. C., JAN 18 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 Howard D. Burham (0-766850), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the finding of guilty and the sentence and to warrant confirmation thereof. The previous conviction of the accused together with his present absence without leave demonstrates a lack of responsibility inconsistent with his position as an officer of the Army of the United States. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Sentence confirmed. G.C.M.O. 95, 24 Mar 1945)

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

SPJGN
CM 272772

24 JAN 1945

UNITED STATES	)	SACRAMENTO AIR TECHNICAL SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Air Service Command Training Center, Fresno, California, 9 December 1944. Dismissal.
First Lieutenant R. H. MORGAN (O-560145), 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 Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that First Lieutenant R. H. Morgan (i.o.), 4128th Army Air Forces Base Unit, Base Administration, Section A, then of the 347th Service Group, did without proper leave absent himself from his station at Air Service Command Training Center, Fresno, 2, California, from about 5 September 1944 to about 12 November 1944.

He pleaded guilty to and was found guilty of the Charge and Specification. He was sentenced to be dismissed the service and "to pay to the United States a fine of $1000.00". The reviewing authority approved the sentence but remitted that portion thereof providing for the payment of the $1000 fine and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, supplementing the accused's plea of guilty, consists of proper documentary evidence, which was ad-

mitted without objection and shows the accused's unauthorized absence as alleged (R. 7; Ex. A).

4. The accused, after explanation of his rights as a witness, elected to make an unsworn statement through his counsel (R. 7). The statement is as follows:

"Lt. R. H. Morgan is twenty-eight years of Age. He was born and reared in a small Texas town. He graduated from high school at an early age. After this graduation he worked at odd jobs for a couple of years, and then joined the Army. His boyhood instead of being remarkable, to the contrary was very ordinary. In his early manhood his efforts when directed seemed to accomplish any task with remarkable facility, but without supervision his deeds were negligible. Because of this apparent lack of initiative he floundered around for some time and finally became a member of the armed forces in 1935.

"As a soldier, Morgan served three enlistments. The first, a short term of sixteen months, which culminated by his enlistment for overseas service. This overseas service was performed in the Phillipine Islands. He became a Corporal and at the end of two years service returned to the United States for discharge in the summer of 1939. In the Fall of 1939 he again re-enlisted, and at the time of Pearl Harbor three years and two days ago, he was a Tech Sergeant and was assigned as Personnel Sergeant Major at Minter Field, California. Soon after the declaration of war he was ordered to Officers' Candidate School. He did not apply for Officers' Candidate School, and when the orders came he did not want to accept the appointment, but this was the second class at the school and he was required by the exigencies of the service to attent though he protested this assignment.

"Thus, his period of enlisted service was terminated. During the six years of his enlisted service he earned the Good Conduct Medal and was never given punishment under the 104th Article of War or court-martialed for any offense.

"At Officers' Candidate School, because of his intelligence and experience, the work which so many found difficult was relatively easy for Morgan, and he graduated high in his class of nine hundred.

"Lt. R. H. Morgan was sworn into the service as a Second Lieutenant and became an officer in the army. He found himself to be a very perplexed individual. In his own words he felt like a fish out of water. He was, he said, used to working and taking orders and not accustomed to supervisory effort

and the giving of orders. To say that he was unhappy in his position would be a gross understatement, for his change of status constantly weighed upon his mind and became an obsession.

"His first duty assignments were as Adjutant and Personnel Officer, and for a brief period when Cuaraco and Aruba were consolidated he served as Administrative Inspector. He knew the requirements of these jobs but was unable to secure much assistance from his subordinates and as a consequence he performed the required details personally. These assignment were, for a period from August 1942 to 15 June 1944, at stations in the Carribean Defense Area. For this performance he was rated 'Superior' five times and 'Excellent' twice. On 6 June 1943, he was promoted to the grade of First Lieutenant. During all this period of performance, he was unhappy with his status as an officer. He found compensation in the work that he was doing and stayed with it diligently. He was in a familiar field, but try as he would, he always felt that he would have been better satisfied to have served in a capacity as an enlisted man and knew in his own mind that he could have been of more benefit to the armed forces in that capacity. On return from overseas duty, there was a considerable period of time when he had nothing to do. He applied for Flexible Gunnery School for he felt that this would give him an outlet for self-expression which he was finding more difficult as the months went by. Some two weeks prior to his delinquency, he was assigned to the 347th Service Group as Personnel Officer, but the only duties required of him were to keep a roster of Duty Officers and to occasionally prepare an examination for the enlisted men in the Personnel Section.

"Two days prior to his delinquency his best friend received orders to report to Flexible Gunnery School. He learned that his own application had been turned down. Deep in the throws of despondency, he absented himself and sought refuge from his beleaguered mind.

"Ever conscious of the effect of his conduct, and not having found any relief in his useless wanderings, he returned to this station to face what he knew was inevitable" (R. 7-10).

5. The Specification alleges that the accused absented himself without proper leave from his named station from about 5 September 1944 to about 12 November 1944. The elements of the offense of absence without leave, which is violative of Article of War 61, and the proof required for conviction thereof, according to applicable authority, are as follows:

"* * * (a) That the accused absented himself from his command, * * *, station, or camp for a certain period, as

alleged, and (b) that such absence was without authority from anyone competent to give him leave" (MCM, 1928, par. 132).

The evidence adduced by the prosecution conclusively establishes the accused's unauthorized absence as alleged and abundantly supplements his plea of guilty which alone would warrant the findings of guilty as made by the court since it does not appear that such plea was improvidently entered. The matters contained in the accused's unsworn statement exclusive of the admission of the offense charged do not constitute evidence and sound not in defense but only in mitigation. All of the evidence and the accused's plea of guilty, therefore, beyond a reasonable doubt support the court's findings of guilty of the Charge and its Specification.

6. The accused is about 28 years old and single. War Department records show that he has had enlisted service from August 1935 to April 1939 and from October 1939 until 24 June 1942 when he was commissioned a second lieutenant upon completion of Officers' Candidate School. Since the latter date he has had active duty as an officer and was promoted to first lieutenant on 6 July 1943. On 10 October 1942 he was punished under Article of War 104 for four days absence without leave and on 15 August 1944 he was punished under the same Article for wrongfully using a government vehicle for his own purposes and making a false statement regarding such use.

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

Abner E. Lipscomb, Judge Advocate.

Robert J. Clannon, Judge Advocate.

Gabriel H. Goldin, Judge Advocate.

SPJGN-CM 272772 1st Ind.

HQ ASF, JAGO, Washington 25, D. C. JAN 30 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 R. H. Morgan (0-560145), Air Corps.

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

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 123, 5 Apr 1945)

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

SPJGK
CM 272944

19 JAN 1945

UNITED STATES v. Private SAM A. WILBURN (44020506), Company F, 197th Infantry Training Battalion, 61st Infantry Training Regiment.	INFANTRY REPLACEMENT TRAINING CENTER Camp Blanding, Florida. Trial by G.C.M., convened at Camp Blanding, Florida, 29 December 1944. Dishonorable discharge and confinement for ten (10) years. Disciplinary Barracks.

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

---

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Sam A. Wilburn, Company "F", 197th Infantry Training Battalion, 61st Infantry Training Regiment, Camp Blanding, Florida, did, at Camp Blanding, Florida, on or about 8 December 1944, willfully maim himself in the foot by shooting himself with a Rifle, M-1, .30 cal., 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 ten years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence is legally sufficient to support the finding of guilty. The only question requiring consideration is the legality of the period of confinement. Accused was not charged with the commission of the crime of mayhem under Article of War 93, but with the commission of the military offense of self-maiming, in violation of Article of War 96. The gravamen

of the latter offense is the willful unfitting of oneself by self-inflicted wounds for the full performance of military service (CM ETO 1161, Waters; CM 268217, Duncan). Mayhem, on the other hand, 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; ***".

It is apparent that many self-inflicted wounds may temporarily render the offender unfit for the full performance of military service without being of so serious a nature as to constitute mayhem. In the present case it was established that accused shot off a part of the great toe on his left foot and at the time of his trial, exactly three weeks later, was so far incapacitated as to "fall in the limited service category" (R. 11). According to the views of the medical officer who testified for the prosecution, had this toe been completely shot off "then he [accused] would be disqualified for most any type of military service", but "under existing conditions" he may within three months be "qualified for full military duty" with a "very good probability that it [the wound] will heal in a proper manner" (R. 12,13). Accused's injury, therefore, is not of such a nature or extent as to amount to mayhem, but more closely resembles those injuries included in 18 United States Code, 462, which 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 other 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".

No maximum punishment is prescribed for the offense of self-maiming under Article of War 96, nor for any closely related offense. Being purely a military offense, there is no Federal statute of general application or law of the District of Columbia defining the offense and fixing the period of confinement (CM 268217, Duncan). Under an opinion rendered by The Judge Advocate General (SPJGJ 1942/2425, 9 June 1942) where the self-inflicted

wound amounts to mayhem and accused is charged with that offense, the maximum sentence that may be imposed upon conviction is ten years, which is the limitation placed by Title 22, Section 506, Code of the District of Columbia, on the punishment for the crime of mayhem. On the other hand in CM NATO 464, McKenzie, the Board of Review held that where there was added to the regular specification charging self-maiming (Form 162, p. 257, MCM, 1928) an allegation, properly supported by the evidence, that the wounds were inflicted by accused upon himself with intent to avoid hazardous duty, a more serious offense than ordinary self-maiming was charged, that accused's misconduct was assimilable to misconduct before the enemy as denounced by Article of War 75, and that, therefore, there was no limit to the imposable punishment. The present charge does not fall within either of these categories. In the absence of any previous determination of the matter, and of any other prescribed guide, it is necessary to resort to the "custom of the service" to determine the appropriate maximum punishment (MCM, 1928, par. 104c).

The Board of Review in CM 199369, Davis (4 B.R. 37), aptly expressed the principle that,

> "It is the custom of the service, where no limit of punishment for an offense is specifically prescribed in the Executive Order, to follow Congressional expression of what constitutes appropriate punishment".

Applying this rule to the facts in the present case, the Board is of the opinion that the injury which accused inflicted upon himself bears a more marked resemblance to the type of injuries described in 18 United States Code 462 than to mayhem; and that, therefore, the maximum punishment prescribed in this Federal statute, namely seven years, should serve as a guide where the self-inflicted wounds are not of such an extent and nature as to constitute mayhem, and there are no additional elements which may render the offense, as charged and established, a more serious one than that contemplated by the form of specification used in the present case.

4. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for seven years.

Judge Advocate.

Judge Advocate.

Judge Advocate.

1st Ind
MAR 13 1945

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

TO: CG, Inf Repl Tr Cn, Camp Blanding, Florida.

1. In the case of Private Sam A. Wilburn (44020506), Company F, 197th Infantry Training Battalion, 61st Infantry Training Regiment, 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 seven years, which holding is hereby approved. Upon approval of 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 seven years, you will have authority to order the execution of the modified 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 272944).

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 273060

2 MAR 1945

UNITED STATES	)	ANTILLES DEPARTMENT
v.	)	Trial by G.C.M., convened at APO 850, c/o Postmaster, Miami, Florida, 7 December 1944. Dismissal and total forfeitures.
Second Lieutenant FRANCISCO CARRILLO (0-1320099), Infantry.	)	

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

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

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

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

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

Specification 2: In that Second Lieutenant Francisco Carrillo, 2702nd Engineer Dump Truck Company, did, at Salinas Training Area, P. R., on or about 5 October 1944 fail to repair at the fixed time to the properly appointed place of assembly for the purpose of standing reveille formation with his organization.

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

Specification 4: In that Second Lieutenant Francisco Carrillo, 2702nd Engineer Dump Truck Company, did, at Salinas Training Area, P. R., on or about 9 October 1944 fail to repair at the proper time to the appointed place of assembly for the purpose of standing reveille formation with his organization.

Specification 5: (Motion for finding of not guilty sustained).

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

Specification 1: (Motion for finding of not guilty sustained).

Specification 2: (Finding of guilty disapproved by the reviewing authority).

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

Specification: In that Second Lieutenant Francisco Carrillo, Company "C", Replacement Battalion, Unit Training Center, APO #850, c/o Postmaster, Miami, Florida, did, without proper leave, absent himself from his place of duty; to wit: The School for Bakers and Cooks, Mess Supervisors Course, APO #846, c/o Postmaster, Miami, Florida, from on or about 0800, 25 October 1944 to on or about 0800, 26 October 1944.

He pleaded not guilty to all Charges and Specifications. A motion for a finding of not guilty as to Specification 5, Charge I, and Specification 1, Charge II, was granted (R. 31). Accused was found guilty of the remaining Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the findings of guilty of Specifications 1 and 3, Charge I, and Specification 2, Charge II, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The only evidence for the prosecution, as to Specifications 2 and 4, Charge I, is the testimony of Captain William C. Buchanan, accused's company commander, that accused was "absent at reveille" on 5 October 1944 and that "he was not present at reveille" on 9 October 1944. Captain Buchanan "looked for" accused "after he was absent", and on one of these occasions he and Lieutenant McCollum went to accused's tent and "awoke him up." The organization had an appointed place of assembly, and accused knew the place. The witness and the rest of the organization "must stand reveille formation." No entry was made on the daily sick report of the organization for 5 or 9 October concerning accused (R. 15-17).

The evidence as to the Specification of the Additional Charge shows that accused reported officially for instructions to Major George Mironoff, Commandant of the School for Bakers and Cooks, APO 846, on 24 October 1944 (R. 26, 28, 29). At 8:00 a.m. on 25 October 1944 Major Mironoff called the roll of student officers. Accused failed to answer when his name was called, and was not present in the classroom.

He was also absent from the afternoon class (R. 28). Major Mironoff caused a diligent search to be made. He sent a captain to look for accused, and instructed the first sergeant to call the hospital at San Juan to see if accused had been admitted there, but they failed to learn anything about accused. The prosecution introduced without objection extract copies of the morning report of the school for 25 October 1944 showing accused "Duty to AWOL 0800," and for 26 October 1944 showing accused "AWOL to duty 0800" (R. 27-30; Pros. Exs. 1 and 2). No entry appeared on the daily sick report concerning accused on 25 October, and nothing appeared on the morning report for that date relative to any sickness of accused (R. 29-30). On 26 October, accused reported to Major Mironoff and, when asked the reason for his absence, replied that he had been sick (R. 29).

4. The accused, after having his rights explained to him by the law member, declined to make any statement (R. 37).

For the defense, Captain Manuel E. Paniagua, Medical Corps, testified that he had been "attendant physician" to accused, who had been a patient in the hospital from 4 November 1944 to the date of trial, 7 December 1944. Accused had a temperature of 99.2 when hospitalized, and was having acute attacks of respiratory infection. Upon X-Ray of his chest, his illness was diagnosed as bronchitis, chronic. Accused made "no marked improvement that I would consider to discharge him to duty" during the thirty-four days he was in the hospital. "Probably he must have had this condition for a month or six weeks prior to his admission to the hospital." He "could have been ill" around the middle of September (R. 31-33). The disease from which accused suffered manifests itself by "frequent exhacerbations (sic) in the form of periods of from two days to two weeks of relatively high fever and accentuation of all these symptoms, and there is a severe chest cold." During such periods the patient "could be considered as unable to carry on any kind of duty and requires hospitalization." In the opinion of the witness, it is possible that on 25 October 1944 accused "might have been sick with acute exhacerbations" (R. 33).

Captain William C. Buchanan, commanding officer of accused, testified that at Salinas Training Area accused worked with troops and "performed his work very well in the field. He did a good job handling troops." Whether the witness would care to have accused under his orders on the battlefield would depend on his conduct. "He works efficiently" (R. 34-35).

5. The testimony of accused's company commander to the two absences of accused from reveille, and to the fact that the witness and the rest of the organization "must stand reveille formation", was sufficient to warrant a finding of guilty of Specifications 2 and 4, Charge I.

The evidence clearly establishes the absence of accused from the School for Bakers and Cooks from 0800 on 25 October to 0800 on 26 October 1944. While no evidence was introduced which showed that accused was actually ordered to attend the school, there is testimony that accused reported officially for instruction to the commandant of the school. This evidence, together with the testimony indicating that accused's name appeared on the attendance roll as well as the morning report of the school, is sufficient to show that the school was actually his "place of duty."

Accused introduced medical testimony indicating the possibility that he was sick on the dates he failed to repair to reveille and also on the day he was absent without leave from the school. Major Mironoff also testified that accused told him that he was sick on 25 October, the date of the unauthorized absence. There is a lack of any definite proof, however, that accused was sick on the particular dates to such extent that he was not physically able to report on a regular sick call or have medical assistance summoned to his bedside so that his name might appear on the proper sick report. Furthermore, the court was not bound to conclude that accused was sick at all. There is nothing in the evidence concerning sickness to warrant reversal of the court's findings.

6. Prior to pleading to the general issue, the defense pleaded former jeopardy in bar of trial as to Specification 2, Charge I, in that accused was restricted on 6 October 1944 for the offense alleged therein (R. 8). The court requested evidence to support the motion, and the defense then showed by Captain Buchanan, accused's company commander, that Major Brinckerhoff, the battalion commander, had told him on 6 October 1944 that accused was not to leave the limits of the camp without permission. Major Brinckerhoff did not state why accused was so restricted, but the witness said "I belief" it was because of accused's absence from reveille on the 5th of October, and because of an absence from duty on 6 October (R. 9-11, 35-36). On 13 October accused was still under restriction (R. 37). Had accused been punished under Article of War 104 for the offense committed on 5 October, he could not be convicted of and punished for it again; but there is no showing that any preliminary investigation was made, written notification of intention to impose punishment given, written record made, or other steps taken such as are enumerated by the Manual for Courts-Martial for punishments under that Article of War (M.C.M., 1928, par. 107-109). Nor does the evidence show that the restriction was intended as punishment. It is therefore reasonable to conclude that the restriction of accused was merely an arrest or restriction preliminary to investigation and further disciplinary action (CM 201435, Darr, 5. B.R. 119).

7. The defense counsel challenged the law member for cause, stating that "the Defense Counsel has information that you had something to do with the accused at the time of the last offense." The law member

replied that he was not sure whether he was the commanding officer of accused at the time of the offense, and that he had no previous knowledge of the case whatsoever (R. 3). Under these circumstances the court was clearly correct in not sustaining the challenge (M.C.M., 1928, par. 58f).

8. The reviewing authority, in disapproving Specification 2, Charge II, disapproved the only finding of guilty under that Charge. Although he did not expressly disapprove the finding of guilty of Charge II, his action had the effect of disapproving such finding (CM 217104, Bradley, 11 B.R. 217).

9. The record of trial is authenticated by Lieutenant Colonel James E. Holton Jr. as president, whereas Lieutenant Colonel Neil M. Cochran appears to have been the senior ranking member present at the trial. A radiogram has been received by The Judge Advocate General from the reviewing authority, The Commanding General, Antilles Department, San Juan, Puerto Rico, dated 22 February 1945, stating that a certificate of correction, showing that Lieutenant Colonel Holton authenticated the record as a member in lieu of the president because of the latter's absence, will be forwarded without delay.

10. War Department records show that accused is 28 years of age, is single, and was graduated in 1940 from a college of agriculture in Mayaguez, Puerto Rico. In 1934 and 1935 he coached in an athletic institution, and he served as timekeeper for a sugar mill in 1935 and 1936. From 1940 to 1942 he acted as rodman in the Land Survey Section of the United States Navy. Accused served from May 1935 to June 1936 in the Puerto Rican National Guard, and from 1936 to 1938 he was a member of the Reserve Officers' Training Corps while in college. He served as an enlisted man in the Army from 25 September 1942, and on 26 May 1943 was commissioned a second lieutenant in the Army of the United States upon graduation from The Infantry School at Fort Benning, Georgia.

11. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority, except the finding of guilty of Charge II, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of the 61st Article of War.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ - CM 273060

1st Ind
MAR 13 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 Second Lieutenant Francisco Carrillo (0-1320099), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority, except the finding of guilty of Charge II, and legally sufficient to support the sentence and to warrant confirmation thereof. In addition to the present offenses, Lieutenant Carrillo was convicted in August 1943 of breach of restriction and failure to obey an order to report daily to his superior officer, in violation of Article of War 96, and in September 1944 he was punished under Article of War 104 for absence without leave for two days. Lieutenant Carrillo's conduct displays a complete lack of appreciation of, and respect for, the duties and responsibilities of a commissioned officer. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

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

(Finding of guilty of Charge II disapproved. Sentence confirmed but forfeitures remitted. G.C.M.O. 165, 12 May 1945)

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

SPJGH
CM 273087

26 JAN 1945

UNITED STATES	NEW ORLEANS PORT OF EMBARKATION
v.	Trial by G.C.M., convened at Camp Plauche, New Orleans, Louisiana, 14 and 28 December 1944. Dismissal and total forfeitures.
Second Lieutenant WARD E. SALSBURY (0-1061240), Transportation 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 61st Article of War.

Specification: In that Second Lieutenant Ward E. Salsbury, Headquarters, Army Service Forces Training Center, Camp Plauche, Louisiana, did, without proper leave, absent himself from his organization at Camp Plauche, Louisiana from about 6 November 1944, to about 3 December 1944.

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and its Specification and not guilty of all other Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence pertaining to Charge II and its Specifications and Charge III and its Specifications, of which there were findings of not guilty, will not be discussed except as it may pertain to the Specification of Charge I, of which accused was found guilty. The evidence for the prosecution in support of this Specification is substantially as follows:

On 6 November 1944 accused absented himself without leave from his organization at Camp Plauche, Louisiana (R. 8; Pros. Ex. 1) and remained absent without leave until 3 December 1944 (R. 8-9; Pros. Exs. 2, 3). First Lieutenant Harold Gernsbacher, the investigating officer, interviewed accused on or about 6 December 1944 and after warning accused of his rights, obtained a sworn written statement from him (R. 34-37; Pros. Ex. 7). In this written statement accused admitted being absent without leave from 6 November 1944 to 3 December 1944 as charged. He stated, among other things, that he left Camp Plauche, Louisiana, 5 November 1944 and stopped at Pat's Place on the Jefferson Highway where he started drinking; that he was under the influence of intoxicating liquor the entire time of his absence, and that he stayed at the Dixie Court, the Alamo Plaza Courts and several small hotels during the time he was away.

4. After being informed of his rights, accused elected to be sworn and testify in his own behalf. He stated that he was married and had a daughter by his first wife, 15 years of age.

> "I realize there is not much that can be said as far as the AWOL. I have been in a very poor mental state of affairs. I tried to procure an emergency leave to see what I could do about getting my daughter in a private school. She is 15. It couldn't exactly be termed an emergency leave. She was not in the proper environment. She is living in an atmosphere I don't like. When I was on this leave I found circumstances were very bad and I wired for an extension of five days for that purpose which according to the receiving party, it was more or less a joke, requesting five days extension for that purpose. At the present time it takes about $700 or $800 in advance each semester to gain entrance into any institution of any prominence and I didn't have it. After I was gone a few days I came to realize I was in a predicament as far as my financial situation was concerned, and I couldn't return to camp until it was straightened out."

He was drinking heavily during the entire period of his absence from Camp Plauche, Louisiana, consuming about a fifth of whiskey each day (R. 42-46).

Mrs. Thelma Billings, Alamo Plaza Courts, New Orleans, Louisiana, a witness for accused, testified that she and her husband were present with accused at Pat Gillen's Place on 5 November 1944, and that she saw him several times between that date and 3 December 1944. She never saw him during this period when he was not drinking (R. 54-56).

It was stipulated that if First Lieutenant George H. Blakeslee, Jr., were present in court and sworn he would testify that he was accused's commanding officer from June 1944 to August 1944; that during this period he was closely associated with him and observed his conduct and the manner in which he performed his duties; that accused was an excellent platoon leader and company officer; that he performed his duties in a conscientious and efficient manner; that accused was held in high esteem by the men serving under him and by his fellow officers. He never had any reason to question accused's honesty or integrity.

5. The uncontradicted evidence of the prosecution and the testimony of accused show that accused absented himself without leave from his organization at Camp Plauche, Louisiana, from 6 November 1944 to 3 December 1944, and fully sustain the court's findings of guilty.

6. Accused is 35 years of age and has a wife and one child age 15. He is a graduate of Kemper Military Academy and in civil life operated a dry cleaning plant. He entered the military service as a private 15 January 1943 and upon graduation from Antiaircraft Artillery School, Camp Davis, North Carolina, was appointed a second lieutenant, Army of the United States, 7 October 1943 and ordered to active duty the same date.

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

Thomas N. Tapty, Judge Advocate.

William H. Gambrell, Jr., Judge Advocate.

Robert C. Trueblood, Judge Advocate.

SPJGH-CM 273087 1st Ind

Hq ASF, JAGO, Washington 25, D. C. Feb 7 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 Ward E. Salsbury (0-1061240), Transportation Corps.

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 107, 25 Mar 1945)

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

SPJGK
CM 273089

15 FEB 1945

UNITED STATES	)	FORT BENNING, GEORGIA
v.	)	Trial by G.C.M., convened at Fort Benning, Georgia, 6-7 December 1944. Dismissal.
First Lieutenant JAMES B. KAEMPFER (O-411316), 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. Accused was tried upon the following Charges and Specifications:

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

Specification: In that First Lieutenant James B. Kaempfer, Company "D", Receiving Battalion, Reception Center, Fort Benning, Georgia, did, without proper leave, absent himself from Army Service Forces Regional Hospital at Fort Benning, Georgia, from about 17 July 1944, to about 18 July 1944.

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

Specification: In that First Lieutenant James B. Kaempfer, Company "D", Receiving Battalion, Reception Center, Fort Benning, Georgia, did, at Atlanta, Georgia, on or about 17 July 1944, feloniously take, steal and carry away three (3) Class E-1 and five (5) Class T gasoline rationing coupons authorizing the purchase of about twenty-eight (28) gallons of gasoline and of some value, the property of the United States of America and rightfully in the possession of McCord Oil Company Filling Station, 2138 Stewart Avenue, Atlanta, Georgia.

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

Specification 1: In that First Lieutenant James B. Kaempfer, Company "D", Receiving Battalion, Reception Center, Fort Benning, Georgia, did, at Atlanta, Georgia, on or about 17 July 1944, wrongfully and unlawfully take and carry away three (3) Class E-1 and five (5) Class T gasoline rationing coupons, the property of the United States of America and rightfully in the possession of McCord Oil Company Filling Station, 2138 Stewart Avenue, Atlanta, Georgia.

Specification 2: (Finding of not guilty - motion by defense counsel for such finding granted at the time the prosecution rested its case).

Specification 3: In that First Lieutenant James B. Kaempfer, Company "D", Receiving Battalion, Reception Center, Fort Benning, Georgia, did, at Columbus, Georgia, on or about 8 July 1944, with intent to deceive, wrongfully and unlawfully make and utter to Arthur Hamburger, Manager, Deluxe Liquor Store, Cusseta Road, Columbus, Georgia, a certain check, in words and figures as follows, to-wit:

" Columbus, Ga. 8 July 1944
THE FIRST NATIONAL BANK 64-58

Pay To The
Order Of Cash $ 23.50/

Twenty-three and 50/100----------DOLLARS

/s/ James B. Kaempfer 1st Lt.
Inf. 0-411316"

indorsed on the back thereof as follows:

"Ringler Bros."

and by means thereof, did fraudulently obtain from said Arthur Hamburger about $15.00 lawful money of the United States and alcoholic beverages of the value of about $8.50, he the said First Lieutenant James B. Kaempfer, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank, Columbus, Georgia, for the payment of said check.

Specification 4: Identical with Specification 3 except that the check involved bore date of 12 July 1944, was for the amount of $28.50, and is alleged to have been negotiated on the date it bore.

Specification 5: Identical with Specification 3 except that the check involved bore date of 13 July 1944, was for the amount of $30.25, and is alleged to have been negotiated on the date it bore.

Specification 6: Identical with Specification 3 except that the check involved bore date of 15 July 1944, was for the amount of $8.10, and is alleged to have been negotiated on the date it bore.

Specification 7: (Finding of not guilty).

ADDITIONAL CHARGES:

CHARGE I: Violation of the 69th Article of War (This charge and its Specification were withdrawn by direction of the appointing authority before accused was arraigned).

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

Specification: (Finding of not guilty).

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

Specification: (Finding of not guilty).

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

Specification: (Finding of not guilty).

By direction of the appointing authority, the prosecution withdrew Additional Charge I and its Specification before the accused was arraigned. Before accused pleaded to the general issue, defense counsel made a motion that the court resolve itself into a court of inquiry and in closed session hear evidence and determine the question of accused's sanity or mental accountability. The court granted this motion and, after hearing evidence, ordered the trial to proceed. The accused thereupon pleaded not guilty to all Charges and Specifications. He was found not guilty of Specifications 2 and 7 of Charge III and of all of the Additional Charges and their Specifications, and guilty of all of the remaining Charges and Specifications. No evidence

was introduced of any previous conviction. He was sentenced to be dismissed the service. The reviewing authority approved "only so much of the findings of guilty of Specifications 3, 4, 5, and 6 of Charge III as involves findings of guilty of wrongfully failing to maintain a sufficient balance to meet payment of the checks described in the specifications, in violation of Article of War 96", approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution relating to the Charges and Specifications of which the accused was found guilty is, briefly summarized, as follows:

Charge I and its Specification - Absence without leave, in violation of Article of War 61. Being at the time assigned as a patient in Ward B6, Army Service Forces Regional Hospital, Fort Benning, Georgia, the accused violated the conditions of an overnight pass granted him on 16 July 1944 by failing to return to the hospital by 8:30 a.m. on 17 July (R. 90). He was accordingly entered on the hospital records as absent without leave as of 8:30 a.m. on 17 July 1944. He was readmitted to the hospital at 7:00 a.m. on 18 July 1944 (R. 90). Evidence introduced by the prosecution in connection with other Charges and Specifications shows that the accused was taken into custody by military police in Atlanta, Georgia, about 10:00 a.m. (E.S.T.) on 17 July 1944 and detained for an undisclosed period of time (R. 40, 44). The ward officer of Ward B-6 stated that a ward rule in force on 17 July prohibited the admission of patients to the ward after 11:00 p.m. (R. 90, 91).

Charge II and its Specification, and Specification 1 of Charge III - larceny of gasoline rationing coupons, in violation of Articles of War 93 and 95. On the morning of 17 July 1944, the accused entered the office of a filling station that William A. Moon was operating for McCord Oil Company in Atlanta, Georgia, and requested and was granted permission to use the telephone (R. 32). While accused was at the telephone, Mr. Moon sold gasoline to two customers. Mr. Moon stated that after waiting on the first customer, he entered the office and placed the gasoline coupons which he had received in the transaction (United States OPA gas rationing coupons) in a box on a desk near which accused was sitting (R. 33, 37). This box was made of pasteboard and had a tin top in which a slot was cut for receipt of the coupons. After waiting on the second customer, who was his cousin, Mr. Moon again entered the office and got some cigarettes and again went outside to talk to his cousin. During such time as Mr. Moon was out of the office, accused was there alone (R. 33). When Mr. Moon re-entered the office after the departure of his cousin, accused stated that he had to go and requested that, when the person whom he had unsuccessfully tried to reach by telephone should answer Mr. Moon deliver a message which accused had written, the message being, "Will you sign in Lieutenant Keampfer?" Accused purchased a quart of oil, paid for it and the long

distance telephone call, and departed. After accused had gone, Mr. Moon noticed that the lid of the box in which he kept the gasoline rationing coupons was loose. He thereupon counted the coupons, which were supposed to represent the sale of approximately 150 gallons of gasoline, and discovered that some "T-coupons" and some "E-1 coupons" were missing. His cousin having returned in the meantime, Mr. Moon discussed the matter with him, and, a short time later, having been advised by his cousin that accused's car was parked at a nearby beer joint, Mr. Moon got in his own car and started in that direction. He met accused on the road, stopped him, and asked him "if he had seen any gas coupons". Accused denied that he had, stated that he needed no coupons, and offered to stand search (R. 33). Mr. Moon declined to search and returned to his filling station. After Mr. Moon's return to the filling station, his cousin called the civil police, who, after their arrival, called military police (R. 33, 34). The civil and military police, proceeding together, found accused at a tourist cabin about two blocks from Mr. Moon's filling station and, with accused's permission, searched both his cabin and his automobile. Gasoline coupons of the kind missed by Mr. Moon were discovered at one end of the front seat of accused's automobile. Both the accused and the coupons were carried into the presence of Mr. Moon and by him identified (R. 34). At first, when thus confronted, accused denied having taken the coupons, but upon being informed by a military police sergeant that it would make it easier on him if he admitted taking the coupons, if he had in fact done so, accused admitted that he had taken them (R. 34, 40, 44). Private James E. Banks, a member of the military police force present, stated that accused said, "All right, I took them off this table here" (R. 40, 42). No witness recalled that accused was instructed as to the rights accorded him by the 24th Article of War before he made this admission. Five "T-coupons" and three "E-1 coupons", identified as the ones missed by Mr. Moon and recovered from accused, were introduced in evidence without objection (R. 35; Ex. A). Together, they originally entitled their holders to purchase 28 gallons of gasoline (R. 35; Ex. A). Mr. Moon stated that they were without value at the time they were taken by accused except that McCord Oil company needed them in order to account for gasoline sold by it (R. 35, 37).

Mr. Moon said that he placed all gasoline ration coupons in the coupon box and did not leave any loose on the desk (R. 36). He recalled that he started to open the box while accused was in the office but did not recall whether he actually opened it (R. 37).

It was about 10:00 a.m. (EST) on 17 July when the military police took accused into custody and upon leaving the filling station, they carried him to military police headquarters (R. 40, 43).

Specifications 3, 4, 5, and 6 of Charge III - Bad checks. The several checks as described in the Specifications, all of which were drawn on The First National Bank, Columbus, Georgia, were properly

identified and introduced in evidence without objection (R. 48, 50, 51; Exs. B, C, D, E). The accused personally negotiated each of the checks to Arthur Hamburger, manager of the "Deluxe Liquor Store", Columbus, Georgia, on the respective dates borne by them, to wit: on 8. 12, 13 and 15 July 1944, and received in exchange for each check its face value in money or merchandise. Each of the checks was deposited for collection and was returned by the bank upon which drawn, marked, "insufficient funds" (R. 47-51; Exs. B, C, D, E). At the time of presenting the check dated 12 July, accused asked Mr. Hamburger if any of his checks had been returned unpaid and was informed that none had been (R. 57). At the time he accepted accused's check on 15 July, which was a Saturday, Mr. Hamburger knew that the checks dated 8, 12, and 13 July, respectively, had been dishonored because of insufficient funds, and so informed accused (R. 52). The accused told him to deposit all of the checks on the following Monday (17 July) and that they would be paid. Mr. Hamburger deposited the four checks for collection as directed but none of them was paid. The accused telephoned Mr. Hamburger twice during the week of 17 July and told him that he (accused) was in arrest and that he would pay the checks as soon as he could obtain his release, which he felt sure would be not later than Friday of that week. Mr. Hamburger held the checks until Monday of the following week, and then took the matter up with the "Reception Center". The checks were thereafter promptly redeemed (R. 54). The money with which they were redeemed was sent instead of being delivered by accused in person.

Mr. W. F. Pearce, vice-president of the drawee bank, stated that each of the four checks in question was presented to the bank for payment and payment was in each instance refused because of insufficient funds (R. 61, 62). Accused maintained a checking account with the bank during the month of July and had done so since sometime in March 1944. As of 1 July 1944, the account was overdrawn to the extent of 84 cents, but on 3 July accused deposited the sum of $300.33 to its credit. He deposited an additional sum of $301.73 on 28 July 1944. Between 3 and 10 July, eleven checks given by accused, ranging in amounts from $8.75 to $100, and aggregating $302.43, were charged against the account. Mr. Pearce was of the opinion that some of these eleven checks were checks that had been given during June.

4. <u>For the defense:</u>

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. Having been requested by a girl who was visiting at the Reception Center to take her to Atlanta, Georgia, Sunday night, 16 July, he obtained a pass from the hospital and went to Atlanta, arriving there about 1:00 a.m. on 17 July (R. 102, 103). He obtained a cabin and went to bed. He was supposed to be back at the hospital by 8:30 a.m. on 17 July but overslept (R. 102). When he woke up

about 9:30 a.m. and realized that he was already late, he immediately went to the filling station operated by Mr. Moon and placed a telephone call to the hospital, intending to convey the information that he was returning immediately (R. 103). While he was waiting on the telephone call he asked the filling station attendant (Mr. Moon) if he had any "extra coupons". The attendant made no reply. Before accused asked about the coupons the attendant had waited on one car and had placed the coupons received in a box on the desk. After accused asked about the coupons, the attendant waited on another car and when he re-entered the office he placed some coupons on the desk and again went outside (R. 104). Accused was not told that he might take the coupons but construed the attendant's conduct in placing the coupons on the desk after he had asked about them as an implied invitation to take them; so he did (R. 104). Upon being advised by the telephone operator that it would be an hour before his call could be completed, accused ascertained the cost of the call, paid the attendant for it, left a message with him to deliver when the call should be completed, and went to his cabin to check out (R. 103). Military Police took him in custody there about 10:30 o'clock. After returning to the filling station, the sergeant of military police who had him in custody told him that if he admitted taking the coupons he would be dealt with by military authorities and that he (the sergeant) would endeavor to have the charges dropped, but that if he did not admit taking the coupons he (accused) would be turned over to civil authorities on a federal charge (R. 106). Accused thereupon admitted taking the coupons off the desk (R. 105). He was not warned before he made this statement (R. 106). He was carried to military police headquarters and there detained until about 7:00 p.m. (R. 114). Immediately upon being released he returned to Fort Benning. He arrived at the hospital a few minutes after 11:00 p.m. on 17 July and was refused admittance (R. 112, 113).

With regard to the four bad checks given by him to Mr. Hamburger, accused stated that he thought at the time of giving the first three checks, i.e., the ones dated 8, 12, and 13 July, respectively, that he had sufficient funds on deposit to meet them (R. 107). He knew that he had not written checks after 3 July sufficient in amount to exhaust the $300.33 which he deposited on that date and did not know that checks issued by him in June had been paid from this deposit (R. 107). He kept no physical record of checks which he issued and rarely knew exactly what his balance was (R. 106-107). He would have made a deposit on Monday (17 July) to take care of all of the checks except for the fact that he was arrested and detained in Atlanta (R. 108). Upon his return to the hospital, he was placed in arrest and thereby prevented from going to town to redeem the checks (R. 108).

5. The evidence offered by the prosecution, together with admissions made by accused while testifying in his own behalf, clearly establishes the offense of absence without leave, as alleged, and supports the findings of guilty of Charge I and its Specification.

(382)

The Specification of Charge II alleges larceny of the gasoline rationing coupons as a violation of Article of War 93, and Specification 1 of Charge III alleges the same act as a violation of Article of War 95. This multiplication of charges is permissible (CM 252773, III Bull. JAG, Aug. 1944, p. 345). While testifying in his own behalf, accused admitted taking the coupons in question without the express consent of the filling station attendant, but contended that the attendant's conduct, under the circumstances which existed, caused him to believe that the attendant was consenting to the taking by him of the coupons. Accused's conduct after he had taken the coupons, together with the other evidence of record, justified the court in rejecting this defensive theory and in finding accused guilty of larceny of the coupons as alleged in the Specification of Charge II. Having found the accused guilty of larceny, in violation of Article of War 93, the court properly found that by the same act he also violated Article of War 95 (CM 258108, III Bull. JAG, Sept. 1944, p. 381).

With respect to that part of the evidence for the prosecution indicating that accused was not warned of his rights under the 24th Article of War before making the statement that the coupons found in his car had been removed by him from the filling station, it will be noted that accused's statement was not necessarily a confession that he had stolen the coupons, but was more in the nature of a declaration against interest. No objection was made to the introduction of this evidence, and after considering the entire record, including the testimony of the accused, it cannot be said that any substantial right of the accused was thereby prejudiced (A.W. 37).

The evidence clearly establishes that accused issued the four checks as alleged in Specifications 3, 4, 5, and 6, Charge III, and, through his own neglect and carelessness, failed to have sufficient funds on deposit to meet them when they were presented for payment. The reviewing authority properly declined to approve such portions of the findings of guilty as involved findings that the checks were issued with intent to defraud, and approved the findings of guilty as violations of Article of War 96 instead of Article of War 95. In the form approved, the findings are supported by the record (CM 249232, III Bull. JAG, July 1944, p. 290).

Based upon the evidence before it relating to accused's sanity, the court's action at the conclusion of the preliminary hearing in ordering the trial to proceed and in thereafter holding accused mentally and legally responsible for the offenses shown to have been committed by him was proper. Two witnesses, both psychiatrists who had examined accused, were called by the defense during the preliminary hearing and recalled by the court during the main trial. Upon each occasion, they stated that while accused was prone to act impulsively and might not be able at times to control his volitional responses, this was a character or personality defect and not a mental ailment (R. 18, 22). Both expressed the opinion that, at the times of committing the offenses charged, as well as at the time of trial, accused was sane, knew right from wrong, and was suffering from no mental derangement which rendered him incapable of adhering to the right (R. 16,

17, 22, 25, 71, 76). Accused was mentally responsible within contemplation of the test contained in paragraph 78a, MCM, 1928.

6. War Department records disclose that this officer is 29 years of age, and single. It appears, however, from the record of trial and the staff judge advocate's review that he is now married. He graduated from high school, attended Stanton Preparatory Academy, Cornwall, New York, for two years, the United States Military Academy for one year (discharged 15 June 1938, upon recommendation of the Academic Board, on account of deficiencies in studies), and was in his senior year at Syracuse University when called to his present tour of active duty. Having completed the R.O.T.C. course at Syracuse University, he was appointed second lieutenant, Infantry, Reserve Corps, Army of the United States, on 2 June 1941. He was called to active duty on 13 March 1942, and was promoted to the grade of first lieutenant on 14 October 1943.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95, and is authorized upon conviction of a violation of either Article of War 61 or 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK - CM 273069 1st Ind.

FEB 28 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 First Lieutenant James B. Kaempfer (O-411316), 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 be confirmed and carried into execution.

3. Consideration has been given to an official report addressed to me from Headquarters, Fort Benning, Georgia, dated 8 February 1945 (report with 6 incls is attached to the record of trial), which report is in part as follows:

> "1. On 10 January 1945, this Headquarters forwarded to the Office of The Judge Advocate General the record of trial in the case of the above named officer. Subsequent to the date of trial this Headquarters received from A.E.R. Howarth, Lieutenant Colonel, Finance Department, Fiscal Director, Fort Benning, Georgia, a communication (Inclosure #1) dated 29 December 1944, stating that his records indicated that since 1 January 1944, mentioned officer had been paid a monthly subsistence and rental allowance for a dependent wife, such payments having been made on signed and certified monthly pay vouchers on which Mrs. Irene Becker Kaempfer, 508 Spruce Street, Montgomery, Minnesota, was listed as officer's lawful wife. It was later disclosed that officer was married on 19 December 1942, to Second Lieutenant Irene C. Becker, Army Nurse Corps, who has been on continuous active duty as a nurse at various posts in the United States and overseas since 30 September 1941. It thus appears that under the provisions of paragraph 28, Army Regulations 35-4220, officer was not entitled to additional allowances for a dependent wife and that he has been guilty of false claim and certification, by means of which he has been overpaid in the sum of $1,059.50 at this post alone."

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

4 Incls
1. Record of trial
2. Drft ltr sig. Sec of War
3. Form of Ex action
4. Report fr Hq Fort Benning, w/incls

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed. G.C.M.O. 166, 12 May 1945)

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

SPJGN -CM 273105

29 MAR 1945

UNITED STATES)	THIRD AIR FORCE
)	
v.)	Trial by G. C. M., convened at Florence Army Air Field, Florence, South Carolina, 16 December 1944. Dismissal.
)	
Second Lieutenant KENNETH E. WARING (0-677357), Air Corps.)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, 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 Kenneth E. Waring, Squadron "S", Florence Combat Crew Training Station (LB), did, at Florence Army Air Field, Florence, South Carolina, about the month of September, 1944, wrongfully and dishonorably cheat while engaged in a game of poker with other officers, by means of pre-arranged signals which passed between the said Second Lieutenant Kenneth E. Waring and Second Lieutenant Bernard I. Nelson.

Specification 2: In that Second Lieutenant Kenneth E. Waring, *** did, at Florence Army Air Field, Florence, South Carolina, about the month of September 1944, wrongfully and dishonorably agree and conspire with Second Lieutenant Bernard I. Nelson to pass and receive signals in a poker game, thereby dishonestly revealing information to each other about their respective hands.

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

3. The evidence for the prosecution shows that on the night of 11 September 1944 the accused, Captains McMullen and Jones, and Lieutenants Nelson, Jacobs, Acker and Hurley were engaged in a poker game at the Officers' Club, Florence Army Air Field, Florence, South Carolina. The table was crowded and the accused sat on Lieutenant Nelson's left and opposite Captain McMullen (R. 8-11). The game being played was known as "High Low Blind Tom" in which five cards are dealt to each player with betting on the last three cards so received (R. 8). Thereafter each card, commencing with the first, is turned up and the betting continues until all cards of those remaining in the game are exposed when the money wagered is divided between the two players with the highest and lowest hand (R. 9). The club's betting limit of $1 was being observed and the average amount bet on each hand was about $40 (R. 8, 27).

During one of the hands the point in play had been reached where each player had turned up his first card (R. 10). Commencing with Captain McMullen, who was high with a king, and proceeding clockwise around the table the players had exposed cards as follows: Acker, a ten; Jones, a nine; Nelson, a queen; accused, a six; Jacobs, a ten; and Hurley, a jack (R. 10-11). According to Captain McMullen, he, having the high card, bet one dollar which was called by Acker and Jones in turn when Nelson then "nudged" the accused with his elbow and raised the bet by one dollar. The accused thereupon turned down his hand and dropped out which action caused some comment as he held the lowest card showing. McMullen dropped out when the next card was turned up and asked to see accused's hand but was refused. Nelson held the high hand which was a "full house" and Jones held the lowest hand with a "nine low". McMullen gathered up all other cards and thereby exposed the accused's hand as a "nine high straight" (R. 12, 29, 35).

Captain McMullen, a self-styled expert, testified that according to "Hoyle's Book of Games" each player "plays entirely for himself and no partnerships are allowed", that the odds on receiving a straight out of the first five cards dealt are 1 to 256, that the odds on so receiving a full house are 1 to 694, that in the game of "Blind Tom" a straight is an excellent hand which ordinarily would not be discarded upon the showing of the first card only (R. 13-16). He charged the accused with cheating to which the latter replied that "a man can turn a hand anytime he wants to" (R. 12), that he knew he was beaten because Nelson had told him so, and that "Besides, Lieutenant Nelson and I are friends, and I don't want his money and he doesn't want mine" (R. 13, 30, 35). None of the players had heard Nelson say anything to the accused during the hand and only McMullen saw Nelson's elbow "nudge" the accused (R. 13, 21, 30, 35). Some of the players asserted that they would not play with Nelson or the accused again but it appears nevertheless that they did (R. 13, 31).

On 11 October 1944 the Provost Marshal, after explaining the 24th Article of War to the accused, orally interrogated the accused in

the presence of a Private William C. Drake and a stenographer who transcribed the conversation verbatim (R.41,43,46). The accused refused to sign the statement unless the following question and answer were deleted: "Have you or Nelson ever formed a syndicate or 'racket' in working your cards? No, the only thing was that Nelson and Jacobs and I had an agreement that when we were playing high, we would take our money in our right hand, and when we were playing low, we would take our money in our left hand." The question and answer were deleted from the recopied statement which the accused signed on oath and both statements were admitted into evidence over the objection of the defense (R.43-47;Exs.1,2). The stenographer and Private Drake recalled that the accused so answered the question (R.49,52).

Lieutenant Jacobs denied having entered into any such agreement with the accused and Lieutenant Nelson (R.36,66). On 11 September 1944 he had been indebted to the accused in the sum of $185 for prior gambling losses and subsequent to that date he had charged the accused with causing his losses by cheating but the accused replied that the amount was a gambling debt owed to him (R.36-39). Later, the accused threatened to make "it pretty rough" on the witness unless the debt was paid (R.65).

4. The evidence for the defense shows that the accused's flight commander and his flight instructor considered the accused as a resourceful and better than average pilot (R.53-55). Captain McMullen, recalled as a witness, defined the phrase "checking a lock" as not betting upon a sure winning hand in order to induce other players to stay in the hand and then raise the bet. He also admitted that in some games "checking a lock" is considered unsportsmanlike and in others perfectly proper as when the game is for high stakes with "no limit or pot limit" on the bets (R.56-57). Another officer who had played with most of the players at the Officers' Club described Captain McMullen, Lieutenant Nelson, and the accused as good or better than average poker players and Lieutenant Jacobs as below average (R.58-59).

The accused, after explanation of his rights as a witness, made an unsworn statement in which he stated that he had played a great deal of poker at the Officers' Club, that he usually played with the same group which generally included Lieutenants Nelson and Jacobs, that the latter was a poor poker player and continually lost money, and that Lieutenant Jacobs had approached Lieutenant Nelson and himself with the suggestion that they help him out "a little bit", to which they agreed as they couldn't see much wrong in doing a favor for a friend although they didn't think much of the suggestion (R.63-64).

5. Specifications 1 and 2 respectively allege that the accused at a named place did "about the month of September, 1944, wrongfully and dishonorably cheat while engaged in a game of poker with other officers, by means of pre-arranged signals which passed between the [accused] and Second Lieutenant Bernard I. Nelson" and similarly that the accused did "about the month of September 1944, wrongfully and dishonorably agree and conspire with Second Lieutenant Bernard I. Nelson to pass and receive signals in a poker game, thereby dishonestly revealing information to each other about their respective hands." Both alleged offenses are laid under Article of War 96.

Under the rules of the game called "High Low Blind Tom", which was played by the accused and others on the occasion in question, both the holder of the highest hand and the holder of the lowest hand won, the winnings being divided equally between them. Because of this peculiarity of the game it was important for each player to know, or to be able to guess or determine, who were his opponents by determining who were playing "high" as distinguished from those who were playing "low". The evidence for the prosecution shows that the accused and Lieutenant Nelson had agreed that when they were playing in the same game each would indicate to the other when he was playing for the highest hand by holding his money in his right hand, and would indicate when he was playing for the lowest hand by holding his money in his left hand. Several elements of proof compel the conclusion that this prearranged signal was employed by the accused and Lieutenant Nelson in the game under examination. As the accused admitted, Lieutenant Nelson, who held the strongest and highest hand, told the accused that he, Nelson, had the accused beaten. Lieutenant Nelson could not, however, have known, or in reason have thought that he had the accused beaten unless he knew that the accused was playing "high" and was, therefore, in competition with him. Since a signal had been agreed upon and since Lieutenant Nelson revealed knowledge that the accused was playing "high", whereas the low card exposed by the accused indicated that he was playing "low", it is reasonable to infer that the signal was used.

Although no other form of prearranged signal was directly shown, further evidence of cheating on the part of the accused is revealed in his admission that Nelson told him that he, Nelson, had the accused beaten. This admission, in the light of the evidence that Nelson did not speak to the accused but that he nudged him and the accused's statement that "Besides, Lieutenant Nelson and I are friends, and I don't want his money and he doesn't want mine", justifies the inference that Lieutenant Nelson conveyed the information in pursuance to a previous unfair and illegal agreement and conspiracy. This latter statement shows a purpose on the part of the accused to protect Nelson and himself to the prejudice of the other players. This logical inference is supported by the further proof that the accused's hand was second only to that of Nelson's and was so strong that no reasonable player would have discarded it after only one card had been revealed and only one bet placed. A careful consideration of all the evidence compels the conclusion that the accused and Lieutenant Nelson wrongfully and dishonorably agreed and conspired to

pass and receive signals in a poker game as alleged in Specification 2 and that they did so pass and receive signals as alleged in Specification 1. The evidence is legally sufficient beyond a reasonable doubt to sustain the findings of guilty and the sentence.

6. The accused is about 22 years old. War Department records show that he attended high school for three years and is married. He has no record of civilian employment. He has had enlisted service from 26 February 1941 until 22 April 1943 when he was commissioned a second lieutenant upon completion of Officers' Candidate School, and has had active duty as a commissioned 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. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate.
Robert J. O'Connor, Judge Advocate.
Samuel Morgan, Judge Advocate.

SPJGN-CM 273105 1st Ind

Hq, ASF, JAGO, Washington 25, D.C. 5 APR 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 Kenneth E. Waring (0-677357), 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 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
Major General
The Judge Advocate General

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

(Sentence confirmed. G.C.M.O. 210, 11 Jun 1945)

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

SPGJQ-CM 273159

23 FEB 1945

UNITED STATES v. Second Lieutenant BYRON T. JACKSON (0-1003951), Army of the United States.	FIFTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Atterbury, Indiana, 2 January 1945. Dismissal.

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant Byron T. Jackson, Army of the United States, Headquarters and Headquarters Company, 1584th Service Unit, did, in the ladies' room, adjoining a recreation hall, at Camp Atterbury, Indiana, on or about 21 December 1944, wrongfully and unlawfully have carnal knowledge of Lizzie Reynolds, a female under the age of sixteen years, the wife of an enlisted man, to wit: Private Robert C. Reynolds, 1584th Service Unit.

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

3. The evidence for the prosecution shows that Mrs. Lizzie Reynolds was the wife of Private Robert C. Reynolds, 1584th Service Unit, Camp Atterbury, Indiana. She was 15 years of age, had been married to Private Reynolds fifteen months, and had a child (Pros. Ex. A, C; R. 9, 10, 14). On 21 December 1944, Mrs. Reynolds came by bus from her home in Indianapolis, Indiana, to Camp Atterbury to bring her husband a suit which he

had previously left at home to be pressed (R. 7-9). She arrived at Camp Atterbury at about 10:00 a.m. and went into the 1584th recreation hall. The accused was in the hall, or came in right after her, and asked if there was anything he could do for her. The only other person in the hall went out. Mrs. Reynolds told accused she wanted to see her husband, and he told her he would not get out before noon, and that he would call him (R. 9). Mrs. Reynolds sat down near the men's room, and accused went into the men's room. Accused came back and said that the "company said it would locate" her husband. As some soldiers went marching by, accused said that one of them might be her husband, so she stood by the window and looked. Accused asked her how old she was, and she told him she was 15. "He said he would get him a girl 15." Accused patted her on the shoulder with his hand two or three times. She twisted and tried to get away from him and he grabbed her. She told him if he did not quit she would tell her husband, Accused said nothing (R.10-11). He started kissing her, hugged her arm, and got her up against the wall by the men's room. She kept telling him she would tell her husband, but, in her words:

> "He got to feeling my titties around. I tried to get him to quit and he wouldn't. He stuck his finger in it then. I tried to get him to quit and he said, 'I won't do anything to you.' I went over and watched them march in the field. He went in the men's room" (R. 11).

Accused was gone about five minutes before he came back and asked if she had seen her husband. She told him she had not. Then he picked her up in his arms and took her into the ladies' rest room, laid her on a bench about a foot and a half wide, got on top of her, and then "screwed" her. She had on step-ins with loose legs, and he "put it in the legs of them" (R. 11-12, 15-16). He must have had his pants unbuttoned. He had his penis in her. He did not "go off" in her, but did on the floor (R. 11). She did not call out or fight him except that she "pushed him on the shoulder and tried to get him up." He did not hurt her that she knew of. Her clothes were not disturbed in any way. Accused got up and "went back out in the hall." Mrs. Reynolds stayed there a while, and then went out and told him she would tell her husband. Accused begged her not to tell him, and said that her husband would get mad and cause a lot of trouble; and if she would not tell, he would call her husband and have him sent down right away. She said she would tell him anyhow. Accused then left the hall. A "lieutenant or a corporal" came in, and called for her husband, who came to the hall shortly afterward. She told her husband about the incident (R. 12-13, 25).

On cross examination Mrs. Reynolds admitted that she had had sexual relationship since she was 13. She did not think of running away when accused went into the men's room after touching her breasts and private parts. She "didn't know any other place to go" (R. 14-15). She did not cross her legs as "he was between them." She did not kick accused, but she "tried to push him up." She did not cry out or

complain to anybody until her husband got there. She was not afraid at all until it was all over, and then she was just afraid of what her husband would do. She did not enjoy it when accused kissed her. "anyway, I didn't kiss him back." She did not enjoy the relationship; she was trying to get up. When she got her marriage license she had told them she was 21, and they believed her (R. 15-17).

By stipulation it was agreed that if Major Earl V. Cates and Captain James W. Faulkner were present, they would testify that on 21 December 1944, they, in company with Captain John D. Sears, interviewed the accused in his quarters, and that questions and answers were put in transcript form, and that accused signed the transcript (R. 18, 23). This written testimony was introduced in evidence (R. 23; Pros. Ex. B). In it accused admitted being thoroughly familiar with Article of War 24. He admitted touching and fondling Mrs. Reynolds after he had called her husband's organization. He did not make any verbal suggestion of intercourse to her. She told him not to kiss her because her husband might come in. He then went back into the office and she went to the other side of the room, eight or ten feet from the ladies' room. He joined her there and resumed caressing her, then picked her up and carried her into the ladies' room. To the investigating officer accused later voluntarily made the following statement:

> "She was not reluctant in any way and did not try to stop my advances. All she did was to say that she would tell her husband. She did not try to push me away at all. When I picked her up and carried her into the rest room I laid her on a bench while I unbuttoned my pants and she just laid there with her legs spread and didn't move a bit. I told her to move over so I could lay down and she did. The bench is about 6 feet long and about 18 inches wide without a back. She did not even cross her legs when I lay down and I just inserted my penis in her through the leg of her stepins. I did not know that she was 15 years old, all she told me was that she was married and was looking for her husband" (R. 28).

Accused estimated that she was about 18. She did not cry. When he kissed her she responded with her lips "very much so". She did not seem angry. "She said I shouldn't do it. However, she didn't seem to mind when I did. I have never been mixed up in anything like this before. I don't know what happened this time" (Pros. Ex. B; R. 21-23).

4. For the defense, Captain Charles K. Mitchell, the investigating officer, testified that he had known accused approximately sixteen months, and had generally associated with him around the unit. "As far as I have known him, he has never shown any disrespect or made any improper advances to ladies. He has always been a clean-cut boy, quite an athlete. To my knowledge, he does not drink or smoke. I have never seen him do anything out of the way. He is a very good officer" (R. 31).

First Lieutenant Thomas ... McHugh testified that he had known accused for about sixteen months, and that accused had been his assistant in special services during the past several months. He would say, through his association with accused, that his character was excellent and he was a good officer (R. 33).

Captain Joseph F. Furtado testified that he had known accused quite well for sixteen or seventeen months, and that his character was "very excellent". Accused had very good qualifications as an officer, was a good soldier and a good officer (R. 35).

First Lieutenant Joseph H. Tarkington testified that he had known accused about sixteen months and thought his character was good and his qualifications as an officer were good (R. 36).

Second Lieutenant Harold Feldman, Personnel Consultant of the 1584th Service Unit, testified that he had known accused fourteen months, had gone out with him socially, and had invited accused and a girl friend to his house for dinner. As far as he knew, accused performed his duties all right.

Accused's W.D. A.G.O. Form 66-1 was introduced by the defense. It showed six performance ratings of "very satisfactory" given accused by three different officers (R. 38; Ex. D-1). A copy of a school report from Headquarters, School for Personnel Services, Lexington, Virginia, to The Adjutant General, also introduced by the defense, showed that accused had completed a course for Athletic and Recreation Officers, from 15 November 1944 to 13 December 1944, with an academic rating of "very satisfactory" (R. 38; Ex. D-2). The defense also introduced a certification to the sanity and emotional stability of accused (R. 38; Ex. D-3).

The accused, after having his rights fully explained to him, elected to have his counsel "speak for" him (R. 40). His counsel stated that accused was 23 years of age, and had a high school education and one year of college. Accused did not force the girl to do anything she did not want to do, and he had never before in his life been in any difficulty at all. Accused had been boxing for a number of years, and for several years was in the Golden Gloves competition. Accused had learned a great lesson, and asked the court to let him remain in the Army to redeem himself in the eyes of his friends and family, and prove that he could continue to be a good soldier and serve his country in time of need (R. 41).

5. The evidence leaves no doubt that the accused did, at Camp Atterbury, Indiana, on 21 December 1944, as alleged, have carnal knowledge of Lizzie Reynolds, the fifteen-year-old wife of an enlisted man of the accused's own organization, who had come to the station to see her husband

and was waiting in a recreation hall which was under the supervision of the accused as a Special Service Officer. The act was criminal under Section 279, United States Criminal Code (18 U.S.C. 458), punishing unlawful carnal knowledge of "any female under the age of sixteen years". It was also dishonorable to the point of flagrant and brazen disregard of every consideration of the responsibilities of an officer and a gentleman. It is in the latter aspect, as a military offense, that such misconduct is condemned by the 95th Article of War, whether or not it also involves the commission of a crime (CM 218924, Foster, 12 BR 173). The fact that the conduct in question constituted a crime involving moral turpitude was a proper element for consideration in condemning it as a violation of Article of War 95 (MCM 1928, par. 151, page 187; CM 208296, Huskea, 9 BR 1).

Prior unchastity, consent, or misrepresentation of age by the female concerned constitute no defense under the criminal statute. (CM 234110, Ritchie, 20 BR 237, CM 233689; Tidwell, 20 BR 65). Still less do they excuse or extenuate the military offense clearly established by the evidence in this case.

6. War Department records reveal that accused is 24 years of age, is single, and has completed high school and one and a half years of college. He served as a physical instructor during 1939 and 1940, in the public schools at Albert Lea, Minnesota, and served as a night shipping clerk for a meat packing concern while attending college there. He was inducted into the Army in January 1942, and was commissioned a second lieutenant in the Army of the United States, on 25 August 1943, upon graduation from The Adjutant General's School, Fort Washington, Maryland.

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

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

R. E. Kiser, Jr., Judge Advocate.

(398)

SPJGQ-CM 273159 1st Ind FEB 28 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 Second Lieutenant Byron T. Jackson (O-1003951), Army of the United States.

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

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

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Sentence confirmed. G.C.M.O. 152, 17 Apr 1945)

vol 46 Army JAG Bd. Rev.

Vol 46 Army JAG Bd. Rev.

TITLE

DATE	BORROWER'S NAME	EXT.
	Cdr. Brown	32230

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT