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VOL. 47

1945

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Judge Advocate General's Department

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Holdings, Opinions and Reviews

Volume XLVII

including

CM 273404 to CM 274989

(1945)

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

SPJGN
CM 273404

2 FEB 1945

U N I T E D S T A T E S	)	FOURTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	Trial by G.C.M., convened at Fort Jackson, South Carolina, 4 January 1945. Dishonorable discharge and confinement for thirty (30) years. Penitentiary.
General Prisoner ODIS R. PRICE.	)	

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

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

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

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

Specification 1: In that General Prisoner Odis R. Price, Rehabilitation Center, Fourth Service Command, Fort Jackson, South Carolina, did, without proper leave, absent himself from his station at Fort Jackson, South Carolina, from about 22 August 1944, to about 29 August 1944.

Specification 2: In that General Prisoner Odis R. Price, Rehabilitation Center, Fourth Service Command, Fort Jackson, South Carolina, did, without proper leave, absent himself from his station at Fort Jackson, South Carolina, from about 28 November 1944, to about 30 November 1944.

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

Specification 1: In that General Prisoner Odis R. Price, Rehabilitation Center, Fourth Service Command, Fort Jackson, South Carolina, having been duly placed in confinement in the Rehabilitation Center, Fourth Service Command, Fort Jackson, South Carolina, on or about 29 April 1944, did, at Fort Jackson, South Carolina, on or about 22 August 1944, while under the custody of an armed guard, wrongfully escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that General Prisoner Odis R. Price, Rehabilitation Center, Fourth Service Command, Fort Jackson, South Carolina, having been duly placed in confinement in the Rehabilitation Center, Fourth Service Command, Fort Jackson, South Carolina, on or about 3 September 1944, and transferred, while in confinement, to the Army Service Forces Regional Hospital, Fort Jackson, South Carolina, at Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about 28 November 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that General Prisoner Odis R. Price, Rehabilitation Center, Fourth Service Command, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about 28 November 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Private William J. Kerivan, one Smith-Corona 03-A3 Rifle, the property of the United States, value about $48.17.

Specification 2: In that General Prisoner Odis R. Price, Rehabilitation Center, Fourth Service Command, Fort Jackson South Carolina, did, at or in the vicinity of Fort Jackson, South Carolina, on or about 22 August 1944, by force and violence, and by putting him in fear, feloniously take, steal and carry away from the person of Earl Sumter, the sum of Fifty-five Dollars ($55.00) lawful money of the United States, the property of the said Earl Sumter, and from the presence of said Earl Sumter, one 1940 Reo Truck, the property of the United States, value of more than Fifty Dollars ($50.00).

Specification 3: In that General Prisoner Odis R. Price, Rehabilitation Center, Fourth Service Command, Fort Jackson, South Carolina, did, at or in the vicinity of Fort Jackson, South Carolina, on or about 22 August 1944, with intent to

do him bodily harm, commit an assault upon Private William J. Roth, by willfully and feloniously striking the said Private William J. Roth on the head, with a rifle.

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

Specification: In that General Prisoner Odis R. Price, Rehabilitation Center, Fourth Service Command, Fort Jackson, South Carolina, did, at or near Columbia, South Carolina, on or about 29 November 1944, by force and violence and by putting him in fear, wrongfully and unlawfully force Lee A. Thomas to drive him, the said General Prisoner Odis R. Price, in the automobile of the said Lee A. Thomas, upon the streets of Columbia, South Carolina , and upon United States Highway Number One.

He pleaded guilty to Charges I and II and the Specifications thereunder, and not guilty to the remaining Charges and Specifications. He was found guilty of all Charges and Specifications, and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for life. The reviewing authority approved the sentence but reduced the period of confinement to thirty years, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the prosecution: The accused was confined in the Rehabilitation Center, Fort Jackson, South Carolina, on 29 April 1944, under a sentence which included a dishonorable discharge, execution of which was suspended until release from confinement (R. 8; Pros. Ex. 1). On 22 August 1944 the accused and two other prisoners, members of a work detail engaged in loading a truck with dirt, assaulted their guard Private William J. Roth (R. 10-11, 17; Pros. Ex. 3). The guard was overpowered, forced to the ground and his gun taken away from him. The prisoners beat him as he lay on the ground, the accused striking him over the head with the butt of the gun. The blow rendered the guard unconscious (R. 17-18). The accused then approached Earl Sumter, the civilian driver of the truck, pointed the gun at him and ordered him from the truck. Sumter was forced to disrobe and a wallet containing $55 was taken from him. At his request identification, social security, and similar cards in the wallet were returned to him. Sumter testified that he was so frightened that he did not know who took the wallet out of his pocket but it was "the best of [his] belief" that accused was the prisoner who returned the cards (R. 19-20, 25). The accused and his companions bound Sumter and Roth and then drove off in the truck (R. 21). The truck was a 1940 Reo Dump Truck, 2½ ton, 4 by 4, W-417445, valued at $2517, and the property of the United States Government (R. 17,

21, 30-31). After the prisoners left the bound men were able to free themselves and report the break (R. 22-23). Subsequent to the assault and escape Private Roth received a Certificate of Disability Discharge for cerebral concussion (R. 32). The accused was absent without leave from 22 August 1944 until 29 August 1944, when he was returned to mili-control at Fort McPherson, Georgia (R. 36; Pros. Ex. 5).

Accused was reconfined at Fort Jackson on 3 September 1944 (R. 37; Pros. Ex. 6). In the course of an investigation accused, after being warned of his rights, signed a written statement admitting his complicity in the escape and the robbery of the truck driver (R. 33-35; Pros. Ex. 4).

On 21 November 1944 accused was transferred to the Station Hospital, Fort Jackson (R. 37; Pros. Ex. 7). Here he was confined in the prison ward, a part of the hospital set off with barred doors and windows and which was entered through a locked mesh wire gate at which a guard armed with a .30 calibre Smith-Corona 03-A3 rifle, was stationed (R. 41-43). At about 11 o'clock on the night of 28 November 1944 Private William J. Kerivan was on duty at this post and when he opened the gate for a ward boy the accused and three other prisoners, who had been standing a few feet inside the gate, suddenly rushed him. Private Kerivan was quickly overpowered and thrust inside the gate, his rifle taken away by one of the prisoners, all of whom disappeared down the corridor (R. 44-46, 52-53). The rifle carried by the escaping prisoners was valued at $48.17 (R. 56).

At about 9 p.m. on the following day, 29 November 1944, Mr. L. A. Thomas, a resident of Columbia, South Carolina, entered his garage and found accused and two of the other escaped prisoners, one of them a negro, sitting in his car (R. 57-58). The negro, who was armed with a rifle, told Thomas "he would blow [him] to kingdom come" and Price then ordered him to drive "to the cotton mill". With accused sitting beside him Thomas obeyed the order but when they reached the mill accused said there was too much traffic there and ordered Thomas to drive on to Augusta, Georgia, by way of Highway #1 (R. 58-60). Thomas proceeded down Highway #1 for 45 miles when the car ran out of gas. Here accused and companions got out of the car after Thomas had flagged a car and got them a ride (R. 60-61).

4. Accused, after an explanation of his rights as a witness, elected to remain silent (R. 64-65).

5. a: Specification 3, Charge III, alleges that on 22 August 1944, at Fort Jackson, South Carolina, accused assaulted Private William J. Roth with intent to do him bodily harm by striking him on the head with a rifle; Specification 2, Charge II, alleges that at the same time and place accused robbed Earl Sumter of $55 and a 1940 Reo Truck, property of the United States, valued at more than $50; Specification 1, Charge II, and Specification 1, Charge I, respectively allege that accused at

the same time and place escaped from confinement and absented himself without leave until 29 August 1944.

The evidence shows that while in confinement at the Rehabilitation Center, Fort Jackson, South Carolina, accused and two companions attacked their guard, Private William J. Roth, that accused took the guard's rifle away from him and struck him over the head with it, rendering him insensible and causing injuries of such seriousness as to ultimately result in his discharge from the Army for disability. The rifle was a dangerous weapon although used only as a club inasmuch as it was "used in such a manner that [it was] likely to produce death or great bodily harm" (MCM, 1928, par. 180m). The intent to do bodily harm is inferrable from the nature of the weapon used and the character of the wounds inflicted (CM 193085, 193449, Dig. Op. JAG, 1912-40, 451 (10)). Accordingly, the elements of the aggravated assault set out in Specification 3, Charge III, are clearly established.

Following the assault on Private Roth, accused, still holding the gun, and his confederates, robbed Earl Sumter, the civilian driver of a Government truck into which they were loading dirt, of $55 and also the truck, as alleged in Specification 2, Charge III. The evidence shows that the taking was accomplished by putting Sumter in fear and affords ample basis for the inference that the taking was done with intent to steal. The desperadoes then made good their escape from the Rehabilitation Center in the truck, accused remaining absent without leave until 29 August 1944 when he was returned to military control at Fort McPherson, Georgia. The allegations of escape and absence without leave contained in Specification 1, Charge II, and Specification 1, Charge I, respectively, are accordingly sustained by the evidence and in addition accused pleaded guilty to these Specifications.

b. Specification 1, Charge III, alleges that accused on 28 November 1944 robbed Private William J. Kerivan of a Smith-Corona 03-A3 rifle, property of the United States, valued at $48.17; Specification 2, Charge II, alleges that on the same date he escaped from the Regional Hospital at Fort Jackson, South Carolina; the Specification, Charge IV, alleges that on the following day, 29 November 1944, "by force and violence and by putting him in fear, [he did] wrongfully and unlawfully force Lee A. Thomas" to drive accused in Thomas' automobile upon the streets of Columbia, South Carolina, and upon United States Highway Number 1; and finally Specification 2, Charge I, alleges that accused was absent without leave from 28 November to 30 November 1944.

The evidence in support of the preceding Specifications discloses that while confined in the prisoners' ward at the Regional Hospital, Fort Jackson, accused and some fellow prisoners assaulted Kerivan, their guard, and forcibly robbed him of the Government rifle with which he was armed and escaped from the hospital as alleged. The following day accused and companions hid in a garage at Columbia, South Carolina,

belonging to Mr. Lee A. Thomas and when Mr. Thomas came in to the garage to get his car forced him by threats backed up by the rifle which one of the accused's companions leveled at Thomas, to drive them out of Columbia and some 45 miles away on United States Highway No. 1. Accused was returned to military control on 30 November 1944. All of the Specifications heretofore recited are accordingly sustained without question by competent evidence and further accused pleaded guilty to the escape and absence without leave.

6. The charge sheet shows that accused is about 22 years of age, and was inducted 4 February 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized by the 42nd Article of War for the offenses of robbery and assault with intent to do bodily harm with a dangerous weapon, which are recognized as offenses of a civil nature and so punishable by penitentiary confinement for more than one year by Title 22, Sections 502 and 2901, respectively, of the District of Columbia Code.

Abner E. Lipscomb, Judge Advocate.

Robert J. Glennon, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

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

SPJGH
CM 273450

13 FEB 1945

UNITED STATES	FIELD ARTILLERY REPLACEMENT TRAINING CENTER
v.	Trial by G.C.M., convened at Fort Sill, Oklahoma, 28 December 1944. Dismissal, total forfeitures and confinement for ten (10) years.
Second Lieutenant STEPHEN A. ANTALEK (0-1179166), Field Artillery.	

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 2nd Lt. Stephen A. Antalek, 618th FA Observation Bn, Ft. Riley, Kansas, on D/S with FAS, Fort Sill, Oklahoma, did, without proper leave, absent himself from his station at Fort Sill, from about 14 November 1944 to about 21 November 1944.

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

Specification 1: In that 2d Lt. Stephen A. Antalek, * * *, did, at Lawton, Oklahoma, on or about 1 November 1944, with intent to defraud wrongfully and unlawfully make and utter to Service Mens' Bar, a certain check, in words and figures as follows, to wit:

Central National Bank
86-78
THE ~~SECURITY~~ BANK & TRUST CO. No.
~~of Lawton~~

Junction City Kansas
LAWTON, OKLA. 1 Nov 1944

PAY TO THE
ORDER OF Service Mens' Bar $40.00

Forty and no/100 ---------- DOLLARS
This check is in full settlement of account as shown hereon. Acceptance by endorsement constitutes receipt in full.

/s/ Stephen A. Antalek
No Acct 2d Lt. 01179166

and by means thereof did fraudulently obtain from Service Mens' Bar, Lawton, Okla., the sum of $40.00, he, the said 2d Lt. Stephen A. Antalek, then well knowing that he did not have and not intending that he should have any account with The Central National Bank of Junction City, Kansas for the payment of said check.

Specification 2: In that 2nd Lt. Stephen A. Antalek, * * *, did, at Lawton, Oklahoma, on or about 2 November 1944, with intent to defraud wrongfully and unlawfully make and utter to Service Mens' Bar, a certain check, in words and figures as follows, to wit:

Central National Bank
86-78
THE ~~SECURITY-BANK-&-TRUST-CO.~~ No
~~of-Lawton~~

Junction City, Kansas
~~LAWTON,-OKLA.~~ 2 Nov 1944

PAY TO THE
ORDER OF Service Mens' Bar $20.00

Twenty and 00 ---------- DOLLARS
This check is in full settlement of account as shown hereon. Acceptance by endorsement constitutes receipt in full.

/s/ Stephen A. Antalek
No Acct- 2d Lt. 01179166
Know your endorser Require identification

and by means thereof did fraudulently obtain from Service Mens' Bar, Lawton, Okla., the sum of $20.00 he, the said 2d Lt. Stephen A. Antalek, then well knowing that he did not have and not intending that he should have any account with the Central National Bank of Junction City, Kansas for the payment of said check.

Specification 3: In that 2d Lt. Stephen A. Antalek, * * * did, at Lawton, Oklahoma, on or about 4 November 1944, with intent to defraud wrongfully and unlawfully make and utter to Service Mens' Bar, a certain check, in words and figures as follows, to wit:

Central National Bank
~~THE SECURITY BANK & TRUST CO.~~ No.
of Lawton

Junction City, Kas.
LAWTON, OKLA 4 Nov 1944

PAY TO THE
ORDER OF Service Mens' Bar $20.00

Twenty and no/100 ---------- DOLLARS
This check is in full settlement of account as shown hereon. Acceptance by endorsement constitutes receipt in full.

No Acct /s/ Stephen A. Antalek
Know your endorser 0-1179166
Require identification

and by means thereof did fraudulently obtain from Service Mens' Bar, Lawton, Okla., the sum of $20.00 he, the said 2d Lt. Stephen A. Antalek, then well knowing that he did not have and not intending that he should have any account with The Central National Bank of Junction City, Kansas for the payment of said check.

Specifications 4, 5 and 6: (Nolle prosequi entered on motion of the prosecution).

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

Specification 1: In that 2nd Lt. Stephen A. Antalek, * * *, did, at Lawton, Oklahoma, on or about 1 November 1944, with intent to defraud wrongfully and unlawfully make and utter to Service Mens' Bar, a certain check, in words and figures as follows, to-wit:

Central National Bank
86-78
~~THE SECURITY BANK & TRUST CO.~~ No.
~~of Lawton~~

Junction City, Kansas
~~LAWTON, OKLA~~ 1 Nov 1944

PAY TO THE
ORDER OF Service Mens' Bar $40/00

Forty and no/100---------- DOLLARS
This check is in full settlement of account as shown hereon. Acceptance by endorsement constituted receipt in full.

No Account /s/ Stephen A. Antalek
2d Lt. 01179166

and by means thereof did fraudulently obtain from Service Mens' Bar, Lawton, Okla., the sum of $40.00, he, the said 2d Lt. Stephen A. Antalek, then well knowing that he did not and not intending that he should have any account with the Central National Bank of Junction City, Kansas for the payment of said check.

Specification 2: In that 2nd Lt. Stephen A. Antalek, * * *, did, at Lawton, Oklahoma, on or about 2 November 1944 with intent to defraud wrongfully and unlawfully make and utter to Service Mens' Bar, a certain check, in words and figures as follows, to-wit:

Central National Bank
86-78
THE ~~SECURITY BANK & TRUST CO.~~ No.
~~of Lawton~~

Junction City, Kansas
LAWTON, OKLA. 2 Nov 1944

PAY TO THE
ORDER OF Service Mens' Bar $20/00

Twenty and no/100 ---------- DOLLARS
This check is in full settlement of account as shown hereon. Acceptance by endorsement constitutes receipt in full.

No Acct- /s/ Stephen A. Antalek
Know your endorser. 2d Lt. 01179166
Require identification

and by means thereof did fraudulently obtain from Service Mens' Bar, Lawton, Okla., the sum of $20.00, he, the said

2d Lt. Stephen A. Antalek, then well knowing that he did not have and not intending that he should have any account with The Central National Bank of Junction City, Kansas for the payment of said check.

Specification 3: In that 2nd Lt. Stephen A. Antalek, * * *, did, at Lawton, Oklahoma, on or about 4 November 1944, with intent to defraud wrongfully and unlawfully make and utter to Service Mens' Bar, a certain check, in words and figures as follows, to-wit:

Central National Bank
86-78
~~THE SECURITY BANK & TRUST CO.~~ No.
~~of Lawton~~
Junction City, Kansas
LAWTON, OKLA. 4 Nov 1944

PAY TO THE
ORDER OF Service Mens' Bar $20/00

Twenty and no/100---------- DOLLARS
This check is in full settlement of account as shown hereon.
Acceptance by endorsement constitutes receipt in full.

No Acct- /s/ Stephen A. Antalek
Know your endorser 0-1179166
Require identification

and by means thereof did fraudulently obtain from Service Mens' Bar, Lawton, Okla., the sum of $20.00, he, the said 2d Lt. Stephen A. Antalek, then well knowing that he did not have and not intending that he should have any account with The Central National Bank of Junction City, Kansas for the payment of said check.

He pleaded not guilty to and was found guilty of all Charges and Specifications on which he was tried. Evidence of one previous conviction by a general court-martial was introduced, namely, a conviction of making and uttering three checks, each in the sum of $10, with intent to defraud, for which he was sentenced on 7 July 1944 to be reprimanded and to forfeit $50 per month for 12 months. He was sentenced in the instant case to dismissal, total forfeitures and confinement for ten years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. An extract copy of the morning report of the Student Officer Detachment, Field Artillery School, Fort Sill, Oklahoma, was introduced

in evidence with an entry showing accused from duty to AWOL 14 November 1944 and another entry showing accused from AWOL to confinement 21 November 1944 (R. 9; Pros. Ex. 1). It was stipulated by and between the trial judge advocate, the accused and the defense counsel that if Lieutenant Colonel James E. Ward were in court and sworn as a witness he would testify that at all times between 9 October 1944 and 21 November 1944 the accused was on detached service as a student at officer's sound and flash range course 20; that on the morning of 14 November 1944 in response to a report that accused was absent he checked the accused's barracks and the area where he was living and could not find him; that during the period from 14 November 1944 to 21 November 1944 the accused was not found in his quarters nor in the immediate area thereof; and that the accused to his knowledge did not have authority to be absent during that period (R. 10).

On 1 November 1944 the accused made and uttered to Carl J. Metz, sole proprietor of Service Men's Bar, a tavern in Lawton, Oklahoma, a check for $40 drawn on the Central National Bank, of Junction City, Kansas, receiving the sum of $40 therefor. On 2 November 1944 accused made and uttered to Metz a check drawn on the same bank for $20 and on 4 November 1944 he made and uttered to Metz another check drawn on the same bank for $20, receiving in each case the sum of $20 for the check so made and uttered. All three checks were promptly deposited by Metz for collection and all were returned unpaid (R. 11-16; Pros. Exs. 2, 3, 4). Accused did not have an account in the drawee bank in November 1944 (R. 17; Pros. Ex. 5). Accused did, however, prior to 1 November 1944 borrow the sum of $60 from the drawee bank and agree with the bank to have his pay check of 1 November 1944 sent directly from the finance officer to the bank. Under the agreement between the accused and the bank the loan was to be repaid out of the proceeds of such check and the balance of the proceeds was to be placed in a checking account for the accused (Pros. Ex. 5).

4. After being warned of his rights the accused elected to be sworn and testify in his own behalf. He admitted writing and uttering the checks but stated that when he borrowed $60 from the Central National Bank of Junction City he made arrangements to have his pay check sent to the bank with the understanding that a checking account would be opened for him after deducting the amount of the loan. His check would amount to "one forty four some odd dollars", sufficient to cover the loan and the three checks he had written. When he learned that the first check had been returned to Mr. Metz he realized that his pay check had not been sent to the bank and he then drew his pay at Fort Sill. He felt that he could not raise the money to pay Mr. Metz if he had to attend school so he absented himself from classes for this reason (R. 19-21).

On cross-examination and on examination by the court he stated that he signed a blank pay voucher for his pay for the month of October

at Fort Riley, Kansas, before he came to Fort Sill on 7 October 1944 and at that time made an oral arrangement to have his check sent to the bank. He did not know whether or not the finance officer had made note of the name of the bank. He "left classes" on the 14th of November and remained in Lawton from that date to 21 November 1944. Prior to the 14th he was paid in cash at Fort Sill for the month of October but this money was used to pay debts some of which were paid after the accused was confined. His activities in attempting to raise money to pay Mr. Metz consisted of wiring his mother and friends to which he received no answer. He also tried to borrow money from a loan company. He made no attempt to telephone his mother although she had a telephone, nor to telephone the bank or the finance officer at Fort Riley. He was not notified by the bank that the check had not been received by them. His monthly pay amounted to $140.10. Mr. Metz has not been paid (R. 21-30).

5. The evidence, including the accused's admissions, clearly establishes that he was absent without leave from 14 November 1944 to 21 November 1944, and the findings of guilty of Charge I and its Specification are, accordingly, fully sustained by the record.

The evidence also establishes, and the accused admits, that he made and uttered the three checks which are the subject of Specifications 1, 2 and 3 of Charges II and III, respectively. He did not deny that he had no account in the bank against which the checks were drawn. His explanation of his alleged oral arrangement with the finance officer at Fort Riley respecting the forwarding of his October pay to the drawee bank was not convincing, particularly in view of the fact that prior to the 14th of November he drew his October pay in cash at Fort Sill, and applied no part of it to the payment of his loan at the drawee bank or the reimbursement of Metz. The court was at liberty to disbelieve the specious explanation. The evidence was sufficient to establish the intent to defraud. The findings of guilty of these three Specifications under both Charge II and Charge III were clearly warranted by the record of trial.

The accused was charged with three identical offenses under both Article of War 95 and Article of War 96. There is no inconsistency, nor any unlawful duplication, in the findings of guilty upon identical Specifications, under both Articles of War 95 and 96, where the proof supports conviction under each (CM 239609, Mulroy, 25 B.R. 215).

6. War Department records show that the accused is single and is 24 years of age. He attended high school for four years but did not graduate. He was employed as a filing clerk in Chicago until he was called into the Federal Service as a member of a National Guard

unit in March 1941. Prior to his National Guard service the accused had one month's training in the CMTC. On entry into active Army service he was assigned to the Field Artillery and before transfer to Field Artillery Officer Candidate School attained the rank of staff sergeant. He was commissioned a second lieutenant, Army of the United States, 29 April 1943 at Fort Sill, Oklahoma.

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

Thomas M. Jappy, Judge Advocate.

William H. Gamble, Judge Advocate.

Robert C. Trevithan, Judge Advocate.

SPJGH-CM 273450 1st Ind

FEB 26 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 Stephen A. Antalek (O-1179166), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. This officer was previously convicted by a general court-martial, on 7 July 1944, of making and uttering three worthless checks, each in the amount of $10, with intent to defraud, for which he was sentenced to be reprimanded and to forfeit $50 per month for twelve months. It is my belief, however, that in the present case, upon the facts disclosed by the record of trial and notwithstanding the previous conviction, the sentence is unnecessarily severe. I recommend, therefore, that the sentence be confirmed but that the forfeitures be remitted and that the period of confinement be reduced to two (2) years and as thus modified, that the sentence be carried into execution. I further recommend that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature, transmitting the record 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 and confinement reduced to two years. G.C.M.O. 162, 9 May 1945)

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

SPJGK
CM 273462

24 JAN 1945

UNITED STATES v. Second Lieutenant MERRILL L. EZELL (0-1306207), Infantry.	)	ARMY SERVICE FORCES EIGHTH SERVICE COMMAND Trial by G.C.M., convened at Camp Swift, Texas, 8 January 1945. Dismissal, total forfeitures, and confinement for five (5) years.

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

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

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

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

Specification: In that Second Lieutenant Merrill L. Ezell, Infantry, Ninth Service Command Service Group, Seattle Port of Embarkation, Seattle 4, Washington, formerly of Special Services Replacement Pool, Camp Sibert, Alabama, did, without proper leave, absent himself from his station at Seattle Port of Embarkation, Seattle, Washington, from about 5 October 1944 to about 7 December 1944.

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

Specification: In that Second Lieutenant Merrill L. Ezell, Infantry, Ninth Service Command Service Group, Seattle Port of Embarkation, Seattle 4, Washington, formerly of Special Services Replacement Pool, Camp Sibert, Alabama, did, at Austin, Texas, on or about 2 November 1944, with intent to defraud, wrongfully and unlawfully make and utter to the American National Bank, Austin, Texas, a certain check, in words and figures as follows, to-wit:

(18)

Fort Huachuca, Ariz
~~AUSTIN, TEXAS~~ November 2 1944

Miners & Merchants
~~THE AMERICAN NATIONAL~~ BANK ~~88-18~~

PAY TO THE
ORDER OF Cash $ 150.00

One hundred fifty DOLLARS

500M-9-43

Lieut. Merrill L. Ezell
01306207

and indorsed the same "Lieut Merrill L. Ezell, 01306207"; and by means thereof, did fraudulently obtain from the American National Bank, Austin, Texas, the sum of $150.00, lawful money of the United States, he, the said Second Lieutenant Merrill L. Ezell, then well knowing that he did not have and not intending that he should have sufficient funds in Miners & Merchants Bank, Fort Huachuca, Arizona, for the payment of said check.

He pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specification. He was found guilty of both Charges and Specifications except the words "5 October 1944" in the Specification of Charge I, substituting therefor, the words "9 October 1944", of the excepted words not guilty, but guilty of the substituted words. 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 five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. It was stipulated that the accused was in the military service at the time of the commission of the offenses charged and at the time of trial. (Ex. A). By War Department Special Orders No. 216, 8 September 1944, the accused was relieved from duty at Camp Sibert, Alabama, and assigned to Ninth Service Command, Service Group, Seattle Port of Embarkation, Seattle, Washington (Ex. B). A ten-day leave was granted the accused effective 17 September 1944 on his departure from Camp Sibert (Ex. A). The authorized travel time by privately owned conveyance from Camp Sibert to Seattle, Washington, was 14 days (Ex. A). The accused left Camp Sibert on 15 September 1944 in compliance with the above War Department order (Ex. E). On 7 December 1944 the accused voluntarily returned to military control by turning himself in to the Provost Marshal at Austin, Texas, dressed in officer's uniform without insignia (R. 9, Ex. A). He was carried on the morning report of the

Ninth Service Command Service Group, Seattle Port of Embarkation, Seattle, Washington, as absent without leave from 5 October 1944 (Ex. F). The accused lived at the De Luxe Hotel, Austin, Texas, from about 12 October until 20 November 1944 (R. 7-8).

On 3 July 1944, accused opened an account in the Army Branch of Miners and Merchants Bank, Fort Huachuca, Arizona, with an initial deposit of $50.00 and made no subsequent deposits. On 2 November 1944, he had a balance of $33.00 in the account, with no provision being made by him to take care of any overdraft (Prosecution's Exhibit G). On 2 November 1944, at Austin, Texas, the accused drew a check (Ex. H) on Miners and Merchants Bank, Fort Huachuca, Arizona, payable to cash in the amount of $150.00, endorsed it and cashed it at the American National Bank, Austin, Texas (R. 11-12; Ex. G). The check was presented by the American National Bank through the Federal Reserve Bank to the bank upon which it was drawn and payment was refused by the latter bank because of insufficient funds on deposit with which to pay the check (R. 11-12; Ex. G). It was again presented for payment but again dishonored for the same reason (R. 12). The accused has not reimbursed the bank (R. 13). At the time he cashed the check accused stated that he had sufficient funds on deposit to cover the check (R. 13). The accused admitted by stipulation that he signed the check and received $150 in cash for it from the American National Bank, Austin, Texas (Ex. A).

4. Upon statement by the defense counsel that the rights of the accused had been explained to him, accused elected to be sworn and testify in his own behalf (R. 14). He stated that he made one deposit in the Miners and Merchants Bank about 2 or 3 July 1944 in the amount of $280.00 or $285.00 and that he had only drawn one $10.00 check against the account prior to the cashing of the $150.00 check (R. 14); that the deposit was evidenced by a bank book which he had sent to his home but that his mother is dead and he cannot now locate his father (R. 15); that he had written no letter to clear the matter up because he had been in the hospital ever since he had been at Camp Swift, the camp to which he was taken on surrender; and, further, that he was sick while in Austin (R. 16). He remained at Camp Sibert, Alabama, after signing out until 29 September 1944 to be a witness in a Section VIII case (R. 21). He then proceeded to Austin, Texas, on his ten days' delay en route, arriving about 2 October 1944 (R. 20). He came to Austin because he had lived there when previously stationed at Camp Swift (R. 20). Accused had car trouble in Austin, and after getting his car fixed, he wrote to Seattle telling "them" of it and asking "them" to wire instructions to him in Austin (R. 20). He also, prior to the posting of this letter, wired the Commanding General, Ninth Service Command, to the same effect (R. 22). Accused borrowed money from the Red Cross to pay for the repairs to his car (R. 24, 25, 26). He made an additional loan (R. 19) and sent $30.00 to his wife before he surrendered (R. 28). He borrowed when he thought he had money in the bank because he wanted to send money home (R. 25).

5. Notwithstanding the plea of guilty to Charge I and its Specification the prosecution established by competent evidence that the

accused was absent without leave from his station from 9 October 1944 until 7 December 1944. The accused admitted his unauthorized absence in his testimony under oath. All of the elements of the offense were therefore conclusively proved.

With reference to Charge II and its Specification it was clearly shown by the evidence and admitted by the accused that he did, as alleged in the Specification, make and utter to the American National Bank at Austin, Texas, on 2 November 1944 his check for $150 drawn on the Miners and Merchants Bank, Fort Huachuca, Arizona, and obtained in exchange for this check the sum of $150. It was clearly established without contradiction that in due course the check was presented for payment to the bank upon which it was drawn and payment was refused because of insufficient funds of the accused's on deposit with that bank. The records of the bank showed that there were only $33.00 on deposit at that time. The accused denied any intention to defraud, claiming that there were sufficient funds on deposit at that time. The court resolved the issue thus created against the accused. By its findings it showed that it did not believe the accused's story of having made an initial deposit of $280 or $285 in that bank instead of the $50 as shown by the bank records. We see no valid reason for disturbing this finding. The accused's story was contradicted by and inconsistent with his conduct in borrowing money from various sources while living in Austin during his wrongful absence from the service. His claim of error on the part of the bank was not convincing. He refused to explain how he had obtained the $280 that he deposited. He did not produce his bank book to corroborate this story. He claimed it was lost. If his story is not accepted, it was a fair and reasonable inference to draw from the circumstances that he intended to defraud the American National Bank. In the opinion of the Board of Review the evidence clearly supports the finding of guilty of Charge II and its Specification. The act of an officer of the Army of the United States of issuing his worthless check for cash with the intent to defraud has long been considered conduct unbecoming an officer and gentleman and a violation of the 95th Article of War. CM 270910; CM 265339.

6. War Department records show that accused is 27 years of age, and single. In 1936 he was graduated from high school and for 2½ years thereafter attended college. For six months he was employed in Washington, D. C. as a clerk in the War Department. On 9 September 1941 he was inducted into the service. He served as a clerk at Battalion Headquarters, Fort Benning, Georgia, where he subsequently attended Infantry Officer Candidate School, and, on 22 December 1942, was commissioned second lieutenant, Infantry, Army of the United States.

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 and to warrant confirmation of the sentence. Dismissal is mandatory for conviction of a violation of Article of War 95 and authorized for a conviction of a violation of Article of War 61.

Judge Advocate.

Judge Advocate.

Judge Advocate.

(1)

SPJGK-CM 273462 1st Ind

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

TO: The Secretary of War

1. Herewith are transmitted the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Merrill L. Ezell (O-1306207), Infantry.

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

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry 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

(Sentence confirmed but forfeitures remitted and confinement reduced to three years. G.C.M.O. 120, 5 Apr 1945)

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

SPJGN
CM 273696

1 FEB 1945

UNITED STATES	)	THE INFANTRY SCHOOL
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Benning, Georgia, 17
Second Lieutenant EARL W.	)	January 1945. Dismissal and
LEWIS (0-1046178), Infantry.	)	total forfeitures.

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

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

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

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

Specification: In that Second Lieutenant Earl W. Lewis, Officer Replacement Pool, The Infantry School, attached to 9th Company, First Student Training Regiment, The Infantry School, was at Savannah, Georgia, on or about 14 December 1944, drunk and disorderly in uniform in a public place, to wit, on or near West Broad Street.

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

Specification: In that Second Lieutenant Earl W. Lewis, Officer Replacement Pool, The Infantry School, attached to 9th Company, First Student Training Regiment, The Infantry School, did, without proper leave, while

enroute from Camp Stewart, Georgia, to Fort Benning, Georgia, absent himself from his organization and station at Fort Benning, Georgia, from about 14 December 1944 to about 15 December 1944.

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 by appropriate Special Orders dated 8 December 1944 the accused was relieved from his assignment at Camp Stewart, Georgia, and was assigned to the Infantry Officers' Replacement Pool, Fort Benning, Georgia, where he was directed to report to the Commanding Officer of the First Student Training Regiment not later than 14 December 1944 for the purpose of attending the Infantry Basic Course No. 51 (R. 9; Ex. 4). The accused received copies of these orders, secured a three day delay enroute and departed from Camp Stewart on 10 December 1944 (R. 9). Officers attending Infantry Basic Course No. 51 were attached to the 9th Company, First Student Training Regiment, The Infantry School (R. 7). The accused failed to report as ordered but reported at about 1000 o'clock on 15 December 1944 and his unauthorized absence was appropriately shown upon the 9th Company's morning report of which appropriate extract copies were admitted into evidence (R. 10; Exs. 6, 7).

At about 1830 o'clock on 14 December 1944 the accused was observed standing on the sidewalk on West Broad Street, Savannah, Georgia, by a civilian who, noticing that the accused's uniform was soiled, that his mouth was frothy, that his eyes were not clear, that his speech was incoherent and that he was drunk, escorted him to a nearby Army Prophylactic Station where the accused threatened the civilian and the station attendant, stating that he had been a prize fighter and a racketeer, and proclaimed his membership in an organization which intended to make the negro race superior to the white race, by force if necessary (R, 7, 8; Exs. 1, 2). A military policeman was summoned and the civilian in the accused's presence reported that the accused's soiled uniform had been caused by the accused's uncontrolled urination on the sidewalk and that the accused had made the statements above mentioned which the accused admitted (R. 7, 8; Exs. 1, 2, 3). The military policeman, the station attendant and the civilian were definitely of the opinion that the accused was very drunk (Id.).

4. The accused, after explanation of his rights as a witness, testified that he had a college education and in civilian life was a high school teacher in New Bern, North Carolina, where he had gone to see his wife during his three day delay enroute (R. 11, 12). He and his wife had left New Bern on 13 December 1944 for Kinston, North Carolina, upon

a bus from which they were ejected, necessitating their hiring of a private conveyance. Leaving his wife at Kinston he proceeded to Wilson, North Carolina, where he spent the night and at 0500 o'clock on 14 December 1944 boarded a train, which was then five hours late, for Savannah, Georgia, where he arrived, still five hours late, at about 1700 o'clock on 14 December 1944. He made no effort to secure other transportation from Wilson, North Carolina, and realized that the late train would not take him to Fort Benning in time but did not notify his new station of the impending delay in his arrival (R. 12-17). He commenced drinking in Savannah but did not deny threatening the civilian and the station attendant or making any improper remarks to them (R. 15, 16). He left Savannah at about 2230 o'clock on 14 December 1944 and signed in at Fort Benning at about 0930 o'clock on 15 December 1944 which delay was caused by slow transportation and one of the trains being five hours late (R. 14-16). First Lieutenant Robert B. Haller, who had known the accused since May 1943, testified that the accused's reputation in the Army and among his associates was good (R. 17, 18).

5. The Specification, Charge I, alleges that the accused on or about 14 December 1944 was drunk and disorderly in uniform in a public place, a named public street in Savannah, Georgia. Drunkenness and disorderly conduct while in uniform in a public place is clearly violative of Article of War 96 (MCM, 1928, par. 152a and b; 13 BR 16 & 45; 16 BR 134 & 326; 22 BR 143).

The testimony of three eyewitnesses adduced by the prosecution conclusively demonstrates that the accused was very drunk upon a public street of a large city on the date alleged, that he was in uniform and that his conduct was disorderly in that he threatened a civilian who was attempting to assist him while he was obviously unable to take care of himself and because of his repeated proclamation of improper remarks. Such conduct is certainly discreditable to the military establishment and was not denied by the accused in his testimony. All of the evidence, therefore, shows beyond a reasonable doubt that he was guilty of the offense as alleged in the Specification, Charge I, and amply supports the court's findings of guilty of Charge I and its Specification.

6. The Specification, Charge II, alleges that the accused while enroute from Camp Stewart, Georgia, to Fort Benning, Georgia, absented himself without proper leave from his organization and station at Fort Benning, Georgia, from about 14 December 1944 to about 15 December 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 testimony and documentary evidence adduced by the prosecution clearly show that the accused was absent without leave as alleged. The accused in his own testimony admits that he was so absent and that he made no real effort to report for duty as ordered because he spent the night of 13 December 1944 in Wilson, North Carolina, without endeavoring to continue his journey and then at 0500 o'clock on 14 December 1944 he boarded a train which was already late and which could not possibly have transported him to Savannah, Georgia, in time for him to make connection with other transportation which would carry him to his station by the specified time. He did not even notify the authorities at his new station by telegram or otherwise of his impending delay in arrival, thereby evidencing an utter lack of any feeling of responsibility whatsoever. The evidence beyond a reasonable doubt establishes his guilt of the alleged absence without leave and fully supports the court's findings of guilty of Charge II and its Specification.

7. The accused is married and is about 35 years old. War Department records show that he is both a high school and a college graduate and that from 1935 until entrance into the service he was employed as a high school instructor at New Bern, North Carolina. He has had enlisted service from 7 April 1941 until 5 November 1942 when he was commissioned a second lieutenant upon completion of Officers' Candidate School and has had active duty as an officer since the latter date. On 30 March 1943 he was convicted by a general court-martial for two day's absence without leave and sentenced to three months restriction and to forfeit $100 of his pay. According to the Staff Judge Advocate's Review he was likewise punished by a forfeiture of $75 of his pay under Article of War 104 in January 1943 for refusal to take prophylaxis.

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

Abner E. Lipscomb, Judge Advocate.

Robert J. Glamon, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN-CM 273696 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 Earl W. Lewis (O-1046178), 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 and that the sentence as thus modified be ordered executed.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 122, 5 Apr 1945)

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

19 Apr 1945

SPJGV-CM 273791

UNITED STATES	)	NEW YORK PORT OF EMBARKATION
v.	)	Trial by G.C.M., convened at Brooklyn, New York, 30 October 1944 to 13 November 1944. Dismissal, fine of $10,000 and confinement for two (2) years.
Captain JOSEPH GOULD (0-497243), Transportation Corps.	)	

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, 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 Captain Joseph Gould, Fort Dix Separation Center, attached New York Port of Embarkation, Brooklyn, New York, one Milton A. Henry, Cornwall Shipbuilding Co., Inc., a New York corporation, by its president said Milton A. Henry and other person or persons unknown, did, at New York, New York, in or about the months of May through November 1943, conspire to defraud the United States by wrongfully influencing the awarding of contracts for the manufacture and purchase of life floats, berthing spars, pontoon fenders and capstans to the said Cornwall Shipbuilding Co., Inc. by the Purchasing and Contracting Officer of the Transportation Corps Supply Office, New York Port of Embarkation, at exorbitant and excessive prices and did, pursuant to said conspiracy, wrongfully influence the award of such contracts on or about 7 June 1943, 19 June 1943, 24 July 1943, 4 August 1943, 9 September 1943, and 12 November 1943, under which contracts exorbitant and excessive prices were paid by the United States.

Specification 2: In that Captain Joseph Gould, Fort Dix Separation Center, attached New York Port of Embarkation, Brooklyn, New York,

one Milton A. Henry, Cornwall Shipbuilding Co., Inc., a New York corporation, by its president said Milton A. Henry, and other person or persons unknown, did, at New York, New York, in or about the months of May through November 1943, conspire to commit offenses against the United States by wrongfully arranging that the said Captain Gould, while in the employ of the United States in the Transportation Corps Supply Office, New York Port of Embarkation, should receive secret compensation for services rendered and to be rendered by him on behalf of the said Cornwall Shipbuilding Co., Inc., in relation to the procuring, awarding, handling, supervising and passing upon contracts, entered into on or about 7 June 1943, 19 June 1943, 29 June 1943, 24 July 1943, 4 August 1943, 9 September 1943, and 12 November 1943, by the Purchasing and Contracting Officer of the said Transportation Corps Supply Office, and the said Cornwall Shipbuilding Co., Inc., and in relation to other contracts to be procured for said Cornwall Shipbuilding Co., Inc., in the future from said officer, and did, pursuant to said conspiracy, render such services and did receive payment of such secret compensation.

Specification 3: In that Captain Joseph Gould, Fort Dix Separation Center, attached New York Port of Embarkation, Brooklyn, New York, did, at New York, New York, from about June 1943 to about September 1944, while an officer of the United States and employed in the Transportation Corps Supply Office, New York Port of Embarkation, wrongfully receive compensation in an amount in excess of $18,000.00, from the Cornwall Shipbuilding Co., Inc., of Cornwall Landing, New York, for services rendered and to be rendered by the said Captain Gould to the said Cornwall Shipbuilding Co., Inc., in relation to the procurement of contracts by wrongfully influencing the awarding of contracts for the purchase of material and supplies for the United States, from the said Cornwall Shipbuilding Co., Inc., to which contracts the United States was a party.

Specification 4: In that Captain Joseph Gould, Fort Dix Separation Center, attached New York Port of Embarkation, Brooklyn, New York, did, at New York, New York, in and about the months of August and September 1944, wrongfully and unlawfully attempt to procure Stephen Patrick Sullivan of New York, New York, to testify falsely under oath in behalf of the said Captain Gould before duly authorized representatives of the United States then conducting an official investigation into the conduct of the said Captain Gould as an officer of the United States, and

> before any court-martial in the trial of charges against the said Captain Gould which might arise from the said official investigation, in that he, the said Captain Gould, did attempt to procure the said Stephen Patrick Sullivan to testify in substance that he, the said Stephen Patrick Sullivan, had been employed by the Cornwall Shipbuilding Co., Inc., Cornwall Landing, New York, from about October 1943 to about April 1944 as a publicity agent and had actually rendered services as such and had received compensation therefor, which proposed testimony was false, related to a material matter, and was known by the said Captain Gould and the said Stephen Patrick Sullivan to be false.

He pleaded not guilty to and was found guilty of the Charge and Specifications 1, 2 and 4 thereof. As to Specification 3, he was found guilty except the figures $18,000, substituting therefor the figures $1600. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service, to pay a fine of $12,000, and to be confined at hard labor for three years. The reviewing authority approved the finding of guilty of Specification 4, except for the words "under oath" and "before any court-martial in the trial of charges against the said Captain Gould which might arise from the said official investigation", and approved so much of the sentence as provides for dismissal, confinement at hard labor for two years and payment of a fine of $10,000. The record of trial was forwarded for action under Article of War 48.

3. The trial was long. The proceedings commenced on 30 October 1944, and the trial ended on 13 November. The record consists of 1283 pages of testimony, and two large volumes of documentary exhibits. The testimony and exhibits in large part relate to seven contracts entered into by the Transportation Corps Supply Office, New York Port of Embarkation, hereafter referred to as TCSO, with Cornwall Shipbuilding Company, hereafter referred to as Cornwall, between May and November 1943.

The evidence for the prosecution may be briefly summarized as follows:

From March 1943 (R.845-7) to 14 October 1943 (R. 962; Ex. J) accused was warehouse officer, TCSO, and thereafter was administration officer of TCSO until 16 June 1944, when he was relieved from such duty and placed in charge of warehouse A (R. 959). Throughout this period, Major (later lieutenant colonel) Lewis N. Kemp, T.C., was supply officer and in charge of TCSO.

While warehouse officer, from March to October 1943, accused spent a large part of his time (R. 869, 870) in the office, and was authorized to approve requisitions on behalf of Kemp, which authorization continued

during the period from October 1943 to June 1944, during which accused was administration officer. Other officers were similarly authorized (R. 84, 293, 862). From April to December 1943, 12,282 requisitions were approved, on 2,855 of which the certification evidencing Kemp's approval was signed by accused. Kemp personally signed the authentication of his approval on but few requisitions (R. 84, 864). Accused had nothing to do with the preparation of requisitions (R. 85), and had no official duties in the Purchasing and Contracting Section (R. 118), which was in charge of Captain (later Major) Robert Wylie, T.C., purchasing and contracting officer, from May 1943 to January 1944 (R. 95, 222), under Kemp's immediate supervision (R. 264, 268). Kemp's primary concern was whether a need existed for supplies sought upon requisitions (R. 860). Also under Kemp's immediate supervision was Captain Eugene W. Lederer, T.C., requisition officer. Requisitions were of two classes, those initiated outside the supply office, relating to property sought by another branch of the service (R. 55-58), and those to replenish the stock of supplies maintained by TCSO (R. 77). It was Captain Lederer's duty to examine all requisitions initiated outside the supply office, and he was responsible for the preparation of requisitions to replenish stock (R. 55), from data and information submitted either by the stock record section, the executive officer (R. 57, 58) or by the purchasing and contracting section (R. 82). Sometimes the information was submitted orally (R. 82). Each requisition was edited in the "front office" (R. 58, 64, 83, 863) by an editing section under the supervision of Kemp, to determine whether the items sought could be obtained from stock or would have to be manufactured. It then was presented for approval by an authorized officer (R. 58), and thereafter, if a purchase was necessary, to the Fiscal Branch (R. 64), which would note whether the supplies were authorized for the purpose sought, the proper procurement authority number, and whether funds were available (R. 64). If Fiscal Branch so certified (R. 315), the requisition then was turned over to the Purchasing and Contracting Section (R. 861), to locate a source of supply and make a contract. In that section, Wylie was assisted by a staff of officers and 23 civilian buyers. The officers also acted as buyers (R. 360). Among them were Captain Shulman and Lieutenants Richards, Tepperman, Goodman and Grow (R. 94, 95, 226, 251). Tepperman was in charge of the civilian buyers (R. 260). A purchase recommendation, based upon the requisition, was the work sheet of the buyers (R. 303). From it, the purchase order was made up (R. 305). In cases of extreme emergency, purchase orders were issued before the requisitions were executed and processed (R. 155), although this was not the usual or normal procedure (R. 107, 108, 325), and was irregular (R. 71). The number of the requisitions usually appeared in the purchase recommendation (R. 307). In an emergency, negotiations were undertaken before a formal requisition was typed (R. 108). Ordinarily, at least a week intervened between the date

of the requisition prepared by Lederer and the date of the approval of the purchase order by Wylie (R. 59). An interval of less than three days was abnormal, and it was somewhat unusual for the requisition and purchasing order to be executed on the same day (R. 160). Out of each 2,000 transactions, there were about 100 cases wherein the requisition was signed after the contract had been entered into (R. 71). When the need for the supplies sought was emergent, the requisition was marked "immediate" (R. 313), as was the purchase order.

Wylie saw very few requisitions (R. 306) and very few purchase recommendations (R. 227). As much as possible, the work was delegated to his assistants (R. 260).

Contracts for purchases were either "negotiated" or awarded upon "bids". Usually, when there was time, notices were mailed out that sealed bids would be received and opened at a date and hour specified for the supplies described in the notice (R. 107). The contract would be awarded to the best bidder, when the bids were opened (R. 310). Contracts would be negotiated after price inquiries of several contractors, in 75 per cent of such transactions, over the telephone (R. 312-315). Where a subsequent requisition for identical articles was received within two or three weeks after a purchase (R. 129, 130) and if the articles were needed in a hurry, a repeat order would be placed (R. 133) with the same contractor. In 1942 and 1943, Kemp, Wylie and accused had served together in the supply section, Army Transport Service, Water Division, New York Port of Embarkation (R. 222, 606, 624, 846), and became well acquainted (R. 221, 846). Kemp and accused (R. 846) and Wylie and accused (R. 259) were friendly in 1943. Kemp and accused called each other by their first names and frequently had lunch together. Wylie and accused also addressed one another by their first names, and were much together in the office (R. 176, 177, 223, 224, 847).

For some eight years prior to March 1942, accused had been a friend of Milton A. Henry (R. 964-5), with whom he became acquainted about the time that James J. Braddock, under accused's management, became the world's heavyweight champion prizefighter (R. 962-3). Henry was a toy and novelty manufacturer. On 23 May 1943, he acquired a one-third stock interest (R. 337-8) in Cornwall Shipbuilding Company, Cornwall Landing, New York, and became president, manager and a director thereof. The other stockholders and directors were Henry's attorney, George Glassgold (R. 402), and Victor S. Fox.

Dissension developed between Henry and Fox almost immediately. Henry made a trip to Washington, where he interviewed Colonel Omar J. Ruch, T.C. (R. 419) and on 7 June 1943, Henry told Fox what Colonel Ruch (R. 812) said

about him, and Fox prepared in his own handwriting a draft of a letter to be sent to Colonel Ruch (Def. Ex. FF), stating that both Fox and Glassgold were no longer officers or stockholders of Cornwall. According to Fox, such letter was prepared at Henry's suggestion (R. 834). The employment of Roehrs as superintendent, renewal of bank loans, and the salary to be paid to Fox all became subjects of controversy (R. 825). Henry appointed one Anthony as superintendent, and ordered Fox barred from the plant (R.805). Fox learned that considerable money had been made from the float contract (R. 806), and thereupon consulted an attorney. Finally, after protracted negotiations and much bickering, Henry and Glassgold acquired Fox' interest in Cornwall, after weeks of dispute and negotiation, in accordance with the terms of an agreement entered into on 10 September 1943 (Def. Ex. HH, R. 828-832).

Prior to Henry's connection with Cornwall, it had done business with the Transportation Corps. On 25 August 1942, it had entered into a contract (Ex. Q) with the Transportation Corps for the construction of 100 cargo barges at $3,000 each. On 12 September 1942 it had contracted to deliver (Ex. W) 200 more such barges at the same price. These contracts were entered into before the organization of TCSO which was activated in March 1942 (R. 845), and prior to the appointment on 2 October 1942 of accused as first lieutenant, AUS.

In May 1943, Henry called at TCSO seeking business for Cornwall. Accused had introduced him (R. 848, 968) to Kemp two months earlier (R. 845). Three or four weeks thereafter, accused told Kemp that Henry was a successful business man, "tops" financially, who could be depended upon for deliveries whenever any wood products were required (R. 852, 854). Kemp said that he would put Henry on the bidder's list. Late in May or early in June, Kemp introduced Henry to Wylie; accused was not present (R. 224, 225). Sometime in May, Wylie introduced Henry to Tepperman. Prior to 5 June 1943 when Tepperman had his first dealings with Henry, he saw Henry with Wylie several times (R. 144, 146). Henry visited TCSO and Wylie frequently (R.223), and was seen in company with Kemp, Wylie and accused several times (R. 323). After 5 June 1943, Henry was in the office quite frequently, usually to confer with Wylie and Tepperman and occasionally entered the "front office", where Kemp and accused were (R. 108). When conferences were held TCSO, Henry was seen there, in discussions with Wylie and Tepperman (R. 109, 154) and sometimes with Kemp and accused (R. 154).

During the summer of 1943, accused twice (R. 327) told Miss Mary Feeney, one of Wylie's civilian buyers, that he could "handle" Kemp, and was the only one who could (R. 325). Two months before that (R. 845) accused referred to Colonel Kemp as a "schnukel", which Miss Feeney understood as meaning

a "sappy", good natured person, of whom advantage can be taken (R. 329).

Between 7 June 1943 and 12 November 1943, Cornwall was awarded seven contracts by TCSO:

(1) 7 June 1943, fenders and spars $20,350 (Ex. 2).
(2) 19 June 1943, capstans $1,050 (Ex. 8).
(3) 29 June 1943, gangways and gangplanks $36,198 (Ex. 12).
(4) 24 July 1943, fenders and spars $20,350.
(5) 4 August 1943, life floats $570,000 (Ex. 23).
(6) 9 September 1943, life floats $380,000 (Ex. 30).
(7) 12 November 1943, berthing spars (Ex. 35).

Each contract was awarded by Wylie as purchasing and contracting officer, as he testified "as a result of the exercise of my own best judgment" (R. 262-8).

With the exception of the third contract, these contracts were "negotiated", and bids were not solicited. Henry unsuccessfully submitted bids for three other contracts awarded after competitive bidding (R. 462, 465-6, 502, 526-7).

The facts in relation to each of the seven contracts are as follows:

First Contract, Spars and Fenders.

31 May 1943, an emergency requisition for 50 berthing spars and 24 pontoon fenders (Pros. Ex. 1) was delivered to Richards. He telephoned seven or eight contractors. Proposals for a negotiated contract were requested, by 5 June (R. 96, 100). About 1 June, Richards discussed spars and fenders with Tepperman, in Henry's presence (R. 96, 99). Tepperman introduced Henry to Richards (R. 100), stated that Henry was interested in bidding and that Cornwall was highly recommended by the office of the Chief of Transportation (R. 130, 133). A discussion as to prices followed. Subsequently, Richards discussed the requisition with Grow and others in accused's hearing (R. 100). Thereafter, accused directed Richards to turn the requisition over to Tepperman (R. 100, 101-2, 126, 127). Since accused was not connected with the Purchasing and Contracting Division and was not his immediate superior (R. 106, 118), Richards reported the matter to Wylie, who told him to do as accused had directed (R. 102, 136, 256). On 5 June, Richards turned over to Tepperman the requisition (R. 102, 103) and a work sheet (Pros. Ex. 3A), on which he had listed suppliers and their respective prices and delivery dates. Cornwall was on the list, but no prices or delivery date was given (R. 102, 103, 123), and this data was inserted on the work sheet by Tepperman after

a talk with Henry (R. 147-8, 150). Considering freight rates from f.o.b. delivery points, Cornwall offered the lowest net prices for spars. Weyerhaeuser offered the lowest price for pontoon fenders. However, Cornwall offered delivery six days earlier than Weyerhaeuser. In Henry's presence, Richards discussed the proposals with Tepperman, and recommended the award of separate contracts, one with Cornwall for spars, and the other with Weyerhaeuser for pontoon fenders. Tepperman laid the papers before Wylie, who ordered a purchase recommendation (Pros. Ex. 3A) prepared for the award of a contract (R. 150, 151) for both items to Cornwall, which in the meantime had submitted a written offer. Although Henry had known at the time that need for the items was immediate, and in connection with an overseas shipment (R. 356-7) and had agreed to make delivery in 8 days, he testified at the trial that it would be almost physically impossible for any contractor to make delivery within the time specified. All pontoon fenders and 25 berthing spars were delivered between 19 June and 1 July, and the remainder of 25 berthing spars on 27 July 1943 (Pros. Ex. 44, R. 618-19, 625). Some of the spars delivered in June were rejected by the inspector, but were accepted after Kemp looked them over and decided that there "was not too much wrong that made any difference".

Second Contract, Capstans.

Shortly after buying into Cornwall, Henry ordered an inventory. This showed that 15 capstans were on hand, for which there was no use (R. 369). These capstans were reconditioned units and had been purchased for installation on barges under construction for the War Department, but were not acceptable (R. 786). At Henry's direction, Fox prepared (R. 795-6) an itemized list of the capstans and of their values, which amounted to $787.00 (Pros. Ex. 52). Henry said he could dispose of them at the base (R. 786) and made an offer to Kemp by letter dated 15 June 1943 (Pros. Ex. 10) to sell the capstans at a unit price of $70.00 or $1,050.00 in all, which he fixed (R. 786), without regard to the values of the five types of capstans, ranging from $40 to $74. Kemp authorized the purchase (R. 229) and turned the letter over to Wylie (R. 228), who directed a civilian buyer to acquire the capstans (R. 228-9). The purchase recommendation (Pros. Ex. 9) was prepared without previous submission of a requisition. On 21 June, Lederer submitted a requisition (Pros. Ex. 7) prepared from information submitted by Miss Feeney (R. 61), which was approved by accused for Kemp. The capstans were shipped to the Voorheesville Storage and Reconsignment Depot (R.890).

Third Contract, Gangways.

A requisition, marked "Immediate - Rush", was received from the Army Transport Service on 27 May 1943, for 56 gangways (Pros. Ex. 12-A). It was approved for Kemp by accused. Bids were requested and five bids

were received, which Wylie on 23 June submitted to the principal marine superintendent for his recommendation (Pros. Ex. 13; R. 266). He recommended on 29 June the award of a contract for twenty-four 46-inch gangways and eight 36-inch gangways to Cornwall, and of a contract for twenty-four 24-inch gangways to Messmore & Damon, whose product was known to be sturdy, if the price were reduced to that offered by Cornwall (Pros. Ex. 14). A purchase order (Pros. Ex. 12) to Cornwall for all 56 gangways was issued on 29 June. On 21 June, Henry addressed a letter, submitting drawings and suggesting changes in the Specifications (Pros. Ex. 15), TCSO, in which he stated that "we are already proceeding with this work." Henry testified that he then knew he "had this order" and "could go ahead" (R. 358-360). Deliveries were promised in two to six weeks, but the last gangway was not delivered until 24 August 1943.

Fourth Contract, Pontoon, Fenders and Berthing Spars.

On 24 July 1943, Wylie directed Tepperman (R. 153) to place a repeat order for 24 pontoon fenders and 50 berthing spars with Cornwall (R. 149-151). Tepperman copied (R. 152) on the purchase order (Pros. Ex. 20) the date from the previous identical transaction seven weeks earlier (Pros. Exs. 3 and 3A). These articles were for stock, but the requisition (Pros. Ex. 17) dated 22 July 1945 was marked "as soon as possible". It called for 14 less pontoon fenders than the purchase order. Tepperman made no check of promptness of delivery under the earlier like contract (R. 153). Immediate delivery was called for, but the last berthing spar was not delivered until 4 December 1943 and the last pontoon fender was not delivered until 2 October 1943 (R. 20, 622; Pros. Ex. 48).

Fifth Contract, Floats.

Cornwall had never manufactured life floats (R. 163, 233, 381). Henry undertook negotiations about 15 July 1943 with Wylie and Tepperman for a contract to manufacture floats (R. 379), after Wylie mentioned that purchase of floats was under consideration (R. 380). Kemp previously had advised Wylie that within a period of a year at least 5,000 floats would be needed (R. 884), that a requisition was expected (R. 245), and that it would be necessary to supply the floats quickly. At this time the Transportation Corps Supply Office in Cincinnati was making inquiries for an additional 5,800 floats (R. 246, 885). Before submitting an offer, Henry wanted to observe the manufacture of floats, and arrangements were made by Wylie and Tepperman for him to observe operations at the plant of the General Equipment Company, then behind schedule on another float contract with TCSO (R. 247). Henry and his superintendent got all the information they desired (R. 383), and thereafter Henry submitted an offer of $200 per float (R. 277, 385) to Wylie (R. 384). Wylie advised him that this price was too high, as floats could be obtained from other sources for $183. A few days later Henry

advised Wylie that he was willing to produce floats at a basic price of $190. Kemp and Wylie discussed the purchase of floats from time to time (R. 231-2, 235, 882), and they finally decided to place a contract with Cornwall for 3,000 floats (R. 882, 885) on the basis of Henry's oral offer (R. 319, 320), and to recommend that the Cincinnati office obtain 4,000 floats from Winner Manufacturing Company (R. 249) and 1,800 from Cornwall (R. 29; Pros.Ex. 26). On 4 August 1943, a requisition for 3,000 floats (Pros. Ex. 22) was marked "Immediate Delivery" (R. 313). It was approved for Kemp by accused (R. 254, 306; Pros. Ex. 22). Wylie instructed Tepperman to prepare a purchase recommendation (R. 156, 191, 192, 193, 304; Pros. Ex. 26), which he did. The Specifications were subject to approval by the Coast Guard, which was not granted until 6 October 1943 (R. 388, 892, 893). The first floats were delivered 1 November.

During the preliminary negotiations, Wylie was apprehensive as to the financial standing of Cornwall (R. 232-33). Henry furnished a financial statement for the company (R. 233, 446; Pros. Ex. 40), which led Wylie to believe that Cornwall's assets were quite small, having regard to the size of the contract. Henry told Wylie that he was putting additional funds (R. 408, 409) of $60,000 into the business (R. 235). Wylie discussed Cornwall's financial resources with Kemp (R. 233, 888), and, at his suggestion, with accused. Accused stated that he had known Henry for years, that Henry was a manufacturer of wood products, toys and pocketbooks, and that he had been successful and was reliable (R. 855). Accused expressed the belief that the Cornwall statement did not adequately reflect Henry's own financial status.

This was the largest contract awarded by Transportation Corps Supply Office up to that time (R. 231). Wylie kept Kemp informed at all times concerning the status of the negotiations (R. 231, 255). Kemp testified that he would not have approved the award of the contract to Cornwall, except for the reliance which he placed upon accused's representations concerning the company and Henry (R. 860, 880). Wylie testified that he was influenced "to a certain extent" by accused's statements as well as by Kemp's opinion.

After the contract was awarded, Kemp, Wylie, Isaac Friedenson, a civilian member of Kemp's staff, Major Milliken of the Water Division and accused made an inspection of Cornwall's plant. Kemp and Wylie were satisfied that its facilities were adequate (R. 270, 879). The inspection trip was not within the scope of accused's duties (R. 238, 853). The group went to Cornwall Landing in accused's automobile (R. 238, 872).

Wylie testified that he directed Tepperman (R. 252, 304) to prepare a memorandum setting forth the circumstances and considerations which caused the award of the contract to Cornwall, "to be left as a

permanent record, as complete a story of the transaction as possible" (R. 314). Tepperman prepared the memorandum (Pros. Ex. 26) and delivered it to Wylie (R. 218). Tepperman testified that the idea of the memorandum was his own (R. 161, 191, 192) and that he began its preparation on 3 August because the contract was the largest he had ever handled (R. 214, 217), because he had nothing to do with buying the floats but acted upon information given him by Wylie and because he had personally recommended orally to Wylie that the contract be not awarded to Cornwall (R. 174, 175, 179, 180), and had expressed the view, in the interest of the Government (R. 180), that Cornwall was without experience in the production of floats. Wylie insisted at the trial that he had directed Tepperman to prepare the memorandum and that Tepperman had never made any recommendation or protest against the award of the contract to Cornwall (R. 304). In Tepperman's opinion, the transaction was not emergent, but was to replenish stock (R. 65, 195) and as such should have been handled by Grow (R. 218).

Tepperman's memorandum (Pros. Ex. 26) listed Cornwall, General Equipment Company and Winner Manufacturing Company as available sources for the floats. General Equipment then was in process of liquidation, and had not completed deliveries under two contracts with Transportation Corps Supply Office. Winner advised that it could undertake the contract, but only if it received an order sufficiently large to justify it in taking over another manufacturing plant (R. 274). In the New York areas were three other manufacturers of such life floats: Modecraft Company, Sculler Equipment Company and Atlantic & Pacific Company (R. 629). Within 250 miles, there were two others: C. C. Galebright (R. 629) and Welin Davit & Marine Co. (R. 630). None of these companies is mentioned in Tepperman's memorandum. Wylie testified that he knew about Atlantic & Pacific production facilities, that it had an uncompleted contract with TCSO, and that there would have been no possibility of its having been able to get into production by the time the floats were needed (R. 272-273). In June 1943, Atlantic & Pacific had been fabricating floats of the type in question for 18 years (R. 625). On 4 August 1943, it was making deliveries to TCSO under two contracts for a total of 750 such floats (Pros. Exs. 50, 51). If in August it had received an order for 3,000, it would have been able to manufacture floats as required (R. 628), either by putting extra shifts or by acquiring another plant, as eventually it did (R. 639). Its price was $153 per float (R. 630). In May 1943, after its factory was damaged by fire, Cornwall obtained floats from a subcontractor, for delivery to TCSO, at $147.50 per float, plus certain adjustments, which brought the net cost to Cornwall per float to about $157.50 per float (R. 391-396). Materials for floats cost no more in 1943 than in 1942 (R. 637-8).

Deliveries were to commence on 21 August 1943 at the rate of 150 floats per week, to be increased in the week of 6 September to 250, and in subsequent weeks at the rate of 300 per week, until all the floats were delivered. Speed in delivery was important (R. 385). Deliveries actually commenced on 1 November 1944 and continued until January at the average rate of 106 floats every week, and thereafter at the average rate of 128 floats per week until deliveries under the contract were completed on 17 April 1944 (Pros. Ex. 46). Failure to fulfill the contract as to delivery dates, after Coast Guard approval of the Specifications was obtained, was due, according to Henry, to inability to obtain balsa wood (R. 463), although Cornwall had been given an AA-1 priority (R. 784). According to Shulman, one of Wylie's assistants and his successor as purchasing and contracting officer, there was no shortage of balsa wood and it was available (R. 783). During this period, Atlantic & Pacific consumed 750,000 feet of balsa wood and was able to fill its needs (R. 631-2), although with difficulty.

Sixth Contract, Floats.

In September 1943, Wylie directed Tepperman to prepare a purchase recommendation for the procurement of an additional 2,000 floats from Cornwall (Pros. Ex. 31; R. 166-7, 244-5). A requisition was prepared on 7 September on the basis of information furnished by Tepperman (R. 65-66, 82-83), which requisition was approved for Kemp by accused (R. 168). The requisition was marked "Delivery as soon as possible". Two days later, the purchase order was issued. The only information considered was that acted upon in awarding the first contract and no bids were sought from other suppliers (R. 245). Reliance was placed on Henry's promise to continue producing 300 floats a week, upon completion of the first order (R. 309). Wylie then knew that no deliveries had been made under the original contract (R. 257, 321).

Henry regarded both float contracts as one transaction. He was advised in August that he could have a second such contract if he so desired (R. 506-7). Deliveries were to commence on 13 November and to be completed by 27 December (Pros. Exs. 30, 32), but actually commenced on 24 March 1944 and were completed on 5 August, Cornwall having been compelled to subcontract because of damage to its plant by fire in April.

Seventh Contract, Berthing Spars.

On 9 November 1943, Kemp approved a requisition for 60 berthing spars (Pros. Ex. 33), contacted Cornwall (R. 265), ordered the spars, and

then told Wylie, who awarded a contract accordingly. The purchase recommendation indicates that Cornwall's offer was $143 per spar for immediate delivery and American Mast & Spar Company offered two weeks delivery at $113 per spar (Pros. Ex. 36). Twenty-four spars were delivered between 1 and 7 December, 24 on 5 February 1944 and 12 on 7 February 1944 (Pros. Ex. 49). Sixteen of the first group of spars were rejected for failure to conform to specifications.

In the construction of the floats under the fifth and sixth contracts, large quantities of sisal rope and canvas were used. The rope and duck were critical materials, of which quantities were on hand in TCSO warehouses. About 7 October 1943, at Wylie's request (R. 171), Tepperman arranged for the delivery of approximately nine tons of such rope (R. 112, 172), having a value of $9,860.60 (R. 445). Early in 1944, written request was made for canvas. Richards arranged for its delivery (R. 111), and in March for the modification of the contracts (R. 509) by supplemental agreement (R. 775) recouping approximately $16,000, the value of the rope and canvas (R. 776). Until then, Cornwall had never been billed for the rope (R. 510).

In January, 1944 Shulman succeeded Wylie as purchasing and contracting officer.

Between June 1943 and April 1944, Government bills of lading were furnished Cornwall at its request by the purchasing and contracting section (R. 778-781), the money value of which was recouped in June 1944, by the Fiscal Officer at the instance of Shulman (R. 777-778). The prices specified in the purchase orders were f.o.b. Cornwall Landing in the first and fourth contracts (Pros. Exs. 2, 18) and f.o.b. Brooklyn in the others (Pros. Exs. 8, 12, 23, 30, 35). Henry testified that in his experience it was not unusual for the consignee, under an f.o.b. destination contract, to pay the freight, and to deduct its cost when payment for the goods was made (R. 522-5).

Eight days after the first float contract was entered into, Henry addressed a letter (Pros. Ex. 39) to Wylie, in which he inclosed a financial statement (Pros. Ex. 40) of Cornwall and requested an advance of $95,000 (R. 236, 416). Wylie made inquiries of Kemp and accused as to Henry's financial responsibility and reliability (R. 207). Accused and Kemp both assured Wylie that Henry had been successful as a manufacturer and as a contractor, and was a good risk (R. 237). Wylie then authorized the advance (R. 407). Prior approval by the Chief of Transportation was required by procurement regulations, but such approval was not sought or obtained (R. 298-299). When the contract was entered into, Henry did not

know that it was possible to obtain such an advance. He made the application therefor, when Glassgold told him advance payments up to one-third of the amount of the contract could be had (R. 447).

Henry was a member of the Fenway Golf Club. Army officers were extended the courtesies of the club, and Henry had arranged for Gould to invite his guests there (R.334-335) and to sign Henry's name to checks for meals. Accused signed Henry's name on the luncheon check when he played at Fenway with Kemp and Wylie on one occasion (R. 239, 334, 859). Kemp played golf with Henry at the club on 6 June, 23 June, 21 August and on one other day in 1943 (R. 849).

Kemp, Wylie, Tepperman and Henry were invited by accused to attend with him a social gathering at the home of Mike Jacobs, sports promoter, in Rumson, New Jersey, in August 1943 (R. 170, 206, 400, 580, 854, 876).

Henry's attorney, Glassgold, who held a one-third stock interest in Cornwall, maintained an apartment in Washington, which Henry could use when he wished. Henry extended permission to accused to use it when he desired, and gave him a key (R. 403, 466, 493, 944). Wylie used the apartment once (R. 240), receiving the key from accused. Accused told Wylie that "he" had an apartment in Washington, which the latter could use when he had to stay there overnight. Henry told Kemp that any time he or Wylie or any of the officers so desired, they were welcome to use the apartment (R. 851, 879).

Henry was accused's guest at a dinner given by accused to the TCSO officers and their ladies (R. 112, 114, 170, 400, 875) on 5 December 1943. He was the only male civilian present. At the time he was attempting to secure additional contracts (R. 462, 465, 466, 502, 526).

31 December 1943, Kemp, Henry and accused together visited Mrs. Henry at the hospital, and spent part of the evening in accused's apartment (R. 877-8).

When Wylie was relieved and ordered to the school at Fort Slocum, Henry learned (R. 401) of the transfer, though not from Wylie (R. 241). The afternoon before Wylie's departure, Henry called him on the telephone and offered to drive him to New Rochelle. The next morning Henry took Wylie there in his car (R.241, 401).

Henry was a guest at the TCSO Christmas party in 1943. He helped to dress the tree, and presented pocketbooks to Mrs. Kemp, to Mrs. Wylie, to Wylie's secretary, and to other ladies (R. 405).

About September 1943 accused told Stephen Patrick Sullivan, otherwise called "Tex" Sullivan, that Henry (R. 662) was making quite a bit of

money and wanted to put accused on his payroll, but that this was not possible because he was in the service. "You got a social security number", accused told him, "and everything, and I wish you would let me put you on and you will receive the checks at your office and you can cash them and give me the proceeds." Accused didn't say and Sullivan didn't ask anything as to what was to be done for Henry. Sullivan had worked for accused as a publicity man (R. 661) and at the time was managing boxers, who had been managed by accused prior to his entry into the military service. In 1943, Sullivan paid about $4,000 as his share of the manager's portion of purses won by the boxers, and in 1944 about $2,500 (R. 709). Such payments were always by cash (R. 730-732) inclosed with statements as to particular prize fights in envelopes addressed to accused by Sullivan personally (R. 729).

Sullivan acceded to accused's request. Soon he received through the mail (R. 662) a check signed by Henry, drawn on Cornwall's account for $73.49 (Pros. Ex. 41A). He cashed it, and sent the proceeds in a sealed envelope to accused by messenger (R. 663, 762-3). Perforations in the check indicate that it was paid on 25 October. No more checks were received by Sullivan until December (R. 663), when by mail (R. 758) he received three checks, drawn in like manner, each in the amount of $53.75 (Pros. Exs. 41H, 41I and 41L), dated respectively December 3, 10 and 31, payable to T. Sullivan, J. Sullivan, J. Sullivan, and T. Sullivan. A voucher incorporated in the face of each check lists a payment of $65, and deductions of $11.25, for taxes (R. 412). Perforations of these checks indicate that they were paid respectively on 23 December, 15 December and 10 January 1944. Sullivan indorsed and cashed the checks and sent the proceeds by messenger to accused (R. 664, 762, 763). The messenger delivered all of the envelopes to accused in person, except one which he pushed under the door of his apartment (R. 772-3).

Prosecution's Exhibits 41B, 41C, 41D, 41E, 41F, 41J, 41K, 41M to 41U, 41W to 41Z, and 41AA to 41FF, are 26 checks in like amounts similarly drawn, with the exception of 41K, made payable to J. Sullivan instead of T. Sullivan, dated respectively October 22 and 29, November 5, 12, 19 and 26, December 17 and 23, 1943, and January 7, 14, 21 and 28, 1944, February 4, 11, 18 and 25, March 3, 10, 17, 24 and 31, April 7, 14, 21 and 28, May 5 and 12.

Sullivan testified that he never received and knew nothing about any of the checks except the four which he cashed. The other 26 checks were indorsed and cashed without his authorization and without his knowledge (R. 666-667). In December 1943 or January 1944, accused inquired on the telephone about the delay in cashing a check which Sullivan

carried in his pocket several days (R. 666, 736, 745, 753). Sullivan said that he would send the proceeds over, whenever money "from one of the fighters" was being delivered to accused. Of the proceeds of these 30 checks, totalling $1,685.99, Sullivan received nothing. The total amount of the checks issued in 1943 was included in Sullivan's income tax return for that year. The return was prepared by the accountant, who prepared accused's income tax return (R. 676). Sullivan did not furnish such amount to him. The accountant already had the figures (R. 698). Sullivan swore that he never talked with Henry about employment by Cornwall, that he never saw Henry in his office (R. 665), and that he had no conversation with him about the termination of the employment (R. 676).

According to Sullivan, he met accused at the Queensboro Arena in August 1944, and accused asked if anyone from the Army had been around to see him (R. 667). Sullivan answered, "No". A week later at the same place, accused asked the same question (R. 667). The same answer was made. About the middle of September they met again (R. 668, 722). Accused then told Sullivan that someone might be around to see him in regard to an investigation, that he should not worry as it did not mean anything (R. 668), and handed him a slip of paper which contained data as to the addresses of Cornwall's office and plant, the amount of Sullivan's salary and the tax deductions, and notations to the effect that Sullivan did publicity work and arranged shows with the employees from October 1943 to April 1944, when there was a fire at the shipyard (R. 669). Sullivan read the memorandum, and placed it in his pocket. He testified that until then, he did not know where he was supposed to have been working. Accused inquired of Sullivan over the telephone whether Army men had interviewed him. On 13 September 1944, two Army representatives called on Sullivan at Stillman's Gymnasium (R. 670, 678, 687). He excused himself for a moment, looked over the memorandum (R. 670), and destroyed it (R. 670, 739, 756). He left with the investigators, and was questioned by them for about an hour. Sullivan's answers were consistent with the data contained in the memorandum (R. 672), and for the most part were false (R. 688). He was asked to sign an affidavit, and refused (R. 679). He made an appointment, which he did not keep, to meet the investigators later that day (R. 672, 679, 687, 756). He wanted to find out more about the case (R. 757) and to think the thing over (R. 691). He got in touch with accused (R. 672), and told him what had happened, that it seemed to be serious, and that the investigators evidently knew of every move which Sullivan had made during the preceding three or four years (R. 673). Accused told him that investigators would be around the next day, that he should tell the same story, and that he did not have to sign anything (R. 673). The next day, the investigators presented a transcript (R. 680) of what he had told them, and asked that he sign it. This Sullivan refused to do (R. 688), but suggested that they

return in two days (R. 681). At Sullivan's request, accused met him on 15 September. Accused inquired whether Sullivan would stick to his story, that if he would tell the same story there would be nothing to worry about, but that if he did not, accused would get into serious trouble (R. 674). Mrs. Gaynes was present during part of this conversation (R. 675). The next day, Sullivan again met the investigators, and went with them to the Army Base in Brooklyn. There he made a 10 page statement, which he signed on 17 September.

About this time, Henry called at Sullivan's office, and said, "This is a nice mess you are getting me in. You have nothing to worry about. Don't sign anything. There's nothing at all to this." Sullivan replied that if such were the fact, he couldn't understand why "everybody" was "around here". He told Henry that several men from the Army had been there, that they knew everything, and that "they know that I don't work on this place of yours". As Henry was leaving he expressed concern whether Sullivan's office was "wired".

Henry testified that Cornwall contemplated production of boats, gynasium sets and athletic equipment (R. 413), and that he discussed with Sullivan publicity for these products, and their indorsement by "famous names". Sullivan agreed to undertake the work. Nothing was ever put in writing (R. 413). Sullivan never did any work whatever and was never at the Cornwall plant or at its office in New York (R. 414). Henry told the bookkeeper that he had employed Sullivan, and turned over to her an application for employment, giving his name, address and social security number (R. 549). It was unsigned (R. 548). Three weeks after the fire, Henry decided he was through with Cornwall, and stopped the payments to Sullivan (R. 414). Sometime in May 1944, he told Sullivan (R. 417), "Cornwall had blown up and our business is through".

Irving Gould, the brother of accused, was employed by Cornwall about the same time as Sullivan (R. 424), for "leg work" as an assistant to Henry. He went on the payroll of Cornwall in October 1943. He was not required to report to the office daily, but went there during the day, from three to five times a week (R. 425). Irving's employment was terminated at the same time as that of Sullivan (R. 426). Henry had known him about five years, and met him through accused. He never discussed the employment of Irving with accused. Irving came into Henry's office several days after a chance meeting on 23rd Street, at which time Henry told him to come up and see him, as he was running a big plant and might have work for him (R. 427). From October 1943 to May 1944, Irving was seen quite regularly around the apartment building in Newark, where he lived, three or four times a week, during the morning and after supper, by the building superintendent (R. 838).

Except for the purely ministerial duty of certifying the fact of Kemp's approval upon requisitions, after editing and approval, when Kemp was too busy to affix his own signature, accused had no official duties in relation to procurement or handling, passing upon and awarding contracts (R. 130, 178, 208, 262), or in the performance thereof by contractors (R. 179).

Prior to appointment and call to active duty as officers of the Army of the United States assigned to the Transportation Corps, Kemp was a civilian employee (transportation agent) of the Army Transport Service, QMC (R. 845); Wylie was a dairyman, selling dairy products (R. 221); Tepperman was a sales manager for a hardware concern (R. 142); and Richards was a law school graduate employed by the Federal Government (R. 94). The record is silent as to the background and experience in civil life of Shulman (R. 775), Lederer (R. 54), Goodman and Grow.

4. For the defense.

The accused's defense was that Sullivan was indebted to him, and also was obligated to divide with him the manager's share of the earnings of certain boxers who were managed by Sullivan during the period of accused's military service, that he did not enter into any conspiracy, as alleged in Specifications 1 and 2, and that he did not receive money unlawfully or attempt to suborn Sullivan, as alleged in Specifications 3 and 4 of the Charge.

Accused testified that he served on active duty in the Navy from May 1918 to January 1919, and was honorably discharged. He was commissioned a first lieutenant, AUS, direct from civil life and ordered on active duty 2 October 1943 (R. 958). After completing the course at the school at Fort Slocum, New York, he was assigned to the Army Transport Service and reported for duty on 22 November 1942. In March 1943, he was assigned to TCSO, and served as warehouse officer until October of that year, when he became administrative officer. He was relieved from such assignment and assigned to Warehouse A about 16 June 1944. After discussing with the personnel officer the lack of work in Warehouse A, accused applied for relief from active duty in June 1944, and on 11 August 1944, he was granted terminal leave and relieved from active duty, effective upon the expiration of such leave (R. 959).

Accused testified that he never conspired with Henry or anyone else, to defraud the United States by influencing the award of contracts at exorbitant prices, or in connection with contracts. He never made any arrangement with Henry or with anyone else to receive secret compensation while an officer of the Army of the United States (R. 963). He never received any compensation from Henry, or the Cornwall Shipbuilding Company,

or any other person while he was in the Army for services. He never was promised payment of money or anything of value by Henry or anyone connected with Cornwall (R. 972). Accused did not at any time tell Sullivan to make any false statement in connection with any investigation by representatives of the Army (R. 964). He had known Henry about nine years. Prior to Henry's marriage early in 1942, accused saw him two or three times a week, at home, at the office, and at sporting events. They lived in apartments in adjoining buildings for six years (R. 965). After Henry's marriage, accused saw him about once a month until June, 1943, and after that less frequently, about once each six or seven weeks.

Accused has four brothers, Honorable Samuel E. Gould, a Judge of the Municipal Court, who sat with him at the counsel table during the trial (R. 4), Harvey, Charlie and Irving (R. 966). Henry had become acquainted with the latter three, at accused's office and at the fights.

Accused first saw Henry at the Army Base in April or May 1943, when he was calling upon Captain Stayer, who was then purchasing and contracting officer. Thereafter and until he became administrative officer in October of that year, he saw Henry at the base six or seven times, when he came to see Major Wylie (R. 967). Accused introduced Henry to Kemp, but not to Wylie. When so introduced to Kemp, Henry stated that he was doing wood work, would like to do some for the Government, and would like to be on the bidder's list. Kemp said that he would put him on the list. Henry never requested him to speak to Kemp, to Wylie, or to any officer on his behalf or on behalf of Cornwall, and accused never did so (R. 968). Henry never asked him to influence any officer. He did not know of the award of the contract for 3,000 life floats to Cornwall until after the contract had been entered into. Neither Kemp nor Wylie told him that the award of the contract to Henry was under consideration. Twice in 1943, in July and again in August, Kemp asked accused to drive him and other officers of Transportation Corps Supply Office to Cornwall Landing to visit the factory (R. 970). This accused did. He never knew that Cornwall made an application for part payment in advance. About the middle of August 1943, Wylie inquired of accused as to Henry's business background, and accused answered that Henry over a period of years had told him that he was very, very wealthy and had a very, very big business (R. 971).

Accused had nothing to do with the making or awarding (R. 972) of contracts by TCSO, with selection of contractors or deliveries (R.973) and never knew the terms of any of the contracts awarded to Cornwall. Henry told him that he had secured a contract for floats, but did not tell him the number, the price, the delivery dates, and did not tell him about any other articles manufactured by his company (R. 972).

Both Irving and Henry mentioned the former's employment by Cornwall a few days after it commenced. Accused never asked Henry to employ Irving, and never received any part of his salary (R. 973).

When requisitions came to him, the fact of Kemp's approval had been typed thereon, and they had been signed by Lederer. All that accused did before affixing his signature, was to note whether they had been stamped approved by Kemp, and whether Lederer had signed (R. 975). He signed "thousands" of requisitions, 25 to 50 a day (R. 976).

During the period in which accused was charged with having received money from Henry's company, he was actually paying money to Henry, $130 per month for the sublease of his apartment (Def. Ex. KK) and $800 for some of his furniture (R. 977). The payments were by check (Def. Exs. MM, NN, OO, PP, QQ, RR, SS, TT-1 to T-T 10 (R. 978-984).

His bank statements and papers in relation to loans, to the rental of a summer home for three months for $1500 and for the sale of such house for $9731.09 in August 1943 were offered in evidence (R. 985-991). He purchased war bonds totaling $12,000 for which Transportation Corps Supply Office was credited in the war bond drive of New York Port of Embarkation (R. 992). From Braddock Beverages, he received $4000 for his half interest in 1943 (R. 993).

He had known "Tex" Sullivan 15 years and employed him from 1935 to 1938, at a salary of $75 per week, and gave him a bonus of $2500, at the time of the Braddock-Louis fight (R. 994). After 1938, Sullivan worked in accused's office, and was paid for his part time services in connection with each fight.

Accused never asked Henry or anyone at Cornwall to engage Sullivan, or to pay him any money. About September 1943, Henry asked him about Sullivan. Accused told Henry that he was having arguments with Sullivan, who was trying to steal accused's fighters, and they were not getting along, but that if Henry wanted to use him as a publicity man, he was a very good man (R. 996). In October 1943, Sullivan told accused that he had been employed by Cornwall (R. 997).

When he entered the service, accused was managing "Young Kid" McCoy, Lee Q. Murray, Georgie Kochan and Danny Kaplo, and he was endeavoring, with Sullivan's assistance, to secure the parole from the Michigan Penitentiary of Lee Oma, so that he might enter his stable of fighters. Oma was not paroled until a month after accused entered the service (R. 998). These fighters, except Oma and Kochan, who was under age (R. 1004) were under contract to accused (Def. Exs. Z, AAA, BBB, CCC, R. 999-1000). Kochan's

fights were always booked by accused prior to his entering the Army, and thereafter by Sullivan (R. 1004). Accused purchased McCoy's contract for $2500 in 1941, and advanced $600 to Murray while he was unable to fight, due to injury, and $300 to McCoy, prior to his entry into the service (R. 1001).

In September 1942, in the presence of James Braddock, former world heaveweight champion, accused told Sullivan that he had received his notice to go in the Army, and that he could get $5,000 to $10,000 for the fighters, but that in view of the years he and Sullivan had been together, accused would turn them over to him, on a 50 percent basis, Sullivan to pay one-half of the $3400 which had been advanced to Murray and McCoy, or $1700 (R. 1002). Sullivan agreed. From time to time thereafter, he turned over to accused, in the latter's apartment, half of the manager's cut from fights (R. 1003). When he handed over the cash, he made oral accountings, until June 1943. In May, August and October, 1943, accused asked Sullivan to make payment of $1700 on account of the advances (R.1004). In June 1943, accused complained to Sullivan about matching Oma and Kochan against fighters who outclassed them. Oma had been knocked out and Kochan took an "unmerciful licking". In boxing a fighter is judged by his "wins" (R. 1006). After the Kochan debacle, at the Queensboro Arena, accused gave Sullivan a "bawling out", and told him that he should listen to "an older head that knew a little more about boxing than he did, and that in the future he should not make any more matches unless he spoke to me first." (R. 1006). There were a lot of people there, and Sullivan walked away. After this, Sullivan continued to pay accused, but not in person. Cash representing accused's share of the cuts was sent in envelopes to his home, by messenger (R. 1007). The next time, Sullivan made a payment in person to accused was in September 1944, at the St. Nicholas Arena, where Sullivan turned over an envelope containing $135.

In August 1943, accused received money and statements in relation to a fight (Def. Ex. BB). Another fight had taken place the same night. Accused sought Sullivan out at the Midtown Tavern, and Sullivan explained that the other fight produced no money. Accused complained of expenses of $1600 deducted from the $5000 manager's share, as shown in the statement. Accused then said, "I want to tell you something 'Tex', you're antagonizing these fighters against me. You're trying to steal my fighters. You're padding all the expenses of all these fights, and you better stop." Sullivan answered that he would do as he pleased. Accused said, "Listen, you son of a bitch, if I wasn't in uniform I would knock your brains out. And another thing, I have been going along pretty nice with you. I want you to start paying off my debt; the money that you're supposed to pay for those fighters." Then accused walked away, because "I

was getting too excited." (R. 1008). Accused's share of the "cuts" continued to come in envelopes by messenger. Accused vainly called Sullivan on the telephone several times between then and October, and recognized the answering voice as that of Sullivan, but was always told that Sullivan was out. He asked that Sullivan get in touch with him. This was not done. About 25 October 1943, accused found Sullivan in the Midtown Tavern, and said to him, "Listen Tex, you have owed this money for over a year. You have made no attempt to pay this money back." Sullivan answered, "I'll pay it." Accused responded, "I want you to start paying right away." Thereupon (R. 1010) Sullivan took a check for "50 some odd" dollars (Pros. Ex. 41B) out of his pocket, handed it to accused, and said that he was working for Henry, and that with this job and two others, besides the fighters, he was doing very well and would try to pay accused with checks he got from Henry, except such of the checks as he had to use for himself; "that the checks he didn't need he would send over to" accused "in payment for the debt." He also said that if he could spare any cash, he would send some with the checks. Thereafter, in 1943 accused received 6 or 7 Cornwall checks in envelopes, which sometimes also contained cash and statements. Accused did not receive such a check every week. The checks which accused received were turned over to Mrs. Gaynes, accused's secretary, or picked up by her at his apartment, when he was in the hospital during January, February and March 1944. She cashed the checks, except one or two, which accused cashed himself (R. 1013). Accused received none of the checks from Henry or anyone connected with Cornwall. Through the years, Mrs. Gaynes had frequently cashed checks for Sullivan, which he had not indorsed. So had accused. In the same way, Sullivan had often cashed checks for accused, which accused had not indorsed (R. 1016-18). Sullivan once signed accused's name to a lease, of which he did not know until long afterward (R. 1087).

In August 1944, while on terminal leave, accused saw Sullivan at Madison Square Garden and told him that he was going out of the Army and expected to be back in the management of the fighters very shortly (R. 1018). Sullivan didn't say anything. About 12 September, accused again saw Sullivan at a fight. Accused asked about Oma and Murray. Sullivan gave to him an envelope containing $135, the proceeds of a Kochan fight. Sullivan did not tell accused that he had been questioned by Army investigators, and never asked whether he should or should not sign a statement. Accused's leave was cancelled, and charges were served on him on 27 September 1944.

Accused never handed a memorandum to Sullivan, containing information about Cornwall or statements which should be made in case he was questioned, and handed him no memorandum of any kind, during the year

1944 (R. 1019, 1020). He never asked Sullivan to make any misstatement or untruthful statement to Army investigators or to anyone else. Accused categorically denied that he ever discussed with Sullivan, Henry, or anyone connected with Cornwall, the placing of Sullivan on the Cornwall payroll.

Since 27 September 1944, accused's fighters had participated in 8 or 9 bouts (R. 1024). As to these fights, Sullivan had not remitted to accused any share of the manager's cut.

While in the service, accused had entree to Fresh Meadows and Bayside Golf Clubs as well as to Fenway. Accused had played golf at Fresh Meadows with Kemp, Wylie and other officers as well as at Fenway.

Accused never took a requisition from Richards and directed him to toss it over to Tepperman (R. 1030). He never told Miss Feeney that Kemp was a schnuckle or that he could handle him. Miss Feeney was known to use Yiddish expressions around the office, "and bragged about it."

On cross-examination, accused was interrogated about his marital status and his life with a woman known as Betty Gould, and was forced to admit that in his income tax return for 1941, he had taken a deduction as her husband, though in fact he was not (R. 1031-1035).

He did not know in advance that Henry was coming to Transportation Corps Supply Office to visit Captain Stayer (R. 1037).

Accused's income tax returns were prepared for him by Mr. Katcher of Jacob Kline and Company, who for 1943 prepared a partnership return for him (R. 1046). He did not know whether the prosecution had requested a copy from Mr. Katcher, and stated that he would talk to his counsel as to whether he objected to producing a copy of such return (R. 1048). His mother resides in a building at 315 Union Street, Jersey City, which accused always gave as his address for Federal income tax and other purposes. Over objection, he was forced to admit that he never paid income tax to the state of New York (R. 1049). Accused again being asked to produce his income tax return, it was agreed that accused would produce his 1943 return (R. 1052). To a question whether he objected to producing his 1941 return, the law member sustained an objection. After argument by the trial judge advocate that the matter went to accused's credibility, the law member reconsidered his ruling (R. 1053).

Accused denied asking Katcher to compute any contribution to be made by accused toward Sullivan's income tax (R. 1057).

He did not know that Henry or Glassgold had an apartment in Washington, until he heard the testimony in the courtroom. He never had a key to it, and never delivered a key to Kemp or Wylie (R. 1060).

Defense counsel produced accused's 1943 and 1944 income tax returns in open court (R. 1062).

Prior to June 1943, accused received 60 percent of the manager's share of the purses, but out of his share paid the office rent and expenses (R. 1064). He admitted that the 1943 partnership return listed office expense as a deduction to Sullivan (Pros. Ex. 53; R. 1065). Accused admitted that he took the exemption as a married man, though not married, in his 1941 income tax return (R. 1062). He lived with a woman who was known as Mrs. Gould, but in 1942 he learned that she was the wife of another man (R. 1066).

Accused did not know whether an income tax return was filed for J. G. Realty Co., real estate holding corporation wholly owned by accused (R. 1068). He left such matters to his tax accountant.

Braddock was to have 50% of the earnings of Braddock Beverages, Inc., after accused received back his original investment of $6000. There were several employees, and the business was being carried on while accused was in the Army. Accused took no interest and was never at its office, while in the Army and prior to selling his interest in August 1943 (R. 1073).

Checks to Sullivan dated May 5 and 12 (Pros. Exs. 41EE, 41FF) were cashed by Mrs. Gaynes on 5 June 1944 (R. 1075). During May, accused knew the Cornwall contracts then were being investigated, but did not know that he was being investigated in connection with them (R. 1076). He did not deposit any of the Cornwall checks received from Sullivan because it was not possible to go to the bank during business hours, except once a week after one o'clock on his afternoon off. Little of the cash from Sullivan was deposited in the bank (R. 1077). Sullivan's messenger, Bentham, brought him money from Sullivan at least 50 times between June 1943 and August 1944 (R. 1078).

Accused asked Mrs. Gaynes to cash 25 of the Sullivan checks, which he knew were not indorsed by Sullivan (R. 1083). One check (Pros. Ex. 41-AA) was indorsed and cashed by accused (R. 1104). He told her that Sullivan had not indorsed them because he was "peeved" (R. 1084). There was no reason why accused did not indorse the checks. It made no difference (R. 1086).

In August 1943 accused expressed his opinion to Wylie concerning Henry's business experience and financial resources, because Wylie asked him about these matters (R. 1088). That was the only time he discussed Henry's background with Wylie (R. 1089). He first learned that he had approved requisitions for the life floats and capstans, during the trial (R. 1090). The requisitions came to him in large batches, and he signed

Kemp's approval as fast as a clerk could lift each requisition from the pile (R. 1091), after he had signed it. It was accused's understanding that requisitions had been checked before submission for approval (R. 1112), and were approved before he authenticated the fact of approval.

Accused knew Schnoor. He never told anyone connected with Transportation Corps Supply Office to give business to him (R. 1098). Schnoor was connected with Braddock before Braddock entered the service (R.1138).

Accused had no personal knowledge of the matters stated in partnership and individual income tax returns (R. 1099).

At the time of the trial, Sullivan still owed accused close to $100 (R. 1108), in addition to accused's share of the manager's cut from several fights (R. 1109).

The only conversation he had with Henry about the float contract was when the latter said that Wylie had asked him to manufacture floats, and he was going to bring his engineers over to see if they could do it. Accused did not know of the contract until two or three days subsequent to its award (R. 1115).

Other requisitions approved for Kemp by accused, incident to the purchase of supplies involving sums of from $29,750 to $261,800 were identified (Def. Exs. JJJ1, JJJ2, JJJ3, JJJ4, JJJ5, JJJ6; R. 1146-1149).

In September and October 1943, the United States Maritime Commission purchased 300 life floats from Cornwall at the same price of $190 as that paid by TCSO to Cornwall (Def. Exs. R, S; R. 457).

Murray C. Becker, testified that he acted as attorney for Henry and Glassgold in the acquisition of Fox's stock in Cornwall. Fox was represented by his attorney, Gallup (R. 1152). At the conferences in Glassgold's office, nothing was said by Henry about the payment of money or commissions to Army officers to secure contracts (R. 1154). At the conference, the attorneys did not withdraw and leave Henry and Fox alone together (R. 1160). Attorney Arthur J. Homan was present at the conferences with Becker (R. 1170), and testified to the same effect (R. 1161-1169). Payments to Army officers were not mentioned at any time (R. 1166).

Irving Gould testified that in 1921 he was cashier for a brokerage firm at a salary of $100 per week (R. 932); that from 1922 to 1933, he was employed by a cosmetic concern, in the beginning at $5000 per year,

which amount had been increased to $10,000 per year before he left (R. 933); and that in 1933 and 1934, he was employed by a brewery on salary and commissions, which averaged from $75 to $100 per week. From 1935 to 1 November 1943, he was employed by the WPA, starting as a junior clerk (R. 934). In 1943, after successive promotions, he was made Director of Finance and Control for the State of New Jersey, at a salary of $4200 per year. He had known Henry several years (R. 935), and while on terminal leave in September 1943 ran into him near 23rd Street and Fifth Avenue. They had a conversation, after which he called at Henry's office (R. 936), where, following a conversation, Irving Gould entered the employment of Cornwall, beginning 5 October 1943 at a salary of $150 per week. He made purchases, attempted to expedite deliveries of supplies, and sought out a factory site for the manufacture of small pianos (R. 938). He made purchases of Balsa wood, and pressed the sellers for early delivery (R. 951), as well as of cypress, nails, rivets and plasolium (R. 955). Irving Gould paid none of the salary which he received from Cornwall to accused (R. 943). At the time of trial, Irving was employed by the O.P.A. at a salary of $3800 per year.

Captain James J. Braddock testified that McCoy, Caplo, Oma, Murray (R. 910) and Kochan (R. 911) were fighters managed by accused, for whom Sullivan worked as a publicity man (R. 910). He was present at conversations between Gould and Sullivan about the fighters (R. 913). Sullivan "took over" the fighters and when they started to make money was to pay $1700 to reimburse accused for half the total of the cost of McCoy's contract and of the funds advanced (R.921).

Braddock (R. 917), John J. McElligott, former fire commissioner of New York (R. 1160), Wilbur W. Wood, sports editor of the New York Sun (R. 1163), and Honorable Jonah J. Goldstein, Judge of the Court of General Sessions of New York County (R. 1177) testified to acquaintance with accused over periods of from 8 to 30 years and concerning their knowledge of his general reputation in the community for veracity, honesty and fair dealing, which was characterized as "he is very well thought of" (R. 917), "the very finest" (R. 1162), "very good - outstanding, I might say" (R. 1164), and "good" (R. 1178).

5. In our deliberations upon this record careful consideration has been given to briefs filed by Messrs. William Cattron Rigby and Fred W. Llewellyn, attorneys for the accused, as well as to the brief filed for the prosecution by Captain David O. Kuh, T.C., and First Lieutenant Kenneth F. Graf, JAGD, who served respectively as trial judge advocate and assistant trial judge advocate upon the trial. Oral arguments by counsel for both sides were heard by the Board of Review. Numerous assignments of error

have been made and and argued at great length. These we shall discuss in the order in which they have been presented.

6. The first point urged is that the court was without jurisdiction, and that its proceedings, findings and sentence are null and void ab initio, for want of jurisdiction. It is argued that the court erred in overruling the motion of accused to dismiss, interposed on such ground, before pleading to the merits. The motion to dismiss asserted that the charges had been unlawfully referred for trial in violation of Article of War 70, after an investigation which was incomplete, and without the accused having been accorded his full rights under that article to confront and cross-examine all of the available witnesses. It was shown in support of the motion, and is now urged, that the accused upon such investigation was not advised that Victor S. Fox would be a witness for the prosecution at the trial, that Fox was not examined as a witness upon the investigation, that the accused was wholly unqualified either by education or by experience, without the aid of counsel, to confront and cross-examine witnesses and to present his defense upon such investigation, that early in the investigation he expressly requested permission to have his attorney present at the cross-examination of the witnesses, and that such permission was refused. It is not denied and it is amply established that the charges were referred to an officer for investigation, that an investigation was had by such officer, and that the accused was advised by him on 28 September 1944 that the names of witnesses then known to the investigating officer were Tepperman, Richards, Bentham and Sullivan. The charge sheet was turned over to the accused and the statements of Bentham and Sullivan were made available to accused. He declined to read the statements on the ground that he was too upset. The investigating officer then read the Charge and Specifications as well as the statements of the witnesses. He advised accused of his rights under Article of War 24 and inquired whether he cared to make any statement. Accused answered in the negative. The investigating officer then asked if accused desired to cross-examine any of the witnesses. Accused answered that he did not. Accused then asked if he might have a civilian lawyer for his defense at the time of the trial and was advised that he could. He then asked whether he could confront the witnesses at the trial, if he did not do so upon the investigation. He read, and expressed surprise at, the contents of Sullivan's statement. Accused made notes as to the contents of the statement of that witness, and as to contents of the affidavits made by the witness Bentham. He then asked that Bentham and Sullivan be brought before him for cross-examination. They were brought before accused. He then requested that the investigating officer ask Sullivan if the statement purporting to be his was actually made and signed by him. Sullivan stated that it was. Accused said that he had no more questions. Bentham was then offered for

examination. The affidavit of this witness' expected testimony was shown to him, and he was asked if he had made and signed such statement. Bentham answered in the affirmative. Accused thereupon asked Sullivan if he would talk with his lawyer. Sullivan said that he would. Accused was advised that Lieutenant Colonel Lewis N. Kemp and Major Robert Wylie would also be witnesses against him. Accused read their statements together with those of Richards and Tepperman. He asked that he be permitted to cross-examine each of them. The next day Kemp, Wylie, Tepperman and Richards were produced before accused by the investigating officer. Accused then stated that he had changed his mind, and desired only to question Lieutenant Richards.

If, at the time of the investigation, it was known to the investigating officer that Henry and Fox were necessary and material witnesses for the prosecution, in case the charges were referred for trial, an attempt should have been made by him to make them available to accused for examination, in accordance with Article of War 70, which provides:

> "* * * At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available * * *."

It must be noted that Fox and Henry are civilians, and that Articles of War 22 and 23 make no provision for compulsory process for the production of witnesses, except before courts-martial. There appears to be no legal means by which to compel the appearance of a witness at the investigation under Article of War 70.

The investigation of the charges appears to have been as thorough as the accused desired. No doubt he saw no purpose in a lengthy oral examination of the witnesses produced before him, in view of the detailed affidavits which they acknowledged having made, which affidavits were exhibited to him. He read the statements, and made notes as to their contents. It would seem that there was a reasonably substantial compliance with the provisions of Article of War 70, and that accused was not denied any legal right, when his request to be represented by counsel was refused. The Manual for Courts-Martial, 1928, contains no express provision in relation to the appearance of counsel for an accused upon the investigation of charges under Article of War 70. Manual for Courts-Martial, 1921, paragraph 76a, p. 58, contained the following provision:

> "No counsel will ordinarily appear either for the accused or for the prosecution (although in exceptional cases a defense counsel of a general or special court-martial, or other counsel,

may be permitted by the commanding officer in his discretion, to appear for the accused, and a trial judge advocate of a general or special court-martial or officer, for the prosecution)."

In 1932, in CM 1999315, Lynch, it was held that there is no provision of law or regulation by which an accused, or an officer or soldier under investigation, may demand as a matter of right counsel to represent him in an investigation of charges which have been preferred against him, and that it was the custom of the service to conduct such an investigation without the presence of counsel. It was said that the rights of the accused were not prejudiced by the refusal to grant his request for counsel upon such investigation (Dig. Ops. JAG 1912-40, par. 428(3), p. 293). In Romero v. Squier, 133 Fed. 2d 528, it was held by the Circuit Court of Appeals that no right to counsel upon the investigation of charges was conferred upon an accused by the 70th Article of War.

Counsel argue that the investigation under Article of War 70 is analogous to the investigation by a grand jury prior to the return of an indictment in a civil court, and call attention to Powell v. Alabama, 287 U.S. 45, 57. That decision discussed the right of a defendant to competent counsel upon his trial. The general rule is that a defendant may not successfully maintain a motion to quash an indictment upon the ground that the evidence before the grand jury was insufficient to warrant the return of the indictment unless it is made to appear that all of the witnesses heard by the grand jury were incompetent and that no competent evidence whatever was heard by the grand jury prior to the return of the indictment (Holt v. U.S., 218 U.S. 245, 54 L. Ed. 1021; Brady v. U.S., 24 Fed. 2d 405, 59 ALR 563, Olmstead v. U.S., 19 Fed. 2d 842, 53 ALR 1472).

It would seem that the provisions of Article of War 70 were substantially complied with, that every witness was called whom accused expressed the desire to question, and that accused had access to the statements of all of the witnesses, then known to the investigating officer. It is strongly urged that the provisions of Article of War 70 are jurisdictional. The provisions of Article of War 70 were once so construed (CM 161728, 1924, Dig. Ops. JAG 1912-40, par. 428(1), p. 292), without qualification. In more recent decisions by Boards of Review, in which the provisions of Article of War 70 have been considered, it has been recognized that such article is procedural in character, specifying the steps by which a general court-martial acquires jurisdiction of the person of the accused. It does not deal with acquisition of jurisdiction of the subject matter of the offense, since jurisdiction of the subject matter is conferred by statute (CM 229477, Floyd, XVII BR 149,

154-156; CM 237032, Nelson, XXIII BR 231, 248; CM CBI 194, Ransom). Errors or irregularities in procedure are not regarded as fatal to the validity of the proceedings unless a substantial right of the accused is thereby prejudiced. We do not perceive how or in what manner the substantial rights of the accused could have been or were prejudiced by the procedure followed by the investigating officer. The contention that the court-martial was without jurisdiction appears to us to be without merit.

7. It is next assigned as error that the evidence fails to prove the guilt of the accused beyond a reasonable doubt, and that, when it is considered as a whole, such consideration raises a doubt, more than merely reasonable, as to accused's guilt. We shall now discuss the evidence in support of the four Specifications individually.

8. In relation to the allegations contained in Specification 1, which charges a conspiracy to defraud the Government by the award of contracts at exorbitant and excessive prices, the following facts are regarded as having been established by the evidence:

a. Accused and Henry had been close personal friends for many years.

b. Kemp, Wylie and accused were good friends.

c. The accused introduced Henry to Kemp who in turn introduced him to Wylie. Social and business contacts between Kemp and Henry and Wylie and Henry followed.

d. All except one of the seven contracts were negotiated. There was no competitive bidding.

e. The steps in negotiating of contracts were taken in haste, the need for which does not always appear.

f. An important factor in awarding five of the contracts to Cornwall was a promise of early delivery. In each instance the promise was not kept.

g. To some extent Wylie was influenced to recommend the award of the contracts for floats to Cornwall, by accused's representations concerning Henry and Cornwall.

h. Kemp would not have approved the contracts, had it not been for the reliance which he placed upon the statements of

accused in respect to Cornwall and to Henry.

i. The requisition for the capstans followed instead of preceding the purchase order.

j. Some of the berthing spars and pontoon fenders did not conform to the specifications.

k. The floats could have been acquired for at least $5 less per float, although not as quickly, and there is evidence that one producer, if able to acquire additional production facilities might have delivered the floats at $35 less each, a total difference in cost of from $25,000 to $175,000.

l. Sisal rope and cotton duck, of the value of $16,000, was obtained from the Government, and was not paid for until several months afterward, and then as the result of action by Wylie's successor.

m. Although the floats were to be delivered f.o.b. Brooklyn, Government bills of lading were obtained for their shipment, and the Government was not reimbursed for the transportation cost until afterward, and then only as a result of action by the Fiscal Branch.

n. The Maritime Commission in 1943 paid the same price per float, $190, as that provided in the contracts between TCSO and Cornwall.

Under the procurement regulations, price was to be regarded as a factor but not as the controlling factor in the awarding of contracts. The prime factor was the ability of a contractor to perform and to make deliveries at the times and in the quantities and qualities required in the war program. Such regulations provide that, when policies relating to ability to perform and labor supply had been met, contracts should be placed so as to give due weight to the following considerations: (a) Cost and efficiency; (b) to small concerns; (c) conservation of exceptional abilities; (d) avoidance of the creation of new facilities; (e) transportation; (f) placements so as to have for each item of supply and equipment at least two producers so located as not to be subject to the same hazard. No one of these objectives alone is to be regarded as controlling and the placement of contracts should reflect an evaluation of all these objectives.

The fact that the Maritime Commission about the same time was paying the same price per float is strong evidence that the two float contracts were not awarded at exorbitant or excessive prices.

In the very able review of the record of trial prepared by Major Robert B. Buckley, Assistant Staff Judge Advocate and concurred in by Colonel Arthur Levitt, Port Judge Advocate, it is said:

> "It is the fact of payment of commissions to accused which clinches the Government's case, which otherwise would consist of little more than a series of suspicious circumstances, by which in the absence of payment of compensation would not attribute to accused any complicity in the conspiracy."

If the checks issued by Cornwall in the name of Sullivan and cashed by accused and his agent, Mrs. Gaynes, were in fact the payment of "commissions", it may be plausibly asserted that the allegations of Specification 1 have been proven beyond a reasonable doubt. However, there is no direct evidence that these checks were given in payment of "commissions". The receipt by the accused of the checks is a circumstance from which it might be inferred that the checks were issued in payment for some service rendered or to be rendered by accused. The evidence conclusively establishes that accused had no official duties in relation to procurement or handling, passing upon or awarding contracts, or in the performance thereof by contractors (R. 130, 178-9, 208, 262). Wylie testified that the accused did not at any time by word or gesture ask him to do anything improper in connection with any contracts or the performance of any contracts and that he awarded each of the contracts in question as a result of an exercise of his own best judgment (R. 262-8). Kemp testified that the accused did not have anything to do at any time with the making or awarding of contracts or with the supervising or checking of their performance and that accused never at any time asked him or so far as he knew, Wylie, to award any contract to Cornwall or to any other contractor or to extend any favor to Henry or Cornwall or to use his influence with any other officer on behalf of Henry or Cornwall (R. 871-872). Tepperman testified that the accused never spoke to him about any contract or about requisitions (R. 178-9). It does not affirmatively appear that accused ever intended to defraud, or intended to aid anyone to defraud, the United States. It seems equally clear that he was glad to be helpful to Henry in securing contracts for Cornwall.

It would seem that the evidence in support of Specification 1, although sufficient to warrant a finding of guilty, is not of such

compelling force that all reasonable minds would agree that the guilt of accused was manifest.

9. Specification 2 charges a conspiracy to receive and Specification 3 alleges the actual receipt of secret compensation from Cornwall for services in influencing the award of contracts. We will consider the proof in support of the findings of guilty under these Specifications, in inverse order. Accused was helpful to Henry and to Cornwall. Henry did not know Kemp, until accused made an introduction. Kemp introduced Henry to Wylie. When questions arose as to the ability of Cornwall to perform and as to the financial strength of the company, Wylie interviewed Kemp and at his suggestion, the accused (R. 233, 888). Accused strongly urged that Henry was successful and reliable and expressed the belief that the Cornwall statement did not adequately reflect Henry's own wealth. Kemp testified that he would not have approved the award of the float contract to Cornwall, except for the reliance which he placed upon accused's representations concerning the company and Henry (R. 860, 880). Wylie testified "that he was influenced to a certain extent" by accused's statements as well as by Kemp's high opinion of Henry. Accused and Sullivan were partners. Sullivan testified and Henry admits that not one jot nor tittle of work was done by Sullivan, to earn the 26 installments of salary. Sullivan says that he was asked by accused to permit the use of his name and social security number as a means through which money might be paid to accused without leaving a record of the payments. Henry says that Sullivan was on the payroll because it was anticipated that at some future time Cornwall might go into the production of sporting goods, in which case Sullivan might be able to obtain testimonials from fighters and other persons prominent in sporting life, as to the excellence of the Cornwall line of sporting goods. Henry knew Sullivan, but he knew him through accused. It is hardly likely that Henry would have sought out Sullivan at a gymnasium to ask him to accept employment which did not then and never did involve the rendering of any service. The application for employment, in the files of Cornwall, gave Sullivan's name, address and social security number, but was not signed by Sullivan. The checks are made out to T. Sullivan rather than to Stephen P. Sullivan, a circumstance indicative to some degree of an intent to becloud the identity of the payee of the checks.

The extent to which the checks issued by Cornwall to Sullivan, and the facts and circumstances attending their disposition, corroborate the testimony of Sullivan, has made desirable the following tabulation of the checks and certain facts in relation thereto:

Pros. Ex. No.	Date	Cashed By	Apparent Date of Cashing	Paid by Drawee Bank
41A	15 Oct. 43	Morris Rosenfeld	23 Oct. 43	25 Oct. 43
41B	22 Oct. 43	Mayflower Pharmacy	26 Oct. 43	28 Oct. 43
41C	29 Oct. 43	Mayflower Pharmacy	31 Oct. 43	3 Nov. 43
41D	5 Nov. 43	Mayflower Pharmacy	6 Nov. 43	9 Nov. 43
41E	12 Nov. 43	Mayflower Pharmacy	14 Nov. 43	16 Nov. 43
41F	19 Nov. 43	Mayflower Pharmacy	30 Nov. 43	2 Dec. 43
41G	26 Nov. 43	Mayflower Pharmacy	30 Nov. 43	2 Dec. 43
41H	3 Dec. 43	M. Rosenfeld	20 Dec. 43	23 Dec. 43
41I	10 Dec. 43	Ridgewood Stadium	12 Dec. 43	15 Dec. 43
41J	17 Dec. 43	Mayflower Pharmacy	26 Dec. 43	28 Dec. 43
41K	23 Dec. 43	Mayflower Pharmacy	26 Dec. 43	28 Dec. 43
41L	31 Dec. 43	Mayflower Pharmacy	7 Jan. 44	10 Jan. 44
41M	7 Jan. 44	Mayflower Pharmacy	11 Jan. 44	13 Jan. 44
41N	14 Jan. 44	Mayflower Pharmacy	18 Jan. 44	20 Jan. 44
41O	21 Jan. 44	Mayflower Pharmacy	26 Jan. 44	28 Jan. 44
41P	28 Jan. 44	Mayflower Pharmacy	30 Jan. 44	1 Feb. 44
41Q	4 Feb. 44	Mayflower Pharmacy	6 Feb. 44	7 Feb. 44
41R	11 Feb. 44	Mayflower Pharmacy	30 Mar. 44	1 Apr. 44
41S	18 Feb. 44	Mayflower Pharmacy	24 Feb. 44	26 Feb. 44
41T	25 Feb. 44	Mayflower Pharmacy	27 Feb. 44	29 Feb. 44
41U	3 Mar. 44	Mayflower Pharmacy	9 Mar. 44	11 Mar. 44
41W	10 Mar. 44	Mayflower Pharmacy	12 Mar. 44	14 Mar. 44
41X	17 Mar. 44	Mayflower Pharmacy	19 Mar. 44	21 Mar. 44
41Y	24 Mar. 44	Mayflower Pharmacy	26 Mar. 44	28 Mar. 44
41Z	31 Mar. 44	Mayflower Pharmacy	6 Apr. 44	8 Apr. 44
41AA	7 Apr. 44	Mayflower Pharmacy	9 Apr. 44	11 Apr. 44
41BB	14 Apr. 44	Mayflower Pharmacy	16 Apr. 44	18 Apr. 44
41CC	21 Apr. 44	Mayflower Pharmacy	4 May 44	6 May 44
41DD	28 Apr. 44	Mayflower Pharmacy	4 May 44	6 May 44
41EE	5 May 44	Mayflower Pharmacy	4 June 44	6 June 44
41FF	12 May 44	Mayflower Pharmacy	4 June 44	6 June 44

The indorsements "T. Sullivan" on Pros. Exs. 41A, 41H, 41I, 41L and 41AA are apparently in handwriting different from that in which was written the indorsement on each of the other 26 checks, which 26 indorsements appear to have been written by the same person, admittedly, Mrs. Gaynes. The payee's indorsements on Pros. Exs. 41H, 41I and 41L are apparently in the same handwriting. The writing on the indorsements on Pros. Exs. 41A and 41AA is dissimilar. Neither of such indorsements, apparently written by different persons is at all similar to the handwriting either of Mrs. Gaynes or of the writer of the indorsements on Pros. Exs. 41H, 41I and 41L, which Sullivan claims to have received in December and to have cashed himself (R. 663-664). Sullivan testified that he cashed Pros. Ex. 41A (R. 663). Gould denied (R. 1079) that he received the proceeds of

Pros. Exs. 41A, 41H, 41I, and 41L, admitted that he received from Sullivan the other 27 checks, and asserted that he never received the proceeds in cash of the other four checks, and learned for the first time of their existence when he saw them in the courtroom (R. 1094). Gould testified that he wrote the indorsement on Pros. Ex. 41AA (R. 839) and that he turned the other checks over to Mrs. Gaynes, so that she might apply the proceeds to payment for maid service and other items of expense, which they shared in connection with their apartments, which were located not far apart (R. 1085).

Accused testified that he received 27 of the checks from Sullivan from time to time, one, 41B from Sullivan personally (R. 1010), and the others in envelopes with cash representing his share of the proceeds of various fights (R. 1011). Sullivan claimed that he never saw such 27 checks, or any of them, never sent any Cornwall checks to Gould, and never inclosed in an envelope any check with the cash from a fight (R. 667, 732). His testimony in this last respect is corroborated by Bentham, who testified that he saw Sullivan insert the contents into the various envelopes which he carried to Gould and that no check was ever inserted with the cash in any such envelope (R. 771-772).

The facts and circumstances in relation to the placing of Sullivan's name on the Cornwall payroll and the issuance in his name of checks totaling $1685.99 are established by the testimony of Mrs. Gloria Leslie, the bookkeeper for Cornwall, Henry, Mrs. Lucille Gaynes, accused's secretary and fiancee, and by Sullivan. The facts and circumstances as related by Mrs. Leslie, Mrs. Gaynes and Henry, without regard to the testimony of Sullivan or to the explanation by accused, are such as in themselves to indicate that accused received at least 27 of the checks and that Sullivan was used as a mere "dummy" in the transaction. The conclusion cannot be reasonably avoided that the Cornwall payroll was padded, to enable secret payment of money to accused. The fact that a large number of the checks were cashed only two days after the date of the issuance of the check, is a circumstance tending to indicate that such checks might have been sent directly by Henry to accused, and that they did not pass through the hands of Sullivan. The checks were prepared in Cornwall and usually were mailed to Henry in New York for signature (R. 415, 552). From the New York office, the checks were mailed "to the payee" (R. 654-656). If any check had been mailed directly to accused, it would have reached him and he could have caused it to be cashed on the second day following the day of issuance. Accused's explanation is that Sullivan was indebted to him in the amount of $1700, and utilized the checks from Cornwall to pay the debt off by installments. Captain Braddock testified that Sullivan owed accused about $1700. Sullivan denied that he was so indebted. The existence or the non-existence of the debt does not seem to us to be of great consequence. Whether accused induced Henry to put

Sullivan on the payroll so that Sullivan would be able to pay a debt, or whether Sullivan was merely used as a channel through which Henry paid accused $1,685.99, seems of slight importance, since in either case it must be the fact nevertheless that accused received $1,685.99 from a corporation, to the president of which he had been helpful in connection with the obtaining of contracts totaling $1,236,928. The part accused had in getting the business for Henry may not have been large. However, the amount of money which accused received is not great. Whether the amount received by accused was large or small, it was illegal for him to accept and receive such payments. This is so whether the payments amounted to a comparatively small or to a comparatively large sum.

Great stress is laid in the brief filed on behalf of the accused on the fact that Sullivan was an accomplice witness and had every motive to seek the destruction of the accused, in order that it might be possible for him to take over the fighters in accused's stable and thereby to reap a financial harvest as a result of his testimony for the Government. Unquestionably Sullivan was an accomplice, and it is possible, if not unlikely, that he disclosed the facts in relation to the checks to the investigators upon learning that accused was on terminal leave, was about to be relieved from active duty in the Army, and would shortly resume the management of the fighters, in which case Sullivan might have been under the necessity of getting along on $75 a week as he did before accused went into the service. Manual for Courts-Martial, 1928, par. 124(a), states:

> "A conviction may be based on the uncorroborated testimony of an accomplice, but such testimony is of doubtful integrity and is to be considered with great caution."

The testimony of an accomplice is evidence from a corrupt and tainted source. Sullivan had given conflicting versions of the entire affair, prior to the trial (R. 673; Def. Ex. X). Sullivan's testimony doubtless was considered by the trial court as being of doubtful integrity. We cannot assume that the trial court failed to regard such testimony with suspicion, or that it failed to act upon it only with great caution. Sullivan's testimony was corroborated in so many and in such vital particulars. We feel that all the evidence strongly tends to establish the guilt of the accused under Specification 3 of the Charge, and that it is such as practically to compel in the minds of conscientious and reasonable men the belief that accused wrongfully received $1,685.99 from the Cornwall Shipbuilding Company for services in relation to the procurement of contracts from the United States for material and supplies. It is not reasonable to believe that events, which fit together

so nicely, could have occurred by accident (People v. Fields, 228 Mich. 166, 170). In view of all the circumstances in evidence, it would be unreasonable to suppose that the checks were issued for any other purpose than that testified to by Sullivan. We regard the evidence which supports the finding of guilty of Specification 3, to be such as practically to compel a conviction.

10. Specification 2 of the Charge avers a conspiracy by accused with Henry, Cornwall and with unknown persons to receive the payments with which he was charged as a substantive offense under Specification 3 of the Charge. That which we have said, in respect to the proof of guilt of the substantive offense, applies with equal force to the same evidence as proof of the existence of the conspiracy and accused's participation in it.

A criminal conspiracy is a combination of two or more persons to do an unlawful act or to effect an unlawful object by any means, or to do a lawful act or to effect a lawful object by unlawful means or in an unlawful manner (Pinkerton v. U.S., 145 Fed. (2d) 252, 254; CM CBI 114, Ranzinger, et al.). This definition of a common-law conspiracy was first enunciated in 1821 by the Court of Appeals of Maryland in State v. Buchanan, 5 Harr. and J. 317, 9 Am. Dec. 534, and has been almost universally followed in the Federal courts as well as in most of the state courts ever since. The Federal Criminal Code has not changed the nature of the offense of conspiracy but has added merely the requirement that an overt act to effect the object of the conspiracy be charged and proved. It is necessary to prove under the Federal Criminal Code not only the existence of the unlawful combination but also that one or more of the confederates did an overt act to effect the common object (McGinniss v. U.S., 256 Fed. 621), proof of such overt act being as much a condition to conviction as the proof of the unlawful confederacy itself (U.S. v. Wexley, 79 Fed. 2d, 526; Eldredge v. U.S., 62 F. 2d 449).

There is no direct evidence that at some particular time and place Henry, accused and Sullivan met and agreed to do what was done. It is certain, however, that Henry placed Sullivan upon the payroll of Cornwall, that Sullivan did nothing to warrant the payment of any compensation, that the greater part if not all of the compensation paid to Sullivan reached the hands of accused, four of the 31 checks being cashed by Sullivan who claims to have sent the proceeds to accused and the others having been cashed by accused or Mrs. Gaynes, and, if we are to believe Sullivan, that Sullivan agreed to the use of his name in the padding of the Cornwall payroll so that accused might secretly receive

the money. The language of the Board of Review in CM CBI 159, Williams, et al., seems applicable:

> "It is not necessary to constitute a conspiracy that two or more persons meet together and enter into an explicit or formal agreement, or that they should directly by words state what the unlawful scheme was to be and the details and plan or means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design. Where an unlawful end is sought to be effected, and two or more persons actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of such persons becomes a member of a conspiracy."

It is enough to prove circumstances which indicate an intelligent and deliberate meeting of the minds of co-conspirators, with intent to commit an offense (Hoffman v. U.S., 68 Fed. (2d) 101). No formal agreement between the parties is essential to the formation of a conspiracy, for the agreement may be shown if there be evidence of concert of action, tending to show that all the parties working together understandingly, with a single design for accomplishment of a common purpose (Marino v. U.S., 91 Fed. (2d) 691; 113 ALR 975). Overt acts performed by the parties to effect an unlawful object may be considered in determining whether a conspiracy existed (Pastrano v. U.S., 127 Fed. (2d) 43, 45). Proof of a formal agreement is unnecessary where it is shown that two or more persons worked together in furtherance of accomplishing the object of an unlawful scheme (U.S. v. Cassidy, 67 Fed. 698, 702). It is sufficient that the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the unlawful acts and to commit the offense charged, although such agreement is not manifested by any formal words, (Marresh v. U.S., 168 Fed. 225). A mutual implied understanding is sufficient (U.S. v. Lancaster, 44 Fed. 896). If two or more persons unlawfully pursue by their acts the same unlawful object, one performing one part and another another part, with a view to attaining the object which they are pursuing, this will be sufficient to constitute a conspiracy (Ochs v. People, 124 Ill. 399; Lawrence v. State, 103 Md. 17). Previous discussion by the conspirators is unnecessary, and it is not regarded as essential that each conspirator take part in every act or that he know the exact part to be performed by his confederates (Spies v. People, 122 Ill. 1). It is enough if the minds of the parties meet and join in an understanding way

to accomplish an unlawful common purpose. A conspiracy is rarely susceptible of direct proof as conspirators seldom reduce their agreements to writing or make public their unlawful plans (Reavis v. U.S., 106 F. 2d 982). It is the essence of a conspiracy conducted by other than the various bunglers that its terms be not expressed but are to be gathered by implication from the conduct of the conspirators (U.S. v. Valenti, 134 F. 362). The standard by which the sufficiency of proof of a conspiracy is to be tested has been thus stated:

> "It is not necessary that the participation of the accused should be shown by direct evidence. The connection may be inferred from such facts and circumstances in evidence as legitimately tend to sustain that inference. Indeed, often if not generally, direct proof of a criminal conspiracy is not available and it will be disclosed only by a development and a collocation of circumstances." (U.S. v. Manton, 107 F. 2d 834).

In the light of the foregoing authorities, it must be apparent to all that the proceeds of the checks in question reached accused through the acts of Henry, Sullivan and of accused, all done in concert. Each of these men did acts to effectuate a common object, viz., the secret compensation of accused by Cornwall for his help to Henry in getting contracts. The evidence in support of Specification 2 of the Charge is such as practically to compel a finding of guilty.

In reaching our conclusion under this head, we have not overlooked the fact that two persons may not in law be deemed guilty of conspiracy to commit a crime, which can only be consummated by a duality of agents. Where guilty conduct by two persons is an essential element of an offense, which must involve the joint act of two participants such as bribery, adultery, bigamy, incest and dueling, a conviction may be had only for such substantive offense and not for conspiracy to commit the offense (Gebardi v. U.S., 287 U.S. 112, 84 A.L.R. 370; U.S. v. Dietrich, 126 F. 664, State v. Law, 189 Iowa 910, 11 A.L.R. 194), if the evidence discloses that such joint offense was actually consummated. Such rule might be applicable here if only Henry and accused had been involved in the transaction. However, Sullivan's testimony leaves no room to escape the conclusion that he too was a guilty conspirator. It is altogether likely that one or more others among the witnesses, who gave testimony in relation to the transaction, was particeps criminis. Since more than the bare plurality of agents necessary to the giving and the receipt of the compensation was involved, it was proper to prosecute for

conspiracy as well as for the substantive offense, which was the object of the conspiracy.

11. In support of Specification 4 of the Charge the only evidence is the testimony of the accomplice, Sullivan. He testified that accused asked him to state to anyone investigating the transaction that he did work for Cornwall, and turned over to Sullivan a written outline of the explanation which should be made to any investigator. Sullivan testified that he destroyed this outline after the first interview by agent Minnetti. Subsequently, he testified that he destroyed the memorandum after the second interview with Minnetti. Accused denies all this. There are no facts and circumstances in evidence tending in the least to corroborate Sullivan as to such memorandum or as to a request by the accused that Sullivan make a false explanation to the investigators, although as we have pointed out a conviction may be had upon the uncorroborated testimony of an accomplice. Such testimony alone, where guilt is denied by the accused, cannot be said to be compelling.

12. Taken as a whole, and considered altogether the evidence in support of the findings of guilty of Specifications 2 and 3 seems to us to be of such compelling force that even serious evidential errors might not be likely to affect the ultimate result, but viewing the evidence bearing upon Specifications 1 and 4 of the Charge in its entirety, it would appear that the proof is not of compelling effect, and that the record of trial should be free of prejudicial error, in order that the findings of guilty under those Specifications may stand.

13. It would be remarkable, if in the course of so long a trial, some error did not intervene in proceedings involving numerous issues of fact. In the admission of such a mass of testimony and documentary evidence, it would be difficult to prevent the introduction of some which was incompetent. In this lengthy trial, the impossible was not achieved. A miracle was not performed. No record as voluminous as this could be entirely free of error. In passing upon the effect of the errors, the vital question is whether the irregularities injuriously affected the substantial rights of the accused.

14. Error is assigned upon two excerpts from the opening statement on behalf of the prosecution, to the effect that the Government was actually defrauded of between $200,000 and $300,000 in the letting of contracts to Cornwall (R. 36) and that a brother of accused was put on the Cornwall payroll who had been a nee'r-do-well, who had formerly borrowed $5 and $10 from accused, and who did no work. There are facts in the record from which it could be argued reasonably that the floats and other articles supplied by Cornwall could have been acquired at less cost from some other contractor. As to Irving Gould, it is apparent

that the evidence does not furnish support for the language of the opening statement. Both of these statements undoubtedly were understood by the court as being in the nature of predictions of what the evidence on behalf of the prosecution would establish. These statements seem to us to have been harmless.

15. Over objection the witness, Fox, was permitted to testify in substance that, at a time and place when accused was not present, Henry stated that he had been paying commissions to accused and others (R. 788) and that he wanted $18,000 more for his Cornwall stock if he sold it to Fox, because "that was the amount he had to pay Gould and others for getting those contracts" (R. 793). Evidence of these statements of Henry to Fox, of course, was hearsay. Such evidence was inadmissible because the statements were not in furtherance of either of the conspiracies charged, although made during the period in which the prosecution contended the conspiracies existed. The applicable rule is summarized in Manual for Courts-Martial, 1928, par. 114(c):

> "In cases where several persons join with a common design in committing an offense, all acts and statements of each made in furtherance of the common design are admissible against all of them." (Underscoring supplied).

The statements of Henry to Fox cannot reasonably be said to have been made in furtherance of the common object of either of the conspiracies charged. The object of the conspiracy charged in Specification 1 is to defraud the United States by the award of contracts for supplies at exorbitant prices. The object of the conspiracy charged in Specification 2 was the making by Cornwall and the acceptance by accused of secret payments of compensation for influencing the award of contracts to Cornwall. Henry's statements to Fox appear to have been made to induce Fox to purchase Henry's stock in Cornwall at a higher price than Henry was willing to pay Fox for the latter's stock. Henry's declaration could not have tended to further or to accomplish any fraud against the United States, or to further the making of the secret payments to accused. It is well settled that acts or declarations of a conspirator, which are not made in furtherance of the object of the conspiracy, are not admissible against a co-conspirator who was not present when the declarations were made, (Brown v. U.S., 150 U.S. 93, 98; Minnire v. U.S., 57 F. (2d) 506, 510-512). The testimony complained of was hearsay and did not come within any exception of the hearsay rule. It was serious error to admit it. In view of the character of the evidence bearing upon the allegations of Specification 1 of the Charge, this evidence might well have tipped the scales, so evenly balanced by the evidence in favor of as well as that against the accused, so as to change the ultimate result. We regard this error as

very prejudicial to the substantial rights of the accused.

16. On cross-examination, in response to questions by the prosecution, accused testified that he was not married and never had been married (R. 1031). He was asked whether he had claimed the exemption as a married man in his Federal income tax returns for the calendar year 1941 and the calendar year 1942. He replied that he did not know (R. 1032). He was then asked "Who is Betty Gould?" The objection of defense was overruled and accused was compelled to answer as follows:

> A. Miss Betty Gould is a lady that I have had several apartments with around the city. She has posed as Mrs. Gould. I haven't seen her in quite a number of years but I still send her $25 or $30 a week up until this time that I had been incarcerated. I think I did send her about $100 while I have been. (R. 1032).

The prosecution then established that in his Federal income tax return for 1941 accused had claimed an exemption of $1,200 as a married man (R. 1065). The facts as to accused's income in 1941 could not possibly be relevant to the offenses charged, which if committed as charged, could only have affected accused's income in 1943 and 1944. He was pressed for an answer as to whether or not he was married during the year 1941. He then testified as follows:

> A. The answer is no, I was not married. As long as this thing was brought up about this woman, I would like to explain to the court that I was with this woman for over fifteen years, and in that time, I lived in several places around the city and also presented her as Mrs. Gould. I paid all of her expenses and this went on until 1940, when we split up. Unfortunately, this woman was addicted to drinking. I had a lot of trouble with her, and in 1940, I split up, but I figured I was obligated to take care of her. I did. I paid all her bills and I sent her money every week. In 1942, I found out that the woman was married, but before that, I really thought that I had introduced everybody to her as my wife but in 1942, when I found out that she was still married, I told her that we would have to split up and I figured I was obligated to take care of her and that is the story of that return, filing that return.
>
> Q. When, in 1942, did you make this discovery? A. The early part of 1942 (R. 1065-66).

The prosecution also brought out on cross-examination that accused had never paid any income tax to the State of New York. Accused

contended that he was not liable to pay any such income tax; but the prosecution plainly sought to infer that accused had improperly evaded the payment of that tax (R. 1049-50).

In closing argument, the prosecution referred to Betty Gould as "the woman with whom he lived for 15 or 18 years and introduced everywhere as his wife" (R. 1231).

The testimony as to Betty Gould, while affecting accused's credibility as to matters which were collateral and not material to any of the issues, tended strongly to establish previous immoral and wrongful conduct on his part. Its prejudicial effect was emphasized by the remarks in summation above-quoted, as well as by the examination on this point of other witnesses, by the prosecution. Before the accused took the witness stand the prosecution hinted at an illicit relationship between accused and Betty Gould. Thus, in the course of the examination of Mrs. Gaynes, accused's fiancee, the following questions were asked (R. 587):

> Q. Did you see Mrs. Gould between June, 1943 and June 1944? A. Which Mrs. Gould?
> Q. Mrs. Joseph Gould. A. Mrs.—no Mrs. Joseph Gould.
> Q. Did you see a Mrs. Joseph Gould? A. No sir.
> Q. Did you see a Mrs. Betty Gould? A. No sir.

And during the examination of Henry the prosecution addressed to him the following questions (R. 501).

> Q. Do you know Mrs. Gould? A. Which Mrs. Gould?
> Q. Is there more than one Mrs. Gould? A. I don't know; you must refer to Captain Gould's mother.
> Q. You don't know Captain Gould's wife? A. No sir.

This evidence had no relation whatever to any of the offenses for which accused was being tried. At the time such questions were asked of Mrs. Gaynes and Henry, as well as during the cross-examination of accused, his general character was not at issue. The witnesses who gave testimony as to the good reputation of the accused, all took the stand after these matters occurred. Moreover, the testimony of the character witnesses related to accused's general character and would not have justified, even in rebuttal, evidence by the prosecution as to alleged former specific acts of misconduct, since any such rebuttal evidence must be limited to general reputation and to actual convictions of crime. Evidence to impeach a witness is properly admitted only in relation to

material matters.

In Dig. Ops. JAG 1912-1940, sec. 395(7), appears the following:

"The extent to which the accused was questioned by the Court regarding his conduct on previous occasions shows beyond doubt that the minds of the members were drawn away from the real issue, which was the intoxication of the accused on the occasion alleged in the specifications. After a careful study of the record it is difficult, if not impossible, to arrive at any other conclusion, than that the large amount of improper evidence as to previous misconduct and the importance attached to this by the prosecution strongly prejudiced the accused with the court. In view of the conflicting character of the evidence regarding the accused's condition and the cause thereof, the admission of this improper evidence injuriously affected his substantial rights within the meaning of A. W. 37, and it is recommended that the findings and sentence be disapproved. C.M. 114908 (1918)."

In a subsequent opinion, it was held that in a case where the evidence was in conflict, nothing unfair to accused should have been received in evidence and that testimony as to other offenses, suspensions, and inadmissible matters so received might have influenced the court to find accused guilty under one of the Specifications, the evidence in support of which was not compelling, and that as to such Specification, the several errors were prejudicial to the substantial rights of accused, although as to the finding of guilty of another Specification which was supported by evidence of compelling force, the accused was not prejudiced (CM 210404, Cameron, IX BR 265, 267-271, 274).

In McDonald v. United States (264 Fed. 733), in a trial for conspiracy to defraud the United States by the use of counterfeits of stamping devices used by Government inspectors in a factory manufacturing shoes for the Government, the prosecution, on cross-examination of the defendant, adduced evidence that he had placed a Government inspector who had functioned at the factory under a previous contract, on the factory payroll under an assumed name. The court held such evidence was not admissible. It said (pp. 738-739):

"We are unable to see how evidence that McDonald had a corrupt understanding with Collette (the inspector) would tend to show that McDonald had any knowledge, whether guilty

or innocent, that counterfeit stamps were procured and used under a contract with which Collette had no connection. It might tend to show that McDonald had an evil disposition and that his character was such that he would be likely to enter into a conspiracy such as that charged in the indictment; but it could not be admitted for this purpose under the well known rule of evidence, which was considered and applied in this circuit in Fish v. United States, 215 Fed. 544, 132 C.C.A. 56, L.R.A. 1915 A, 809, that upon a trial for one offense evidence of another distinct and unrelated offense committed by the defendant is not admissible, unless it is offered for one of the purposes which constitute exceptions to this general rule."

In Toothman v. United States (203 Fed. 218), in the trial of an indictment charging that defendant sent obscene letters through the mails, it was held that the admission of evidence as to a statement made by defendant admitting improper relations with a married woman was prejudicial error.

In Chiccarello v. United States (68 Fed. (2d) 315), a counterfeiting case, it was held that a question, addressed to one of the defendants on cross-examination, designed to show that he had a woman in the apartment where the counterfeit notes were bought, was improper.

In Smith v. United States, 10 Fed. (2d) 787, the defendant was cross-examined as to collateral offenses. Proof was offered in rebuttal of his testimony that he had not committed such other offenses. In reversing the conviction on this ground, the Circuit Court of Appeals said:

"The effect of the admission of the testimony so complained of was to show or tend to show against accused the commission of crimes independent of that for which he was on trial. With certain exceptions not applicable here, it is the well settled rule that this can not be done * * *. In People vs. Molyneux, 6 N.E. 286, the court said: 'This rule, so universally recognized and so firmly established in all English speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of the Magna Charta.'"

In the present case, the evidence of other offenses was elicited either from witnesses on the presentation of the prosecution's case in

chief, or from the accused on cross-examination, before any evidence of his good character had been offered. This was improper (CM 192573, Robinson, II BR 3, 6; CM 196371, Steenberg, II BR 349, 354-355).

Accused was not charged with violation of the Internal Revenue Code of the United States. Neither was he on trial for offending against the laws of the State of New York, in failing to pay state income taxes, or for adulterous cohabitation with the wife of another, whom in 1941 and in previous years he had held out as his wife. These matters had no relationship whatever to the offenses actually charged, and were collateral to the issues.

Under firmly established principles of law which cannot be ignored or departed from without violence to both right and justice, the objections of defense counsel should have been sustained.

17. In the trial of a lengthy and hotly contested case, it is neither unusual nor unnatural for counsel in their zeal to develop intensity of feeling as to merits of counsel's side of the case. The record indicates that such intensity of feeling developed in the trial of this case, and on the part of counsel for defense as well as for the prosecution. Bitter complaint now is voiced on behalf of the accused as to the impassioned and rhetorical closing arguments on behalf of the prosecution. To set out the excerpts of such arguments, as to which error is assigned, would needlessly prolong this opinion. The contention, that in part the arguments were not supported by the evidence and were of such a nature as to arouse feeling against the accused, is not without merit. We have carefully considered the effect of the portions of the argument complained of. It is our opinion that while these matters might have influenced to some extent the findings of guilty under Specifications 1 and 4, nevertheless it seems to us to be unlikely that the findings under Specifications 2 and 3 could or would have been different, had the language complained of not been employed in closing argument.

18. It is the general rule that the prejudicial effect of errors in the admission of irrelevant, incompetent or immaterial evidence offered by the prosecution is to be measured by consideration whether the legal evidence of guilt is relatively conclusive or inconclusive, and the extent to which the evidence for the prosecution is contradicted, or explained consistently with innocence by the evidence on behalf of the accused. It seems obvious that evidence improperly admitted might affect the ultimate result in one case, and not in another. A conviction should

not be set aside where the evidence is of compelling effect and the evidence improperly admitted could not therefore reasonably have affected the result (CM 237711, Fleischer, XXIV BR 89, 99-100). Where the competent evidence of guilt is not such as practically to compel in the minds of conscientious and reasonable men a finding of guilty, the admission of improper evidence on behalf of the prosecution constitutes substantial and prejudicial error (CM 211829, Parnell, 10 BR 133, 137). Where accused was charged with two offenses, and the competent evidence of his guilt as to one Specification was compelling but was not of compelling effect as to the other Specification, the admission of incompetent evidence upon the trial requires that the findings of guilty be disapproved only under the Charge and Specification as to which the legal evidence of guilt was not strong (CM 192573, Robinson, II BR 3, 6; CM 210507, Kennerson, IX BR 219, 229, 233). In such a case, the sentence is valid to the extent that it is authorized upon the findings of guilty, which are not rendered invalid by the admission of improper evidence. These opinions are in accord with the well settled rule, followed in the Federal courts, that where a defendant is convicted on a number of counts in an indictment, and the sentence was warranted by one of the counts, the judgment will not be reversed because of error in admitting incompetent evidence, which related to another count in the indictment (Goll v. U.S., 151 Fed. 412; Wesoky v. U.S., 175 Fed. 333; Weaver v. U.S., 111 Fed. 2d 603). Since the evidence of guilt of the offenses alleged in Specifications 2 and 3 seems to us to be compelling, as pointed out above, in our opinion the admission of incompetent, irrelevant and immaterial evidence did not prejudice accused as to the issues presented by those Specifications, but was highly prejudicial to him and injuriously affected his substantial rights as to Specifications 1 and 4, since the evidence of his guilt of the offenses charged therein is not of compelling effect.

19. The accused is 48 years of age. He was appointed a first lieutenant, Army of the United States, from civil life on 21 September 1942. He entered upon active duty 2 October 1942, and was assigned to duty with the Transportation Corps. He attended the Transportation Corps School at Fort Slocum, New York, from 9 October 1942 to 23 November 1942. On 10 April 1943, he was promoted to Captain. Prior to the commission of the offenses charged, the character of his commissioned service had been excellent. He served as a seaman 2d class in the United States Navy during the first World War, receiving an honorable discharge.

20. The court was legally constituted and had jurisdiction of the subject matter and of the person of the accused. 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 2 and 3 of the Charge, but is not legally sufficient to support the findings of guilty of Specifications 1 and 4 of the Charge, and is legally sufficient to support the sentence, as modified by the reviewing authority, and to warrant confirmation thereof. A sentence to dismissal, to payment of a fine of $10,000, and to confinement at hard labor for two years is authorized upon conviction of a violation of Article of War 96.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

SPJGV-CM 273791 1st Ind

Hq ASF, JAGO, Washington, 25, D. C. 10 Jul 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Joseph Gould (0-497243), Transportation Corps.

2. Upon trial by general court-martial this officer was found guilty of conspiracy to defraud the United States (Specification 1), of conspiracy to commit offenses against the United States by receiving illegal compensation from Cornwall Shipbuilding Company (Specification 2), of receiving $1600 as illegal compensation from Cornwall Shipbuilding Company (Specification 3), and of attempting to procure a witness to make false statements (Specification 4), all in violation of the 96th Article of War. He was sentenced to dismissal, to pay a fine of $12,000, and to be confined at hard labor for three years. The reviewing authority approved the finding of guilty of Specification 4, except for the words "under oath" and "before any court-martial in the trial of charges against the said Captain Gould which might arise from the said official investigation", and approved only so much of the sentence as provides for dismissal, confinement at hard labor for two years and the payment of a fine of $10,000, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specifications 2 and 3 of the Charge and of the Charge, but is legally insufficient to support the findings of guilty of Specifications 1 and 4; and is legally sufficient to support the sentence as modified by the reviewing authority, and to warrant confirmation of the sentence as so modified.

Cornwall Shipbuilding Company had performed contracts involving large sums for the Army Transportation Corps, prior to the appointment of accused, as an officer of the Army in September 1942. In the Spring of 1943, one Milton A. Henry, with whom accused had been very friendly for about eight years, acquired a one-third interest in Cornwall Shipbuilding Company and also became its president. Soon afterward Henry called at the Transportation Corps Supply Office, where accused was on duty. Accused introduced him to the officer in charge and to others on duty there. Between 7 June 1943 and 12 November 1943, the Cornwall Shipbuilding Company

was awarded contracts totalling $1,016,178. Accused had no official duties in relation to the award of contracts or the supervision of the performance thereof. He was in frequent contact with Henry at social gatherings, some of which accused arranged and at some of which the head of the supply office and the chief of its contracting and purchasing section were present. Prior to the award to the Cornwall Company of the largest contract, in June 1943, the two officers who actually authorized the contract discussed with accused the company and Henry, the president, as well as its and his past record and resources. On that occasion accused expressed not only a very high opinion of Henry personally but also great confidence in both him and his company. The two officers who actually awarded the contracts, both testified at this trial that they relied to some extent upon these commendations made to them by accused, concerning the financial soundness of the company and its president, and further stated that the contracts let to Cornwall might not have been entered into except for accused's confidence in Henry, although both officers accepted full personal responsibility for awarding the contracts in question.

In October 1943 one Sullivan, a business associate of accused in the management of prize fighters, was placed on the payroll of Cornwall Shipbuilding Company, and 31 pay checks were issued to him at weekly intervals, which, after deductions for social security and income taxes, totalled $1685.99. These checks, or in a few instances the proceeds thereof, were delivered to Gould by Sullivan, who in fact rendered no services of any kind to the company. Sullivan testified that accused asked him to permit the use of his name and social security number on the Cornwall payroll, so that accused might receive compensation which he could not accept under his own name. Accused's defense was that he did not know how Sullivan got on the Cornwall payroll, and that he, Sullivan, did not work for the company, but that he, Gould, had accepted the checks in question as payments on account of a debt due and owing to him by Sullivan and not as compensation from Cornwall Shipbuilding Company. Sullivan denied that he was indebted to accused. Accused denied that he had attempted to influence the award of contracts to the Cornwall Company and his superior officers in the Transportation Corps Supply Office, who were witnesses at the trial, did not seek to evade full personal responsibility for the awarding and performance of the contracts in question.

The sentence is based on findings of guilty of four Specifications. The Board of Review regards the record as legally insufficient to support two of the findings of guilty (Specifications 1 and 4), which are those involving conspiracy to defraud the United States and the attempted subornation of the witness Sullivan. These are serious offenses, upon

consideration of which a substantial portion of the sentence might have been imposed by the court. Aside from the acceptance of the gratuities in question, totalling $1600, accused's service appears to have been satisfactory. The officers in the Transportation Corps who actually were responsible for the award of the contracts in question have been permitted to resign for the good of the service, without trial. I therefore recommend that the sentence as approved by the reviewing authority be confirmed, but that the fine be reduced to $1,000, that the period of confinement be reduced to one year, that the sentence as thus modified be carried into execution, and that a United States Disciplinary Barracks be designated as the place of confinement.

4. Consideration has been given to briefs filed by counsel for the accused as well as to oral argument had before the Board of Review.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

MYRON C. CRAMER
Major General
The Judge Advocate General

4 Incls
1 Rec of Trial
2 Form of Action
3 Brief for Accused
4 Proceedings Before B/R
3 April 1945

(Findings of guilty of Specifications 1 and 4 of Charge disapproved. Sentence as approved by reviewing authority confirmed, but fine reduced to $1000 and confinement reduced to one year, by order of the Acting Secretary of War. G.C.M.O. 385, 2 Aug 1945)

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

SPJGH
CM 273819

1 FEB 1945

UNITED STATES	THE INFANTRY SCHOOL
v.	Trial by G.C.M., convened at Fort Benning, Georgia, 17 January 1945. Dismissal and total forfeitures.
Second Lieutenant STANLEY F. BEBLO (0-813113), 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 Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Stanley F. Beblo, Officers Replacement Pool, The Infantry School, attached to 11th Company, First Student Training Regiment, The Infantry School, then attached to 9th Company, First Student Training Regiment, The Infantry School, did, without proper leave, absent himself from his organization and station, at Fort Benning, Georgia, from about 23 December 1944 to about 28 December 1944.

He pleaded not guilty to and was found guilty of the Charge and the Specification. 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. Evidence for the prosecution:

Certified extract copies of morning reports of the accused's organization, 9th Company, First Student Training Regiment, The Infantry

School, Fort Benning, Georgia, showing accused from duty to AWOL as of 1:10 p.m. on 23 December 1944 and from AWOL to duty as of 5:30 a.m. on 28 December 1944, were introduced, without objection, as Prosecution's Exhibits 1, 2 and 3, respectively (R. 6).

Major Neal Dow, Headquarters, 2d Battalion, First Student Training Regiment, testified that, as investigating officer, he interviewed accused on 29 December 1944. He warned accused of his rights under the 24th Article of War and advised him that "he was not required to say anything that would tend to incriminate or degrade him in any way, shape or manner." His testimony relating the statements made by the accused to him is as follows:

> "I asked him, 'Where did you go?' and he said, 'Bayonne, New Jersey.' I asked him 'How long does it take to get there?' '28 hours,' was the answer. Question: 'What time did you leave the company?' Answer: 'About 1400, Saturday, 23 December 1944.' Question: 'Did you sign out on the company register?' Answer: 'No, Sir.' Question: 'Why didn't you sign out?' Answer: 'A roster was being made out for those going away over Christmas, and it wasn't ready when I left.' Question: 'Were you told what time to report back to the company?' Answer: 'Yes, Sir. Tuesday morning, 26 December, at 0800.' Question: 'Did you think you could get back in time going such a distance?' Answer: 'No, Sir.' Question: 'Did you realize that you would be carried as AWOL on the morning report?' Answer: 'Yes, Sir.' Question: 'What time did you get back?' Answer: 'Thursday morning at 0530 on the 28th.' Question: 'Was there any other reason why you went home, other than for Christmas?' Answer: 'No, Sir.' Question: 'Did you realize that the responsibility of an officer was to be at the right place at the right time?' Answer: 'Yes, Sir.' Question: 'Didn't that make any difference to you?' Answer: 'No, Sir.' Question: 'How long have you been an officer?' Answer: 'Since 1 October 1943; about 14½ months.' Question: 'Did you have any enlisted service prior to being commissioned?' Answer: 'Yes, Sir, as an Aviation Cadet.' Question: 'Have you anything further to state?' Answer: 'No, Sir.'
> Those were questions propounded by your (sic) orally and answered by the accused?
> That's correct
>
> Defense: No cross examination." (R. 10).

4. Evidence for the defense:

No witnesses were called for the defense. After having his rights as a witness explained to him the accused elected to remain silent (R. 12).

5. The uncontradicted testimony introduced by the prosecution fully establishes the absence without leave alleged in the Specification. The Board of Review is of the opinion, therefore, that the findings of guilty of the Charge and the Specification are not only sustained, but were compelled, by the record of trial.

6. The records of the War Department show that the accused is 23 and 10/12th years of age and unmarried. He was born in Bayonne, New Jersey, of Polish parents. He is a high school graduate, and in civilian life worked for two years as a laborer and for one year as an able-bodied seaman. He was inducted into the Army in June 1942, was an aviation cadet from January 1943 until August 1943 and was commissioned a second lieutenant, Air Corps, Army of the United States, at Maxwell Field, Alabama, on 1 October 1943.

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

Thomas N. Tapley, Judge Advocate.

William H. Gaubrell, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

SPJGH-CM 273819 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 Stanley F. Beblo (0-813113), 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 the youth of the accused, the brevity of his period of absence without leave, the fact that he returned voluntarily, and the absence of any record of previous convictions or punishment, I recommend that the sentence be confirmed but that the execution thereof be suspended during good behavior.

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

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but execution suspended. G.C.M.O. 81, 21 Mar 1945)

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

SPJGK - CM 273874

2 FEB 1945

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Dale Mabry Field, Tallahassee, Florida, 9 January 1945. Dismissal.
Second Lieutenant FRANCIS H. MILLER (O-2057006), Air Corps.	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Second Lieutenant Francis H. Miller, then attached to Detachment of Patients, Station Hospital, Rome Army Air Field, Rome, New York (now assigned to Squadron R, 335th AAF Base Unit, Dale Mabry Field, Tallahassee, Florida) did, without proper leave absent himself from his detachment and station at Rome Army Air Field, Rome, New York, from about 30 Oct 1944 to about 2 Nov 1944.

Specification 2: In that Second Lieutenant Francis H. Miller, * * *, did, without proper leave absent himself from his organization and station at Dale Mabry Field, Tallahassee, Florida, about 8 Nov 1944, while en route from Rome Army Air Field, Rome, New York, to join his said organization and did remain so absent until about 12 Nov 1944.

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

Specification 1: In that Second Lieutenant Francis H. Miller, * * *, did, at Jacksonville, Florida, on or about 10 November 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Roosevelt Hotel a certain check in words and

figures as follows: to-wit:

EAGLE PASS NATIONAL BANK

Eagle Pass, Texas., Nov. 10, 1944

PAY TO THE ORDER OF The Roosevelt Hotel $20.00

Twenty and no/100 Dollars

/s/ Francis H. Miller
2nd Lt., 02057006

and by means thereof did fraudulently obtain from the said Roosevelt Hotel the sum of twenty dollars ($20.00) in currency, he, the said Second Lieutenant Francis H. Miller, then well knowing that he did not have and not intending that he should have any account with the Eagle Pass National Bank, of Eagle Pass, Texas for the payment of said check.

Specification 2: In that Second Lieutenant Francis H. Miller, III Fighter Command Processing Squadron, Dale Mabry Field, Tallahassee, Florida, being indebted to Citizens State Bank, Carrizo Springs, Texas, in the sum of fifty dollars ($50.00) for a loan made by said Citizens State Bank, which amount became due and payable on or about 4 September 1944, did, at Tallahassee, Florida, from about 4 September 1944 to on or about 21 November 1944, dishonorably fail and neglect to pay said debt.

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

3. Notwithstanding the plea of guilty to the Charge and its Specifications, the prosecution introduced in evidence without objection duly authenticated extract copies of the Morning Report of Detachment of Patients, Rome Army Air Field, New York, of 19 November 1944, which showed that the accused was "AWOL" from 1301, 30 October 1944 to 0200, 2 November 1944 (Pros. Ex. 1) and of Squadron "R", 335th AAFBU, Dale Mabry Field, Florida, of 12 November 1944, which showed the accused to be "AWOL" from 0800 8 November 1944 to 1100 12 November 1944 (Pros. Ex. 2). By stipulation (Pros. Ex. 3) it was shown that the accused on 23 October 1944 was attached to the Detachment of Patients at Station Hospital, Rome Army Air

Field, Rome, New York, and on 4 November 1944 was discharged therefrom and instructed to return to his station at Dale Mabry Field, Florida. Reasonable travel time from one station to the other is two days. Transportation was available.

In support of the Additional Charge and its Specifications the prosecution introduced in evidence without objection a stipulation that the following facts are true:

> "THAT, the check referred to in Specification 1 of the Additional Charge is annexed hereto and has been initialed by Lt MILLER. Said check was prepared by Lt FRANCIS H. MILLER, and bears his signature. It was presented to the Roosevelt Hotel at Jacksonville, Florida, on or about 10 November, 1944. Mr. Eugene R. Trobaugh, resident manager of said hotel, cashed said check by delivering to Lt MILLER $20 in currency therefor. The Roosevelt Hotel presented said check for payment to the Eagle Pass National Bank, of Eagle Pass, Texas. Said checkwas not paid by said bank, but was returned by said bank bearing the notation that Lt MILLER'S 'account appeared closed'. The records of the Eagle Pass National Bank, of Eagle Pass, Texas, show that the account of Lt FRANCIS H. MILLER had a zero balance at the time said check was presented for payment, and when such check was presented for payment his account was closed on the bank's books; that said check was presented for payment on 17 November, 1944, and that it was returned to the depositor, the Roosevelt Hotel.
>
> "THAT, Lt FRANCIS H. MILLER borrowed the sum of $50 from the Citizens State Bank, Carrizo Springs, Texas, on 4 August, 1944, by promissory note made by Lt MILLER to the order of said bank, which note was payable in 30 days, to wit, on 4 September, 1944. That after the maturity of said note, two letters were written to Lt. MILLER and a telegram was sent to him on 29 September, 1944, requesting payment of said note. Lt MILLER did not reply to either of said letters or to said telegram. On 14 October, 1944, a letter was written to the Commanding Officer, Dale Mabry Field, with reference to the non-payment of said note. Upon receipt of said letter Lt MILLER was notified to appear before the Adjutant of the III Fighter Command Processing Squadron, Dale Mabry Field, to which he was assigned, and advised to pay the same. Said note was paid on 27 November, 1944." (Pros. Ex. 3)

The check referred to in the stipulation for $20 payable to the Roosevelt Hotel and signed by the accused was also admitted in evidence (Pros. Ex. 4).

4. The accused,having been advised concerning his right to testify on his own behalf, elected to testify, restricting his testimony to Specification 1 of the Additional Charge. He identified a letter received by him

from the Eagle Pass National Bank (R. 9, Def. Ex. A) and a copy of his bank statement from the same bank (R. 9, Def. Ex. B), which documents were admitted in evidence without objection. He stated that he had allotted out of his monthly pay $75 each month to be paid to that bank,which allotment was still in effect and that the account was not closed (R. 10). Exhibit A is a letter from the bank to the accused dated 22 December 1944 explaining that when the accused's check for $20 dated 10 November 1944 (Pros. Ex. 4) was presented to it for payment the accused's "account was closed" on the bank's books and for that reason a notation was made on the check "account appears closed." A copy of the accused's account with the bank was inclosed which showed that on 18 November 1944 (the date upon which the check was presented for payment) he had no balance. There were also inclosed in the letter two cancelled notes for $150 which had previously been forwarded to the accused at Eagle Pass, but returned to the bank unclaimed. The bank statement (Ex. B) showed a deposit of $75 each month from August 1944 to December 1944, inclusive. The account, however, was charged with $75 immediately upon the receipt of each deposit in August, September, October, and November. The $75 deposit for December was depleted during that month by three withdrawals of $25 each.

5. The morning reports of the military organization of which the accused was a member at the times involved, together with the accused's plea of guilty, legally constitute sufficient evidence of record to support the findings of guilty of the Charge and its two specifications. The plea of guilty cures the possible objection that the entry in the morning report recording the accused's change of status to "AWOL" on 30 October 1944 was not made until 19 November 1944. The extract copies corroborate the times and places where the offenses were committed as alleged in the specifications.

With reference to Specification 1 of the Additional Charge, the accused stands convicted of fraudulently issuing a check for $20 to the Roosevelt Hotel in Jacksonville, Florida, and fraudulently obtaining $20 in exchange for it, "well knowing that he did not have and not intending that he should have any account with" the bank upon which the check was drawn for the payment of the check. It was established by stipulation and clarified to some extent by the defense's introduction in evidence of the bank's letter and statement of the accused's account that the accused did at Jacksonville, Florida, on or about 10 November 1944 issue his check for $20 to the Roosevelt Hotel in exchange for $20 in cash,and when the check was in due course presented for payment to the bank upon which it was drawn payment was refused and the check returned marked "account appears closed." At that time the accused had no funds on deposit with the bank and his account had been closed by the bank. It was also established that accused had an account with the bank in which he had arranged that there would be deposited the sum of $75 each month. Apparently this arrangement was effected in order that the bank might be reimbursed a loan that the bank

had made to the accused evidenced by two notes of $150 each. The account shows that as soon as each monthly deposit of $75.00 was made it was immediately applied to the loan so that there were no funds on deposit in the account at any time during this intervening period with which to make payment of any checks that might be drawn on the account. In truth there was no indication that the accused ever previously used the account as a checking account. The $75 deposited on 8 November 1944 apparently was immediately applied to the balance due on the accused's note. It was sufficient to pay the note in full. As a result the bank mailed the cancelled notes to the accused and considered its account with the accused as closed. The accused, however, did not receive this communication in time to put him on notice that the bank had closed the account before he drew on the bank for $20. In view of the fact that the accused had made the arrangement with the bank concerning the monthly allotment and the notes it may fairly be inferred that he knew that the $75 deposited by means of the allotment each month would be consumed immediately by the bank in applying it to his loan. He therefore must have known that he did not have any funds on deposit with that bank when he uttered his check for $20, but took the chance that the bank, in view of his previous record of payment of his obligations, would honor his draft for $20. It is equally clear, however, that he had previously had a "line of credit" with the bank and that he had an account with the bank. He had borrowed $150 from the bank upon two previous occasions. His loans had been paid in full. His "line of credit" was shown to be $150, so, therefore, an overdraft of $20 was not in any sense of the word straining that line of credit. He was therefore justified in believing that the bank might honor his draft for $20. True he should not have adopted such a careless method of renewing his obligations to the bank, but the more serious question that concerns us is whether he intended to defraud. It appears from the papers attached to the record that accused redeemed the dishonored check for $20 about 14 December 1944 prior to the institution of the Additional Charge.

The evidence therefore favors the conclusion that the accused knowing he had no funds in his account with the bank, and knowing that the monthly allotment to the bank would be more than sufficient in December to cover the amount of the check, took the chance that the bank might honor his $20 check. In this regard he was mistaken. His failure to arrange for credit to this extent in advance was carelessness. The weight of the evidence does not support the conclusion that he at any time intended to defraud anyone. The $75 allotment payable to the bank in December was paid in due course and would have been more than sufficient to take care of the $20 draft if the bank had honored it. He redeemed the dishonored check within a reasonable time. The finding of guilty of fraud alleged in this Specification should not therefore be sustained.

For the foregoing reasons the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of

the finding of guilty of Specification 1, Additional Charge, as involves a finding that accused wrongfully failed to maintain a sufficient bank balance or to arrange for a sufficient credit for the payment of the check therein described in violation of Article of War 96. The issuing of a check which is dishonored due to the carelessness of the maker even without fraudulent intent brings discredit upon the service and constitutes a violation of Article of War 96 (CM 232592, 19 B.R. 117; CM 249006, 32 B.R. 5; CM 249232, 32 B.R. 95).

Specification 2 of the Additional Charge alleges the dishonorable failure on the part of the accused to pay a loan of $50 to a bank from its due date of 4 September 1944 to 21 November 1944 when he paid it. The records disclose no false representations, fraud, deceit, evasion or dishonorable conduct in connection with the accused's protracted delay in the payment of this note. It has been consistently held by the Board of Review that the neglect on the part of an officer to pay his debts promptly is not of itself sufficient grounds for charges against him. There must be proof of some dishonorable conduct with reference to the debt in order to constitute an offense (CM 121207, CM 123090; CM 235676, 22 B.R. 209; CM 220760, 13 B.R. 61; 221833, 13 B.R. 239). In the light of these precedents the Board of Review is of the opinion that the record of trial is not legally sufficient to support the finding of guilty of this Specification.

6. War Department records show the accused to be 27-1/2 years of age and married. He was born and reared in Fulton, New York. He completed the first ten grades of school. On 1 November 1942 he enlisted in the service as an aviation cadet, successfully completed the prescribed training as a pilot, and was commissioned second lieutenant, Air Corps, AUS, on 23 May 1944.

7. The court was legally constituted and had jurisdiction of the person and the offenses. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Specification 2 of the Additional Charge, legally sufficient to support only so much of the finding of guilty of Specification 1 of the Additional Charge as involves a wrongful failure to maintain a sufficient bank balance or to arrange for a sufficient credit for the payment of the check issued by the accused in the manner described in the Specification, sufficient to support the findings of guilty of the Charges and the remaining Specifications and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War 61 or Article of War 96.

Amy G. Eom, Judge Advocate.

Carl Stephen, Judge Advocate.

Thomas Moyer, Judge Advocate.

SPJGK - CM 273874 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAR 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 Francis H. Miller (0-2057006), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 2 of the Additional Charge, legally sufficient to support only so much of the finding of guilty of Specification 1 of the Additional Charge as involves a wrongful failure to maintain a sufficient bank balance or to arrange for a sufficient credit for the payment of the check issued by the accused in the manner described in the specification, sufficient to support the findings of guilty of the Charges and the remaining Specifications and the sentence and to warrant confirmation of the sentence. I recommend that the finding of guilty of Specification 2 of the Additional Charge be disapproved; that only so much of the finding of guilty of Specification 1 of the Additional Charge be approved as involves a finding of guilty of a wrongful failure to maintain a sufficient bank balance or to arrange for a sufficient credit for the payment of the check described in the specification. I have been officially advised that the accused is now under court-martial charges alleging the negotiation by him of five additional bad checks amounting in all to $125, and that the additional checks were negotiated subsequent to his trial and conviction in this case. It is evident 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 recommendation hereinabove made, 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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed, by order of the Under Secretary of War. G.C.M.O. 196, 9 Jun 1945)

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

SPJGN
CM 273877

13 FEB 1945

UNITED STATES	)	ARMY AIR FORCES EASTERN TECHNICAL TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Langley Field, Virginia, 10 January 1945. Dismissal and total forfeitures.
Second Lieutenant WARREN P. COLEMAN (O-716365), Air Corps.	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Warren P. Coleman, Section H, 3539th Army Air Forces Base Unit (Technical School), did, without proper leave, absent himself from his command at Langley Field, Virginia, from about 23 November 1944, to about 9 December 1944.

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

3. The evidence for the prosecution shows that the accused was a second lieutenant attached to Section H, 3539th Army Air Forces

Base Unit, Langley Field, Virginia (R. 6). According to a duly authenticated extract copy of that organization's morning report, he was absent without leave during the period between 23 November and 9 December 1944 (R. 7; Pros. Ex. 1).

4. After being apprized of his rights relative to testifying or remaining silent, the accused elected to make the following unsworn statement:

> "I have been at Langley Field since July, 1944. During this time, and through 11 November 1944, I have been assigned to no classes or duties, to my knowledge. I entered the hospital on 11 November and was released from the hospital on 22 November. Upon checking the bulletin board at Section H on that day, I found I was still not assigned to a class. There was no notice on the bulletin board pertaining to me. On 24 November, I again checked the bulletin board and my name was not listed. Several times, between 23 November and 2 December, I checked the bulletin board and my name never appeared on any absentee list or for assignment to classes. On 25 November, I had a dental appointment which I kept" (R. 14).

Earlier in the course of the trial the defense had called Lieutenant Colonel Ivan C. Jackson, who had authenticated the extract copy of the morning report introduced as Prosecution's Exhibit 1, and had attempted to examine him for the purpose of proving that the facts therein recorded were outside the purview of his personal knowledge. After he had admitted that the morning reports of Section H were made under his direction, the court, upon objection by the Trial Judge Advocate, precluded any further interrogation upon the subject by ruling that the "entry of the extract copy of the morning report cannot be attacked in validity" (R. 8).

The only other witness called by the defense was Second Lieutenant Vincent V. Tanner. He had been with the accused at the Officers' Club on 25 November 1944, had dinner with him at the Officers' mess on 26 November 1944, saw him again on 29 November, accompanied him to the Base Finance Office to draw pay on 30 November 1944, attended a dance at the Officers' Club with him on 2 December 1944, and was with him in the Officers' Lounge on 6 December 1944. All of these places were at Langley Field (R. 9-13). On the last date a notice was posted on the bulletin board of Section H Headquarters stating that Lieutenant Colonel Jackson desired to see the accused immediately. Having read this document, Lieutenant Tanner advised the accused of its contents upon meeting him later in the day at the Officers' Lounge (R. 11).

5. Recalled as a witness for the prosecution on rebuttal, Lieutenant Colonel Jackson testified that the accused had absented himself from his duly assigned class on 23 November 1944; that two notes re-

questing the accused to present himself for duty were placed on his bed at his Base quarters by a Private Selznick, one on that date and the other subsequently; that a notice was placed on the bulletin board on 25 November 1944 ordering the accused to report to a Lieutenant Frederickson; that a second notice in large red letters was posted on 2 December instructing the accused to report to Lieutenant Colonel Jackson; that a Technical Sergeant McQueen made several calls over the public address system in an attempt to locate the accused; and that on 7 or 8 December 1944 a wire was sent to the accused's father (R. 15-19). Upon cross-examination, however, Lieutenant Colonel Jackson admitted that he had no personal knowledge of any of these matters and that he was not acquainted with the accused (R. 20-22). In response to the telegram mentioned the accused's father immediately supplied a Captain Matthius with two telephone numbers at which the accused might be contacted, one being that of his Base quarters, the other that of Lieutenant Tanner's apartment in Newport News, Virginia. According to Lieutenant Colonel Jackson, officers were "not supposed to" live off the post without making formal application for permission to do so. No regulation had been adopted requiring that they sleep at their Base quarters (R. 23).

Private Max Selznick, Technical Sergeant George V. McQueen, and Second Lieutenant Edward A. Kindler, Jr., were also called as witnesses for the prosecution on rebuttal. Private Selznick had pinned two notes on the accused's bunk, one on 23 November and the other two days later. Both directed the accused to report to Lieutenant Colonel Jackson immediately. On entering the accused's room the second time Private Selznick found the first note still on the bed (R. 24-26). Technical Sergeant McQueen posted the notice in large red letters on the bulletin board on 2 December 1944. The following day he made the one and only announcement over the loud speaker system requesting the accused to report (R. 26-28). Lieutenant Kindler, the last witness for the prosecution, was a deputy disbursing officer at Langley Field. He had paid both the accused and Lieutenant Tanner in cash on 30 November 1944 (R. 28-29).

6. The Specification of the Charge alleges that the accused "did, without proper leave, absent himself from his command * * * from about 23 November 1944, to about 9 December 1944". This offense was laid under Article of War 61.

Dig. Op. JAG, 1912-40, Sec. 395 (18) states that:

> "Where it is manifest that entries in an official record required to be kept, such as a morning report or a muster roll, could not have been based upon the personal knowledge of the person who made such record, such entries are not competent evidence of the facts therein stated".

Since Lieutenant Colonel Ivan C. Jackson, the Commanding Officer of the accused's organization, was shown upon cross-examination to have no personal knowledge of the facts contained in the morning report introduced as Prosecution's Exhibit 1 and purporting to have been made by him, that document was conclusively demonstrated to be the sheerest hearsay and should have been excluded from judicial consideration. The refusal to permit the defense to examine Lieutenant Colonel Jackson, its own witness, on his familiarity with the data entered by him was manifestly error. Although the court subsequently rectified its arbitrary action by allowing his cross-examination as a witness for the prosecution on rebuttal, it again committed error by giving probative value to his discredited evidence.

The only other proof offered in support of the Specification was the testimony of Private Selznick and Technical Sergeant McQueen. This, too, falls short of its mark. The leaving of a note does not establish the accused's absence without leave from his command, for he may have been, and probably was, living off the post. Although he was "not supposed to" and "should not" have done so, according to Lieutenant Colonel Jackson, there is absolutely no evidence that officers at Langley Field were forbidden to avail themselves of civilian accomodations. The single announcement over the public address system also indicates nothing, for at that precise moment the accused may have been on the post but out of range of the loud speaker.

The use of the bulletin board raises a more difficult problem. Although Lieutenant Colonel Jackson referred to two notices, he had seen neither and his remarks thereon may accordingly also be completely discounted as hearsay. Sergeant McQueen testified that only one notice was posted and that not until 2 December 1944. It was first observed by Lieutenant Tanner on 6 December 1944, and its message was conveyed that very day to the accused. Whether the date of inception be calculated from 2 December or 6 December 1944, a continuing offense, terminating on 9 December 1944, was unquestionably committed by the accused in not promptly reporting to his commanding officer as directed. Since, however, the accused was apparently on the post throughout the period, he was not shown to have been absent without leave from his command; for the notice was merely a circumstance tending to establish that violation of Article of War 61 but not to prove it beyond a reasonable doubt. If guilty of anything under that Article, he was guilty of failing to repair at the fixed time to his properly appointed place of duty. In Dig. Op. JAG, 1912-40, sec. 419 (3) this was held not to be a lesser included offense of absence without leave from one's station. Since absence without leave from one's command is but a variant of the last crime, the Specification must be disapproved.

7. The accused, who is single, is about 23 years of age. After attending the University of Pennsylvania for one year, he was employed from September of 1941 to March of 1943 by The Pennsylvania Company as

a general ledger clerk. He had enlisted service from 21 March 1943 to 18 March 1944 when he was commissioned a second lieutenant. On 5 September 1944 he was reprimanded and directed to pay a forfeiture of $75 per month for one month under Article of War 104 for absenting himself without leave from 15 August to 18 August 1944. Since 18 March 1944 he has been on active duty as an officer.

8. The court was legally constituted. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and the sentence or to warrant confirmation thereof.

Abner E. Lipscomb, Judge Advocate.

Robert J. Connor, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN-CM 273877

1st Ind.
FEB 23 1945

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

TO: Commanding General, Army Air Forces Eastern Technical Training Command, 455 Lake Ave., St. Louis 8, Missouri.

1. In the case of Second Lieutenant Warren P. Coleman (O-716365), Air Corps, I concur in the foregoing opinion of the Board of Review, holding the record of trial legally insufficient to support the findings of guilty and the sentence, and for the reasons stated therein I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (MCM, 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action as you may deem proper.

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

(CM 273877).

Myron C. Cramer

1 Incl
Record of trial

MYRON C. CRAMER
Major General
The Judge Advocate General

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

SPJGV-CM 273879

19 FEB 1945

(99)

UNITED STATES v. Second Lieutenant VERNON B. SIMPSON (0-803053), Air Corps.	SIXTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Sheridan, Illinois, 3-7 November 1944. Dismissal, total forfeitures and confinement for five (5) years.

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, 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 92d Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: In that Second Lieutenant Vernon B. Simpson, Headquarters 223rd Army Air Force Base Unit, Combat Crew Training School, Heavy, Army Air Field, Dyersburg, Tennessee, did, at Chicago, Illinois, on or about 1 October 1944, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Esther Jacobs.

Specification 2: (Finding of not guilty).

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

Specification: In that Second Lieutenant Vernon B. Simpson, Headquarters 223rd Army Air Force Base Unit, Combat Crew

Training School, Heavy, Army Air Field, Dyersburg, Tennessee, did, at Chicago, Illinois, on or about 1 October 1944, wrongfully and unlawfully introduce Esther Jacobs, a woman not his wife, into a room occupied by him in the Stevens Hotel for immoral and unlawful purposes.

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Specification 4: In that Second Lieutenant Vernon B. Simpson, Headquarters 223rd Army Air Force Base Unit, Combat Crew Training School, Heavy, Army Air Field, Dyersburg, Tennessee, did, in room 2214 of the Stevens Hotel, Chicago, Illinois, on or about 1 October 1944, wrongfully and unlawfully photograph Esther Jacobs in obscene poses in the nude.

Specification 5: (Finding of not guilty).

He pleaded not guilty to all the Specifications and Charges, and was found guilty of Charge II and of Specification 1 thereunder and of Charge IV and of Specification 4 thereunder. As to Charge III, he was found not guilty, but guilty of a violation of Article of War 96, and guilty of the Specification of Charge III. He was found not guilty of all the other Specifications and of Charge I. Evidence was introduced of one previous conviction by general court-martial of a violation of flying regulations (A.W. 96). He was sentenced to dismissal, total forfeitures and confinement at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

Accused registered at the Stevens Hotel in Chicago on 28 September 1944, and was assigned room 2214, at a "single rate" (R. 89, 90; Pros. Ex.1).

Esther Jacobs is an unmarried Syrian woman. She was 29 years old at the time of trial. In September 1944, she was unemployed. She had been

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NAVY DEPARTMENT

a regular patron of bars in downtown Chicago, sometimes visiting these places in company with other persons (R. 133, 134), and on other occasions entering the resorts alone. She had come to Chicago the previous February and had worked in three different factories (R. 91, 92, 127 and 128). Previously, she had worked for 10 years in a tin plate mill in Washington, Pennsylvania (R. 92, 127).

Miss Jacobs testified that about midnight, 30 September 1944, she entered the Prevue Tavern, in downtown Chicago, and took a seat at the bar next to accused (R. 95, 136, 137, 140, 141, 148). After some conversation between her and accused, he offered to, and did, pay for her drink (R. 95, 147, 148). After further conversation, he invited her to a mixed party at the Stevens Hotel (R. 95, 96, 148, 149, 797). They left the tavern together (R. 97), and entered a cab, which was already occupied by Miss Fritzi Siebach (R. 96). The cab was driven north to Miss Siebach's home. Accused commented to Miss Siebach on her beauty, and suggested his desire to marry her (R. 96, 97), and to photograph her. Miss Siebach suggested that his companion might object, to which he replied that she was merely a model and not a girl friend (R. 97, 151). After Miss Siebach got out of the car, it was driven back south to the Stevens Hotel. Upon entering accused's room, Miss Jacobs observed that no others were present and asked about the party. Accused said, "They will be here in a couple of minutes" (R. 97, 98). It was then about 1:30 a.m. Accused told her to undress, as he was going to photograph her in the nude. She refused (R. 98, 99). He told her that she would be paid (R. 113). When she again refused, he struck her on the jaw and in the stomach. Then he removed her clothes, tearing her corset in the process. After undressing himself, he photographed her in the nude. She sat still and posed, because of fear of further physical violence (R.99-101, 152-3, 197-8). She assumed poses on the bed, as desired by him (R.100-102). On the bed, he forced her to take his penis in her mouth, and to be photographed (R. 102, 155-161). She identified photographs (Pros. Exs. 2-9) as having then been taken (R. 114-122). Then he forced her to lie on the floor, with his penis in her mouth (R. 105-107, 166-168, 180, 181-185). She sucked the organ, but was uncertain whether she bit it (R. 166-170). He became drowsy and inactive. His eyes closed. She slowly withdrew, and then ran from the room (R. 107, 111-112, 167, 174). She was naked, but did not think about her clothes because of fear and excitement (R. 112, 175, 178). She pressed the elevator button and called for help over the telephone. An elevator operator and a bell boy gave her their coats, and called the house detective, who in turn called the military police.

Elevator operators James Hartridge and Otis S. Fahl, house officers Nicholas W. Kartheiser and John J. Breheney, and chief night clerk George Funkhouser, testified that she was hysterical. She said repeatedly that she had been beaten by a soldier and thrown out of his room. Her appearance

was not such as to indicate that she had been beaten (R. 201-2, 205-6, 211-12, 219-20, 224, 227, 230-6, 238, 248-9, 296-8, 303). Funkhouser, Kartheiser and Breheney entered accused's room, which was neat and orderly, although they did not agree whether Miss Jacobs' clothing was on a chair, or on a luggage rack, or piled on the floor. Accused was unconscious on the floor, and was naked. It was then about 4:30 or 5:00 a.m. Prior to this time, there had been no complaints about noise or disturbance in the room (R. 237-9, 241, 243-4, 246-7, 249, 272-7, 280-283, 298-303, 792-6).

Sergeant Mike L. Spezia and Corporal Edward Fialkowski of the Military Police arrived about 6:25, and about 20 minutes later Second Lieutenant Edward W. McLaren came. Before Lieutenant McLaren's arrival, at Miss Jacobs' suggestion, and in the presence of the MPs, Breheney took a camera from underneath accused's arm, and Spezia removed two rolls of film from the dresser drawer. One of these rolls was unexposed, and the other had been exposed. Accused was revived, and about 7:00 a.m. he and Miss Jacobs went with the military police to military police headquarters (R. 251, 257, 258, 259). There First Lieutenant James J. Cowhey removed the film (Pros. Ex. 11) from the camera. This roll and the other exposed roll of film were developed by the Personnel Security Branch (R. 332-3, 338-9). Prints from eight frames of the film taken from the camera (R. 334) were mounted on cardboard, and at the trial were admitted in evidence (Pros. Exs. 2 to 9).

Captain John A. Layne, M.C., made a complete physical examination of Miss Jacobs between 1 and 2 p.m. 1 October 1944. He found bruises on her head and body (R. 374, 376). Her cervix was clean and not inflamed. Her vaginal opening was larger than is usual in unmarried women of her age.

On 14 October 1944, accused was questioned at Fort Sheridan by Major Sol A. Hoffman, MAC, who had been designated to investigate the charges under Article of War 70. Corporal Inga B. Anderson, WAC, recorded accused's statement on a stenotype. Captain Lawrence H. Meyer, the Post Adjutant, was present. Major Hoffman read Article of War 24 to accused and made an explanation of his rights (R. 391-2, 396-7, 492-3, 498). Accused examined the papers in the case (R. 493, 498), and stated that he desired to make a statement. Accused dictated a statement to Corporal Anderson. It was rephrased in part by Major Hoffman. Accused stated that it was correct (R. 394-5, 398, 485, 486, 490, 491). On 16 October 1944, in Captain Meyer's presence, Major Hoffman handed a transcript of the statement to accused, who read it and made certain corrections. He did not complain that it was inaccurate, but stated that he would not sign it until his civilian counsel appeared (R. 494).

This unsigned statement (Pros. Ex. 15) was received in evidence over objection (R. 503, 505, 506). In substance, it recites that accused was accosted in a tavern by the Jacobs woman when she noticed that he was carrying a camera. She suggested that he photograph her in the nude for pay. After several drinks he acquiesced. Upon arrival in his room, she immediately stripped. She sought, and he refused, to have sexual intercourse. He was intoxicated and could not. She then inserted his penis in her mouth, manipulated her tongue, and suggested a picture. Accused took the picture.

4. The evidence on behalf of accused is that he had eight or ten drinks of whisky, some of double strength, in a bowling alley on the evening of 30 September, and took the bartender's picture (R. 512-519). About 1:30 a.m., accused entered the Brass Rail Tavern. He wanted to take everyone's picture. William W. O'Brien, the bartender, and Joyce Briggs, the hostess, saw Miss Jacobs accost accused and heard her ask him to take her picture. Miss Briggs saw the Jacobs woman put her arm around accused's shoulder (R. 540). O'Brien heard her say that she had posed in the nude for pictures. She inquired whether accused would like to photograph her in the nude (R. 522, 525, 526). O'Brien served two drinks to accused and one to Miss Jacobs. After 2:00 a.m., they left together. Earlier that evening, the manager had pointed Miss Jacobs out to O'Brien as an undesirable and directed that he be informed if her conduct became improper (R. 523-7). O'Brien had seen her in the tavern on two or three previous occasions (R. 533-4).

Miss Fritzi Siebach was a passenger in a taxicab with accused and Miss Jacobs. He was loquacious. Exhibiting his camera, he stated that he was going to take pictures of Miss Jacobs, "a model", in the nude (R. 557, 559, 561, 564). He was drunk (R. 563). Miss Jacobs was sober (R. 564). The latter commented that most men take pictures (R. 561, 564), but appeared concerned about Miss Siebach's identity. Witness told her not to worry, that she was a pianist and not a policewoman.

Three women employees of the Harold E. Saper Company, where Miss Jacobs had been employed, testified that, unlike the other girls, she did not wear slacks, but sat habitually at a bench with her skirt above her knees and with her legs spread apart, so that her private parts were visible to the other employees, both male and female. This conduct appeared to be deliberate. It attracted general attention (R. 600-605, 608, 613, 620-22, 625-6, 632). Earlier in the summer, Miss Jacobs was employed by Coyne Electric Manufacturing Company. Her immediate supervisor, Miss Helen Brooks, testified that Miss Jacobs repeatedly related salacious stories and talked constantly about going out with and getting money from men. On one occasion, she told Miss Brooks that she had spent the previous night with a man for money. She put her arms around the men at the place, whenever they came near (R. 654-660).

John J. Kimbrell, night manager at the Stevens, saw accused and the Jacobs woman in his room about 4:30 a.m., 1 October. She looked "terribly dissipated", but did not appear to have been beaten (R. 641-2). The transom of the room, as well as those of nearby rooms, was open (R. 637). There had been no complaints of any disturbance in accused's room. As to Miss Jacobs, he directed the house officer, "Get this pig out of here" (R. 636, 648).

After being warned of his rights in the premises, accused was sworn as a witness, and testified that he attempted to join the Army the day the war began. He was sworn in on 13 January 1942 (R. 677). After completing a radio course, he was appointed an aviation cadet. Upon completion of the course, he was commissioned (R. 678). For eight months he served as an instructor, although he frequently sought foreign service. Finally, he was convicted of low flying and, at his request, was assigned as a bomber pilot and scheduled to go overseas in November (R. 679). In order to start overseas earlier, accused accepted a four-day leave in lieu of a ten-day leave (R. 679). Because four days was not enough for a trip to visit his parents in Virginia, he came to Chicago to spend the leave (R. 680). He had never been there before (R. 684).

On the night of 30 September, he went to the bowling alley, in the hope of seeing Miss Billy Shane, whom he had previously met there and whom he liked (R. 680, 684, 685). He took his camera, in order to make candid shots of floor shows and bars. Miss Shane did not appear. After bowling and drinking, he left. It was late and he was "pretty intoxicated" (R. 685-7). After more drinks in several bars, he entered the Brass Rail (R. 687). He talked there with the bartender (R. 688). Miss Jacobs came up and put her arm around him. After chatting about inconsequential matters, she suggested her desire to pose in the nude for photographs, as she needed money to support her aged father (R. 688, 689, 739, 740). After another drink, they left the Brass Rail and sought a cab. She was boisterous (R. 689, 690). They entered a cab in which Miss Siebach already was a passenger. Accused talked about taking pictures in the nude of Miss Jacobs (R. 690), who became alarmed less Miss Siebach be a policewoman.

At the Stevens Hotel, accused felt sick. It was hot and he was nauseated. Miss Jacobs prepared a cold drink for him, and he felt better (R. 694). She became passionate. After scratching his pants around his privates, she dropped her dress, exposed her breast and asked him to photograph her. As though in a hypnotic state (R. 695) he took the picture (Def. Ex. 3). She then disrobed. He was curious and did not object (R. 695-6, 725). She suggested that he undress and opened his belt. He took his clothes off and began to take pictures. He was intoxicated and his will power was weak. He tried in vain to induce her to

leave. She got on the bed and asked him to have intercourse. He had no desire and could not get an erection. She said she would not leave until she got what she wanted. Feeling that he was about to pass out, he sat on the bed. She slipped under his leg and inserted his penis in her mouth (R. 699). She suggested a picture (R. 700), which he took (Pros. Ex. 3). Intercourse per os was a new experience for him. She rolled her teeth around. It hurt. He told her that he was going to leave and attempted to get up. She said that, if he would take one more picture, she would go. He made the picture (R. 699-701, 704-744). Then he said, "all right let's go", and started to pull away. She wrapped her arms around him, would not let go, and bit his penis (R. 701, 745-6). This phallic bite was painful. It felt as if a needle pierced his abdomen. He pried her mouth open (R. 701), stepped away from the bed, slapped her, and, opening the door with one hand, threw her out the door with the other. He slammed and locked the door, so that she could not reenter (R. 702). She scratched on the door and asked for her clothes (R. 737-8). He was still in pain. The next thing that he remembered was being awakened in the presence of the military police. He insisted that he did not beat Miss Jacobs (R. 758-761), and that her bruises must have been suffered in the struggle to eject her from his room.

Captain Perry L. Simpson, accused's father, joined the Army when 16. He was a noncommissioned officer for 17 years, and had held a reserve commission since 1922. Accused is 21, and was born and raised in the Army (R. 769). He graduated from high school in 1939, worked for a time in a shipyard, and enlisted in the Air Corps when 18. Before that, he did not drink (R. 772). He was active in the boy scouts (R. 770) and regularly attended Sunday School from the age of 6 (R. 773). In January 1944, he married without his parents' knowledge. Witness declined to help accused obtain a commission because of his youth and immaturity. He became an aviation cadet (R. 772) without his father's help.

About 3 October 1944, accused was examined by Major Perry B. Wagley, M.C., a neuropsychiatrist. The report of such examination was received in evidence as Defense Exhibit 4. The examiner concluded that accused was weak, both in character and in physique, a dependent sort of person, immature and adolescent, who could easily be persuaded and influenced. His emotions were unstable. He was not homosexual or perverted, but juvenile and curious. He was lacking in judgment, and when under the influence of alcohol was unable to accept adult responsibility. The examiner found him to be free from mental disease and sexual psycopathy.

5. The greater weight of the evidence tends to establish that accused fell into the hands of an evil woman, of depraved and perverted character, who was much older than him, and that by reason of intoxication he was unable to resist her enticement to participate in the acts charged in the Specifications of which he was found guilty. It seems

to be equally well established that accused knew what he was doing when he introduced her into his room to pose for pictures in the nude, when he submitted to carnal connection per os with her, and when he made obscene photographs.

We have not overlooked the fact that in many respects, the testimony of Miss Jacobs is at variance with that of apparently disinterested and credible witnesses. She may be regarded as having been impeached in important particulars. It would seem that to shield herself, she swore that she met accused in the Prevue Tavern, while the evidence appears to be conclusive of the fact that she actually picked him up in the Brass Rail Tavern. Her statements that she did not observe the camera and that nothing was said about pictures until she entered accused's room at the Stevens Hotel is incredible in view of the testimony of the witnesses Siebach, O'Brien and Briggs that the camera and pictures in the nude were discussed by her in their presence, both at the Brass Rail and in the taxicab. Prior to the trial she swore that she was driven directly to the hotel, while at the trial she testified that the cab was driven north to Miss Siebach's home, and then back south to the Stevens Hotel. The orderly condition of accused's room and its contents, as described by the hotel employees, is inconsistent with her tale that she submitted to bucal coitus and to the taking of indecent pictures only when her resistance was overcome by a cruel beating. The terrific struggle described by her necessarily would have left the room in disorder and confusion. The evidence as a whole justifies the conclusion that this woman was a shameless harpy, who would not hesitate to resort to perjury to serve her own ends. Although her testimony may not be regarded as worthy of belief except in those particulars as to which corroboration was furnished by other and credible witnesses and by facts and circumstances in evidence, we cannot escape the conclusion that abundant corroborative evidence was presented, sufficient not only to support the findings of guilty, but such as to render any other findings unwarranted. Accused's own testimony conclusively establishes that he introduced the Jacobs woman into his hotel room to take obscene pictures, a purpose which was both immoral and unlawful, that however unwillingly, but while conscious of what he was doing, her permitted her to complete the act of sodomy, and that he made photographs of the woman while she was naked and while in the act of sodomy per os. The prints from film in his camera furnish incontrovertible proof of the sodomy and of the taking of obscene photographs. Sodomy was proven, even though there was no proof of emission. Proof of penetration by the mouth, without more, is sufficient and both parties are equally guilty as principals (MCM 1928, par. 149k). There is no doubt that the acts of which the accused was found guilty were committed by him. The testimony shows him to be a person of weak character, rather than one who is unable to adhere to the right, who particips

in the commission of the wrongful acts of which he was found guilty when he could have prevented them.

6. At the beginning of the trial, and before pleading to the merits, the accused interposed a motion to strike all the charges and specifications (R. 23-25), on the ground that the court was without jurisdiction to hear and determine the cause, for the reason that a thorough investigation of the charges, as required by Article of War 70 had not been made. The contention that the investigation was not "thorough" was based upon the fact that accused requested that the investigating officer call two witnesses, Esther Jacobs and Second Lieutenant Richard F. King, and that his counsel be permitted to cross-examine them. Any question which might otherwise arise out of the fact that Lieutenant King was not called for cross-examination at the investigation would appear to have been waived in the course of the hearing on the motion, since counsel for the accused then stated to the court:

> "* * * I would like to say that the accused waived cross examination of all the witnesses except Esther Jacobs * * *." (R. 26).

During the hearing on the motion, both the accused (R. 30-51), and the officer designated to investigate the charges under Article of War 70, Major Sol A. Hoffman, MAC (R. 54-62) testified in considerable detail concerning the manner in which the investigation was conducted. There is no substantial conflict in the testimony of these witnesses. Both agree that accused requested that Miss Jacobs be called to testify upon such examination. Major Hoffman in accused's presence called the military police headquarters in Chicago on the telephone (R. 55), and requested that arrangements be made for her production before him. Two days later he was advised that she was under the care of a physician and was not available. Major Hoffman went to Chicago on 17 October and again made inquiry concerning her availability. Miss Jacobs testified (R. 68) that she was requested to appear before the investigating officer and that she refused to comply with such request because she was ill and "feeling bad". From this evidence, the court was warranted in concluding that in good faith Major Hoffman attempted to secure Miss Jacobs' appearance for cross-examination by accused, upon the investigation and that she refused to appear. Article of War 70 provides in pertinent part:

> "* * * At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him <u>if they are available</u> * * *." (Underscoring supplied).

Accused had no opportunity to cross-examine Miss Jacobs. Was she available? The answer to this question would seem to hinge upon whether the investigating officer did all that was reasonably within his power to secure her presence. Articles of War 22 and 23 authorize the issuance of subpoenas and other process to secure the presence of witnesses before courts-martial. These articles provide for the punishment of those who neglect or refuse to appear after having been legally subpoenaed to appear and give testimony at a trial. However, no statutory provision appears to have been made for legal process to compel the appearance of a witness before an officer designated to make an investigation of charges under Article of War 70. When Miss Jacobs was requested to appear and she refused to come, there was no more that the investigating officer could do to secure her presence. There was no suggestion on behalf of the accused that Major Hoffman's effort was not made in good faith, or that the witness was deliberately withheld. These facts impelled the court to overrule the motion to strike. We think its ruling was proper. The vital question was whether the witness was "available". The court's ruling necessarily implies its conclusion that she was not available. With that conclusion, we feel compelled to agree. The refusal of Miss Jacobs to appear did not make invalid the investigation of the charges under Article of War 70. A contrary conclusion would mean that it could be in the power of a recalcitrant witness to prevent a trial by general court-martial by refusing to appear upon the investigation. Congress could not have intended to vest any such power in a witness, when it enacted Article of War 70. That article delineates the procedure by which a general court-martial acquires jurisdiction of the person of an accused (CM 229477, Floyd, XVII BR 149, 154-156; CM 237032, Nelson, XXIII BR 231, 248; CM CBI 194, Ranson.) Even where there is no attempt to comply with the provisions of Article of War 70 in respect to authentication and verification of the charges and in respect to the investigation, the errors are regarded as procedural and not such as affect the jurisdiction of the court. Such an error does not impair the validity of the findings of guilty and the sentence, unless it appears that they injuriously affected the substantial rights of the accused. In the instant case it seems to be clear that the provisions of Article of War 70 were substantially complied with, and that no irregularity occurred upon the investigation, which may be regarded as having injuriously affected the substantial rights of the accused. In this connection, it seems proper to point out that one of the reasons given by the law member for the court's decision is subject to qualification. Among other things, he stated that the question of the "availability" of a witness was one to be determined by the investigating officer (R. 64). It is true that such determination is to be made in the first instance by him. His determination is presumptively correct, but it is subject to review by the court upon special plea or upon such a motion as was presented here. The fact that a partially incorrect reason was given for a correct ruling does not here seem to be of consequence.

7. Defense moved to strike Charge III and its Specification (introducing a woman into the accused's hotel room for immoral purposes), as being multiplicious. The rule against multiplicity of charges is set forth in paragraph 27 of the Manual for Courts-Martial, 1928. It states that what is substantially one transaction should not be made the basis of an unreasonable multiplication of charges against one person. It further states (MCM 1928, p. 17) that "there are times when sufficient doubt as to the facts or law exists to warrant making one transaction the basis for charging two or more offenses". There well may have been such doubt in the minds of the accuser and the convening authority for them to feel that Charge III should have been added to the Charges when they were drawn. It would seem obvious that the "immoral purposes" for which the accused introduced Esther Jacobs into his hotel room was the sodomy and the taking of obscene pictures of which he was found guilty in separate Specifications. However, this rule against multiplicity is neither jurisdictional nor substantive, but procedural, so far as the findings are concerned. Any one of the three findings of guilty would support the sentence. This being so, the error, if it was error, was cured under Article of War 37 by the action of the reviewing authority in approving the finding of guilty of the Charges and Specifications herein involved. The same may be said of the defense's contention that Charge III should have been stricken because it was not such a serious charge as to be included with other charges serious enough to warrant the dismissal of an officer.

8. At the outset, accused moved to suppress and impound a camera, films and other property taken at the time of his arrest. It was contended that these articles were unlawfully seized incidentally to an unlawful search of accused's hotel room in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States. The motion was denied. The grounds, upon which it was based later were vainly urged in support of objections to the admission of the camera and pictures in evidence. It is undisputed that the film from which the pictures were printed was in the camera when it was taken. It is this film and these pictures with which we are mainly concerned.

The camera was plainly in sight, between the arm and body of accused, when the house officers and military police entered the room. One of the hotel employees picked it up, while an enlisted member of the military police was present, but before Lieutenant McLaren came and before accused had been restored to consciousness. Miss Jacobs then was complaining that she had been raped, and hence probable cause existed under the law for the arrest and detention of accused without a warrant (People v. Kissane, 347 Ill. 385, 179 N. E. 850, 852).

As an incident to a lawful arrest, the person arrested may be searched and property tending to incriminate him may be seized from his

person (6 C.J.S. 620, U.S. v. David, 107 Fed. (2d) 519). It seems to us to be immaterial that accused was not actually placed under military arrest until a few minutes after the search, when Lieutenant McLaren arrived. Accused was actually in a status of detention, which was the equivalent of an arrest within the meaning of the authorities cited in 6 C.J.S. 620, at the time the evidence was seized. Moreover, the camera was actually taken from accused by a house detective of the hotel, and not by a military policeman. There is no evidence of any arrangement that the hotel employer should make the search and seizure to circumvent accused's constitutional rights. It has been held that evidence seized illegally by state officers and turned over to federal agents is admissible on a trial in a federal court (U.S. v. Blanco, 27 Fed. (2d) 375). The mere presence of a federal officer when an illegal search and seizure is made by one not connected with the federal government does not render evidence, so obtained, subject to exclusion upon motion to suppress (Malacruis v. U. S., 299 Fed. 253). A defendant may not successfully object to the admission of evidence obtained by an unlawful search of his premises by a private person (Chapman v. Comm., 206 Ky. 439, Barnett v. Comm., 207 Ky. 160). Evidence turned over to the prosecution by a third party is admissible, if competent, relevant and material, even though it was obtained in an unlawful manner (State v. Barrett, 254 Pac. 198).

The court did not err in denying the motion to suppress and in admitting the camera and pictures in evidence. Even were it made to appear, as was not done here, that the evidence had been obtained unlawfully, nevertheless no substantial right of the accused could have been injuriously affected, in view of the fact that pictures did not tend to prove anything which was not in fact established by accused's own testimony.

9. Prior to the trial accused made a statement to the officer who investigated the charges under Article of War 70. Some of the language was rephrased by the investigating officer. Prior to giving the statement, accused was warned of his rights. Article of War 24 and Article of War 70 were read to him by the investigating officer. The statement was recorded on a stenotype by Corporal Inga B. Anderson, WAC. He read the typewritten transcript prepared by her, made certain minor changes in the language, after which he stated that it was correct. He declined to sign the statement, until it had been discussed with his civilian counsel. It was never signed. The lack of a signature is immaterial, since a confession may be either oral or written. The vital question presented to the court was whether the confession was voluntary, and whether the transcript accurately recited the substance of accused's statement. Whether the transcript was the statement of the accused is a question of probity. Whether it was voluntary is a question of admissibility. A mixed question of law and fact was thereby presented.

Assuming this statement to be a confession, and applying the more stringent rules in regard to confessions and their admissibility, the Manual for Courts-Martial, 1928, provides (sec. 114b, p. 116):

> "* * * No hard and fast rules for determining whether or not a confession was voluntary are here prescribed. The matter depends largely on the circumstances of each case. * * *"

There is nothing to indicate any promise or reward was held out to the accused to make the statement, nor is there any evidence of fraud, coercion, pressure or undue influence used in the obtaining of it. We find nothing in the attitude of the investigating officer or the manner in which the statement was taken to indicate the contrary.

If the court believed the testimony of Major Hoffman and Corporal Anderson it was warranted in concluding that the transcript was accurate and correct, and that it was voluntarily and understandingly made. It may be noted in passing that the substance of the confession is not in conflict with the testimony of the accused as a witness on his own behalf.

10. The records of the War Department show that the accused is less than 22 years of age. He was born in Elizabeth City, Virginia, is a high school graduate and is married. He enlisted in the Regular Army 13 January 1942 and was discharged 28 April 1943 to accept a commission as Second Lieutenant, Air Corps, 29 April 1943. He is a qualified Army pilot and was a flying instructor for eight months.

11. Evidence was offered of one previous conviction for low flying. With this exception, there is no evidence that accused's military record had been otherwise than good. At his own request, he was under orders to go overseas, at the time of the commission of the offenses of which he has been found guilty.

12. Attached to the record of trial is a letter signed by nine of the ten members of the court, recommending clemency because of the youth, background and inexperience of the accused, because the psychiatric examination showed him to be immature in emotional and physical reactions and to be lacking in judgment, and because he appeared to be easily influenced by older people and to be unable to accept adult responsibilities. These members of the court state that in their opinion the ends of justice would be best obtained by remitting the confinement adjudged, "leaving the accused in such status as would then make possible for him subsequent enlisted service," and they recommend remission of the confinement.

13. 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 Articles of War 93 and 96.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind
FEB 21 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 Vernon B. Simpson (0-803053), 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. The accused was found guilty of sodomy, in violation of the 93rd Article of War, and of introducing a woman into his hotel room for immoral purposes, as well as taking obscene pictures of a nude woman in his hotel room, in violation of the 96th Article of War. He has one previous conviction for low flying. He was sentenced to dismissal, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. Nine of the ten members of the court recommended remission of the confinement. I recommend that the sentence be confirmed but the confinement and forfeitures be remitted, and the sentence as thus modified be carried into execution.

3. Consideration has been given to letters from civilian counsel on behalf of accused, addressed to the Commanding General of the Sixth Service Command, dated 23 December 1944, 23 December 1944 and 6 January 1945, respectively, requesting clemency in behalf of the accused. Consideration has also been given to a letter from the father of accused, Captain Bailey L. Simpson, dated 8 February 1945 and to a Memorandum addressed to The Judge Advocate General from Brigadier General Miles Reber, with inclosure, dated 7 February 1945. These communications are attached to the record of trial.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

8 Incls
1. Record of trial
2. Dft ltr for sig S/W
3. Form of action
4. Ltr fr civilian counsel, dated 23 Dec 1944
5. Ltr fr civilian counsel, dated 23 Dec 1944
6. Ltr fr civilian counsel, dated 6 Jan 1945
7. Ltr fr Capt. Simpson, dated 8 Feb 1945
8. Memo fr Brig. Gen. Miles Reber, dated 7 Feb 1945, w/incl

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

SPJGQ
CM 273922

2 FEB 1945

UNITED STATES v. Private GUILLERMO O. ORTEGA (39575704), Company C, 15th Training Battalion, 4th Training Regiment, Infantry Advanced Replacement Training Center, Camp Gordon, Georgia.	INFANTRY ADVANCED REPLACEMENT TRAINING CENTER Camp Gordon, Georgia Trial by G.C.M., convened at Camp Gordon, Georgia, 16 January 1945. Dishonorable discharge (suspended) and confinement for five (5) years. Disciplinary Barracks.

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Private Guillermo O. Ortega, Company C, 15th Training Battalion, 4th Training Regiment, Infantry Advanced Replacement Training Center, Camp Gordon, Georgia, did, without proper leave, absent himself from his organization and station at Camp Gordon, Georgia, from about 23 November 1944 to about 7 December 1944.

He pleaded not guilty to, and was found guilty of, the Specification and the Charge. Evidence was introduced of two previous convictions for absences without leave for brief periods and breach of arrest. 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 (5) years. The reviewing authority approved the sentence, suspended that portion thereof adjudging dishonorable discharge, and

designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 14, Headquarters Infantry Advanced Replacement Training Center, Camp Gordon, Georgia, 22 January 1945.

3. The evidence for the prosecution consisted of a duly authenticated extract copy of the morning report of the specified organization of the accused, entered 14 December 1944, showing the accused from 22 days' furlough to AWOL 23 November 1944 (R. 7; Pros. Ex. 1), a duly authenticated copy of the morning report of the Military Police Detachment, Ninth Service Command, Los Angeles, California, showing the accused confined at that station 7 December 1944, released with guard 19 December 1944 (R. 8; Pros. Ex. 2), and the testimony of the company commander of the accused's specified organization. The witness testified, identifying the person of the accused, and identifying him as a member of the military service (R. 6). He testified that he had seen the accused only once (R. 6), about 24 December 1944, when he was brought to the station under guard after apprehension (R. 8). The accused was absent from the company on 23 November 1944 (R. 7). From that time to his return 24 December, the captain stated, "he had not officially been there, not to my knowledge. I had never seen him" (R. 8). The captain testified:

> "I know he was absent because as Company Commander, it was my duty to keep track of the absentees and it so happened that Ortega had been carried as assigned but not joined as he had been given a furlough from Orlando, Florida and had never physically joined the organization. Therefore, my only knowledge of Ortega was that morning report entry. I might have overlooked his absence except that just prior to the date of expiration of his furlough, a report came in from the military police in California. That report was dated the 17th of November 1944. It was a delinquency report which stated, or rather the delinquency report called my attention to the fact that Ortega was a member of my command whose furlough was about to expire." (R. 7)

4. The accused, duly advised of his rights, elected to remain silent and introduced no evidence.

5. Prima facie, the extract copy of the morning report of the specified organization of the accused would have been sufficient to show his absence without leave from 23 November 1944. However, the testimony of the company commander affirmatively disclosed that the accused had never been with his organization and further established only that he "had been carried" as assigned but not joined and was on furlough status. Since he had not joined, the fact that he had been assigned and given a furlough were matters which, since they obviously occurred at another station, patently were not within the

personal knowledge of the witness. If there were orders assigning the accused to the station and organization specified, such orders should have been introduced in evidence to establish the duty of the accused to be present with the specified organization at the specified time and place. The record shows no such orders. Proof that the accused was a member of the military service and was not present in a particular company at a particular station, where he was "carried as" assigned but not joined, is insufficient to sustain the findings of his absence without leave for want of the establishment of any duty to be present there.

C.M. 199270, Andrews, 3 BR 343, sharply criticized the failure to prove the orders transferring the accused to his new station, but held that the morning report entered at the new station was admissible to establish prima facie the assignment of the accused, as well as his absence, since it was the duty of the company commander to know what officers and men were assigned to his organization and to know their status. On the presumption of regularity, it was presumed that the soldier was duly transferred to and assigned to duty with the organization which showed his absence on the morning report. However, such presumption of accuracy was there recognized as existing only until the recital should be impeached, and accordingly such presumption does not prevail where other evidence affirmatively discloses a lack of foundation for the entry in question, or casts reasonable doubt upon it.

6. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and the sentence.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ - CM 273922 1st Ind

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

TO: The Secretary of War

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U. S.C. 1522), is the record of trial in the case of Private Guillermo O. Ortega (39575704), Company C, 15th Training Battalion, 4th Training Regiment, Infantry Advanced Replacement Training Center, Camp Gordon, Georgia.

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

3. Inclosed is a form of action suitable to carry into effect this recommendation, 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

(Findings of guilty and sentence vacated by order of the Under Secretary of War. G.C.M.O. 75, 23 Feb 1945)

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

SPJGH
CM 273929

3 MAR 1945

UNITED STATES v. Private HERBERT W. REID (33813129), Company C, 5th Replacement Battalion, Army Service Forces Personnel Replacement Depot, Camp Beale, California.	CAMP BEALE Trial by G.C.M., convened at Camp Beale, California, 11 January 1945. To be hanged by the neck until dead.

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 soldier named above and submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 92d Article of War

Specification: In that Private Herbert W. Reid, Company C, Fifth Replacement Battalion, Army Service Forces Personnel Replacement Depot, Camp Beale, California, did, at or near Marysville, California, on or about December 24, 1944, forcibly and feloniously, against her will, have carnal knowledge of Betty Ann Roper.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by a special court-martial for AWOL from 3 November 1944 to 19 November 1944 for which the accused was sentenced to forfeit $33 per month for three months was considered by the court. He was sentenced in the instant case to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. On Saturday night, 23 December 1944, about 11 p.m. the prosecutrix, Betty Ann Roper, age 15, and her "boy friend", Wilbur Guy Lewis, age 16, were parked outside the former's residence in Marysville, California. The accused approached the car and solicited a ride to Sacramento (R. 10, 28, 29). Lewis indicated that this was impossible and during the course of the discussion the accused asked the prosecutrix to get him a girl (R. 10, 30). Finally, they agreed to take him to the bus station in Marysville. En route the accused changed his mind and stated that he wanted to "go out here just over the bridge" (R. 10, 29). On reaching the indicated location, it now being about 11:30 p.m., they stopped across from "Alabam's", apparently a place where liquor was sold, and the accused invited them to have a drink, an invitation which they refused. Up to this point relations between the three were not unpleasant (R. 15, 31). The accused, however, now became more forceful and demanded that they take him further. They acceded to his demands, drove over a railroad track and stopped again. On his direct testimony Lewis stated that the accused at this point threatened him with an automobile crank and then gave him 50 cents and ordered him to drive on to the camp (R. 29, 88). After driving another 200 or 300 feet accused directed Lewis to stop and, by threatening him with the crank and stating that he had a knife in his pocket, forced Lewis from the car (R. 10, 29, 89). Outside the car the accused asked Lewis if he had ever made "a pass" at Miss Roper (R. 32). The latter, however, stated that this conversation took place before they alighted and in her presence (R. 10). He asked Lewis if he knew any girls in town and "what [the] chances might be with Miss Roper." Lewis stated "there wasn't any" whereupon the accused inquired whether Lewis had any objections to his "trying". Lewis then changed the subject without indicating that he had any objections (R. 32). The accused forced Miss Roper to get out of the car -- after she, in the meantime, had tried to lock the door -- and the two were compelled to go with him into an adjoining orchard (R. 10, 23, 29, 34). They walked three abreast, Lewis on the accused's left and Miss Roper on Lewis' left (R. 16, 33). As an inducement for accused to cease molesting them she suggested without success that they return to town where they would get some liquor and girls. After they had proceeded some distance into the orchard accused ordered Lewis to return to the road and as Lewis protested, Miss Roper started to slip away but returned when accused ordered her to. Lewis then reluctantly returned to the road (R. 11, 17, 18). The accused then asked the prosecutrix "what the chances were" and she replied that she "didn't believe in those things." He asked her what she thought of colored soldiers and she replied, "they are okay as far as I know", or words to that effect (R. 48). He pinned her against a tree and tried to kiss her. She screamed and bit his finger. He threatened to hit her with the crank and said, "If you scream again I will kill you." She managed to break away by bending his fingers but he caught her after she had run only a few feet and pushed her to the ground. During the

struggle she lost a corsage she was wearing in her hair (R. 27, 45). She kicked him in the face and tried to run again. He hit her on the head with his fist. When she still tried to run he hit her on the head with the crank and she became unconscious (R. 11, 18, 19). When she regained consciousness he was just finishing "raping" her; her underclothes were "pulled over", and he had his "private parts" in hers.

After completion of the act accused accompanied Miss Roper back to the road and "pushed a one dollar bill" into her hand telling her to obtain a bus back to town. She reluctantly accepted the money because she was without funds (R. 12). Just as they reached the highway an automobile approached and the accused pulled her across the road and down into a ditch and held her there until it passed. She made no attempt to attract the attention of its occupants by screaming while she was being dragged across the road as they were not close enough to the approaching automobile. However, neither did she do so when the automobile passed while she was being held in the ditch . He then dragged her into another orchard, pushed her down on the ground, held her hands down by her side and again had intercourse with her. This time she was "so weak and worn out" that she was unable to offer much resistance although she managed to scratch him. She did not scream but did attempt to escape from him (R. 13, 14, 20, 21, 22, 50). After this episode the prosecutrix saw a house with the lights on about the distance of "a good block" away and started toward it. The accused followed her and asked whether he might see her again. For fear of provoking him and to insure that he would let her go without further molestation she said that he could and designated a meeting place (R. 13, 21, 23). She asked accused for a cigarette, being accustomed to smoke occasionally when nervous, but did not smoke the one he gave her (R. 20-21). They separated, she going to the house. She found no one there but she entered and attempted to telephone a taxicab driver who was a friend of hers. She did not contact him so she left her number and about one half hour later he called back. To ascertain her whereabouts so she could direct him to her location she left the house and proceeded toward the road, although frightened and reluctant to do so, and was found by a corporal and a lieutenant who had been searching for her (R. 13, 22, 23, 37).

In the meantime, Lewis had remained in the orchard after the prosecutrix and the accused were lost from his sight. When he heard her scream he ran to a parked automobile occupied by two soldiers and two women. He told them what had happened and the women started for Marysville in the automobile to notify the Military Police while the two soldiers and Lewis searched the orchard in vain for Miss Roper. They called for her but she did not hear them nor were they able to find her. It was then about 11:40 or 11:45 (R. 29, 35, 50, 91).

At about 12:30 a.m. the Military Police at Marysville were notified of the incident by an unidentified woman. As a result of

this information Corporal Barnie J. Shaw and First Lieutenant Arnold B. Pratt, Corps of Military Police, went to the scene. After searching both sides of the road without success they saw Miss Roper coming from a nearby house. The lieutenant asked her "if she was the girl" and she replied she was. She collapsed and was carried into the car. At this time, according to the lieutenant's testimony, she became so hysterical that the lieutenant had to hold her down in the seat. He further testified that her clothing was not greatly disturbed and her coat, which was light colored, was not dirty but was damp and "rumpled." She had a "knot on her forehead which protruded about an inch or an inch and a quarter" but it was not bleeding. Her jaw was a little red. On the way to the first aid station at Marysville in response to a question, she stated that she had been raped (R. 36-44, 73-76).

The accused, after leaving Miss Roper, was given a ride to Camp Beale by a lieutenant who picked him up on the road. At the camp gate the accused was removed from the car by a lieutenant attached to the Military Police. When the driver asked the reason for this he was told by the lieutenant that it was "a case of rape." The accused repeated the word "rape" and when he got out of the car said, "Here I goes." The knees of accused's trousers and the sleeves of his coat were very wet and muddy as were his shoes. A little piece of skin had been torn from one of his fingers which was wrapped in a handkerchief and he had several scratches under one of his eyes. He had been drinking (R. 51, 52, 58, 59, 60, 61). The accused was then taken upstairs where in a line-up of three colored soldiers the prosecutrix identified him as her assailant (R. 26, 30, 62).

Evidence of the prosecutrix' physical condition and of the condition of her clothing was furnished by the prosecutrix and by a medical officer who examined her about three hours after the alleged assault. She testified that her blouse was torn, her coat had a few spots of dirt on it and that there was blood on her panties which she supposed was caused by the "attack." She admitted that she began menstruating on 25 December but denied that there was any sign of it on the 24th (R. 45-50).

The medical officer testified that she had a lump on her left forehead about one quarter inch high and some swelling on the left side of her face and her left upper lip. There was no odor of alcohol on her breath. Her hymen was slightly swollen, lacerated, ruptured, and slightly ecchymotic. There was blood in the vagina. A test to determine the extent of the injury thereto revealed that "an attempt to dilate her vagina orifice to the extent of two fingers spread caused her quite a little distress" although "one finger was admitted fairly easy." Such swelling and soreness of the vagina after intercourse is not uncommon in cases where the woman is a virgin or has not had much sexual experience. There is no way to differentiate

between blood that is the result of menstruation and blood that is the result of a ruptured blood vessel. A shock can cause an abnormal menstrual period. The lump on her head was consistent with a blow that would render her unconscious for a maximum of two minutes but it was like a swelling that would be raised when the head was bumped up against a wall or any flat object (R. 64-68). The prosecutrix was not "terribly upset" but she did become "a little upset" when he began his examination (R. 69). Microscopic and chemical analysis confirmed the presence of blood on the panties and revealed that there were living spermatozoa in her vagina (R. 69).

Later Sunday morning the prosecutrix, accompanied by civilian and military authorities, visited the locale of the alleged assaults. An automobile crank was found in the orchard about 285 yards from the road. In the words of the prosecutrix "It was quite a ways" * * * "approximately about half a block east" of the place where the accused first had intercourse with her (R. 25, 39). No attempt was made to obtain fingerprints from it because it was wet with dew (R. 41). This crank was identified by Lewis as the one that the accused had taken from his car (R. 35). Seventy-five yards distant from the crank they found a stocking cap muddy and wet with dew (R. 41, 42). No blood was found on it, and no tests were made to determine the presence of any other substance on it (R. 42). The prosecutrix denied that accused had given her the cap to clean herself (R. 20, 86, 87). On the following Friday another trip was made to the orchard and on this occasion they found a corsage about 20 feet from where the crank was discovered and in a direction opposite to the place where they had previously located the cap (R. 42). The prosecution identified this corsage as the one that had fallen from her hair during the scuffle with the accused (R. 45).

4. The accused, after his right to testify, to remain silent, or to make an unsworn statement was explained to him, elected to be sworn and testify. On the night of 23 December 1944 he was drinking in a restaurant when an altercation developed and the Military Police assumed custody of him, took him to the bus station and relieved him of his pass. They directed him to board a bus and return to camp but instead he went back to town to look for some of his companions. Unable to find them and afraid to return to the bus station he approached the Lewis automobile and solicited a ride to camp. Lewis agreed to take him part way. At first they stopped near a restaurant but the accused, still worried about the Military Police, persuaded him to drive on a little further. They drove on and when they stopped this time the accused gave Lewis 50 cents for the ride. He then asked Lewis if he knew where there were any girls and the prosecutrix indicated that she could find some. This was the first time he had mentioned that subject. The accused then stated that he would like to speak to Lewis outside the car. They alighted and he asked Lewis whether he could talk to the prosecutrix. Lewis stated that he could. He spoke to her and she got out of the car, Lewis getting back in. Asked what she thought of colored soldiers the

prosecutrix replied that they were "all right." After denying previous sexual experience she finally admitted, when pressed by him, that she had "been with two soldiers." The accused then inquired about her having sexual intercourse with him. She referred to the presence of Lewis and the accused dismissed him with the remark "He act like he is nowhere." The accused and Miss Roper then started across the field. He never at any time had a crank in his hand nor saw one that night but Lewis followed them with something in his hand, although accused did not know what it was. He told Lewis to go back and Lewis did. The accused's testimony continued:

> "we walks on out there and walks to a tree. So we started talking and I played with her awhile and asked could I be with her and she said: 'I guess so.' I tried to do it standing up and I couldn't do it so I take my blouse off and hat and I laid my blouse down. Then when I was doing it I had her legs up and she told me to put her legs down it hurt back there. So I got finished and she didn't have anything to wipe with so I have a stocking cap I give her."

Going back toward the car he assured her she would not have a baby, when she seemed worried about it. In answer to his query about "Roy" (referring to Lewis) she stated that he would not tell anyone. On reaching the road they could not find Lewis' automobile so he gave her some money for taxicab fare. They crossed the road and she tripped on the bank but so far as he knew she did not bruise herself at that time although she had bumped against a limb "in a way when we were like back against the tree." They smoked a cigarette and made a date for the following evening. With her permission he again had intercourse with her, using his blouse and hat for her to lay on. Thereafter he left her, it now being some 35 minutes since they first left Lewis' automobile, and accused started walking along the road en route to camp. He was chased by a couple of dogs and fell while running away from them. A lieutenant gave him a ride back to camp and when they reached the camp gate he was ordered out of the car by a military policeman. When he asked the reason for that and was told that it was "a case of rape" he said, "Oh, here I go again." In making that remark he had reference to the fact that previously that evening he had been in the custody of the Military Police. He must have scratched his nose while walking through the orchard because Miss Roper had not done it. His hand had been hurt during the argument in the barroom earlier that evening (R. 77-81).

One of the Military Police "made some like he would punch me up." He was taken into a room with two other soldiers "and the girl was laying on the bed" and she asked him to repeat his name. When questioned, he denied that he had raped anybody. They said they would like to shoot him, so after that he said nothing (R. 79).

On cross-examination the accused testified that he had no difficulty in "getting [his] thing in" on either occasion and that he never noticed any bleeding. He stated that the prosecutrix had refused to remove her panties entirely but she had removed them from one leg.

5. In rebuttal the prosecution offered evidence as to the condition of the accused's blouse. It was testified that it was taken from him early in the morning of 24 December and at that time it was wet and there was mud on it. The mud was "on the sleeves and elbows" but there was "none right on the back" (R. 84).

The prosecutrix resumed the stand and denied that the accused had removed his blouse and put it on the ground for her to lay on and that she had used accused's stocking cap as claimed by him (R. 85-88).

6. Paragraph 148b, Manual for Courts-Martial, 1928, defines rape as the "unlawful carnal knowledge of a woman by force and without her consent." The accused admits sexual intercourse with the prosecutrix on two occasions on the night and morning in question but contends that she consented thereto. As to consent, the same paragraph of the Manual for Courts-Martial contains the following admonition in the light of which the evidence on this point must be viewed:

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

The testimony of the prosecutrix shows that the accused forced himself on her and her youthful companion, Lewis, and finally persuaded them to drive him part of the way to Camp Beale. After they had twice tried to rid themselves of him, the accused by threatening them with an automobile crank forced them to stop the car and compelled the prosecutrix to accompany him into an adjoining orchard. When she resisted his advances by biting him and screaming, he threatened to kill her and finally overcame her opposition by rendering her unconscious with a blow from an automobile crank. He then had sexual intercourse with her. He followed her after he had finished and again had sexual intercourse with her, overcoming her weakened resistance by holding her arms down by her sides.

Lewis' testimony corroborates that of the prosecutrix on all events occurring immediately prior to the actual acts of intercourse. The lieutenant who found her described her collapse and subsequent hysteria when she realized she was safe. A medical examination revealed that her face was swollen and that she had a lump on her forehead. The accused's attempt to explain the condition of the prosecutrix' face and

forehead as the result of her striking the branch of a tree was unconvincing particularly in the light of his admission that she did not at the time indicate that she was injured. The examination further revealed a soreness, swelling and laceration of her hymen and vagina which tended to show that penetration was forced and additional corroboration of this fact is found by the presence of blood on her panties. The crank the accused wielded was found in the orchard near the place where the corsage she lost during the struggle was discovered. Its presence there is much more rationally explained by the prosecution's theory that the accused discarded it after he subdued Miss Roper than by adopting the accused's contention that Lewis carried it into the orchard and left it there. There was evidence that the accused had several scratches on his face and an abrasion on his finger. He did not account for the former and the court was at liberty to disbelieve his uncorroborated explanation that the latter had been self-inflicted during a barroom altercation earlier in the evening, in view of the fact that his use of a handkerchief as a bandage indicated that it was of more recent origin.

The accused admitted that he forced himself on this couple without any solicitation from either of them. He conceded that he introduced the subject of girls and that he made the first overtures to Miss Roper. He made no claim that prior to his suggestion she gave him any reason to believe that she would be willing to have sexual intercourse with him. According to his story, all that was necessary for him to achieve his purpose was to secure Lewis' permission and engage in a few moments' conversation with the prosecutrix. In the absence of any corroborating evidence the court was fully justified in disbelieving that he accomplished his purpose in the manner which he related and that Lewis exhibited the docility and the prosecutrix the shamelessness that he attributed to them.

Moreover, the accused's story that on both occasions he spread his blouse on the ground to protect her against the mud and dampness was belied by the presence of mud on the sleeves, particularly around the elbows which indicated that the blouse had been worn by him at the time when he had intercourse with the prosecutrix.

In view of the foregoing evidence the record amply warrants a finding that the youthful prosecutrix on neither occasion consented to the accused's having sexual intercourse with her but that she resisted to the utmost of her ability until rendered unconscious or until completely exhausted. In reaching this conclusion we have fully considered the conduct of the prosecutrix both prior to and after the acts of intercourse and find in it no substantial basis for discrediting her testimony.

7. The accused is 21 years of age and was inducted on 6 July 1944.

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

Thomas H. Tally, Judge Advocate

William H. Gambrell, Judge Advocate

Robert E. Trevethan, Judge Advocate

SPJGH-CM 273929 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAR 24 1945

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private Herbert W. Reid (33813129), Company C, 5th Replacement Battalion, Army Service Forces Personnel Replacement Depot, Camp Beale, California.

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. There appear to be no mitigating or extenuating circumstances. I recommend that the sentence be confirmed and carried into execution.

3. Consideration has been given to (a) the inclosed letters dated 13 January, 18 January and 15 February 1945, from Mrs. Gertrude Reid, wife of the accused, addressed to the President, (b) the inclosed telegram dated 19 January 1945, from Miss Carolyn D. Moore, Executive Secretary of the Philadelphia Branch, National Association for the Advancement of Colored People, addressed to the President and (c) the inclosed letter and telegram, both dated 19 January 1945, from Miss Moore to Colonel R. E. Kunkel, of this office. By letter dated 21 February 1945 this office advised Miss Moore, in response to her request for a hearing, that the Board of Review would be pleased to grant a hearing on either 26 February 1945 or 27 February 1945. No further word has been received from Miss Moore and no representative of the National Association for the Advancement of Colored People has appeared at this office for a hearing.

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

8 Incls
1. Record of trial
2. Ltr fr Mrs Reid, 13 Jan 45
3. Ltr fr Mrs Reid, 18 Jan 45
4. Ltr fr Mrs Reid, 15 Feb 45
5. Telegrams fr NAACP, 19 Jan 45 (2)
6. Ltr fr NAACP, 19 Jan 45
7. Dft ltr for sig S/W
8. Form of action

10

(Sentence confirmed. G.C.M.O. 362, 23 Jul 1945)

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

SPJGN-CM 274119

6 MAR 1945

UNITED STATES v. Private WILLI SCHMIDT (32061484), Company C, 1800th Engineer General Service Battalion.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Forrest, Tullahoma, Tennessee, 8 January 1945. Dishonorable discharge and confinement for ten (10) years. Disciplinary Barracks.

HOLDING by 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 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 Willi Schmidt, Company C, 1800th Engineer Service Battalion, did, at Thayer General Hospital, Nashville, Tennessee, on or about 7 November 1944, wrongfully and unlawfully make and utter the following disloyal statement against the United States of America, to wit, "I will be glad when I can go back to Germany. The people here, in America, are 100 years behind the times. If you think this war is rough wait until the next one. I will be right at home when I can go back to Hamburg, Germany", or words to this effect.

Specification 2: In that Private Willi Schmidt, Company C, 1800th Engineer General Service Battalion, did, at Thayer General Hospital, Nashville, Tennessee, on or about 25 October 1944, wrongfully and unlawfully make and utter the following disloyal statement against the United States of America, to wit, "My mother lives in Hamburg, Germany, where she owns some apartment houses that have been bombed. I have a brother in the German Air Force that has been recently killed, and three other brothers in the German Army. Hitler is the most

wonderful person in the world. I am going back to Germany after the war", or words to this effect.

Specification 3: In that Private Willi Schmidt, Company C, 1800th Engineer General Service Battalion, did, at Thayer General Hospital, Nashville, Tennessee, on or about 10 November 1944, wrongfully and unlawfully make and utter the following disloyal statement against the United States of America and Russia, an ally of the United States of America, to wit: "Of course Hitler will not be killed after the war. After the war the United States will permit Germany to remain strong so as to help this country fight the Russians. The happiest moment in my life will be when I can go back to Hamburg, Germany", or words to this effect.

Specification 4: In that Private Willi Schmidt, Company C, 1800th Engineer General Service Battalion, did, at the home of Dr. C. S. Simmons, Nashville, Tennessee, on or about 5 November 1944, wrongfully and unlawfully make and utter the following disloyal statement against the United States of America, to wit: "Hitler is a wonderful man and he has done a lot for Germany. War brings out the best in people, since they can accomplish so much during the course of the war", or words to this effect.

The accused pleaded not guilty to, and was found guilty of, the Charge and the Specifications thereunder with the exception of the words in Specification 4 that: "War brings out the best in people, since they can accomplish so much during the course of war". After evidence had been introduced of one prior conviction by summary court for absence without leave, 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 a period of ten years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The evidence for the prosecution shows that Mrs. Veva Greve, a Grey Lady serving at the Thayer General Hospital, Nashville, Tennessee, had been instructed "to talk to the patients and draw them out as to their home life". On 25 October 1944 she approached the accused, who apparently was being treated for injuries sustained in an accident, and engaged him in conversation (R. 10, 15, 18). His remarks were summarized by her as follows:

"He told me he had one brother killed and three other brothers in the German service; that his mother had an apartment house in Hamburg, Germany, which had been bombed; that he thought the United States was about 100 years behind Germany and that Germany was a very wonderful place.

* * * * *

"/W/hen he said Germany was so far ahead of the United States, he said the good German people think Hitler is wonderful, and that he probably would go back to Germany after the war" (R. 10, 12).

A few days later on 5 November 1944 he was a guest at the home of Dr. C. S. Simmons in Nashville (R. 7, 9). While speaking to a Mrs. Edith L. S. Cox, the accused stated that "he had come to this country in 1929" from Hamburg, Germany; that his native land was "a very beautiful place;" and that "he had four brothers in the German Army, two of whom had been killed." At this point she expressed the opinion that "it was a pity that his country had fallen into the hands of a mad man." In reply the accused asserted that Hitler "was a wonderful man and that he had done a lot of /sic/ Germany" (R. 8).

The accused was still undergoing treatment at the Thayer General Hospital between 7 and 10 November 1944 and frequently indulged in "bull sessions" with other patients (R. 12, 14-16, 18). In the course of several conversations with Corporal Allen W. Craver occurring on 7, 8, and 9 November 1944 he stated that "he would be glad to go back to Germany, because the people in this country were 100 years behind the times"; that "when he went overseas, he would be right at home in Hamburg, Germany"; and that "if we thought this war was rough, just wait until the next one" (R. 16, 18).

Sergeant Hascal H. Hooper, another patient, talked with the accused at some length over a period of several days around 10 November 1944. Their respective comments were described by Sergeant Hooper as follows:

"I think I had been reading a newspaper, and I asked him what did he think we would do with Hitler after the war. I said I think we will kill him, and he said 'No, <u>we</u> arn't /sic/ trying to kill Roosevelt' and I said 'We are with the victors.' He said he did not think they would do anything to Hitler; 'no, they are not going to kill him - <u>we</u> are not trying to kill Roosevelt.' I said they might attempt it or something to that effect. Then he said he did not think they would do anything to Hitler (underscoring supplied).

* * * * *

"At one time he told me he had a brother in the German Air Force who had been killed and another brother in the German Air Force and another brother who was a Captain in the German Submarine service and that his mother lives in Hamburg and that the happiest day of his life would be when he returned to Hamburg, Germany.

* * * *

"I think I asked something about the strength of Germany after the war and he said Germany would be stronger, in case we fought Russia.

* * * *

"As to whether Germany would be broken up or would remain strong after the war, he made the statement that Germany would not be weak after the war, because we would probably need Germany to help fight Russia" (R. 12-16).

4. After being apprised of his rights as a witness, the accused elected to remain silent. No evidence was adduced on his behalf.

5. Specifications 1, 2, and 4 of the Charge allege that the accused on or about 7 November, 25 October, and 5 November 1944, respectively, did "wrongfully and unlawfully make and utter [certain] disloyal statement[s] against the United States of America". Specification 3 alleges that he on 10 November 1944 did "wrongfully and unlawfully make and utter a [certain] disloyal statement against the United States of America and Russia, an ally of the United States of America." These acts were laid under Article of War 96.

Although all of the statements made by the accused evidenced admiration for the German people, preference for his native land, doubt of some of our war aims, and distrust and animosity toward our Russian ally, only one of them can properly be held to be intrinsically disloyal. The rest revealed a patronizing attitude toward this country and its people but they were not traitorous or subversive in character and were not calculated to incite disaffection in, or subversive action by, his listeners. They were mere expressions of sentiment and opinion which, while distasteful, were nevertheless lawful. Thus the assertion that "Hitler will not be killed after the war" was no more than a surmise concerning the future course of events. Similar predictions have been made by citizens whose patriotism and loyalty is beyond question. The statement that this country is "100 years behind Germany" may be galling to the pride of Americans but its utterance is well within the province of that freedom of speech which, though abused all too often, is one of the crowning glories of our nation. The unfriendly attempt at prophecy concerning Russia, with whom we are at present allied in a common cause, was of a more serious

import and, if properly charged and alleged, might possibly have constituted an offense; but certainly no disparagement of an ally, no matter how close or valiant, is disloyalty to the United States; nor can a soldier in our Army be disloyal to a foreign country of which he is not a citizen.

The one exception referred to, constituting the gravamen of Specification 4 as modified by the court, is the remark that Hitler "was a wonderful man". Specification 2 alleges the utterance of much the same words in an even more aggravated form, to wit, "Hitler is the most wonderful person in the world"; but no proof of this comment was offered. The statement contained in Specification 4 must be considered in the light of the definition of "wonderful" contained in Webster's New International Dictionary. This ascribes to the word the import among others, of "admirable," "excellent," and "in careless use . . . vague approval." Considering the context, these were the meanings which were undoubtedly intended to be conveyed. Mrs. Cox had made a slighting remark concerning Hitler, and the accused obviously meant to offer a direct contradiction. In other words, he attempted to counter harsh criticism with praise. This conclusion finds strong support in the other comments for which he has been tried, for though they were not proof of disloyalty in themselves, they indicate a frame of mind hostile to this land and unduly friendly toward Germany. His repetition of the words, "we are not trying to kill Roosevelt" clearly reveal his true predilections.

The heads of government of the nations presently at war with one another represent not only the supreme political authority but also the ideologies of their respective peoples. Thus the name of Hitler is synonymous in this country with all of the malignant doctrines of Nazism which the allies have pledged themselves to eradicate. To praise Hitler, therefore, is to praise the evil philosophy and pseudo-religion against which we are now struggling at so great a cost. To utter even "vague approval" of him is to make a mockery of our cause. The offense would be opprobrious in the case of a civilian; in a soldier it is absolutely intolerable.

6. The record shows that the accused is about 37 years old; that he was inducted on 27 February 1941 and discharged 12 November 1941; and that he was recalled at Fort Dix, New Jersey, on 22 January 1942 for the duration of the war plus six months.

7. The court was legally constituted. For the reasons stated the Board of Review holds the record legally insufficient to support the findings of guilty of Specifications 1, 2 and 3 of the Charge; legally sufficient to support the findings of guilty of Specification 4 of the Charge as modified by the court; and legally sufficient to support the Charge and the sentence.

Abner E. Lipscomb, Judge Advocate

Robert Connor, Judge Advocate

Samuel Morgan, Judge Advocate

SPJGN-CM 274119

1st Ind.
9 MAR 1945

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

TO: Commanding General, Fourth Service Command, Army Service Forces, Atlanta, Georgia.

1. In the case of Private Willi Schmidt (32061484), Company C, 1800th Engineer General Service Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specifications 1, 2, and 3 of the Charge; but is legally sufficient to support the findings of guilty of Specification 4 of the Charge as modified by the court; and legally sufficient to support the Charge and the sentence, which holding is hereby approved. Upon vacation of the findings of guilty of Specifications 1, 2, and 3 of the Charge, you will have authority to order the execution of the sentence.

2. In view of the disapproval of three of the four Specifications upon which the court based its sentence and in view of the fact that the Specification approved does not allege an offense of a sufficiently aggravated nature to warrant the severe punishment imposed, it is recommended that the period of confinement be reduced to three years and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

(CM 274119).

Myron C. Cramer

1 Incl
Record of trial

MYRON C. CRAMER
Major General
The Judge Advocate General

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

SPJGK - CM 274174

7 FEB 1945

UNITED STATES v. Second Lieutenant LEON F. REID (0-584617), Air Corps.	FOURTH AIR FORCE Trial by G.C.M., convened at Metropolitan Airport, Van Nuys, California, 8 January 1945. Dismissal, total forfeitures, and confinement for one (1) year.

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

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

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

CHARGE: Violation of the 96th Article of War.

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

Specification 2: In that Second Lieutenant Leon F. Reid, Provisional Squadron "A", 441st Army Air Forces Base Unit, did, at Metropolitan Airport, Van Nuys, California, on or about 27 October 1944, with intent to defraud wrongfully and unlawfully make and utter to the Metropolitan Airport Exchange, a certain check, in words and figures as follows, to wit:

16-195 ~~Van Nuys Branch~~ 16-195
Hamilton Field Branch
No._____

BANK OF AMERICA
Trust and
National Association
Savings

Hamilton Field
~~Van Nuys~~, Calif. _____ 19____

Pay to the
Order of _____ CASH _____ $20.00

Twenty Dollars and no cents _____ Dollars

/s/ Leon F. Reid, 2nd Lt. AC
0-584617

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and by means thereof, did fraudulently obtain $20.00, United States Currency, from the Metropolitan Airport Exchange, he the said Second Lieutenant Leon F. Reid, then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of America, Hamilton Field Branch for the payment of said check.

Note: Specifications 3, 4, 5 and 6 are identical in form with Specification 2 except for the dates, amounts, and the person alleged to have been defrauded, which variations are as follows:

Spec.	Date 1944	Amount	Person alleged to have been defrauded
3	27 Oct.	$25.00	Metropolitan Airport Exchange
4	31 Oct.	$15.00	Ontario Army Air Field Officer's Mess
5	3 Nov.	$10.00	Citizens National Trust and Savings Bank of Riverside, March Field Branch
6	10 Nov.	$10.00	H. S. Brown (Spec. 6 alleges that the accused obtained merchandise instead of cash.)

He pleaded not guilty to and was found guilty of the Charge and all the 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 one year. The reviewing authority disapproved the finding of guilty of Specification 1 of the Charge, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution may be summarized as follows: A bookkeeper employed by the Bank of America at its branch located on Hamilton Field, California, testified that the accused had a checking account at that branch of the bank for a period of six to eight months including October and November 1944. During this period of time the bank at the end of each month mailed to its depositors a statement of their deposit accounts. Those mailed to the accused were never returned. During October and November there were numerous instances in which checks drawn by the accused were presented for payment to the bank but the checks were returned because of insufficient funds. On nine of these occasions his account was charged with a service charge of fifty cents. Copies of the monthly statement of the accused's account from 22 September 1944 to 28 November 1944 issued by the bank were introduced in evidence without objection (R. 7, Pros. Exs. 1, 2, 3, 4).

The pertinent balances in that account were as follows:

Date	Balance
Oct. 19	$3.00
" 24	2.00
" 27	1.36
" 31	24.36
Nov. 2	4.36
" 3	4.36
" 10	4.36

Specifications 2 and 3.

Without objection there were admitted in evidence (R. 17, Pros. Exs. 6 and 7) two of the accused's checks drawn on the Bank of America in the sum of $20 and $25, respectively, payable to cash, which accused had cashed for face value on the 24th and 27th of October 1944 at the Metropolitan Airport Exchange at Van Nuys, California. These checks were in due course deposited by that Exchange in its own depository but were returned unpaid and marked "Refer to maker." They were redeposited on 18 November 1944, but were again returned unpaid (R. 12-15,16). The checks are still unpaid (R. 16). It was stipulated that the checks (Pros. Exs. 6 and 7) were signed by the accused (R. 17).

On or about 8 November 1944 when the checks had been returned by the Bank of America unpaid, Warrant Officer M. R. Summers stationed at the Metropolitan Airport informed the accused of these facts and the accused told him to redeposit the checks, that he had "got kinda mixed up" in his bank account and had since deposited sufficient funds to cover the checks (R. 19). When the checks were again returned unpaid Mr. Summers endeavored without success to have the accused take care of the matter (R. 19-20).

Specification 4.

Without objection (R. 24) there was admitted in evidence (Pros. Ex. 8) a check for $15.00 dated 31 October 1944 drawn on the Bank of America, Hamilton Field, California, payable to cash and signed by the accused (R. 28). This check had been cashed by the Officers' Club at Ontario, California, and deposited in its bank account for collection on 4 November 1944. It was returned unpaid on 13 November 1944 (R. 21-23). The check was redeemed on 2 December 1944 (R. 24).

Specification 5.

A counter check for $10 drawn on the Bank of America at Hamilton Field, California, drawn by the accused was cashed by the March Field Branch of the Citizens National Trust and Savings Bank, California, on 3 November 1944. The check was forwarded for collection and on or about the 14th or

15th of November it was returned unpaid and marked "Refer to Maker" which, according to the witness, "is a polite way of saying not sufficient funds although it could be for some other reason". On 2 December following the bank received payment of the check from the accused (R. 25-26). The check was admitted in evidence without objection (Pros. Ex. 9). It was stipulated that it was signed by the accused (R. 27).

Specification 6.

Mr. H. S. Brown, optometrist, testified that he sold to the accused a pair of glasses for $13.00 on 17 October 1944 and received in payment $3 in cash as a down payment and later, upon delivery of the glasses, the accused's check for $10 dated 10 November 1944 payable to cash drawn on the Hamilton Field Branch of the Bank of America (Pros. Ex. 10). He deposited the check but it was returned unpaid for lack of funds (R. 27-29). The check was subsequently redeemed on 2 December 1944 by a money order given to Mr. Brown by the trial judge advocate (R. 30). The check was admitted in evidence without objection (R. 30, Pros. Ex. 10). It was stipulated that the check was signed by the accused (R. 31).

4. The accused, having been advised of his right to testify on his own behalf, to make an unsworn statement, or to remain silent, elected to testify (R. 31). He stated that he was a second lieutenant, Air Corps. He arrived on 16 October 1944 for duty with Squadron "A", 441st Air Force Base Unit, Metropolitan Airport, Van Nuys, California, from Hamilton Field, California (R. 31-32). In the month of November he received an envelope (Def. Ex. A) containing his bank statement for 23 October to 22 November 1944, a copy of which was put in evidence by the prosecution and appears as Prosecution's Exhibit 3. The delivery of the envelope and its contents had been delayed in transit for the lack of postage (R. 32-33). He claimed that he did not receive his bank statement for the preceding period shown by Prosecution's Exhibit 2 (R. 33).

5. The evidence for the prosecution clearly established beyond any doubt and without contradiction by the accused, who elected to testify in defense, that the accused did at the places, on the dates, and in the amounts alleged in the Specifications make and utter the checks described therein drawn on the Hamilton Field Branch of the Bank of America and by means thereof did obtain, with reference to Specifications 2, 3 4 and 5, cash in exchange for each check in the amount of the check, and, with reference to Specification 6, did obtain merchandise of the value of the amount of the check. It was also clearly shown that all of these checks were deposited by the respective holders or recipients in their own depositories for collection and all were returned unpaid and marked "refer to maker". The checks proved to be worthless as the bank account of the accused with the bank upon which the checks were drawn disclosed that there were not sufficient funds on deposit at any time during this period with which to pay any of the checks.

It was a fair and reasonable inference for the court to draw from the foregoing established facts, particularly when there was no explanation made or offered by the accused while testifying on his own behalf to the contrary, that he intended to defraud those to whom he issued the checks; that he did defraud them; and that he knew he did not have sufficient funds in the Bank of America for the payment of the checks and did not intend to so have. The findings of guilty of Specifications 2, 3, 4, 5 and 6 were therefore clearly and amply supported by the evidence and should not be disturbed. The issuance of a worthless check in exchange for cash or merchandise by one in the military service with the intent to defraud constitutes a violation of the 96th Article of War (CM 249006, 32 B.R. 5; CM 262189, CM 270910).

There was no direct evidence that any of the checks involved in the case under discussion were actually presented for payment to the bank upon which they were drawn. This fact as to each check was however proved by circumstantial evidence. It was shown that each holder deposited each check in his own bank for collection; that there were not sufficient funds in the accused's account for the payment of any of the checks; and that the checks were returned unpaid and stamped by forwarding banks. In some instances the checks were redeemed. The checks all appear to be in good form and were admittedly signed by the accused. All of these circumstances exclude every reasonable hypothesis except the one that the checks were presented to the Bank of America and payment was refused because of insufficient funds on deposit for the payment of the checks. Moreover, without identifying these specific checks, the bank clerk testified that during this period at least nine checks of the accused were in this manner presented and dishonored.

6. War Department records show the accused to be 27 years of age, married, and the father of one child. He completed eleven grades of schooling. From March 1937 until he enlisted on 8 January 1941 he was employed in Houston, Texas, and Texarkana, Arkansas, as a meter reader, truck driver, photographer, salesman, and maintenance man at an Army Air Field. He served as an enlisted man, attaining the grade of staff sergeant, until he was commissioned on 8 January 1944 second lieutenant, AUS, at the Army Air Forces Officers' Candidate School at Miami Beach, Florida.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK - CM 274174 1st Ind.

Hq ASF, JAGO, Washington 25, D. C. FEB 12 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 Leon F. Reid (O-584617), Air Corps.

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

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. G.C.M.O. 154, 17 Apr 1945)

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

SPJGN-CM 274178

12 MAR 1945

UNITED STATES	)	ARMY AIR FORCES EASTERN TECHNICAL TRAINING COMMAND
v.	)	
First Lieutenant WILLIAM K. BYLE (O-808089), Air Corps.	)	Trial by G.C.M., convened at Langley Field, Virginia, 16 January 1945. Dismissal and total forfeitures.

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 Specification:

CHARGE: Violation of the 94th Article of War.

Specification: In that First Lieutenant William K. Byle, Section B, 3539th Army Air Forces Base Unit (Technical School), Langley Field, Virginia, did, in conjunction with Corporal Richard J. Loman, Section C, 3539th Army Air Forces Base Unit (Technical School), Langley Field, Virginia, at Langley Field, Virginia on or about 10 December 1944 feloniously take, steal and carry away three gallons of gasoline of the value of about sixty cents (.60¢) the property of the United States of America furnished and intended for the military service thereof.

He pleaded not guilty to, and was found guilty of, both the Charge and the Specification and 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 and Private Richard J. Loman were "friends" (R. 12). On the night of 9 December 1944 they were sharing a "booth" with Corporal Howard J. Kniskern at the North Carolina Social Club, "a place to dance and

drink beer" located in Newport News, Virginia (R. 11-12, 17-19, 23). In the course of their conversation the accused remarked that "he wasn't going to come to town anymore because he wasn't going to have any gasoline." He followed this comment with an inquiry as to whether Loman "could get any...". Loman, who was assigned as a driver to the Special Purpose Pool at Langley Field, Virginia, replied that he "might be able to get some from the [hangar] line" and suggested that the accused "leave his car at the end of [that] line with [a] five gallon can in the back" (R. 12, 20-21). An understanding was reached, and, not long after, the three men returned in the accused's car to Langley Field, Virginia, where they were all stationed. According to Loman, they were accompanied during the ride by a flight officer named "Bud Lowrey." Kniskern, on the other hand, remembered no such passenger (R. 11, 14, 18, 21).

Pursuant to the arrangement entered into, the accused on the following evening parked his car at the end of the hangar line. Some time later Loman, who was on duty, drove an Army oil truck nearby. Removing a five gallon can from "behind the seat" of the car, he re-entered the truck and proceeded to a spot between the hangars. By inserting one end of a hose in the tank of the truck he was able to siphon approximately three gallons of gasoline into the can (R. 7, 13-15; Pros. Ex. 1). At this point, hearing "people going by", he became nervous and "stopped." Placing the can in the truck, he again drove to the end of the hangar line. Bearing the container with him, he seated himself behind the wheel of the car and travelled some distance "down the old Shellbank Road." He "pulled up to the first building", stepped out, and "proceeded to put the gas in the gas tank" (R. 15-16). In the process he spilled a little on the ground. Seeing some cars approaching, he deposited the can behind the driver's seat, "got in and sat down" (R. 9, 16).

One of the vehicles passing by was driven by Private Cyrl L. Smith, Sr., of the military police. Observing a wet spot on the concrete he stopped to investigate. After he had ascertained that the moisture was gasoline, and after he had found the five-gallon can in the accused's car, he "carried [Loman] to the guard house" (R. 9-10, 16-17). The gasoline removed by Loman from the oil truck had a total value of approximately sixty cents (R. 24; Pros. Ex. 2).

4. The accused, after being apprised of his rights relative to testifying or remaining silent, took the stand on his own behalf. The only other witness offered by the defense was Flight Officer Perry E. Lowrey. He testified that on the night of 9 December 1944 he was in bed at the post and was not present at the North Carolina Social Club (R. 27).

The accused's own version of the facts in issue differed markedly from that of the principal witnesses for the prosecution. He had seen

Loman but not Kniskern at the North Carolina Social Club and had not conveyed either back to the field. The conversation with Loman was paraphrased by the accused as follows:

> "Well, I had a date at approximately 8:00 and I picked my date up and we went to the Officers' Club in Hilton. We remained there until about 11:00. After 11:00 I thought we would take a trip by the North Carolina Social Club and see if any friends were there and see if Flight Officer Lowrey was there. My date and I went in there and we had the second booth at the rear. At that time, Private Loman came over to me and said he wanted to talk to me. I went over to a sofa at the front of the club and he wanted to know what I was doing the following night and I said I thought I would stay in since I had to fly early the next morning. He wanted to know about my car, if I was going to use it and I said no. He said for me to leave my car on the line for him and I would as I wasn't going to use it myself. I said, 'When you get through with it bring my car back to the barracks and I will get it the following day.' About fifteen or twenty minutes later, my date and I left the club and I returned back to the Base after that" (R. 28).

The accused had never asked that gasoline be obtained for him (R. 29). Although he was not short of that commodity on 9 December 1944, he had made application for a supplementary ration two days before (R. 31-32). The parking place at the end of the hangar line was one of three regularly used by him (R. 28-29, 31). His explanation for the presence of the can was that, "I carry it in all my cars in case I run out of gas" (R. 31).

5. The Specification of the Charge alleges that the accused "did, in conjunction with Corporal Richard J. Loman..., on or about 10 December 1944, feloniously take, steal and carry away three gallons of gasoline of the value of about sixty cents... the property of the United States furnished and intended for the military service thereof." This offense was laid under Article of War 94.

Section 550, Title 18, of the United States Code Annotated, commonly referred to as section 332 of the Criminal Code, reads as follows:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

This provision has repeatedly been construed as authority for the proposition that an accessory before the fact may be charged with the commission of an offense in the same manner and in the same words as the principal. Thus in Colbeck v. United States, 10 F (2d) 401 (C.C.A., 7th, 1926), the court remarked that:

"The defendants were all indicted as principals. There was evidence to show that a part only perpetrated the actual robbery, while the others were accessories before the fact. Under section 332 of the Criminal Code..., accessories before the fact are principals, and it has been held that an accessory before the fact may be charged as a principal, and the charge will be sustained by proof showing him to be an accessory before the fact... It is not necessary that one who aids and abets the commission of a crime be present when the crime is committed...".

The holdings were to the same effect in Rooney v. United States, 203 Fed. 928 (C.C.A., 9th, 1913). Kelly v. United States, 258 Fed. 392 (C.C.A., 6th, 1919). Collins v. United States, 20 F (2d) 574 (C.C.A., 8th 1927); and O'Brien v. United States, 25 F (2d) 90 (C.C.A., 7th, 1928).

Since the theory of the prosecution's case was that the accused as an accessory before the fact induced and procured the theft of three gallons of gasoline belonging to the United States, the decisions cited warranted his being directly charged with the larceny as a principal. The only question, therefore, is whether the proof sustains the findings of guilty. The testimony presented by the prosecution is clearly and unequivocably to the effect that the accused induced and procured Loman to steal government gasoline. The testimony adduced by the defense just as clearly and just as unequivocably indicates that the accused and Loman had never even discussed the subject and that the car had been loaned to Loman for his convenience and for a perfectly innocent purpose.

This being the state of the evidence, the major issue presented by the record is the credibility of the witnesses. Since they were before the court, its determination, though not conclusive in a case reviewable under Article of War 48, is entitled to great weight: Dig. Op. JAG, 1912-1940, sec. 395 (56). Having observed all the witnesses, the court chose to believe those for the prosecution and to disregard the testimony of the accused. Although the proof offered by the prosecution contained discrepant statements concerning the presence of Flight Officer Lowrey, the inconsistency was not vital to the true issue. There is nothing in the record to indicate that the court erred in according credence to Loman and Kniskern and not to the accused. The Specification has been established beyond a reasonable doubt.

6. The accused, who is divorced, is about 28 years old. After attending the University of Florida and the University of Illinois for a total of three and one-half years, he was successively employed as a hotel doorman in Chicago, Illinois, as a night auditor for a hotel in Ft. Myers, Florida, and finally as a bank teller in Ft. Myers, Florida. He had enlisted service from 28 October 1942 to 29 August 1943, was commissioned a second lieutenant on 30 August 1943, and was promoted to first lieutenant on 22 July 1944. For exceptionally meritorious service overseas as a pilot he was awarded the Air Medal with three

Oakleaf Clusters, the Bronze Star, and the Distinguished Flying Cross. He has on one occasion accepted punishment under Article of War 104 for being late at a briefing.

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

Abner E. Lipscomb, Judge Advocate.

Robert J. Gannon, Judge Advocate.

Samuel Morgan, Judge Advocate.

(126)

SPJGN-CM 274178 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 27 MAR 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 William K. Hyle (O-808089), 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. Because of the brilliant war record of the accused and the petty amount involved, I recommend that the sentence be confirmed but that the dismissal be commuted to a reprimand, that the total forfeitures imposed be reduced to a forfeiture of pay of $100 and that the sentence as thus modified be ordered executed.

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

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Sentence confirmed but dismissal commuted to reprimand and total forfeitures reduced to forfeiture of $100, by order of the Under Secretary of War. G.C.M.O. 180, 9 Jun 1945)

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

SPJCK
CM 274187

9 FEB 1945

UNITED STATES v. Second Lieutenant ARTHUR C. SHEFFIELD, JR. (O-771138), Air Corps.	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Lowry Field, Denver, Colorado, 16 January 1945. Dismissal.

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant Arthur C. Sheffield, Junior, Air Corps, Assigned Section B, Squadron 23, Group 2, Headquarters, 3014th Army Air Forces Base Unit, Douglas Army Air Field, Douglas, Arizona, on temporary duty at Officers Armament School, Buckley Field, Colorado, did, at Buckley Field, Colorado, on or about 7 December 1944, wrongfully and falsely indicate in a flight report (WDAAF Form No. 1) that First Lieutenant Warren W. Vest had participated as a passenger in the flight of a BT-13A army aircraft, Serial No. 42-88766, piloted by the said Second Lieutenant Arthur C. Sheffield, Junior, on 7 December 1944, on a local flight from Buckley Field, Colorado.

He pleaded guilty to the Specification and not guilty to the Charge but guilty of a violation of the 96th Article of War, and was found guilty of the Charge and Specification. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provides for dismissal, recommended that the sentence of dismissal be commuted to a reprimand and forfeiture of $50 of accused's pay per month for a period of six months, and forwarded the record of trial for action under Article of War 48.

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

At all times pertinent to the issues involved, as well as at the time of trial, accused was in the military service, on temporary duty, as a student officer, at Officers' Armament School, Buckley Field, Colorado (R. 6, 21). On 6 December 1944, Captain Daniel R. McDuff, Armament Operations Officer, scheduled the accused and First Lieutenant Warren W. Vest to fly at seven o'clock the following morning, 7 December, of which fact they had notice (R. 6, 7, 8, 12). Accused flew on 7 December as scheduled, but Lieutenant Vest did not (R. 11). Upon completion of his flight and at the time of entering his own name and flight data on War Department A.A.F. Form No. 1, an official record, accused, pursuant to a request made the previous day by Lieutenant Vest, also entered on the same record the name of Lieutenant Vest, indicating that the latter had also flown (R. 12).

Captain McDuff stated that as a punitive measure accused and Lieutenant Vest were scheduled to fly at the early hour of 7:00 a.m., at which hour it was still dark (R. 8). He professed not to recall the reason for the punishment (R. 8, 9). Student officers at the Armament School were required to fly twelve hours each month, but night flying, i.e., between official sunset and sunrise, was not customary (R. 6, 10). Captain McDuff identified an instrument in writing, dated 10 November 1944, addressed to "All pilots, Officers Armament School", and signed by him in his official capacity, as "a directive that I put out to discontinue any flights in instrument weather", and stated that it was posted on the Armament School bulletin board on or about the date it bore (R. 8). This instrument was introduced in evidence by the defense as its "Exhibit 1" and is, in pertinent part, as follows:

> "1. The BT-13 type aircraft assigned to this department are old ships, having seen considerable use by the flying training commands in basic instruction. Although the radio and flight instruments in these ships may operate perfectly, they cannot be relied upon for flight in instrument weather.
>
> "2. For this reason no flights in BT-13 type aircraft will be made by pilots of the Armament School in instrument weather.
>
> "3. Week-end cross-country trips will be cancelled when instrument weather exists or is indicated at any point along the proposed route. If instrument weather is forecast for the return trip, flights will not be cleared from this base.
>
> "4. Pilots on cross-country flights will return to Buckley Field as nearly as possible at the time scheduled; however, layovers are authorized when the return trip would have to be made under instrument weather conditions."

Captain McDuff stated that instruments were ordinarily relied upon

to some extent by pilots engaged in night flying, but expressed the opinion that there was nothing in the directive that would excuse those from flying at 7:00 a.m. on 7 December who were ordered to do so, even though the flight was scheduled to begin in the dark (R. 9).

Captain McDuff professed his ignorance of any particular purpose that was served by the twelve hours of required flying each month. The time was not allotted to enable the officers to draw flight pay, for none of them had any difficulty in getting in the four hours of flying required for that purpose (R. 10); nor was it for training or testing purposes (R. 6, 7).

> "Those twelve hours a month are given only as twelve hours a month flying. They are not for training purposes or any specific reason, only that they are to be kept busy.
>
> * * *
>
> "It is a part of the armament course, but there is no specification as to what the purpose is or what it is for - it is just for flying" (R. 6).

The flights which he scheduled for accused and Lieutenant Vest on 7 December were neither to qualify them for flight pay nor to test their efficiency (R. 7). They were merely scheduled as a part of the twelve hours of required flying (R. 7), the time of day for which they were scheduled being a punitive measure (R. 8).

Lieutenant Vest stated that on 6 December he and accused and others were called before Captain McDuff and charged with having missed scheduled training in the Link Trainer on either 5 or 6 December (R. 11, 13). They protested that they had not been scheduled for training at the time alleged, but Captain McDuff insisted that they had, and, upon being asked what he was going to do to them, he informed them that they would be required to make an early morning flight (R. 11, 14). Upon discovering that evening that they were scheduled to fly at seven o'clock the following morning, they being together at the bulletin board at the time, Lieutenant Vest told accused that he was not going to make the flight and asked accused if he would enter his (Vest's) name on the Form 1 as having flown (R. 11, 12). Accused "hesitated about it. He never did say he would or wouldn't. He just hesitated and he took my name and rank so that was indicating that he would, I guess" (R. 12). Lieutenant Vest did not see accused again until after noon of the following day, at which time accused told him that he had entered his (Vest's) name on the Form 1 (R. 12).

Lieutenant Vest was positive that no schedule requiring him or accused to fly in the Link Trainer had been posted at the termination of classes at 5:45 p.m. on the day preceding that on which they were alleged to have missed such training (R. 13). He therefore felt that he was being

unjustly punished by being required to fly at 7:00 a.m. on 7 December (R. 11). He also entertained the opinion that the planes in which they were to fly were not equipped with good enough instruments for safe night flying, and, in view of the directive above set out, felt that the order to fly at 7:00 a.m. was probably a mistake (R. 12, 14). For these reasons he did not wish to make the early flight and requested accused to enter his name on the Form 1 (R. 11, 12, 14).

Lieutenant Vest and accused had been acquainted for more than a year and were good friends (R. 12, 14). Lieutenant Vest stated that, knowing accused, who was seemingly the type who had never done anything wrong, he could understand accused's hesitancy and failure to agree in advance to comply with his request, for it probably seemed "to be wrong in his mind"; "but we being friends probably influenced him" (R. 14).

4. For the defense.

Captain Ralph A. Rudd and Flight Officer Clifford W. Nelson, who were two of about fifteen who were alleged to have missed scheduled training at the same time as accused and Lieutenant Vest on 5 or 6 December, both stated that no schedule was posted on the bulletin board when they finished classes at 5:45 p.m. on the day preceding that of their alleged failure to comply with the schedule (R. 17, 18-19). When they informed Captain McDuff of this fact on 6 December, Captain McDuff questioned his secretary and apparently accepted her word that she had posted the schedule in preference to the word of the officers involved (R. 7, 19). Flight Officer Nelson made the "penalty flight" at 7:00 a.m. on 7 December (R. 18). It was "quite dark" when he took off, so he flew by instruments for a while (R. 20).

Upon being advised of his right to testify under oath, to make an unsworn statement, or to remain silent, the accused elected to testify under oath (R. 20). He admitted that on 7 December 1944 he represented by an entry on Form 1 that Lieutenant Vest had accompanied him on his flight when in fact he had not done so, and said that it was difficult, because of "false pride", for him to explain why he did it. He and Lieutenant Vest were good friends, were in the same class together, and he did not want to "strain their friendship" or to cause hard feelings between them. He knew that Lieutenant Vest had an aversion to flying at night in the planes which they were to fly and also that he objected to making the flight because of its punitive nature, but gave him no advance assurance that he would make the false entry. Accused "had been in the States all the time" and knew at the time Lieutenant Vest requested him to make the false entry that it was not a good thing to do, so objected, hesitated, and never did promise that he would do it. When Lieutenant Vest failed to appear for the flight the following morning, accused realized that since the flight had been scheduled as a punitive measure Lieutenant Vest's failure to make it would not be lightly overlooked; so, because of their friendship and the circumstances generally, against his better judgment, he made the false entry.

"That was bad judgment, but it happened" (R. 20). While he had never done it before, he had known of others making such entries (R. 20).

Four letters, one from the Dean of the College of Engineering, Louisiana State University, and three from corporations by which accused was formerly employed, all apparently written at the time accused made application to enter the service in 1942, and all attesting to accused's high qualities of character and to his proficiency as a student and workman, were introduced in evidence (R. 22).

5. The finding of guilty of the Specification is clearly supported by accused's plea of guilty thereto and the evidence of record. The correctness of the finding of guilty of a violation of the 95th Article of War alone requires discussion.

It has been often held, and may, perhaps, generally be taken for granted, that the making of false official statements by an officer with intent to deceive, the willful falsification of official records, and similar allied offenses constitute violations of Article of War 95. Whether or not given conduct constitutes conduct unbecoming an officer and a gentleman is, however, always a mixed question of law and fact, and no hard and fast rule can be laid down for or applied to its determination. Each case must be determined upon its own particular set of facts. Article of War 95 contemplates conduct by an officer which, taking all the circumstances into consideration, satisfactorily shows moral unfitness to be an officer or to be considered a gentleman (par. 151, MCM, 1928).

> "The conduct had in view by the Article may not consist in conduct unbecoming an <u>officer</u> only, or in conduct unbecoming a <u>gentleman</u> only, but must in every case be unbecoming the accused in both these characters at once. * * * There may be acts which, in the estimate of a court-martial, may be unbecoming to an accused party in the one capacity without being necessarily unbecoming to him in another * * * the conduct here denounced * * * need not amount to a crime, it must offend so seriously against law, justice, morality, or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrespect upon the military profession which he represents" (Winthrop, Military Law and Precedents, 1920, page 711; CM 265678, <u>Wolf</u>).

The Board of Review is of the opinion that while accused's conduct in the instant case was clearly to the prejudice of good order and military discipline, in violation of Article of War 96, when considered in the light of all the circumstances, it does not satisfactorily show a lack of moral fitness on his part to be an officer or to be considered a gentleman. The false entry was not made with any intent to defraud, nor did accused stand to gain or to derive any personal benefit from it. He made the entry to

protect a personal friend, who was also his superior officer, in a situation that he himself had perhaps contributed to by his failure forthrightly to tell Lieutenant Vest when requested by him on 6 December that he would not make the false entry for him. This desire on the part of accused not to see his friend get into trouble and to avoid embarrassing their friendship was a normal and understandable reaction. Accused's sense of responsibility was no doubt lulled to some extent by his appreciation of the fact that, aside from its punitive nature, the flight was routine, and perhaps by a conscious or subconscious sympathy with Lieutenant Vest's reasons for not making the flight. As above indicated, it is not believed that the fact that accused yielded to the press of circumstances in this isolated instance and, as he says, through exercise of poor judgment, made the false entry which he did, evidences that lack of moral worth contemplated by Article of War 95 and the finding of guilty of a violation of this Article of War should not be sustained.

6. War Department records disclose that this officer is 24 years of age and married. He is a high school graduate and also holds a B.S. degree from Louisiana State University, where he studied mechanical and aero engineering. He was employed by a firm of contracting engineers as a draftsman before entering the service. He enlisted in the Air Corps reserves on 11 December 1942, was called to active duty on 2 March 1943 and was appointed a second lieutenant, Army of the United States, on 12 March 1944.

A recommendation for clemency, addressed to the reviewing authority, and signed by seven of the eight members of the court that convicted accused, is attached to the record. The seven signers of this recommendation indicate that except for the fact that dismissal is mandatory upon conviction of Article of War 95 they would have imposed a less severe sentence and recommend that because of accused's previously clean record and his future value to the service the sentence of dismissal be suspended.

7. The court was legally constituted and had jurisdiction over the accused and of the offense. Except as noted herein no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification of the Charge as involves a finding of guilty thereof in violation of Article of War 96, and the sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

SPJGK - CM 274187 1st Ind.

FEB 26 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 Arthur C. Sheffield, Jr. (O-771138), 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 Specification of the Charge as involves a finding of guilty thereof in violation of Article of War 96, and the sentence as approved by the reviewing authority, and to warrant confirmation of the sentence. Seven of eight members of the court that convicted accused recommended to the reviewing authority that the sentence be suspended, and the reviewing authority has recommended that the sentence of dismissal be commuted to a reprimand and forfeiture of $50 of accused's pay per month for six months. I recommend that the sentence be confirmed, but, in view of accused's previous good record, and the recommendation of the reviewing authority, I further recommend that the sentence of dismissal be commuted to a reprimand and forfeiture of $50 of accused's pay per month for a period of 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 into effect the recommendation hereinabove made, should such action meet with approval.

MYRON C. CRAMER
Major General
The Judge Advocate General.

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence as approved by reviewing authority confirmed but commuted to reprimand and forfeiture of $50 per month for six months. G.C.M.O. 131, 9 Apr 1945)

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

SPJGN-CM 274375

8 FEB 1945

UNITED STATES	)	THE INFANTRY SCHOOL
v.	)	Trial by G.C.M., convened at Fort Benning, Georgia, 30 January 1945. Dismissal and total forfeitures.
First Lieutenant JAMES A. DEVER (0-562864), Infantry.	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that First Lieutenant James A. Dever, Officers' Replacement Pool, The Infantry School, attached to 10th Company, First Student Training Regiment, The Infantry School, then attached to 5th Company, First Student Training Regiment, The Infantry School, did, without proper leave, absent himself from his then organization and station at Fort Benning, Georgia, from about 5 January 1945 to about 10 January 1945.

Specification 2: In that First Lieutenant James A. Dever, Officers' Replacement Pool, The Infantry School, attached to 10th Company, First Student Training Regiment, The Infantry School, did, without proper leave, absent himself from his organization and station at Fort Benning, Georgia, from about 19 January 1945 to about 22 January 1945.

He pleaded not guilty to and was found guilty of the Charge and its 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 consists of appropriate extract copies of morning reports of the accused's organization showing his unauthorized absences as alleged (R. 6-7, Ex. 1-4).

4. The accused, after explanation of his rights as a witness, elected to remain silent but by stipulation it was shown that he had formerly served as a special services officer in the Army Air Forces and had volunteered for duty with the Infantry (R. 7-8).

5. Specifications 1 and 2 of the Charge respectively allege that the accused absented himself without proper leave from his organization and station at Fort Benning, Georgia, from about 5 January 1945 to about 10 January 1945 and from about 19 January 1945 to about 22 January 1945. 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 documentary evidence adduced by the prosecution and admitted without objection conclusively establishes the accused's unauthorized absences as alleged. Such evidence is undisputed and beyond a reasonable doubt fully supports the Court's findings of guilty of the Charge and its two Specifications.

6. The accused is single and about 26 years old. War Department records show that he is a high school graduate and attended college for 3½ years. From September, 1938 until June, 1941 he was a teacher in an elementary school. He has had enlisted service from 7 July 1941 until 16 September 1942 when he was commissioned a second lieutenant upon completion of officers' candidate school and has had active duty as an officer since the latter date. On 7 August 1943 he was promoted to first lieutenant.

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

Abner E. Lipscomb, Judge Advocate.

Robert J. Clamor, Judge Advocate.

Gabriel F. Goldberg, Judge Advocate.

SPJGN-CM 274375 1st Ind.
FEB 16 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 A. Dever (0-562864), 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 reduced to forfeiture of $50 pay per month for six months, that the sentence as thus modified be carried into execution, but that the execution of that portion thereof adjudging dismissal be suspended during good behavior.

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

4 Incls
Incl 1 - Record of trial
Incl 2 - Dft. of ltr. for sig. S/W
Incl 3 - Form of Executive action
Incl 4 - Ltr. fr. Mrs. Oneita B. Dever, mother of accused

(Sentence confirmed but forfeitures reduced to $50 per month for six months. Execution of that portion of sentence adjudging dismissal suspended. G.C.M.O. 119, 5 Apr 1945)

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

SPJGQ CM 274389

8 MAR 1945

UNITED STATES	FIRST AIR FORCE
v.	Trial by G.C.M., convened at Army Air Base, Chatham Field, Georgia, 4, 5 and 6 January 1945. Dismissal, total forfeitures and confinement at hard labor for three (3) years.
First Lieutenant BERNARD D. SCHEAFFER (0-1576612), Quartermaster 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 94th Article of War.

Specification 1: In that First Lieutenant Bernard D. Scheaffer, Quartermaster Corps, Section H, 114th Army Air Forces Base Unit, did, at Army Air Base, Chatham Field, Georgia, on or about 28 October 1944, feloniously embezzle by fraudulently converting to his own use one console model piano and bench, of the value of about $250.00, property of the United States furnished and intended for the military service thereof, intrusted to him, the said First Lieutenant Bernard D. Scheaffer, by virtue of his office as Quartermaster Salvage and Reclamation Officer, Army Air Base, Chatham Field, Georgia.

Specification 2: In that First Lieutenant Bernard D. Scheaffer, Quartermaster Corps, Section H, 114th Army Air Forces Base Unit, did, at Army Air Base, Chatham Field, Georgia, from about 16 July 1944 to about 2 December 1944, wrongfully, knowingly and wilfully apply to his own use and benefit the following described property of the United States, furnished and intended for the military service thereof:

Three metal water pitchers, of the value of about $3.00
Eight steel table knives, of the value of about $1.52
One paring knife, of the value of about $0.19
One 5-gallon drum, of the value of about $2.00

Eight wooden folding chairs, of the value of about $12.16
Eight woolen blankets, of the value of about $64.80
Thirteen cotton-filled comforters, of the value of about $37.96
Eleven feather pillows, of the value of about $8.14
One iron bedstead, of the value of about $6.92
Eleven cotton mattresses, of the value of about $69.30
Four mattress covers, of the value of about $7.36
Two frame bedsteads, of the value of about $7.86
Three barracks bags, of the value of about $3.51
One canvas folding cot, of the value of about $6.58
Two paint brushes, of the value of about $1.00
One badminton net, of the value of about $6.00
Six volley balls, of the value of about $24.60
One basket ball, of the value of about $6.40
Eleven soft balls, of the value of about $9.35
One striking bag, of the value of about $3.60
Five pairs of boxing gloves, of the value of about $21.25
One 50-foot extension cord, of the value of about $2.38
One airplane life raft, of the value of about $200.00
One tool kit, of the value of about $1.50
One bomb shackle stowage bag, of the value of about $3.00
One airplane cockpit cover, of the value of about $25.00

total value of about $535.38.

Specification 3: Finding of Not Guilty

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

Specification: In that First Lieutenant Bernard D. Scheaffer, Quartermaster Corps, Section H, 114th Army Air Forces Base Unit, did, at Army Air Base, Chatham Field, Georgia, on or about 1 December 1944, with intent to deceive Major Kenneth R. Benjamin, Base Quartermaster, and Captain James D. McKnight, Base Provost Marshal, Army Air Base, Chatham Field, Georgia, officially state to the said Major Kenneth R. Benjamin and the said Camptain James D. McKnight that a certain console model piano, property of the United States, had not been taken to his home, which statement was known by the said First Lieutenant Bernard D. Scheaffer to be untrue, in that the said piano had been taken to the home of the said First Lieutenant Bernard D. Scheaffer and was then in his home, as he then well knew.

He pleaded not guilty to all Charges and Specifications and was found not guilty of Specification 3 of Charge I, guilty of all other Specifications and of the Charges. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for three

years. The reviewing authority approved only so much of the finding of guilty of Specification 2 of Charge I as involves a finding of guilty of the Specification excepting therefrom the words and figures "$24.60", "the value of about $9.35", and "$535.38", substituting therefor, respectively, the words and figures "$12.20", "Some value less than $20.00", and $513.63", approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution established the following state of facts:

From 16 July 1944 through 3 December 1944, the accused was Base Salvage and Reclamation Officer and Base Clothing and Equipage Classification Officer at Chatham Field, Georgia (R. 31; Ex. 3; R. 32, 103).

About 25 October 1944, Chief Warrant Officer Marston, Band Leader, 589th Army Air Forces Band, delivered to the Quartermaster warehouse at Chatham Field, Georgia, a console model piano and bench, property of the United States Government, previously drawn by Mr. Marston through the Quartermaster at another station for use by the band (R. 15, 16). On 26 October 1944, the piano and bench were taken to the salvage warehouse. A Property Turn-In Slip, Form 447, was signed by Mr. Marston for a "Piano, complete w/bench". On the reverse side of this document, Mr. Marston signed a stamped certificate to the effect that the items listed were unserviceable beyond a state of repair and were properly disposable as salvage, and the accused signed, as Salvage Officer, a stamped certificate that he had checked and received the property listed, and that the amount and nomenclature agreed with the property presented (R. 17; Ex. 1). This document as introduced in evidence bears a handwritten notation, "200 lbs. scrap lumber, 10 lbs. light metal." (Ex. 1). At the same time, Mr. Marston orally told the accused that the piano was not serviceable for use by the band because it would not hold its tuning at standard pitch (R. 16). However, the piano would be useful in a day room or some place where it could be used when tuned to a lower pitch, and should not be termed as junk (R. 17). Its value was about $250 (R. 22, 89). A piano and bench in the courtroom were identified by Mr. Marston as the same items (R. 17), and introduced in evidence (R. 18; Ex. 2).

The piano and bench were posted into the salvage stock record as 10 pounds of light metal and 200 pounds of lumber (R. 34). The ledger showed no piano (R. 35). There was on hand a pile of scrap lumber, of which record was kept in feet, not pounds (R. 34) and 37,565 pounds of scrap metal (R. 35).

About 28 October 1944, at the direction of the accused, a civilian truck driver employed at Chatham Field transported the piano (and bench) from the warehouse to the home of the accused in Port Wentworth, Georgia (R. 26). About the last of October, the accused moved from Port Wentworth, Georgia, to Thunderbolt, Georgia. A piano was picked up at Port Wentworth by the driver of a moving van employed by the accused to

move his household goods from Charleston, South Carolina, and taken to his home at Thunderbolt, Georgia (R. 13, 27).

About 22 November 1944, Major Benjamin, Base Quartermaster, acting upon information which had come to him, asked the accused whether he had taken a piano from the base to his home, and the accused denied having done so. The accused at that time said that he was having a piano fixed up for one of the day rooms. Asked whether he had a piano, the accused said "I have my own piano I brought here". (R. 49).

On 1 December 1944, after receiving further information from the Provost Marshal, Major Benjamin and Captain McKnight, the Provost Marshal, asked the accused about the piano. The accused at first denied that there was a piano, but on observing that Major Benjamin had the Property Turn-In Slip (Ex. 1), the accused admitted that there was a piano, but denied that it was in his house, and said that it was at a warehouse being repaired by a Mr. Green, and that the accused did not know where the warehouse was (R. 50, 68). The accused refused to take Major Benjamin to the piano, but made a purported telephone call to "Mr. Green", announced that he could not find him, and then refused to give Major Benjamin and Captain McKnight the number that he had called or the address (R. 51, 68). Confronted with statements of the truck drivers, the accused said that they were a "pack of lies" and that he would produce the piano in his own time and in his own way. He denied "four or five or six times" that the piano had ever been in his home. He refused to permit Major Benjamin and Captain McKnight to go to his home and see for themselves, saying that his word as a commissioned officer should not be doubted (R. 51, 69).

Following the above interview, and in the evening of the same day, 1 December 1944, the accused procured Benton Brothers, civilian storage and transfer concern, to send a driver and truck to his home and move the piano to its storage warehouse, which was done, with the active participation of the accused (R. 8). This was the same concern which had previously moved the household goods of the accused from Charleston, South Carolina, and Port Wentworth, Georgia, to Thunderbolt, Georgia (R.8). The accused requested the manager of the storage concern to say, if questioned, that the piano had been in their warehouse for 30 days, which the manager refused to do. The accused then arranged for a man to come and "work on" the piano in the warehouse the next morning, and a soldier did come (R. 8), after whose departure the piano was freshly painted (R. 9).

Private Roy W. Wing (R. 72), detailed to the salvage warehouse under the accused, took the accused from the base to Benton's warehouse in Savannah, Georgia, on the night of 1 December 1944, in Private Wing's automobile. Thence Private Wing drove, with the accused, to the accused's home in Thunderbolt, Georgia, followed by Benton's pickup truck (R. 74). They loaded the piano onto the truck and the truck left (R. 75). The accused ordered Private Wing to proceed to Benton's warehouse the next morning and paint the piano (R. 75) and to dispose of the bench (R. 76). The orders were to procure the paint at the salvage warehouse, but as the

warehouse was locked, the accused gave Private Wing money and Private Wing bought the paint at a hardware store (R. 75). The bench was placed in Private Wing's car (R. 76). On the next morning, 2 December 1944, Private Wing went to Benton's Warehouse and painted the piano (R. 76). The piano and bench were "Army OD" color. Private Wing painted the piano gray. (R. 73). Private Wing then reported the incident to the Provost Marshal's office, with the piano bench still in the back of his car (R. 76).

On 2 December 1944, Captain McKnight, Provost Marshal, and Mr. Marston discovered the piano, freshly painted gray, at Benton's Warehouse (R. 83, 88). Captain McNabb, Assistant Provost Marshal, found the piano Bench in Private Wing's car. The bench remained olive drab (R. 91).

On the afternoon of 2 December 1944, Captain McNabb, accompanied by Captain Wennberg, Quartermaster Supply Officer, went with the accused to the accused's home, which they entered with the accused's consent and assistance. There they found 3 metal water pitchers, 8 steel table knives, one paring knife, one 5-gallon drum and one folding chair. The accused admitted that all of these items were government property, and all were taken into possession and tagged by Captain McNabb (R. 92, 93, 94; Ex. 5, 6, 7, 9). The search was then discontinued at the request of the accused, two ladies having arrived. The accused said that he did not have any more Government property, but gave permission for the search to be resumed on the following morning at 1000 (R. 94, 95). The next morning, Sunday, 3 December, the accused asked Captain McNabb by telephone to postpone further search until that evening, when the ladies would be gone, and Captain McNabb agreed (R. 95).

The accused then called Private Wing and instructed him to go to the accused's house and dispose of beds, linens, chairs, mattresses, pillows, athletic equipment and other items by distributing them in the weeds and elsewhere about the premises, putting the smaller items in barracks bags (R. 97). That afternoon the accused again called Private Wing and directed him to put the things in burlap bags in the coal bin in the cellar, and to have the accused's secretary make up predated memorandum receipts for several items that the accused had (R. 98, 99). The instructions were for Private Wing to wait until evening, then go over the back fence and through the kitchen door, and to use a flashlight and not turn on the house lights. The accused called again about 2200, wanting to know if Private Wing was in trouble (R. 98). Private Wing did not obey the instructions, but instead notified the Provost Marshal (R. 98).

On Sunday evening, 3 December 1944, the accused again requested that further search be postponed, but accompanied Captain McKnight, Captain McNabb and Captain Wennberg to his home after that request was denied, and consented that his home be searched without requiring a search warrant. On arrival at the accused's home, the accused telephoned to Private Wing (R. 104). Upon search begun that night and completed on the following day, all of the remaining items listed in Specification 2 of Charge I were found in the home of the accused and taken into possession and tagged by Captain McNabb. Many were concealed behind a steel door in a basement

area (R. 106, 107, 108, 109; Ex. 5, 6, 7, 9-30). All were identified by the accused as Government property. (R. 109).

The entire search was conducted with the permission of the accused, (R. 113), although at one point he became angry and ordered the officers out of the house. He then retracted that order and permitted completion of the search, upon being told that it would be necessary to place him in confinement. He was expressly told that no immunity from confinement could be promised him (R. 107, 108).

Values substantially as alleged were established by competent testimony from Army Price Lists and expert opinion (R. 117-121, 133-136). Minor variances were reflected in the findings as approved, except trivial inaccuracies amounting to 43 cents. All of the property was exhibited in the court room except five chairs, which were accounted for (R. 109). All of the items, except some volley balls and softballs for which due allowance was made, were shown to be serviceable (R. 117-121, 133-136). The rubber life raft needed repair, but was repairable and could be used without repair (R. 127-129). Listed at $200 on the Air Corps Supply Stock List (R. 135-136), it appeared on the accused's stock record as Salvage Officer only as 30 pounds of scrap rubber, though turned in to him on a turn-in slip describing it as a pneumatic raft with fair wear and tear (R. 35).

4. Evidence introduced for the defense established that the Quartermaster Supply Officer, and not the accused, directed that the piano be taken to quartermaster warehouse, when it was turned in (R. 139).

By stipulation (R. 140; Ex. A), Lieutenant Pacheco, of Squadron D, testified that about 11 November the accused suggested using in the squadron day room a piano that he said was then in the repair shop. About two weeks later the accused said the repairs would cost more than the piano. That was the end of the conversation.

The accused made an unsworn statement (R. 140-144). He reviewed an early life of economic privation, solicitude for his parents and brothers and sisters, and attempts to obtain an education interrupted by the necessity of earning a living for himself and his family. He had established a newspaper and advertising business prior to entering the Army, which operated at a loss after his induction in June, 1941, and had to close. His discharge for dependency was recommended and approved, but he withdrew the application after war began on 7 December 1941. He served in the Pacific, where he contracted Malta fever. He was returned to the United States for Officer Candidate School and commissioned in July, 1942. He became engaged to be married, but has not married by reason of financial hardship. He was disqualified for overseas duty by reason of the persistence of his Malta fever. The doctors proposed his medical discharge, but he persuaded them out of it. He had made plans and arrangements to have his parents and brothers and sisters come to live with him and had his furniture moved from Charleston to Savannah to a house which he had provided for them. He hoped to be married. He looked forward happily to these events and the approaching Christmas season, when on 1 December

Major Benjamin and Captain McKnight came to the salvage office and were very hostile and asked insistent questions. Thereafter, the accused had been in arrest in quarters and for 35 days life had been "a living hell". His family had been writing him and his fiancee had come to Savannah to see him, and he had been refused permission to go and see her. They could not understand what had disrupted their plans. The accused has done nothing malicious or wilful and if he has made any mistake it is due to thoughtlessness or negligence or misjudgment. He is not a criminal. At Chatham Field, he has worked hard to build an efficient department, and received the commendation of his superiors and those working with him. The property in question that he had is on his records, charged to him, and he remained responsible for it. It was taken in by him as salvage and classification officer. He never tried to show it was destroyed or disposed of, and believed there was no wrong in what he did.

5. All elements of each offense specified and charged, as approved by the reviewing authority, are abundantly proved by the evidence. The only material portion of the unsworn statement introduced by the accused is his admission that he received all the property concerned as Salvage and Classification Officer, thus establishing by inference that it was property furnished and intended for the military service. His protestations of innocent intention are entirely incompatible with the trail of deliberate deceit which marks his activities in the case. The truth is not in him.

The naive contention by the defense that the accused was not guilty of embezzlement so long as he still had the property and remained legally responsible for it is wholly unconvincing. His embezzlement was complete in each instance when he converted and appropriated the property for his own use, under circumstances so fraught with concealment and deception as to leave no doubt of his fraudulent intent, (Par. 149h, MCM 1928, page 174).

The assertion that falsehood purged by correction in the same interview does not support conviction for making a false official statement is inapplicable to the case. The statement by the accused, when hopelessly cornered, that he would produce the piano in his own way and time, did not correct or purge his false statement to his superior officer that the piano had not been taken to his home.

No question of unlawful search and seizure is presented, as the search of the home of the accused was made with his consent, and he himself admitted the officers to his premises for that well-understood purpose.

6. The accused officer is 31 years of age, unmarried, a native of Chicago, Illinois, and citizen by Act of Congress. His father and mother were born in Russia. He completed high school in 1930 and attended Northwestern University for two years, Crane College and Lewis Institute for one year, and De Paul Law School for two years. During summer vacations from college he was a recreational athletic director at a Chicago

park. He held various employment concerned with promotional advertising and printing sales from 1935 to 1941, and was publishing a newspaper in Miami Beach, Florida, at the time of his induction, 20 June 1941. He was appointed second lieutenant, Army of the United States, on completion of Officer Candidate School at Camp Lee, Virginia, 15 July 1942, and promoted to the grade of first lieutenant 7 November 1942.

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, to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 94 and mandatory upon conviction of a violation of Article of War 95.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ-CM 274389 1st Ind

Hq ASF, JAGO, Washington 25, 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 Bernard D. Scheaffer (0-1576612), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed, but that the forfeitures and one year of the confinement imposed be remitted, that the United States Penitentiary, Atlanta, Georgia, be designated as the place of confinement, and that the sentence as thus modified be carried into execution. This recommendation is made in consideration of the circumstances that the Government property embezzled was all recovered in substantially as serviceable condition as when the accused received it, but that the course of deception practised by the accused reveals a high degree of moral turpitude.

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 forfeitures and one year of confinement remitted, by order of the Under Secretary of War. G.C.M.O. 199, 9 Jun 1945)

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

SPJGH
CM 274390

23 FEB 1945

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Coffeyville Army Air Field, Coffeyville, Kansas, 4 and 5 January 1945. Dismissal, total forfeitures and confinement for three (3) years.
Second Lieutenant ROBERT B. ROTHEY (0-547174), 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: Violation of the 96th Article of War

Specification 1: In that Second Lieutenant Robert B. Rothey, Squadron T, 379th AAF Base Unit, did, at Coffeyville Army Air Field, Coffeyville, Kansas, on or about 20 November 1944, wrongfully and unlawfully submit an Operations Order and Mission Report (Paragraph 34, Coffeyville Combat Crew Training Station Operations Order No. 159A) which falsely stated that the total flying time of the flight covered thereby was three hours fifteen minutes, whereas the actual flying time was approximately two hours forty-five minutes, and which falsely failed to disclose a landing at Kansas City Municipal Airport.

Specification 2: In that Second Lieutenant Robert B. Rothey, * * *, did, at Coffeyville Army Air Field, Coffeyville, Kansas, on or about 20 November 1944, wrongfully and

unlawfully induce and procure First Lieutenant Butler H. Sanchez, a student officer, to enter Lieutenant Rothey's name as pilot of Airplane Number 8700 upon an Operations Order and Mission Report (Paragraph 82, Coffeyville Combat Crew Training Station Operations Order Number 159A), whereas Lieutenant Rothy did not in fact participate in the flight covered by such Operations Order and Mission Report.

Specification 3: In that Second Lieutenant Robert B. Rothey, * * *, did, at Coffeyville Army Air Field, Coffeyville, Kansas, on or about 21 November 1944, wrongfully and unlawfully induce and procure Second Lieutenant Ansel Davis, a student officer, to enter Lieutenant Rothey's name as pilot of Airplane No. 8700 upon Operations Order and Mission Report (Paragraph 56, Coffeyville Combat Crew Training Station Operations Order No. 160A), whereas Lieutenant Rothey did not in fact participate in the flight covered by such Operations Order and Mission Report.

Specification 4: In that Second Lieutenant Robert B. Rothey, * * *, did, at Coffeyville Army Air Field, Coffeyville, Kansas, on or about 21 November 1944, wrongfully and unlawfully induce and procure Second Lieutenant Ansel Davis, a student officer, to enter Lieutenant Rothey's name as Pilot of Airplane No. 8700 upon an Operations Order and Mission Report (Paragraph 74, Coffeyville Combat Crew Training Station Operations Order No. 160A), whereas Lieutenant Rothey did not in fact participate in the flight covered by such Operations Order and Mission Report.

ADDITIONAL CHARGE: Violation of the 96th Article of War

Specification 1: In that Second Lieutenant Robert B. Rothey, * * *, did, at Coffeyville Army Air Field, Coffeyville, Kansas, on or about 20 November 1944, submit a flight report, War Department AAF Form No. 1, which falsely reported a round-robin flight of 3 hours, 15 minutes, whereas in fact the aircraft was landed at Kansas City Municipal Airport and the actual flying time of the mission was less than 3 hours and 15 minutes, to-wit: approximately, 2 hours, 45 minutes.

Specification 2: In that Second Lieutenant Robert B. Rothey, * * *, did, at Coffeyville Army Air Field, Coffeyville, Kansas, on or about 20 November 1944, wrongfully and

unlawfully induce and procure First Lieutenant Butler H. Sanchez, a student officer to place Lieutenant Rothey's name as pilot on a flight report, War Department AAF Form No. 1, for a flight in which Lieutenant Rothey did not participate.

Specification 3: In that Second Lieutenant Robert B. Rothey, * * *, did, at Coffeyville Army Air Field, Coffeyville, Kansas, on or about 21 November 1944, wrongfully and unlawfully induce and procure Second Lieutenant Ansel Davis, a student officer, to place Lieutenant Rothey's name as pilot on a flight report, War Department AAF Form No. 1, for a flight in which Lieutenant Rothey did not participate.

Specification 4: In that Second Lieutenant Robert B. Rothey, * * *, did, at Coffeyville Army Air Field, Coffeyville, Kansas, on or about 21 November 1944, wrongfully and unlawfully induce and procure Second Lieutenant Ansel Davis, a student officer, to place Lieutenant Rothey's name as pilot on a flight report, War Department AAF Form No. 1, for a flight in which Lieutenant Rothey did not participate.

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

Specification: In that Second Lieutenant Robert B. Rothey, * * *, did, at Coffeyville Army Air Field, Coffeyville, Kansas, on or about 6 December 1944, defraud the Officers Mess by preparing and submitting a chit for twenty cents (20¢), and paying that amount, whereas the price of the meal actually received by the said Second Lieutenant Robert B. Rothey was fifty cents (50¢), as he, the said Second Lieutenant Robert B. Rothey, then well knew.

Accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for three years. 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 particular evidence is pertinent.

a. <u>Charge, Specification 1 and Additional Charge, Specification 1</u>:

Under the Charge, Specification 1, accused is charged with reporting certain false information on an Operations Order and Mission Report, commonly called a Clearance sheet, and, under the Additional Charge, Specification 1, he is charged with reporting the same false information on another report known as W.D. A.A.F. Form No. 1.

The evidence introduced by the prosecution shows that on 20 November 1944, accused, an instructor in instrument flying, accompanied one of his students, Second Lieutenant William E. Hubert, on a scheduled instrument training, round robin flight from Coffeyville Army Air Field to Kansas City and return. A round robin flight connotes a continuous flight from place of departure to destination and return without landing until return to place of departure (R. 10, 11). If, during a round robin flight, the plane is landed before return to the place of departure and "spends any amount of time on the ground and then takes off and flys again" that constitutes two separate flights and must be logged as two separate flights on reports made relative thereto (R. 55). When such an interrupted round robin flight is reported on W.D. A.A.F. Form No. 1, there should be set forth the original take-off time, the time of the emergency landing, the time of take off from the emergency landing field and the final landing at the place of departure (R. 56).

During this instrument training flight the plane was landed at Kansas City Municipal Airport and remained on the ground for approximately 30 minutes (R. 11, 12). When landing at the airport accused mentioned to Lieutenant Hubert that "the weather was bad" (R. 15). He visited an office on the field to "check the weather" and thereafter informed Lieutenant Hubert that "there was a 500 feet ceiling at Chanute but it would be cleared to come back" (R. 17).

The Operations Order and Mission Report which pertained to this flight had been signed by accused and was admitted in evidence (R. 12, 13, 47; Pros. Ex. 1). It listed the plane's take-off time as 1335 hours, its landing time as 1650 hours and total flying time as three hours and fifteen minutes. Line 20 of this form contained the mimeographed words "ROUTE OUT note landings". In the blanks thereunder there had been printed in pencil the words "Chanute to KC". Line 21 of this form contained the mimeographed words "ROUTE BACK note landings". In the blanks thereunder there had been printed in pencil the words "KC to Chan DCK" (Pros. Ex. 1). The words "DCK" referred to Coffeyville Army Air Field and the words "KC" indicated Kansas City (R. 15).

The W.D. A.A.F. Form No. 1 which pertained to this flight was also admitted in evidence (R. 13, 24; Pros. Ex. 2). Lieutenant Hubert did not make the entries on this form and he testified that the writing on it resembled that of accused (R. 13, 14). The entries on this form also reported that the time of the flight was from 1335 hours to 1650 hours, a total of three hours and fifteen minutes. The flight was reported thereon as made from "DCK KC" to "KC DCK" and in the blank entitled

"NO. OF LANDINGS" the figure "2" had been inserted (Pros. Ex. 2). All running landings, i.e. aircraft touching ground but taking off immediately in continuous movement without coming to a stop, were to be totaled in this blank "NO. OF LANDINGS" along with all other landings. No running landing, however, had been made during this flight (R. 16). If an emergency landing were made during a flight and time spent on the ground, these events should be reported on this form as two flights and the time of both take offs and both landings should be reported thereon just as on the Clearance sheet (R. 55). As this form had been made out, showing a flight from "DCK KC" to "KC DCK" from 1335 hours to 1650 hours, a total of three hours and fifteen minutes without any break in the time sequence, and showing two landings made during the flight, it indicated a continuous round robin flight from Coffeyville Army Air Field to Kansas City and return with one running landing made during it and the final landing made at the conclusion thereof, but did not reflect the landing made at Kansas City where 30 minutes were spent on the ground (R. 15, 16, 42, 43, 46, 47, 56).

When questioned the following day about the landing at Kansas City, accused admitted it and stated that it had been made because he had received a report of bad weather from "Kansas City Radio or the Tower" (R. 48). Under the regulations in effect at Coffeyville Army Air Field the minimum ceiling of visibility for instrument training flights was 1000 feet above the ground over cities and 500 feet above the ground over open country (R. 52, 53).

b. Charge, Specification 2 and Additional Charge, Specification 2:

Under Specification 2 of the Charge accused is charged with procuring the entrance of certain false information on an Operations Order and Mission Report, commonly called a Clearance sheet, and under Specification 2 of the Additional Charge he is charged with procuring the entrance of the same false information on another report known as W.D. A.A.F. Form No. 1.

The evidence introduced by the prosecution shows that when an instructor and a student engaged in an instrument training flight it was known as a dual flight and the student and instructor received credit for dual instrument training flying time. When two students flew a mission without an instructor it was known as a team flight. There were some four or five student officers at Coffeyville Army Air Field who had sufficient training to qualify them to act as instructors on instrument training flights and each of these qualified students had been individually advised that he was capable of so acting. When one of these acting instructors engaged in an instrument training flight with another student, the latter would be credited with dual instrument flying time (R. 27, 57, 58).

On 20 November 1944 accused told two of his students, First Lieutenant Butler H. Sanchez and Second Lieutenant Craig T. Anneberg,

to fly an instrument training mission and instructed Lieutenant Anneberg to occupy the forward cockpit and Lieutenant Sanchez the rear cockpit. On the Operations Order and Mission Report the students inserted Lieutenant Anneberg's name as pilot on this mission. However, before taking off accused instructed both of the students that, after completion of the mission, they were to erase Lieutenant Anneberg's name on the Operations Order and Mission Report and insert accused's name as pilot on this mission both on that report and on the W.D. A.A.F. Form No. 1 relative thereto so that Lieutenant Sanchez would receive credit for dual instrument flying time. Accused also told them that other instructors were indulging in the same practice. The two student officers performed the training mission unaccompanied by accused and, after completion thereof, Lieutenant Sanchez followed accused's instructions by erasing Lieutenant Anneberg's name as pilot on the Operations Order and Mission Report and inserting accused's name in place thereof and by inserting accused's name as pilot on the W.D. A.A.F. Form No. 1 pertaining to this mission (R. 20-26, 28, 29; Pros. Exs. 2, 5). Neither Lieutenant Anneberg nor Lieutenant Sanchez were qualified to act as instructors. Furthermore, Captain Arthur E. Luthy, accused's superior officer and Operations Officer in charge of accused's instrument training flights, had never heard of such a practice of instructors informing students to report team flights as dual flights (R. 57). A W.D. A.A.F. Form No. 1 was kept in each training plane, each flight was recorded thereon by the pilot after completion thereof and at the end of the day the forms were collected from the planes (R. 48).

c. Charge, Specifications 3, 4 and Additional Charge, Specifications 3, 4:

Under Specifications 3 of the Charge and the Additional Charge, accused is charged with procuring a student officer, Lieutenant Ansel Davis to enter false information on an Operations Order and Mission Report and to enter similar information on a W.D. A.A.F. Form No. 1. Under Specifications 4 of the Charge and the Additional Charge, accused is charged with similar offenses involving the same student officer. The apparent duplication of offenses is occasioned because of the fact this student officer engaged in two missions on the same day and each set of offenses arose out of each of the missions.

The prosecution introduced evidence to show that on 21 November 1944, two of accused's students, Second Lieutenants Ansel Davis and John F. Alleman, flew together on two instrument training missions. The first flight commenced at 1335 hours and ended at 1535 hours. During that flight Lieutenant Alleman occupied the forward cockpit of the plane and Lieutenant Davis occupied the rear one. On the second flight which commenced at 1600 hours and lasted for an hour and fifty minutes the two students reversed their previous positions in the plane, Lieutenant Davis moving to the forward cockpit while Lieutenant Alleman occupied

the rear one. The accused did not participate in either of these flights (R. 31, 32, 39).

Before taking off on the first flight accused told these two student officers that although they were to fly together on a team flight they were to log it on their reports as a dual mission (R. 40). After the first flight had been concluded and in accordance with accused's instructions, Lieutenant Davis erased Lieutenant Alleman's name which had been previously entered as the name of the pilot on the Operations Order and Mission Report relative to this flight, inserted accused's name as that of the pilot and signed accused's name in the signature blank at the bottom thereof (R. 33, 34; Pros. Ex. 6). Similarly, after conclusion of the second flight and again following accused's instructions, Lieutenant Davis erased his own name which appeared as the name of the pilot on the Operations Order and Mission Report relative to this flight, inserted the accused's name as pilot and signed accused's name at the bottom of the report (R. 35, 36; Pros. Ex. 7). Also, in accordance with accused's instructions, Lieutenant Davis entered accused's name as that of the pilot on both of these flights on the W.D. A.A.F. Form No. 1 relative thereto (R. 36-38; Pros. Ex. 8). To explain his conduct in giving these instructions to these two student officers, accused informed them that he was feeling ill but feared to report to the Flight Surgeon because he might be grounded (R. 38). Neither Lieutenant Davis nor Lieutenant Alleman was qualified to act as an instructor on instrument training missions (R. 57, 89).

d. Second Additional Charge, Specification:

The prosecution introduced evidence to show that on 6 December 1944 accused visited the Officers' Mess at Coffeyville Army Air Field where he consumed a full course noonday meal which sold for 50 cents (R. 59-62). After completing his meal accused picked up the guest check which lay alongside his plate, approached the cashier's desk and filled out the check stating on it that he had consumed a sandwich and milk and placing what appears to be the figure "20" in the price column on the check. He presented the check to the cashier who wrote the figure "20" in red pencil at the bottom thereof and then accused paid 20 cents to the cashier for the meal. Accused's conduct was being specifically observed by personnel on duty in the Mess because their suspicions had been aroused by his behavior a few days prior (R. 65-69, 72, 73).

4. After accused's rights had been explained to him he elected to make an unsworn statement reciting the following matters. With respect to Specification 1 of the Charge accused stated that the scheduled round robin flight to Kansas City and return was made via Chanute and that, when they arrived over Kansas City, they were advised by the "Kansas City Radio" that the ceiling over Chanute had dropped to 400 feet.

Rather than risk a return flight with such low visibility accused landed at Kansas City Municipal Airport and was then informed that the ceiling over Chanute had risen to 900 feet and was still rising. He was also informed that he needed no additional clearance to leave the airport because of his Army round robin Clearance sheet covering the entire flight. He entered two landings on his report concerning this flight and "volunteered to tell different people around the flight that I had landed at Kansas City, which is also some proof that I wasn't trying to mutilate any record." He did not indicate his emergency landing on the forms by reciting place and time because "It has been advisable on the Base that you do not have to fill out both squares of landing time when you take-off right away and come back" (R. 79).

In reply to Specifications 2, 3, 4 of the Charge and the Additional Charge accused stated that at one instructors' meeting with Captain Jeffers there was a discussion about qualifying certain students as instructors who had 1000 or 500 hours of flying time but no names of any such students were mentioned. Accused interpreted the discussion to mean that when two of his students, one of whom had been qualified as an instructor, engaged in a team flight, the unqualified student could receive credit for a dual instrument flight only if the reports were made out with accused's name entered as pilot on the flight. Later on 20 and 21 November 1944, he was feeling ill but, so that his students would lose no instruction time and so that no extra burden would be imposed on other instructors, he "didn't authorize" but "merely told these students word for word what Captain Jeffers had told me at this previous meeting and I just told them to not lose any time that if they wanted to they could go ahead and fly and log my name in the Form 1 as a dual ride so they would not get behind in their time." No notice was ever posted on the bulletin board as to the names of those students who were qualified to act as instructors and accused did not learn who they were until after commission of the acts recited in these Specifications (R. 79-80).

In reply to the Specification of the Second Additional Charge accused stated that, after eating "a full meal" costing 50 cents at the Officers' Mess on 6 December 1944, he approached the cashier, discovered he had but "twenty cents in silver and some odd pennies" in his pocket, laid 20 cents with his check on the counter and told the cashier he would obtain the balance from his coat pocket. He obtained 30 cents from his trench coat, returned and "thinking nothing of it just nonchalantly laid the thirty cents on the counter and turned around and walked out, thinking nothing of it."

The defense offered Second Lieutenant Curtis W. Hoke as a witness and he testified that Captain Jeffers had stated that certain

students could be used as instructors and that "we were to use these students on team rides, and when we used these students in the front seat, the student in the back seat was to receive qualified dual instruments" (R. 81). He further testified that Captain Jeffers definitely named the students who were qualified to serve as instructors and that Captain Jeffers never stated that, if a student served as an acting instructor, the instructor-in-fact would receive pilot time credit for the flight (R. 83).

5. To rebut the matters introduced by the defense, the prosecution offered evidence to show that Captain Jeffers discovered that some eight or nine of the student flyers had extensive instrument training and approximately 1500 hours of flying time. He informed these students individually and also their respective flight commanders that they were qualified to act as instructors. He never told accused that any of the students in his flight were qualified to act as instructors and in fact Lieutenants Sanchez, Alleman, Anneberg and Davis had not been designated as qualified instructors (R. 88, 89). Furthermore, when any such qualified student acted as an instructor he was the one to receive credit for the flying time and not the instructor who had not participated in the flight. Captain Jeffers had never authorized the instructors under his command to claim credit "for pilot time in a plane in which they did not fly"; no one was entitled to claim credit for flying time unless he actually participated in a mission and he had never stated that when students flew as instructors they were to substitute the name of the instructor-in-fact on flight reports (R. 90, 92, 96).

In the latter part of November 1944, Captain Lester C. Pagliuso showed accused the various Clearance sheets and W.D. A.A.F. Forms No. 1 (Pros. Exs. 1, 2, 5, 6, 7, 8) involved in these proceedings and, when he informed accused he would have to report the matters to higher authority, accused stated that there was a "misunderstanding on his part" and he wished that Captain Pagliuso would "forget the whole affair" (R. 93, 94).

Second Lieutenant William E. Hubert was recalled as a witness and testified that on the scheduled round robin flight to Kansas City he did not fly under the hood but with the cockpit seat lowered and that during the flight the lowest ceiling of visibility was 3000 feet, the plane always being flown below the clouds (R. 95).

Lieutenants Sanchez, Davis and Anneberg all were recalled and testified that accused had not told them that Captain Jeffers had stated that student officers who had 500 or even 1000 hours of flying time were qualified to act as instructors (R. 95-97).

6. Under Specifications 1 of the Charge and the Additional Charge, the accused is charged with falsely stating on a Clearance sheet and on a

W.D. A.A.F. Form No. 1, respectively, that the flying time of a particular mission was three and a quarter hours and failing to disclose a landing and a thirty minute stop at a Kansas City airport. The evidence conclusively establishes that the stop was made and that the actual flying time was only two hours and forty-five minutes. Furthermore, it was established reporting practice at the field for all pilots to indicate on these flight reports any landings made during a mission, other than running landings, by noting the time and place of landing and time of take off. However, on the Clearance sheet and the W.D. A.A.F. Form No. 1 relative to this flight accused entered the total flying time as three and a quarter hours and did not note the Kansas City landing by entering time and place thereof. This evidence establishes the falsity of both reports and sustains the court's findings of guilty.

The evidence introduced under Specifications 2, 3, 4 of the Charge and the Additional Charge amply establishes commission of the offenses alleged. We find accused's attempts to excuse his conduct because of ignorance as unconvincing as did the court. It is quite apparent from the record of trial that the preparation of these false reports was knowingly and intentionally procured by the accused to indicate his performance of duty in which he had not in fact engaged. The evidence sustains the findings of guilty of these six Specifications.

The evidence also sustains the findings of guilty of the Specification of the Second Additional Charge. Accused's defense to this Charge is entitled to no credence in view of the fact that the witnesses to the transaction were not casual observers but were personnel of the Officers' Mess who paid careful attention to accused's conduct because their suspicions had previously been aroused.

7. Accused is almost 25 years of age. From September 1938 to June 1940 he was a student at the University of North Carolina. He entered military service on 1 October 1940 and after completing the course of instruction as an aviation student at Luke Field, Arizona, on 30 October 1942, he was promoted to staff sergeant and was rated pilot. On 9 January 1943 he was appointed a flight officer and on 9 March 1944 he was commissioned a second lieutenant.

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 mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 96.

Thomas N. Jaffy, Judge Advocate

William H. Gaunt, Judge Advocate

Robert E. Truethan, Judge Advocate

SPJGH-CM 274390 1st Ind MAR 3 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 Second Lieutenant Robert B. Rothey (O-547174), 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. 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 and confinement remitted. G.C.M.O. 149, 16 Apr 1945)

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

(181)

SPJGK - CM 274412

8 FEB 1945

UNITED STATES v. Second Lieutenant THOMAS C. AVERY (0-1180797), Field Artillery.	FIFTH HEADQUARTERS AND HEADQUARTERS DETACHMENT, SPECIAL TROOPS, FOURTH ARMY Trial by G.C.M., convened at Camp Swift, Texas, 18 January 1945. Dismissal, total forfeitures, and confinement for three (3) years.

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 Thomas C. Avery, 4102d Quartermaster Truck Company, did, without proper leave, absent himself from his organization at Camp Swift, Texas from about 22 December 1944 to about 30 December 1944.

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

3. Notwithstanding the accused's plea of guilty the prosecution introduced evidence to show that during the time set forth in the Specification and at the time of trial the accused was in the military service of the United States in the grade of second lieutenant, and in August 1944 was assigned to duty with the 4102nd Quartermaster Truck Company (R. 6). During December 1944 he was absent on a leave of absence which expired 22 December 1944. He failed to return to his organization until 0600 30 December 1944 (R. 7). On or about the 23rd of December 1944 a telegram was received from the accused stating that he would be two or three days late in returning from his leave because he had lost his baggage. The telegram was not answered as it did not request any extension of the leave (R. 9). He was entered as absent without leave in the morning report of his organization as of 21 December 1944 (Ex. A).

4. Defense counsel announced that the accused's rights had been explained to him and that he desired to make an unsworn statement. Thereupon

the accused stated that on 18 December 1944 while going from Columbia, South Carolina, to Greensboro, North Carolina, he lost his luggage. Upon his arrival at the latter place he wired to battalion headquarters that he would be two or three days late because of his loss. He did not request additional leave because he did not know how long it would take to find his luggage. He waited two days in Greensboro upon the advice of those in charge of the freight station. A tracer was then sent out for the luggage so he waited three more days for a report. His luggage could not be found so he returned to his post. That was the only reason for his delay in transit (R. 8).

5. The findings of guilty of the Charge and Specification were amply supported by the evidence adduced by the prosecution, the unsworn statement of the accused, and his plea of guilty.

6. War Department records show the accused to be 28-1/2 years of age and single. He graduated from high school and for 2-1/2 years attended Georgia State College. From October 1939 until he was inducted into the service on 22 January 1942 he was employed intermittently as a teacher by the Board of Education in Atlanta, Georgia. He attended Officers' Candidate School in Field Artillery at Fort Sill, Oklahoma, and on 22 April 1943 was commissioned a second lieutenant, Field Artillery, AUS.

7. The court was legally constituted and had jurisdiction of the accused and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the finding of guilty of the Charge and its Specification and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War 61.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK - CM 274412 1st Ind

Hq ASF, JAGO, Washington 25, D. C. FEB 12 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 Thomas C. Avery (0-1180797), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. 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 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. Drft of ltr sig Sec of War
3. Form of Ex action

(Sentence confirmed but commuted to reprimand and forfeiture of $50 per month for six months. G.C.M.O. 114, 5 Apr 1945)

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

SPJGQ
CM 274482

16 FEB 1945

UNITED STATES v. Private J. D. TALBOTT (34279487), Security Section, 610th Army Air Forces Base Unit, D.	ARMY AIR FORCES PROVING GROUND COMMAND Trial by G.C.M., convened at Eglin Field, Florida, 25 January 1945. Dishonorable discharge and confinement for thirty (30) years. Disciplinary Barracks.

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

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

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

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

Specification: In that Private J. D. Talbott, Security Section, 610th Army Air Forces Base Unit, D, then 889th Guard Squadron, did, without proper leave, absent himself from his station at Eglin Field, Florida, from about 4 December 1942, to about 11 July 1943.

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

Specification: In that Private J. D. Talbott, Security Section, 610th Army Air Forces Base Unit, D, then 889th Guard Squadron, having been duly placed in confinement at Fort Crook, Nebraska, on or about 11 July 1943, did, enroute to Eglin Field, Florida, under armed guard, at Nashville, Tennessee, on or about 16 July 1943, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private J. D. Talbott, Security Section, 610th Army Air Forces Base Unit, D, then 889th Guard Squadron, Eglin Field, Florida, did, at Nashville, Tennessee, on or about 16 July 1943 desert the service of the United States and did remain absent in desertion until he was returned to military control at Greenville, Mississippi on or about 29 December 1944.

He pleaded guilty to Charges I and II and the Specifications thereof, guilty to the Specification, Charge III, except the words "desertion" (sic) and "in desertion," substituting therefor respectively, the words, "absent himself without leave from," and "without leave;" of the excepted words, not guilty, and of the substituted words, guilty; and not guilty to Charge III, but guilty of a violation of the 61st Article of War. He was found guilty of all Charges and Specifications. Evidence of one previous conviction by summary court-martial for absence without leave for 16 days in violation of Article of War 61 was introduced at the trial. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for thirty (30) 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 support of the plea of guilty to Charge I and the Specification thereof, the prosecution introduced the original morning report of the 889th Guard Squadron for 4 December 1942, showing accused "fr dt pass to AWOL 1600" (R. 9; Pros. Ex. A). Master Sergeant Clifford N. Brown, first sergeant of the 889th Guard Squadron on 4 December 1942, who slept in the same barracks with and knew accused, made the entry on the original morning report, which was initialed by the commanding officer. Sergeant Brown also made a personal search for accused after accused failed to return from a pass, but could not locate him. (R. 10-12) The prosecution also introduced an extract copy of the morning report of Detachment of Prisoners, Fort Crook, Nebraska, for 10 July 1943 showing accused "App by C Auth in Council Bluffs, Ia. Delv by Det M.P. Dist #5 7th SC Ft Omaha, Nebr. Conf under 58th AW 11:45 AM by order of CD" (R. 13; Pros. Ex. B). The court was requested by the trial judge advocate and instructed by the president to consider only the portion of the extract copy which pertained to incarceration of accused in the guardhouse (R. 13-14).

The 889th Guard Squadron was de-activated on 1 April 1944 and all personnel were transferred in grade to the 610th Army Air Forces Base Unit, D. At the time of trial, accused was a member of the latter organization (R. 14-15),

As to the Specification, Charge II, and the Specification, Charge III, the evidence for the prosecution shows that Private First Class Edwin C. Myers, Jr. was directed by special orders dated 9 July 1943 to proceed to Fort Crook, Nebraska, where accused was in confinement, for the purpose of obtaining and returning accused to Eglin Field, Florida (R. 16; Pros. Ex. C). Private Myers proceeded to and arrived at Fort Crook on 15 July 1943, on which date accused was turned over to him in civilian clothes. Private Myers, armed with a pistol, handcuffed accused to him and started by rail back to Eglin Field (R. 17). Upon arrival at Nashville, Tennessee, on 16 July 1944, they had a layover of several hours and went to the U.S.O. Lounge in the Union Station. Accused asked permission to write a letter, and permission was granted and the handcuffs were removed. Upon request, accused was also given permission to step across the room, about 25 feet, to mail the letter. Instead of doing so, accused dropped the letter and without permission ran out of the doorway into the crowd. Private Myers pursued him, but was unable to find him, and did not see him again until 4 January 1945 at the guardhouse in Eglin Field. Private Myers notified the Military Police and civilian highway patrol in Nashville and returned to Eglin Field without the accused (R. 17-19). Private Myers was armed with a loaded pistol at the time accused fled from the room (R. 20).

The accused was stopped on the streets of Cleveland, Mississippi, on 3 December 1944 by Rufus P. Walt, Jr., Chief of Police of Cleveland (R. 20-21). On being asked for his draft card, accused presented a classification card bearing the name Leon Price, and showing a 4-F classification (R. 20-22, 24). On the following day the card was re-examined by Walt, and by tearing off something pasted on the back, he found that the card was from the "Neshoba County, Mississippi, Philadelphia board" (R. 24). Accused subsequently admitted tearing this card up and throwing it in the commode in the jail (R. 23). Accused was taken to the Bolivar County Jail in Cleveland on the night of 3 December 1944, and was there informed about his "constitutional rights" by Walt, who told him that he did not need to say anything and that anything he said could be used against him. He told Walt that his name was Leon Price (R. 25). Accused was wearing civilian clothing when arrested, and had a 1936 Pontiac automobile in his possession which he said was his, and to which he had a bill of sale made out to Leon Price. The car had an Arkansas license tag on it, and an Alabama and Tennessee license tag were found in the back of the car. Accused admitted throwing away an Oklahoma license tag near Cleveland, which was later found by Walt (R. 23-24, 33). This tag belonged to a "Buick automobile and some lady in Oklahoma" (R. 29). Accused had a typewriter and a suitcase at a local hotel. The suitcase contained two suits of civilian clothing, cards, dice, two little boxes "known as the shell game," personal letters addressed to the accused, and other personal articles (R. 25, 29, 35).

William Clayton Dempsey, Chief Deputy Sheriff of Bolivar County, was present during a conversation between accused and Walt on 3 December 1944 in the sheriff's office (R. 33-34, 38). Accused told Dempsey that his name was Leon Price; that he had been classified 4-F because he had lung trouble; and that he had been following carnivals and circuses all over the country (R. 34-35).

On the following day (4 December 1944) accused asked to be represented by an attorney, and "the best criminal lawyer in Bolivar County" was detailed to represent him (R. 26).

On Monday, 5 December 1944, Chief Deputy Dempsey and an agent of the Federal Bureau of Investigation went to the jail to talk to the accused, and as they "started in the hallway", before either had addressed the accused, accused said, "Mr. Dempsey, come here a minute. I want to talk to you a little bit this morning". On being asked what he wanted, accused said, "I just wanted to tell you the truth. I have been lying to you. I am a deserter from the Army and have been gone over two years. I want to get back in the Army and get straightened up" (R. 36). Accused then said that his name was J. D. Talbott and that he had been following carnivals and circus shows from place to place and had been in Idaho, Nevada, and Chicago (R. 36). Accused admitted having escaped his guard in Nashville, Tennessee. He admitted picking up the classification card in Pascagoula, rubbing out the name on it, and typing in the name "Leon Price" (R. 36-37). The above conversation took place thirty minutes after accused had talked with his lawyer, and accused admitted that his lawyer had told him he could not get him out. Accused admitted using the aliases of Leon Price and Frank Nelson, and his "fingerprints showed" that he had been fined $10.00 as Frank Nelson in Granada, Mississippi, on a "drunk" charge (R. 37).

On 6 December 1944, while the witness Walt was in the jail "after another prisoner for trial", he told accused, "I see you have lied to me". Accused then admitted that he had lied, and told Walt that he had deserted the Army at Eglin Field, Florida, in 1942, and in July 1943 had been apprehended, had escaped from his military escort, and had been at large since that time. He also stated that he had used the aliases of Frank Nelson and Leon Price (R. 26-27). Walt asked accused why he had deserted, and accused stated that he did not like the Army. Accused did not say anything about intending to return to the military authorities (R. 28). Subsequently, on 29 December 1944, Walt turned accused over to the military authorities at the guardhouse at Greenville Army Air Base, Greenville, Mississippi, a distance of 43 miles from Cleveland (R. 28).

After being warned of his rights by the investigating officer, First Lieutenant Alfred A. Levingston, at Eglin Field, Florida,

accused later admitted having been arrested in Cleveland, Mississippi, after being there only two hours. He recounted having worked for two circuses in the spring of 1944 under the name of Frank Nelson, and also mentioned other shows and expositions. He stated that he had been all over the country and that he did not stay in any one place more than two to four days at a time (R. 43-45). The distance from Cleveland, Mississippi, to Eglin Field, Florida, is 460 miles (R. 45).

4. The accused, after having his rights as a witness fully explained to him, elected to remain silent. No evidence was offered in his behalf (R. 46-47).

5. The pleas of guilty, together with the evidence introduced by the prosecution, support the findings of guilty of Charges I and II and the Specifications thereof. While in the custody of the armed guard, to whom he was delivered from his place of confinement at Fort Crook, Nebraska, accused was in confinement within the meaning of Article of War 69 (See M.C.M. 1928, par. 139; Dig. Op. JAG, 1912-40, sec. 427(6); Bull. JAG, Jan.-June 1942, p. 58).

With reference to Charge III and the Specification thereof, accused pleaded guilty to absence without leave, and the prosecution introduced independent evidence in proof of that offense. The evidence bearing upon the accused's intent to desert so clearly justifies the finding of guilty of desertion that further discussion is unnecessary.

6. The accused first absented himself on 4 December 1942, and was not arraigned until 25 January 1945. Absence without leave not being a continuing offense (M.C.M., 1928, par. 67), a plea in bar under Article of War 39 would have been proper, since more than two years had elapsed since the commission of the offense alleged under Charge I. The record does not show that accused was advised of his right to plead the statute of limitations. It is now settled, however, that the failure of the record to show affirmatively that accused was advised by the court or his counsel of the availability of the statute as a defense does not affect the legal sufficiency of the record to support the findings of guilty. It is presumed that accused's counsel properly performed his duty and advised accused fully of his rights (CM 231504, Santo, 18 BR 235, Bull. JAG, Feb. 1944, p. 56).

7. The defense moved to strike from the record the testimony of Rufus P. Walt, Jr. as to statements made by the accused on 6 December 1944 while in the county jail, on the ground that a confession was elicited without previous warning to the accused that the information given might later be used against him (R. 31).

Upon similar grounds the defense also moved to strike all the testimony of William Clayton Dempsey with respect to questioning in the sheriff's office on 3 December 1944 (R. 38). It is true that accused was not apprised of his rights by Walt in the sheriff's office on 3 December until after some questions concerning his classification card had been answered by the accused (R. 34, 38), and that on 6 December, Walt, by his own admission, did not again advise accused of his rights (R. 30-31). However, for a number of reasons the motion to strike the testimony was properly overruled. It appears that practically all of such testimony consisted of admissions against interest rather than confessions, and as such was admissible without any affirmative showing that it was voluntarily made (Dig. Op. JAG, 1912-40, sec. 395(3); M.C.M. 1928, par. 114b). Assuming that the testimony did contain a confession, it appears that the statements were made to civilian officers who were not acting as agents or representatives of military superiors, and consequently it was not essential that accused be advised of his rights (M.C.M. 1928, par. 114a; CM 121585, Dig. Op. JAG, 1918, p. 317; CM 211898, Shelton, 10 BR 153; CM 234838, Blizzard, 21 BR 183). Moreover, it appears from the record that accused was expressly advised of his rights by Walt on the night of 3 December 1944, before Dempsey saw him, and, even if such advice were necessary, it was not necessary to repeat it on 6 December. The warning need not be immediately prior to the confession (CM 230070, Henry et al, 17 BR 291, Bull. JAG, March 1943, p. 95).

In any event, if regarded as improperly admitted confessions, the statements made by accused would not be fatal to conviction because the intention not to return is clearly proved by other competent evidence of such quantity and quality as practically to compel in the minds of reasonable men the finding of guilty (CM 237711, Fleischer, 24 BR 89).

8. The charge sheet shows that accused is 25 years of age. He was inducted at Camp Shelby, Mississippi, on 11 June 1942, and had no prior service.

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

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

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

SPJGQ
CM 274498

12 FEB 1945

UNITED STATES v. Private DANIEL W. GREEN (33170934), Company C, Military Police Battalion, Army Ground Forces Replacement Depot No. 1, Fort George G. Meade, Maryland.	ARMY GROUND FORCES REPLACEMENT DEPOT NO 1 Trial by G.C.M., convened at Fort George G. Meade, Maryland, 29 January 1945. Dishonorable discharge and confinement for five (5) years. Midwestern Branch, Disciplinary Barracks.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Daniel W. Green, then of Company D, 31st Replacement Battalion, 8th Replacement Regiment (Inf), now of Company C, Military Police Battalion, did, at Fort George G. Meade, Maryland, on or about 0545, 13 December 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to shirk important service, to wit: transfer to a port of embarkation for overseas shipment, and did remain absent in desertion until he was apprehended at Washington, District of Columbia, on or about 0530, 20 January 1945.

He pleaded not guilty to and was found guilty of the Specification and the Charge. Evidence of three previous convictions for minor offenses was introduced at the trial. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence, designated the Midwestern Branch, United States Disciplinary Barracks, Fort Benjamin Harrison, Indiana, as the place of confinement, and withheld the order directing the execution of the sentence, pursuant to Article of War 50½.

3. The evidence for the prosecution established the following state of facts.

The accused was named on a shipping list in orders to proceed from an Army Ground Forces Replacement Depot to a port of embarkation. The orders assigned the personnel so named to a specific shipment number, assigned an APO mailing address for use "until arrival at final destination", provided for movement by trains, with an escort personnel detailed, a convoy commander and convoy officer to conduct the movement to the port of embarkation and "continue with movement through port area to overseas destination", with staff officers detailed "for period of movement from this station to overseas destination." (R. 7; Pros. Ex. A). The shipping list, naming the accused, was attached (R. 7; Pros. Ex. B).

An officer assembled the men, including the accused, and notified them that they were on an alert status for shipment, read to them a certificate of notice of transfer to a port of embarkation for shipment overseas, and explained the seriousness of the occasion and the importance of their being present (R. 7). He notified the accused that the accused was on orders for shipment overseas (R. 8). The accused signed a certificate showing that he had received and understood such notice (R. 8; Pros. Ex. C).

The shipment departed from the replacement depot for the port at 0700 hours, 13 December 1944. The accused was absent without leave. (Morning Reports, R. 9; Pros. Ex. D; R. 11; Pros. Ex. F; R. 12; Pros. Ex. G). His absence was discovered at reveille that morning, and he was not found upon search made for him. He was not present when the shipment left (R. 12). He was apprehended by military police at a bus terminal in Washington, D.C., at about 0530 hours on 20 January 1945 (Stipulation, R. 12).

4. After explanation of his rights, the accused elected to remain silent. The defense introduced no evidence.

5. Embarkation for foreign duty is "important service" within the meaning of the 28th Article of War (CM 151672, Lytle, Dig. Op. JAG 1912-40, sec. 385; CM 224805, Conlon, 14 BR 191; CM 225128, Southern, 14 BR 231). Entrainment for a port of embarkation under circumstances clearly indicating a substantially continuous movement through the port and on to an overseas destination is directly and immediately related to the actual embarkation. Absence without leave at the time of such entrainment, with knowledge of such movement, not otherwise explained, is a fair basis for the inference of the specific intent to avoid embarkation (CM 227485, Sapp, 15 BR 379; CM 228400, McElroy, 16 BR 161; CM 272354, Naselli; CM 272683, Kelly, 30 January 1945).

This movement was not preparatory, but a part of the actual progression of movement overseas, after preparation was completed at the Replacement Depot. The circumstances were sufficient to apprise the accused that embarkation for overseas service was imminent and that his absence would avoid it. The case is thus sharply distinguished from recent cases involving movements to Replacement Depot "Preparatory for Overseas Replacements" (3 Bull. JAG 511, December, 1944, sec. 385).

The requisite specific intent was imperfectly alleged in the Specification, as the important service involved was overseas shipment, not "transfer to a port of embarkation for overseas shipment", but the record of trial indicates that the intendment of the Specification was understood, the inaccuracy was not complained of, and the substantial rights of the accused were not injured thereby (M.C.M. 1928, par. 87b, p. 74).

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty of the Specification and of the Charge and to support the sentence.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Fredericks, Judge Advocate.

[illegible], Judge Advocate.

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

SPJGN
CM 274502

10 FEB 1945

UNITED STATES	FIFTH HEADQUARTERS AND HEADQUARTERS DETACHMENT SPECIAL TROOPS, FOURTH ARMY
v.	Trial by G.C.M., convened at Camp Swift, Texas, 19 January 1945. Dismissal and total forfeitures.
Captain EDMUND F. BUTLER, Jr. (0-1109391), Corps of Engineers.	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Edmund F. Butler Jr., Headquarters 1161st Engineer Combat Group was at Dallas, Texas, on or about 10 December 1944 in a public place, to wit, the Baker Hotel, drunk and disorderly while in uniform.

Specification 2: In that Captain Edmund F. Butler Jr., Headquarters 1161st Engineer Combat Group did at Dallas, Texas on or about 10 December 1944 wrongfully slap Private First Class Adron H. Franks, Company C, 48th Infantry Advance Training Battalion, 12th Regiment, on each side of his cheeks with the palms of his hands.

Specification 3: In that Captain Edmund F. Butler Jr., Headquarters 1161st Engineer Combat Group did at Dallas, Texas

on or about 10 December 1944 wrongfully shove Private Roe E Nehls, Company C, 48th Infantry Advance Training Battalion, 12th Regiment, by grabbing him from behind on the shoulders with his hands.

Specification 4: In that Captain Edmund F. Butler Jr., Headquarters 1161st Engineer Combat Group did at Dallas, Texas on or about 10 December 1944 wrongfully shove Private First Class Dale Ringgenberg Troop B, 107th Cavalry (Reconnaissance Squad) by grabbing him from behind on the shoulders with his hands.

The accused pleaded 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 four years. The reviewing authority approved only so much of the sentence as provided for dismissal and forfeiture of all pay and allowances due and to become due and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that between 1:00 and 1:30 a.m. on 10 December 1944 the lobby of the Baker Hotel in Dallas, Texas, was "full of people". The majority were civilians but there were also several enlisted men, a number of whom were at the desk "waiting for a room" (R. 8-11, 13-17). Suddenly the accused, who wore the uniform and insignia of his rank, approached some of the soldiers and began "pushing them to the side". When they offered some resistance, he "shoved" and struck Provate Roe E. Nehls, "shoved" Private First Class Dale Ringgenberg, and slapped Private First Class Adron H. Franks on both cheeks (R. 7-15). As he performed these rude and violent acts the accused shouted, "Line up, you God Damn Prisoners of War" (R. 7-8, 10-13). A lieutenant immediately remonstrated and said, among other things that, "you are not going to carry on any more in my presence". The accused responded by "arguing" (R. 14-15). The military police were summoned, and he was removed to the Provost Marshal's office (R. 7, 9, 14-16). He was drunk but apparently knew what he was doing (R. 7-8, 10-13, 15-17).

4. The accused, after being apprised of his rights relative to testifying or remaining silent, elected not to take the stand. Three witnesses were presented by the defense on his behalf. Lieutenant Colonel Henry K. Kellogg, his commanding officer, rated him as superior, had relieved him only because of the belief that the incident at the Baker Hotel "would not set to [sic] well with the men", and desired him to accompany the "outfit" on its overseas assignment (R. 17-18). Master Sergeant Harold E. Thomas and Master Sergeant Francis G. Musolf were of the opinion that the accused was highly regarded by his men and that his behavior at the hotel had not changed their feelings toward him (R. 19-20).

5. Specification 1 of the Charge alleges that the accused was "on or about 10 December 1944 in a public place * * * drunk and disorderly while in uniform". Specification 2 alleges that he did on the same day "wrongfully slap Private First Class Adron H. Franks * * * on each side of his cheeks with the palms of his hands". Specifications 3 and 4 allege that the accused did on the same day "wrongfully shove" Private Roe E. Nehls and Private First Class Dale Ringgenberg, respectively, by "grabbing [them] from behind on the shoulders with his hands". These offenses were laid under Article of War 96.

The evidence adduced by the prosecution, coupled with the pleas of guilty, establish beyond a peradventure of a doubt that the accused on 10 December 1944, without any provocation and while under the influence of liquor, struck Private First Class Franks and Private Nehls and violently pushed Private Nehls and Private First Class Ringgenberg, all of whom were total strangers to him. This irrational and drunken behavior, which was manifestly disorderly, occurred in a public place in full view of a large number of onlookers, most of whom were civilians, and was highly discreditable to the military service. Each of the Specifications of the Charge has been satisfactorily proved.

6. The accused who is single is about 36 years old. After graduating from high school, he attended Georgetown University for three years. He was employed from September of 1929 to December of 1930 by the American Radiator Company as a clerk, from January of 1931 to April of 1932 by the Federal Huber Company as a salesman, from May of 1932 to March of 1936 by the American Radiator Company as a salesman and clerk, and from April of 1936 to December of 1940 by the Youngstown Sheet and Tube Company as a salesman. He had enlisted service from January of 1941 to 16 January 1943 when he was commissioned a second lieutenant. He was promoted to first lieutenant on 7 October 1943 and to captain on 27 November 1944. Since 16 January 1943 he has been on active duty as an officer.

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

Abner E. Lifsconb, Judge Advocate.

Robert J. Clarma, Judge Advocate.

Gabriel N. Golden, Judge Advocate.

(198)

SPJGH-CM 274502 1st Ind.

FEB 27 1945

Hq ASF, JAGD, 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 Edmund F. Butler, Jr. (O-1109391), 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 the sentence as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed but commuted to a reprimand and forfeiture of pay of $50 per month for six months and that the sentence as thus modified be ordered executed.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Sentence as approved by reviewing authority confirmed but commuted to reprimand and forfeiture of $50 per month for six months. G.C.M.O. 116, 5 Apr 1945)

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

SPJGQ
CM 274516

22 MAR 1945

UNITED STATES	SECOND AIR FORCE
v.	Trial by G.C.M., convened at Smoky Hill Army Air Field, Salina, Kansas, 12 January 1945. Dismissal, total forfeitures and confinement for three (3) years.
Second Lieutenant EDWARD R. PHILLIPP (02069108), Air Corps.	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Edward R. Phillipp, 1st Photo Reconnaissance Squadron, did, at Smoky Hill Army Air Field, Salina, Kansas, on or about 25 December 1944, feloniously take, steal and carry away $100.00, lawful money of the United States, property of First Lieutenant Richard VanZandt, 1st Photo Reconnaissance Squadron.

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, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three 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 on the evening of 24 December 1944, at about 11:45 p.m., accused attended midnight Mass at the post chapel, Smoky Hill Army Air Field, Salina, Kansas, in the company of two officers and two young women. Accused "appeared to have been drinking and may have been just slightly unsteady", but his "judgment seemed clear" at that time. Accused,

who was Catholic, sat on the front row of seats at Mass, and "was ahead of the movement of the crowd, in other words he seemed to know exactly what he was doing during the Mass". After the services, he came with the party by automobile to an area behind the Club, and got out of the car at about 1:10 or 1:15 a.m. He "seemed quiet" after the service (R. 6-12).

First Lieutenant Richard VanZandt, an occupant of BOQ 477, Smoky Hill Army Air Base, had one drink of liquor during the evening of 24 December 1944, and retired at about 12:30 a.m., 25 December. He was the only person in the quarters at the time. He was unable to sleep, and at 2:30 or perhaps 1:30 a.m. he heard someone enter the quarters. Subsequently he identified this person as accused (R. 12-14, 16, 17, 26, 27). Accused turned on a light and walked over to a chest of drawers about three or four feet from Lieutenant VanZandt's bunk (R. 15, 16, 24, 25, 32, 33). Accused walked with the "step of a person that had been drinking" (R. 25). VanZandt opened his eyes, looked at accused, and asked him what he wanted. Accused asked him if that was BOQ 487. VanZandt told him it was not, and lay "back down" with his face toward the wall. Accused said, "I am sorry I woke you up". VanZandt understood him clearly. "This person continued standing there for a few seconds longer and then walked over and turned out the light" (R. 17). "I would say he was there at least a minute and a half" from the time he came in and stood by the bunk until he left (R. 26).

Before retiring, VanZandt had left his billfold on top of the chest of drawers as had been his habit (R. 16-17, 33). The billfold was divided into two separate parts, one side containing a torn one hundred dollar bill, folded in three folds, and the other side containing other bills in the approximate amount of $15.00 (R. 16-18). The billfold was introduced in evidence (R. 17; Pros. Ex. 2). VanZandt had looked at the one hundred dollar bill before putting the billfold on the chest of drawers and knew it was there (R. 27). The bill had been given to him by Lieutenant Sponburgh in payment of a debt on the night of 23 December 1944 at the Officers' Club. It had been torn one-third from the left end, in two pieces, when a Lieutenant Agnew had grabbed it (R. 13-14, 34-35). The bill had not been "shown around" to anyone else (R. 32). It was introduced in evidence (R. 21; Pros. Ex. 1).

At about 7:00 a.m., 25 December, Lieutenant Van Zandt arose, picked up his billfold, and noticed that the one hundred dollar bill was missing (R. 18). Nothing else was disturbed or missing (R. 32). He called Lieutenant Bird, the Provost Marshal and they searched for BOQ 487, but found no such number. After looking at some officers' pictures in Bird's office without identifying the intruder, they searched BOQs 477, 478 and 479. In BOQ 479

VanZandt identified accused, who was asleep, as the person he had seen in his room the night before. Lieutenant Bird went for and returned with the Officer of the Day. VanZandt told them he was positive that accused was the person who had been in his room. Then they waked accused, at about 8:45 a.m. (R. 18-20, 36-38, 47). When accused opened his eyes he was "red-faced", and appeared like a person who might have a "hangover" (R. 28, 43). His trousers were not on a hanger, and clothing "was all over the place, some other articles were hanging on the wall, some on the bunk across the way from him" (R. 29). Lieutenant Bird said that something serious had happened the night before and warned accused that under the 24th Article of War he did not have to answer any questions and that any questions he did answer might be used against him later on (R. 20, 39). Accused told Bird that he had a "one hundred dollar bill, three fives and three ones" in the pocket of his pants, which were hanging on the side wall. He stated that the one hundred dollar bill was torn in two pieces, and either said it was torn five-sixths of the way down the bill, or torn in half (R. 21, 39). Accused allowed Bird to remove the one hundred dollar bill from the pocket, and it was later returned thereto (R. 21). Accused said he did not know where, how or when he got the bill (R. 21-22, 40). He

> "said he had gotten a partial pay the week before and the pay was one hundred dollars. But later on we asked him again about where he got the one hundred dollar bill and he still said he didn't know. He was asked again about his partial pay and he admitted that in that partial pay he did not receive a one hundred dollar bill, that the currency he received were twenty dollar bills and lower" (R. 22).

Bird told accused that the evidence "seemed to point out that the bill belonged to" VanZandt, and suggested that he return the bill to VanZandt. Accused "agreed" or "admitted it could be possible", and removed the bill from the trousers and handed it to VanZandt (R. 22, 40-41). Accused denied having been in VanZandt's room the night before, but voluntarily stated that "he knew that he had this money when he went to bed the night before because when he undressed for bed he counted the money he had in his possession" (R. 40). Accused did not delay his answers to any questions; they were coherent and immediate. He spoke "very clearly" and there was no difficulty in making out what he said (R. 28, 30, 43).

4. The evidence for the defense may be summarized as follows:

Accused and Second Lieutenant Anthony M. Paolo went to the Officers' Club on the evening of 24 December at about 7:30 after attending a show in town, and they were together until about 11:45 p.m. Accused had been drinking quite a bit, was intoxicated, was

"very giddy about everything", and was staggering when he left for midnight Mass (R. 46-47). "He spoke as if he was saying things he didn't know he was saying. He was muttering words" (R. 49-50). However, he was rational (R. 52). Paolo saw accused again about 1:15 a.m. at which time accused got out of a car and walked toward his barracks. He staggered as he walked. When witness waked accused at 4 p.m. Christmas day, accused still had a hangover from the evening before. At that time accused "said he remembered something about a one hundred dollar bill and three officers woke him up and he knew he had a one hundred dollar bill on him and he didn't know where he got it and he thought it was all a dream because he didn't remember any definite facts about it" (R. 47-50). Paolo had also gone with accused to the club on 23 December and they had had two or three drinks together (R. 49, 52). He actually saw accused take only two drinks on 24 December (R. 49). He has known accused since December 1943. Accused's reputation as to character and behavior has been very good. Accused had one of the highest averages in the echelon in Preflight and Advanced Navigation School, and also had very good grades in Radar School. So far as witness knew, accused has never been in any difficulty. He has been married for over a year. Paolo has seen accused out on dates with women other than his wife at other places than this field. He has seen accused "just a little" intoxicated "just about three" times before on this field (R. 48, 51-52).

Second Lieutenants Dossie B. Glass, Arthur W. Kade and Jerome Prokop, all residents of accused's barracks, BOQ 479, had come from town after midnight on Christmas Eve. All saw accused between 1:00 a.m. and 1:30 a.m. when they went to his room, at his invitation, for some drinks (R. 53-54, 61-62, 67-68). Accused was insistent that they drink with him because his wife was to have a child, and "he would like to have us, if we wouldn't drink with him, to drink to his wife" (R. 54, 68). At that time, Glass testified, accused was drinking but was not "intoxicated to any higher degree" (R. 55). Prokop stated that accused "was just slightly befuddled" (R. 68). Accused opened a new bottle of liquor and passed it around. They drank at least three-fourths of it without any "chasers". Prokop did not indulge, but watched them drink awhile and then returned to his part of the barracks (R. 54-55, 62-63, 69). They remained there about an hour (R. 56). Glass testified that as time progressed accused was "definitely drunk. His nerve control was definitely off, he couldn't very well control himself". At 2:30 a.m. accused was "in the extreme stages of drunkenness," but was still able to walk. Glass had never seen him intoxicated before (R. 55-57). Glass left accused's bay about 2:30 a.m. (R. 60). Kade and accused talked about and showed each other pictures of their wives. Kade got "dizzy and pretty tight" and the last thing

he remembered was getting up and going to the latrine. He did not know accused's condition (R. 61-66). Prokop testified that they came in his room after a short while to get him to rejoin the party, and "by that time there was only about two inches left in the bottle and there was considerable thick talking, waving of the bottle around, and of course the wife and the possible baby had to be drunk to again". As to accused's condition between 2:00 and 2:30, he stated that "men with less to drink than that and with better behavior than that are often called drunk" (R. 69-70).

Flight Officer Aaron H. Kuppersmith, also a resident of BOQ 479, came in between 2:00 and 2:30 a.m. while the party was in progress. He thought accused was drunk, and "it appeared more to" him "as time went on". "He wasn't falling down drunk but drunk enough to make his actions shaky". Witness could understand what accused was saying. Accused had lost a purse and they looked for and found it. The party broke up about 2:30 or 3:30, and Kuppersmith put accused and Kade to bed, and helped Glass to bed (R. 70-75). Prokop testified that Kuppersmith put Kade to bed and "tucked in" Glass at what seemed to be between 3:00 and 3:30 a.m. "Then somebody came rushing through making inquiry as to where Lieutenant Phillipp's AGO and wallet might be. Then Flight Officer Kuppersmith finally came back saying he had put Lieutenant Phillipp to bed" (R. 70).

Second Lieutenant Robert E. Mitchell, co-pilot of accused's crew, was with accused from about 6:00 p.m. on 24 December, and knew that accused had been drinking from then until about 11:45 p.m., when he went to Mass. Accused had, he thought, about eight or nine drinks. At about 1:10 a.m. accused came into Mitchell's BOQ from Mass "in about the same shape he was in when he left the club". He was "just high". "He seemed to be able to navigate pretty good". His speech seemed coherent. "He just came in to wish everybody a Merry Christmas". He also talked "about his wife and she expected a child and that was about all. He left in about ten minutes". At about 2:00 a.m., after Mitchell was in bed, accused came back "rumaging around, he was barging in wishing everybody a happy new year and everything and I got up and steared him out into the bay. * * * He was more under the influence of liquor than he was the first time. * * * He was pretty drunk" (R. 76-83). He showed it by,

> "his speech and walk, he was a little more all over the place than he had been the first time * * * his speech was pretty bad and he was stumbling around * * * it must have been about 3:00 o'clock when he came barging back into the room. * * * He was standing there and had trousers on, khaki shirt, no tie, no blouse and no hat. This time, I have never seen a case of DT, but that was him if I ever saw it. He was very muttery in his speech and his breath

was coming quick. * * * I was pretty mad, I just took hold of him and steared him out into the bay and into his own barracks. That was the last I saw of him until the next afternoon (R. 80-81). * * * He was just about out. * * * I was afraid he would pass out before I got him into his barracks" (R. 83).

A couple of days before Christmas Eve accused had been drinking a little more than usual. Mitchell tried to get him to "cut it out", and also advised him to "cut out" going to town at night (R. 81). Mitchell had also seen accused drunk a few nights before Christmas Eve (R. 83).

At about 2:30 a.m. accused entered BOQ 478, shortly after Second Lieutenants Robert T. Rodriquez and Bernard James Proft had retired. According to Rodriquez, accused was "making an awful noise and he was screaming 'Proft, Proft, Proft.' He came over and jumped on my bed and woke me up and I caught a glimpse of him. I didn't know who he was at the time. I told him where Lieutenant Proft was sleeping so he just left and that is all I know. * * * He was very drunk" (R. 83-85). Lieutenant Proft testified that accused was intoxicated, and wanted him to come next door, which he did for about five or ten minutes. Accused was not there when Proft got there (R. 86-88).

Accused, after having his rights explained to him by the president, elected to be sworn as a witness (R. 88-89). He entered the Army in April 1943, and after basic training he became an aviation cadet, took college training, preflight course, advanced navigation, and radar training. He is from Cleveland, Ohio, has a brother overseas, and a sister who is training to be a nurse. He married in October 1943. He has been arrested only one time, for speeding. On the evening of 24 December, he had "around eight to eleven" drinks prior to about 11:40 p.m. He was worried because his wife was expecting a baby and it had been two weeks since the "pre-determined date". The child was born on 26 December. He had not eaten anything at all during the entire day of 24 December, and he felt the effects of the drinks he had in the Officers' Club when he went to the midnight Mass. He "felt pretty happy". However, he had been trained in a Catholic School for about eight years and believed he "could go through the motions or what goes on in church" whether he was sober or drunk. He was dropped off at his barracks about 1:10 a.m. and went to the latrine. Then he went to Lieutenant Mitchell's quarters at about 1:15 to wish him a Merry Christmas and ask him to come over for a drink. He did not remember being in Mitchell's quarters after that. The last he remembered was opening the bottle and drinking with Kade, Glass, and Prokop, and talking and showing pictures of wives and sweethearts. He did not remember waking up Lieutenant Rodriquez or calling Lieutenant Proft. He had

no recollection of being in BOQ 477. He did not know Lieutenant VanZandt until about 27 or 28 December. He did not recall Lieutenant Kuppersmith helping him go to bed. He recalled nothing about undressing or putting his clothes away, and on waking up he found his clothes were not where he usually put them. He did not remember losing his billfold during the night. He remembered "vaguely" Lieutenant Bird, the Officer of the Day and Lieutenant VanZandt coming to his room. He did not remember any of the questions they asked him. He did not recall taking one hundred dollars out of his "pants" or seeing the bill that morning. He had no knowledge of how the one hundred dollar bill got in his clothing. He did not understand why he made a statement to the investigating officers that he knew how much money he had in his pocketbook. He did not recall counting his money on the 23rd or 24th, but he had a habit of counting his money before going to bed every night. He did not remember finding a one hundred dollar bill that evening, or anyone giving him such a bill. Stealing a quantity of money has never entered his mind. On 24 December he had eighteen dollars of his own money and had loaned fifty dollars to three different officers. On 18 December he had drawn $100.00 as an advance on his 31 December pay because he had a chance of getting home, but he had loaned it after learning he could not get home. He had no immediate need for money. The doctor and hospital bills for his wife were paid before she went to the hospital. He could have sent home for more money, or could have borrowed from fellow officers if he had needed it. He did not recall seeing Lieutenant VanZandt at the Officers' Club on the evening of 23 December. He had never seen the billfold before the trial. On 25 December he slept until around 4 or 4:30 p.m. (R. 89-105).

5. The testimony for the prosecution establishes the fact that accused was seen in the room of a fellow officer at about 2:30 or 1:30 a.m. on 25 December 1944, standing within reach of a chest of drawers upon which lay a billfold containing a torn one hundred dollar bill. At about 7:00 a.m. the bill was discovered to be missing. Less than two hours later a bill of the same description was removed from a pocket of accused's trousers, which were hanging near the bed in which he was sleeping. Accused was unable to explain where, when or how he came into possession of the bill. Under this state of the evidence, the court was warranted in concluding that accused took the bill by trespass.

The only serious issue of fact presented is whether or not accused, at the time he took the bill, was intoxicated to such an extent that he was unable to form the specific intent required for a finding of guilty of the offense of larceny. Drunkenness is not an excuse for a crime committed while in that condition, but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense (MCM 1928, par. 126a). The testimony of several officers other than

accused as to his actions and appearance about the time of the alleged theft leaves little doubt that accused was intoxicated to a considerable degree. However, the testimony of Lieutenant VanZandt clearly shows that at the time of the taking, accused could walk, turn a light on and off, and speak distinctly and was sober enough to apologize for waking the witness. The testimony of the prosecution also shows that accused, when he was wakened by the officers on the morning of 25 December, knew the exact amount of money in his pocket and the denominations and knew that he had the torn one hundred dollar bill, which he described. Under these circumstances the court was justified in finding that at the time of the taking, the accused, although drunk, was capable of forming the intent to steal.

6. On direct examination Lieutenant Paolo testified to accused's good character. On cross-examination, over the objection of the defense he was permitted to testify that he had seen accused on "dates" with women other than his wife. This testimony was incompetent (MCM 1921, par. 205), but undoubtedly did not influence the court in convicting accused of larceny. Testimony relating to prior acts of drunkenness was likewise erroneously admitted in evidence, but since the theory of the defense was the accused's inability to form a specific intent by reason of drunkenness, it is obvious that he was not prejudiced by the admission thereof.

7. The defense counsel attempted to cross-examine the Provost Marshal, Lieutenant Bird, as to "other facts known by the witness," apparently concerning a conversation between the witness and accused at about 7:30 or 8:00 p.m. on 25 December (R. 43-44). On direct examination the prosecution had not introduced evidence relative to any occurrence that evening. The prosecution objected to the evidence upon the ground that the defense should be limited to matters brought out on direct examination. The court sustained the objection and informed defense counsel that he would have to call the witness as his own if he wished to bring out such new matter. The defense counsel did not do so. The Manual for Courts-Martial states that "Cross-examination should be limited to matters having a bearing upon the testimony of the witness on direct examination" (MCM 1928, par. 121b). This provision is somewhat elastic and contemplates the exercise of discretion by the court. In the opinion of the Board of Review, the court did not abuse its discretion in this instance and in any event the accused was not prejudiced, for the testimony could have been adduced by recalling the witness.

8. Attached to the record of trial is a letter from Major Victor F. Sieverding, defense counsel, dated 17 January 1945, addressed to the Commanding General, Second Air Force, in which he requested clemency for the accused upon the ground that the evidence shows that accused was too drunk at the time of the alleged offense

to have formed any intent to steal, and so drunk at the time he was questioned in his quarters as to preclude the possibility of his answers having been voluntarily given, and also because of accused's "previously clean and efficient record". He also requested a new trial because of the refusal of the court to allow proper cross-examination of Lieutenant Bird, previously discussed herein, and because of newly discovered evidence that after the trial a psychiatrist examined accused and found that he was unable to form an intent to commit larceny during the early morning of 25 December, and was "still incapable" at the time of the interview with the Provost Marshal later that morning.

Technically, there is no such thing as a "new trial" in court-martial procedure. However, a reviewing or confirming authority, upon disapproval of the findings and sentence, may order a "rehearing" in a case in which execution of the sentence has not previously been ordered (AW 50½). Conceivably, the disapproval of the proceedings and the ordering of a rehearing might be based upon newly discovered evidence. In a case wherein a "new trial" or rehearing is requested upon that ground, resort to the principles adopted by the civil courts is proper. Those principles are set forth in Clark's Criminal Procedure (2nd ed.), page 587, as follows:

> "* * * To authorize a new trial on this ground (1) the evidence must have been discovered since the trial; (2) it must be such as reasonable diligence on the part of the defendant could not have secured on the former trial; (3) it must be material, and not merely collateral or cumulative or corroborative or impeaching; (4) it must be such as ought to produce a different result on the merits on another trial; (5) it must go to the merits, and not rest on merely a technical defense."

In the present case the "motion" was addressed to the discretion of the reviewing authority and there is nothing in the proceedings to indicate that the reviewing authority abused his discretion. Indeed, so far as appears, the evidence could have been secured in time for presentation at the trial. Furthermore, in view of the testimony concerning the accused's mental condition when interviewed on the morning of 25 December by Lieutenants Bird and VanZandt, it cannot be said that the "newly discovered" evidence "ought to produce a different result on the merits on another trial" (See Clark, above). In our opinion no prejudice appears by reason of the reviewing authority's refusal to disapprove the proceedings and order a rehearing.

9. War Department records show that accused is 20 years of age, and is married. He has one daughter, born 26 December 1944.

He is a high school graduate and worked from February 1941 to March 1943 as a machinist in an aircraft parts firm in Cleveland, Ohio. He served as an enlisted man from April 1943 until 28 August 1944, when he was commissioned a second lieutenant in the Army of the United States upon completion of the Aircraft Observers' course at the Army Air Forces Navigation School, San Marcos, Texas.

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

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ -, CM 274516 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 27 MAR 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 Edward R. Phillipp (02069108), 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 of the unusual circumstances of the case, by reason of which the degree of moral turpitude involved is relatively slight, and of the officer's youth and prior good record, I recommend that the sentence be confirmed but that the forfeitures and confinement be remitted, and that the execution of that portion of the sentence adjudging dismissal be suspended during good behavior.

3. Consideration has been given to a comment by the Staff Judge Advocate, Second Air Force, suggesting that remission of that portion of the sentence relating to confinement be seriously considered; and also to a letter from accused's father, Mr. Hugo Phillipp, and a letter and inclosures from the Honorable Robert A. Taft, United States Senate.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

5 Incls
1 - Record of trial
2 - Dft ltr for sig S/W
3 - Form of action
4 - Ltr fr Mr. Hugo Phillipp
5 - Ltr fr Hon. Robert A. Taft with incls.

(Sentence confirmed but forfeitures and confinement remitted and execution of that portion of sentence adjudging dismissal suspended, by order of the Under Secretary of War. G.C.M.O. 222, 13 Jun 1945)

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

SPJGH
CM 274517

2 MAR 1945

UNITED STATES v. First Lieutenant HAROLD L. GENTRY (0-673356), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Aloe Army Air Field, Victoria, Texas, 22 January 1945. 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 Charge and Specification:

CHARGE: Violation of the 96th Article of War

Specification: In that First Lieutenant Harold L. Gentry, Air Corps, did, at or near Matagorda Island Bombing and Gunnery Range, Texas, on or about 9 January 1945, wrongfully fly a military aircraft closer than five hundred (500) feet to another aircraft in flight in violation of Army Air Forces Regulation No. 60-16D.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction 1 December 1944, by general court-martial was introduced, viz: a conviction for wrongful operation of a military airplane in a reckless and careless manner in violation of paragraph 1 a, Army Air Forces Regulation 60-16D. For this offense accused was sentenced to be restricted to the limits of his post for three months and to forfeit $50 of his pay per month for ten months. He was sentenced in the instant case 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. The prosecution introduced evidence showing that on 9 January 1945 accused was a student officer assigned to flight No. 11 of the Gunnery Squadron, Aloe Field, Victoria, Texas. Second Lieutenant W. O. Haga was the gunnery instructor and flight leader (R. 6-71; Pros. Ex. 2). On the morning of 9 January 1945 the members of flight No. 11 were engaged in practice firing at a tow target near Matagorda Island Bombing and Gunnery Range. Lieutenant Haga was riding as instructor in the rear seat of the number one plane, which was an AT-6 military airplane No. 416, piloted by student officer Second Lieutenant John D. Ayers, Jr. Accused was the pilot of another AT-6 military airplane flying in the number two position following the take off. There were four other planes participating in the mission, and while the six planes took off in formation, the mission was not thereafter a formation flight. The pilots had been instructed to fly the mission at 5000 feet and as each plane finished the required firing it was to break out of traffic in a 90 degree turn from the base leg at the altitude then flying in order to avoid going through the other gunnery patterns. There was no set order for the planes to return to the base, except that the first plane to finish the mission was expected to return first, the next to finish was expected to return second and so on until all had returned. All of the pilots understood that they were to return in the above manner and not in formation (R. 9-13).

Lieutenant Ayers, the student officer piloting the number one plane in which the instructor was riding, finished his mission about ten minutes after eleven o'clock on the morning of 9 January 1944, and proceeded to return to the field. Ayers broke out of the gunnery pattern at 5000 feet and headed in a northeasterly direction across Matagorda Island. He was descending at a rate of about 500 feet per minute, at a speed of about 170 miles per hour, and had reached an altitude of about 4000 feet, when accused broke out of the gunnery pattern at 5000 feet behind and to the right of the number one plane occupied by Haga and Ayers. Normally in this type of mission the plane finishing second in the firing should be about 1000 feet above and a mile behind the plane finishing ahead of it, and this relative position should be maintained throughout the return trip to the field (R. 9-15).

After breaking out of the gunnery pattern at 5000 feet, accused peeled off from about 1000 feet above Ayers' plane and dove on it, coming in from the right, passing behind and below it, and coming up on its left wing at a distance of between 25 and 50 feet therefrom, after which accused passed Ayers' plane, proceeded to the field and landed ahead of Ayers. When accused passed behind and underneath and then over to the left side of Ayers' plane Lieutenant Haga recognized

him and also observed the number of his plane (R. 10, 12-16). Lieutenant Ayers first saw the plane flown by accused when it appeared off the left wing of his plane, flying at about the same altitude and between 300 and 400 feet away. It appeared to be making a climbing turn to the right with the nose of the ship slightly upward. Ayers was unable to recognize accused as the pilot of this plane, but did observe the number and made a mental note of it. Upon landing he saw accused getting out of the plane bearing this number (R. 17-20). Such a maneuver was unauthorized and was not a part of the assigned mission (R. 8-10, 13).

As soon as Lieutenant Haga landed he informed accused that he was grounded because of the unauthorized pass at the plane in which Haga was riding and ordered accused to report to Lieutenant Kerr at Group Operations (R. 10). Shortly thereafter Lieutenant Haga was present when accused was called into Captain Mitchell's office, and there, in answer to Captain Mitchell's question as to what he had done, heard accused state that he had made a pass at airplane No. 416. Accused then made a written statement to that effect, but Haga was unable to locate this statement at the time of trial (R. 11). The following day accused went to the office of Captain McClymont, the group commander at the field, and there in the presence of Lieutenant Kerr and Captain McClymont stated that after leaving the gunnery pattern he had made a pass at the airplane occupied by Lieutenant Haga and Lieutenant Ayers, and asked Captain McClymont what would be done about it (R. 21).

During the investigation of the charges and after being warned of his rights under Article of War 24, accused stated that he did not wish to make a statement. The investigating officer thereupon showed accused Prosecution's Exhibit 4 purporting to bear accused's signature and asked him if that was his signature, and he answered, "Yes." This statement was admitted in evidence without objection and was to the effect that on returning from an aerial gunnery mission at about 5000 feet altitude accused dived 1000 feet on plane No. 416 piloted by Lieutenant Haga and passed it on the left side within about fifty feet, after which he continued to the landing field (R. 23; Pros. Ex. 4).

An extract copy of Army Air Forces Regulation 60-16D, dated 20 September 1944 was admitted in evidence without objection and reads in pertinent part 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."

4. After being informed of his rights accused elected to be sworn and testify in his own behalf. He testified that on 9 January 1945, following the completion of the assigned gunnery mission, he broke out of the pattern in the prescribed manner at an altitude of about 5000 feet, letting down slowly while flying in a northeasterly direction; that airplane No. 416 in which Lieutenant Haga was riding broke traffic just ahead of him and was flying in the same direction but west of accused's plane and about a mile ahead of it; that he (accused) put his plane in a two hundred mile per hour dive and intercepted plane No. 416, coming into it from the right rear, passing under it and coming up on the left wing of plane No. 416 at a distance from it of about fifty feet; that he then continued his dive at about 200 miles per hour, descending to about fifteen hundred feet, where he entered the field traffic pattern and landed ahead of Lieutenant Haga. On cross-examination accused stated that he was familiar with Army Air Forces regulations prohibiting the operation of aircraft closer than 500 feet to any other aircraft except in authorized flight formation, and stated further that when he performed this maneuver he did not do so with any intention of flying formation with Lieutenant Haga, he did not see any particular reason, at the time, why he should stay 500 feet away from the other airplane; he considered the question of whether or not a flight was an authorized formation flight to be a flexible matter (33-35).

Major Jack W. Millis, post surgeon, a witness for defense, testified that accused's act in diving upon the other airplane, while normal, was nevertheless impulsive and evidenced poor judgment. In his opinion accused was of sound mind, able to perform the usual duties of an officer on flying status, was not suffering from pilot fatigue, and at the time of the commission of the offense knew right from wrong and was able to adhere to the right (R. 24-26, 31).

The WD AGO Form No. 66-2, AAF Officers' Qualification Record, of accused was admitted in evidence without objection. It appears therefrom that the accused is twenty-five years of age; that he is a college graduate with a Bachelor of Science Degree in Forestry; that he is qualified as both a single-engine and two-engine basic and advanced flying instructor; that he has successfully completed Central Instructors School (Basic) at Kelly Field, Texas, the instrument course at Bryan Army Air Field, and the fixed gunnery course at Matagorda Island, Texas; that he was commissioned a second lieutenant on 16 February 1943 and thereafter promoted to first lieutenant on 18 October 1943; that from 16 February 1943 to 31 December 1944 he has had thirteen efficiency ratings, four of which are unknown, four are excellent, four are very satisfactory, the other and most recent rating is satisfactory; and that accused has 1543 hours flying time as a rated pilot (R. 28; Def. Ex. A).

5. The prosecution's evidence demonstrates that on the morning of 9 January 1945 after completing a gunnery target mission over Matagorda

Island Bombing and Gunnery Range, near Aloe Army Air Field, Victoria, Texas, accused as pilot of an AT-6 military airplane flew out of the target pattern at 5000 feet altitude, peeled off and dived 1000 feet at the rate of 200 miles per hour upon the same type of airplane occupied by Lieutenant Haga and Lieutenant Ayers, who had preceded accused out of the target pattern and were then flying in a northeasterly direction at an altitude of about 4000 feet. Accused's airplane came in from the rear right, passed below, and came up on the left wing of Haga's plane at a distance of about fifty feet from it. Accused then continued his dive at the rate of 200 miles per hour until he had descended to about 1500 feet, where he entered the traffic pattern at the field and landed ahead of Lieutenant Haga and Lieutenant Ayers. This maneuver was neither authorized, nor essential to the performance of the gunnery practice mission previously assigned to accused, and which he had completed. That the operation of an Army airplane in violation of the provisions of Army Air Forces regulations here involved constitutes a violation of Article of War 96 is so well established that no citation of authority is necessary. The record of trial sustains the court's findings of guilty of the Specification and Charge.

6. Accused is 25 years of age and single. He is a college graduate holding a Bachelor of Science Degree in Forestry. Prior to entering the military service he was employed as an assistant agricultural aid by the United States Forestry Service. He served as an aviation cadet from 18 June 1942 to 16 February 1943, when upon graduation from Army Air Forces Advanced Flying School, Foster Field, Texas, he was commissioned a second lieutenant, Air Reserve, Army of the United States, and ordered to active duty the same date. He was promoted to first lieutenant 18 October 1943. He has 1543 hours of flying time and is qualified as both a single engine and twin engine basic and advanced flying instructor. Between the initial date of his commission and 31 December 1944, accused has been given thirteen efficiency ratings, four of which are unknown, four are excellent, four very satisfactory, and the remaining and most recent is satisfactory.

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

Thomas N. Tatky, Judge Advocate

William H. Brambill, Judge Advocate

Robert E. Trevithan, Judge Advocate

SPJGH-CM 274517 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAR 23 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 L. Gentry (O-673356), 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. There is attached to the record a memorandum for The Judge Advocate General dated 28 February 1945, from Lieutenant General Barney M. Giles, Deputy Commander, Army Air Forces, in which he recommends that the sentence be confirmed but commuted to a forfeiture of pay of $50 per month for six months and that the sentence as thus commuted be carried into execution. I concur in that recommendation.

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

Myron C. Cramer

4 Incls
1. Record of trial
2. Memo fr Gen Giles, 28 Feb 45
3. Dft ltr for sig S/w
4. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but commuted to forfeiture of $50 per month for six months. G.C.M.O. 159, 24 Apr 1945)

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

(217)

SPJGK - CM 274609

21 FEB 1945

UNITED STATES v. Second Lieutenant WEBSTER L. HARRAWAY (O-1105494), Corps of Engineers.	)))))))	SIXTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Mayo General Hospital, Galesburg, Illinois, 2-4 January 1945. Dismissal, total forfeitures, and confinement for twenty-five (25) years.

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

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

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

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

Specification 1: In that Second Lieutenant Webster L. Harraway, Corps of Engineers, did, at Galesburg, Illinois, on or about 20 December 1944, unlawfully enter the dwelling of Miss Evelyn Charlett, 533 East Berrien Street, Galesburg, Illinois, with intent to commit a criminal offense, towit, rape therein.

Specification 2: In that Second Lieutenant Webster L. Harraway, * * *, did, at Galesburg, Illinois, on or about 20 December 1944, unlawfully enter the dwelling of Miss Marjorie Nelson, 679 East Main Street, Galesburg, Illinois, with intent to commit a criminal offense, to-wit, rape therein.

Specification 3: In that Second Lieutenant Webster L. Harraway, * * *, did, at Galesburg, Illinois, on or about 20 December 1944, unlawfully enter the dwelling of George D. Martz, 537 East Main Street, Galesburg, Illinois, with intent to commit a criminal offense, towit, larceny therein.

Specification 4: In that Second Lieutenant Webster L. Harraway, Corps of Engineers, did, at Galesburg, Illinois, on or about 20 December 1944, unlawfully enter the dwelling of Harvey B. Jensen, 115 North Chambers Street, Galesburg, Illinois, with intent to commit a criminal offense, towit, assault and battery upon the occupant thereof, the said Harvey B. Jensen.

Specification 5: In that Second Lieutenant Webster L. Harraway, Corps of Engineers, did, at Galesburg, Illinois, on or about 20 December 1944, with intent to commit a felony, viz, rape, commit an assault upon Miss Evelyn Charlett, 533 East Berrien Street, Galesburg, Illinois, by wilfully and feloniously lying upon the said Evelyn Charlett in her bed, by kissing the mouth, neck and breasts of the said Evelyn Charlett, by fondling the breasts and body of the said Evelyn Charlett, by placing his hand over the mouth of the said Evelyn Charlett, by slapping the said Evelyn Charlett on the face with his hand and by saying to the said Evelyn Charlett "Can I get undressed and get in bed with you?" and "Don't try anything. If you do I'll hurt you", or words to that effect.

Specification 6: In that Second Lieutenant Webster L. Harraway, Corps of Engineers, did, at Galesburg, Illinois, on or about 20 December 1944, with intent to commit a felony, viz, rape, commit an assault upon Miss Marjorie Nelson, 679 East Main Street, Galesburg, Illinois, by wilfully and feloniously taking hold of the said Marjorie Nelson by the wrists with his hands and saying "I want you" to the said Marjorie Nelson, by dragging the said Marjorie Nelson from her bed by the hands and by taking hold of the throat of the said Marjorie Nelson with his hands and saying to the said Marjorie Wilson "If you make any noise I will kill you", or words to that effect.

Specification 7: In that Second Lieutenant Webster L. Harraway, Corps of Engineers, did, at Galesburg, Illinois, on or about 20 December 1944, feloniously take, steal, and carry away one billfold, value about Three Dollars ($3.00) and Twelve Dollars Seventy Five Cents ($12.75) lawful money of the United States, the property of George D. Martz, 537 East Main Street, Galesburg, Illinois.

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

Specification: In that Second Lieutenant Webster L. Harraway, Corps of Engineers, did, at Galesburg, Illinois, on or about 20 December 1944, wrongfully strike Harvey B. Jensen, 115 North Chambers Street, Galesburg, Illinois, on the face with his fist.

He pleaded not guilty to the Charges and the Specifications. He was found not guilty of Specification 4 of Charge I, guilty of the Charges and the remaining specifications except the words "by dragging the said Marjorie Nelson from her bed by the hands" contained in Specification 6 of Charge I,

and except the words and figures "value about three dollars ($3.00)" contained in Specification 7 of Charge I, substituting for the latter the words "of some value," and guilty of the substituted words. 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 twenty-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 may be summarized as follows:

The accused was first seen by Paul Pedigo, a taxicab driver of Galesburg, Illinois, at the DeLuxe Cafe in Galesburg at about 0130 hours on 20 December 1944 (R. 312,313). Fifteen or twenty minutes thereafter the accused departed from the DeLuxe Cafe accompanied by two enlisted men and a girl. They were taken by Pedigo to Ollie's Barbecue at 420 S. Henderson Street, Galesburg, Illinois, arriving there at about 0215 hours (R. 313,314). Upon that occasion the enlisted man who was accompanying the young lady, borrowed money from her to pay the taxi fare (R. 316). Pedigo was requested to come back and pick the party up. He consequently returned to Ollie's Barbecue at about 0330 hours on the same morning (R. 314,315). The accused, accompanied by the two enlisted men and the young woman, left Ollie's Barbecue at about 0340 hours, and, after some argument, took the young woman in the cab to her home. The three men then rode in the cab to the DeLuxe Cafe, arriving there at about 0345 hours where an argument ensued as to who was going to pay the taxi fare (R. 315,316,317). The accused took some change out of his pocket, consisting of a quarter and a dime, and stated, "That is all I have" (R. 317). Pedigo did not see the accused again after leaving the DeLuxe Cafe (R. 316).

Peter Spilios, a joint owner of the DeLuxe Cafe, Galesburg, Illinois, observed the accused enter the cafe at about 0330 hours on 20 December 1944 accompanied by two white soldiers (R. 319,321). The accused departed from the restaurant alone at about 0350 hours on the same morning, his two companions remaining for about another hour (R. 322).

<u>Specifications 1 and 5, Charge I.</u> Housebreaking by unlawfully entering the dwelling of Miss Evelyn Charlett, and assault with intent to rape Miss Evelyn Charlett.

Evelyn Charlett, a waitress in the Victory Lunchroom, Galesburg, Illinois, on 20 December 1944, resided alone in an apartment at 533 E. Berrien Street, Galesburg, Illinois (R. 162,163,166). Miss Charlett was then 19 years of age and weighed 108 pounds (R. 163). In the morning of 20 December 1944 Miss Charlett did not finish her work at the Victory Lunchroom until about 0400 hours. She was driven to her home at about 0415 hours in a cab driven by Everett Coffee (R. 164,165,185). Because of the fact that it was necessary for her to return to work at 0600 hours on the same morning, Miss Charlett made arrangements with Mr. Coffee to return for her at about 0600 hours. She explained to him that she would leave the door open so that he would be able to come in to wake her up

at that time (R. 164,165,166). Miss Charlett almost imediately went to bed, dressed in a slip, brassiere and a pair of "pants" (R. 166,167). She did not undress completely in order that she would be able to dress more quickly when she was awakened in the morning (R. 167). After she had pulled the cover over her and turned out the lamp on the dresser, she began to doze off to sleep (R. 166,167). She suddenly felt something bump the end of the bed. When she looked up she saw the form of a man standing there (R. 167). She noticed that he had on a "high cap" like those worn by cab drivers. For that reason she thought that she had gone to sleep and that Mr. Coffee had returned to awaken her at 0600 hours. Miss Charlett accordingly asked, "Everett, is that you?" Upon receiving no reply, she again asked the question. Whereupon the figure came around by the side of the bed and "got on top of" her (R. 167). At that time Miss Charlett was lying flat on her back. The intruder, dressed in overcoat, field jacket and uniform, lay full length with the front part of his body on top of her (R. 168,186). Miss Charlett did not know what to think at first and did not say or do much (R. 168). She was "just merely confused" but was not afraid of him (R. 168). The intruder asked her if he could get undressed and get in bed with her but she replied, "No" (R. 186). He then began stroking the back part of Miss Charlett's head and running his hands over the "top part" of her (R. 168). When he came to the strap of her brassiere on her shoulder, he rested on her with one arm and pulled the shoulder strap down just about to her elbow. He then leaned on her with the other arm and did the same thing to the other shoulder strap (R. 168,169,188,189). He then ran his hands over her breast and "everything" and kissed her on the neck, face and mouth (R. 170, 182). He also kissed her breast and "everything" (R. 170).

During this time he also tried to get his hands down under the covers and attempted to get hold of the cover to pull it down off Miss Charlett (R. 171,172,189). However, because of the fact that he was lying on top of her and had her arms clamped down on top of the cover, Miss Charlett was able to keep the cover over her (R. 171). During all of this time the intruder was pinning Miss Charlett's arms down and there was not much that she could do other than hit him on the back. Although she tried thus to strike him, she was unable to hit him hard enough to hurt him (R. 169). She likewise tried to get out from under him by shoving away from him, but every time she moved the intruder clamped down a little harder (R. 169,170). During this struggle Miss Charlett knocked the intruder's cap off and felt of his hair (R. 170). For the first time she realized that he was a negro and she started to scream (R. 170). When she started screaming, the intruder put his hand over her mouth and told her to be quiet or that he would hurt her (R. 171, 186). He then began running his hands over her face and said that he wanted to turn on the light so that he could see what she looked like (R. 171,172). Miss Charlett replied that that was all right if he would get up. The intruder then warned her, "Well, don't try anything" (R. 172).

The reason Miss Charlett consented to this suggestion was that she thought that in that way she would be able to get the intruder off her and perhaps would be able to get him out of the house (R. 172). The intruder thereupon got up and Miss Charlett pulled up her straps, put on her jacket which was lying on the dresser and then turned on the lamp (R. 172). Miss Charlett was then able for the first time to see the person whom she afterwards identified as the accused. The accused then told Miss Charlett that she was beautiful and that he would like to take her where there were other colored men with white women (R. 173). Miss Charlett refused, however, and told him that he had better leave in view of the fact that the cab driver was coming back for her at 0530 or 0600 hours, and that both of them would get in trouble if he stayed and was found on the premises. She hoped thus to frighten him out of the apartment (R. 173). The accused told her that she would have to go to the door with him, seized her by the arm, jerked her out of bed and walked into the kitchen with her (R. 173). She then noted that the rear door was open although she had closed it when she had entered earlier in the morning (R. 174). She therefore taxed the accused with failing to close the door. When the accused walked over to it, he looked out and stated, "Well, this is not the door I came in because it is too dark out there" (R. 173). Miss Charlett told him, however, that he could not have come in the other way because that door was locked and bolted at all times (R. 173,174). The accused requested to see the other door, which Miss Charlett stated was in the living room. He walked over, shut the kitchen door, and then caught and kissed Miss Charlett while she was standing in the kitchen (R. 174). She backed up and jerked away from him, again warning him that he would have to get out of the apartment because the taxi driver would be coming in a little while. She took hold of his hand and walked into the living room with him where she showed him the front door. The accused stated, "This is the door I came in." She denied that it was but told him he could go out that door and thereupon unlocked it and tried to get him to go outside (R. 174).

The accused, however, said, "Well, wait a second" and backed Miss Charlett into the living room again, telling her that he wanted a date with her (R. 174,175). At first she refused but then, with the hope that she would be able to get him out of the apartment, agreed to meet him at 2130 hours that evening (R. 175). The accused then told Miss Charlett that, if she failed to meet him, he would hurt her and that if she ever told anyone about his having been in her apartment he would kill her, or if he were unable to do it, he would get someone else to kill her (R. 175,176,189). Miss Charlett began to cry, whereupon the accused slapped her four or five times on her face with his hand (R. 176). At various times during these occurrences, the accused kissed Miss Charlett until she finally jerked away from him and told him he would have to go (R. 175). The accused finally walked out of the door, which Miss Charlett immediately shut and locked. She then went to the kitchen door, locked it,

and, after turning off all the lights, ran downstairs into the basement because of the fact that the accused had begun to knock on the doors and windows wanting to come back in (R. 175,176). Miss Charlett's basement was connected by a door to her neighbor's basement. After staying in the basement for ten minutes, she became courageous enough to walk past her coal bin and up the stairway into the adjoining apartment (R. 177). Miss Charlett remained in that apartment for about five minutes. During all of that time the accused continued to knock on the doors (R. 177). At last the man, whose house Miss Charlett had entered, answered the door. The accused inquired of him if Miss Charlett were there. He also inquired if there were a "Lieutenant Johnson" in the house (R. 177,178,188). Shortly thereafter Mr. Coffee, the cab driver, called and took Miss Charlett to the Victory Lunchroom from where Charles Healy, her employer, called the police to report the incident (R. 179). On the way to the lunchroom Miss Charlett described the intruder to Mr. Coffee who replied that he thought he knew who it was and that it must have been the lieutenant who was at the DeLuxe Cafe early that morning, although he did not mention the accused by name to Miss Charlett (R. 179,183,184). Miss Charlett was interviewed by the civilian and military police at the station at Galesburg shortly thereafter (R. 179). She described the accused as best she could and identified the accused when he was brought to the station at about 0730 hours that morning (R. 179,180). Miss Charlett did not give the accused or any other person except Everett Coffee, the cab driver, authority or permission to enter her home on the morning of 20 December 1944 (R. 180).

At the time of the incident in question, the accused was dressed in a cap with a visor, a long overcoat, a field jacket, lieutenant's bars and Engineer Corps insignia (R. 181,182).

The accused during the incident described remained in Miss Charlett's apartment for about 45 minutes. During all of that time Miss Charlett's activities were directed toward "the scheme to talk him out of it" (R. 182).

While the accused was in Miss Charlett's apartment, she smelled liquor on his breath and knew that he had been drinking (R. 186). However, the accused talked coherently and appeared to have had enough to make him feel as though he should have "everything he wanted or everything he asked for" (R. 186,187).

Specifications 3 and 7, Charge I. Housebreaking by unlawfully entering the dwelling of George D. Martz with intent to commit larceny therein, and larceny of one billfold, value about $3.00, and $12.75, lawful money of the United States, property of George D. Martz.

On 20 December 1944, George D. Martz and his wife, Agnes, resided in the upstairs front apartment at 537 E. Main Street, Galesburg, Illinois, which address is four and a half blocks from 533 E. Berrien Street (Miss

Charlett's apartment) (R. 9, 10, 195). Mr. and Mrs. Martz returned to their home at about 2215 hours on the evening of 19 December 1944, leaving the front door to their apartment unlocked (R. 10, 22,25). They retired at about 2315 hours. At that time Mr. Martz hung his trousers over the edge of the closet door at the foot of their bed (R. 10, 19, 22, 30). Both Mr. and Mrs. Martz slept through the night until they were awakened by their alarm clock at 0600 hours on 20 December 1944 (R. 11,22). Mrs. Martz got out of bed. Just as she stepped outside the bedroom door, she thought she heard the noise of someone walking across the floor (R. 23). Thinking, however, that the noise came from outside, she walked on into the bathroom and about five minutes later heard the bedroom door slam (R. 23,24). She immediately opened the bathroom door and noticed that the hall door was open and that the hall light had been turned on, although she was positive that the door had been closed and the light had been turned off when she had entered the bathroom (R. 24,25). She was entering the bedroom door when she heard the front hall door slamming shut. She thereby knew that someone had gone out of the house (R. 26). She ran over to the parlor window and was able to see a soldier going around to the west side of the house (R. 26,31). Although he was walking fast, Mrs. Martz noted that he was wearing a soldier's overcoat and service hat (R. 26,27). Mrs. Martz immediately wakened her husband. As a result of his conversation with her, Mr. Martz dressed and looked around the house to see if anything were missing (R. 12,27).

Some time after he had dressed, Mr. Martz discovered that his billfold which was black, old, and ripped out at one end, was missing from his trousers pocket (R. 13). Mrs. Martz' purse, however, which had been lying on the dresser where it was covered by her nightgown, had not been touched (R. 28,33). Mr. Martz' billfold contained $12.00 in United States currency, consisting of one ten-dollar bill and two one-dollar bills (R. 13). He also discovered that seventy-five cents in change, consisting of a fifty-cent piece and a quarter were missing from his trousers pocket (R. 13). Mr. Martz had last used his billfold at noon on 19 December 1944 and was positive that it contained the bills enumerated above and was likewise positive that his billfold and the seventy-five cents in change were in his trousers pocket at the time he retired (R. 14,19,20,21). He did not see the billfold again until it was shown to him at the Administration Building of Mayo General Hospital, at which time he positively identified it because of the rip in one end and the various membership cards, driver's license and draft cards containing Mr. Martz' name, which were carried in the billfold and were still contained therein when last shown to him (R. 16,17,18). Mr. Martz had given no person authority to remove such billfold or its contents from his clothing on the night of 19-20 December 1944 (R. 18).

<u>Specification, Charge II.</u> Assault and battery upon Harvey B. Jensen.

On 19-20 December 1944, Harvey B. Jensen, a supervisor of the Mid-Continent Petroleum Company, and his wife Sarah, resided at 115 N. Chambers Street, Galesburg, Illinois, where they occupied an upper five-room apartment (R. 36,38,39,59,60). Both Mr. and Mrs. Jensen retired at about 0300 hours on 20 December 1944, leaving the outside door unlocked (R. 39,40). Mrs. Jensen was awakened at about 0640 hours on the same morning by the sound of a door knocking against the chiffonier in their bedroom (R. 48,60,61). Mrs. Jensen immediately awakened her husband, who then saw someone tip-toeing from the bedroom and then running towards the dining room and thence to the living room of the apartment (R. 40,48, 50). Mr. Jensen was at that time unable to distinguish who the intruder was. He immediately jumped out of bed and ran to the front door where he grabbed the intruder by the coat lapels and then turned on the light in the hall (R. 42,61,67). At that time he noticed that the front door was partially open (R. 48). When the light had been turned on, Mr. Jensen discovered that the intruder was the accused, who was then dressed in an Army overcoat with second lieutenant's bars and officer's cap and field jacket (R. 42,46,57). Mr. Jensen asked the accused for whom he was looking and the accused replied, "Lieutenant Johnson" (R. 43). Mr. Jensen then told his wife to call the police but the accused protested "No" (R. 42,43, 62). When Mr. Jensen turned his head and repeated to his wife, "Call the police," the accused struck him in the left eye with his right fist and then opened the door in an effort to get away (R. 44,64). Mr. Jensen swung back at the accused as he was on his way out of the door, causing him to fall off the top landing and partially to break through the window which was at the middle landing (R. 44,45,64,65). The accused rolled down the steps quite fast and lost his cap in the melee (R. 45). The cap, however, rolled down the stairs. This enabled the accused to pick it up and to run with it out of the lower door (R. 47). Mr. Jensen followed him to the door but, because he was dressed only in his pajamas and was barefoot, he did not chase the accused (R. 47). He described the blow given him by the accused as not "very hard" and stated that it did not close the eye entirely and that it did not turn black until the next day (R. 47). Mr. Jensen had given no one authority to enter his apartment on the night of 19-20 December 1944 (R. 47,48). Later that morning the accused was positively identified by Mr. Jensen as the intruder at the police station at Galesburg (R. 55,58,59), and was positively identified as the intruder by both Mr. and Mrs. Jensen at the trial (R. 58,68).

The Jensen apartment is located two blocks from the Martz apartment at 537 E. Main Street, Galesburg, Illinois (R. 56).

Specifications 2 and 6, Charge I. Housebreaking by unlawfully entering the dwelling of Miss Marjorie Nelson with intent to commit rape therein, and assault with intent to rape Miss Marjorie Nelson.

Marjorie Nelson, who is employed as a clerk, resided in a downstairs apartment at 679 E. Main Street, Galesburg, Illinois, on the night

of 19-20 December 1944 (R. 69,70). Although at that time she shared the apartment with another girl, the latter was absent from the apartment on the night of 19 December 1944 (R. 70). On the night in question Miss Nelson retired at about 2330 hours and slept until 0600 hours on 20 December 1944. Upon awakening Miss Nelson went upstairs to the bathroom. When she returned to her apartment, she left the outside door unlocked (R. 71,72). About twenty minutes thereafter, one of the girls living upstairs stopped to talk to her on her way to work (R. 71). Miss Nelson, however, remained in bed dressed only in her nightgown (R.71,72). After her friend left, Miss Nelson continued to leave the bed lamp on at the head of her bed (R. 72). At about 0650 hours she heard the outside door open and then close. The next thing she knew she saw the accused standing between the living room and the bedroom, which were separated only by drapes (R. 73,74,86). Miss Nelson immediately asked him who he was but the accused did not answer. When he drew back a ways, Miss Nelson told him that he had better get out of there but the accused still did not answer (R.74). Instead he began coming towards the bed on which Miss Nelson was lying (R. 74,75). When Miss Nelson asked him what he wanted, the accused replied, "I want you" (R. 75). The accused came to the bed and grabbed Miss Nelson by the wrist and tried to pin her to the bed. Although she was talking during this time, she did not remember what she said but tried to pull back out of his reach (R. 75). The accused placed himself on the side of the bed, lying on his side (R. 75,88). At this time Miss Nelson was lying with the covers off her for the reason that she had thrown them to one side when she had attempted to get out of the bed (R. 75). The accused and Miss Nelson then began fighting, with Miss Nelson attempting to twist out of the bed on the opposite side (R. 75,76). During this time the accused was attempting to hold Miss Nelson and was talking to her (R. 76). She finally succeeded in getting out of the bed despite the fact that the accused had hold of her wrist.

In the ensuing scuffle both of them reached the foot of the bed where Miss Nelson tripped and fell, the accused falling with her (R. 76). After fighting with the accused on the floor, Miss Nelson managed to get up and continued to scuffle with the accused until they reached the living room. As she reached the living room, Miss Nelson began to scream but the accused grabbed her by the throat with both hands and told her, "Shut up or I will kill you" (R. 76). Miss Nelson then noted that the accused reached for his pocket with his left hand and thought that he was reaching for something. Instead, however, he sat down in a nearby chair, continuing to hold Miss Nelson by the wrist and attempting to pull her into the chair with him (R. 77). However, Miss Nelson managed to twist around so that the arm of the chair separated them and reached for the doorknob with her right hand, attempting to get out the door (R. 77). The accused, however, arose, came to the door and pulled Miss Nelson's hair with both hands until she was forced to loosen her grasp on the door (R. 77). He instructed her to lock the door. When she refused, he told her again. Miss Nelson then pretended that she had locked it by merely drawing the bolt across the door

and then back again (R. 77,78). The accused, however, noticed that the door was not locked and reached up with his left hand to lock it (R. 78). After this occurred, Miss Nelson twisted herself loose from his grasp and ran through the apartment out the back door to a neighbor in another building (R. 78,193). Miss Nelson's screams aroused her neighbor who let her in and called the police for her (R. 78).

A day or two thereafter Miss Nelson at the Mayo General Hospital positively identified the accused as her assailant. Returning from this incident she informed the driver of the Army car that on her way to the hospital she had been afraid that she would not be able to identify the accused but when she got to the hospital "It was easy" (R. 193).

Miss Nelson had given no one permission to enter her apartment on the morning of 20 December 1944 (R. 80). At the time of the incidents related above, Miss Nelson was "very scared" (R. 80). She described the accused as dressed in a khaki Army overcoat, which was unbottoned, and a service cap (R. 80,86).

Miss Nelson's apartment was located about two or three blocks from the Jensen apartment at 115 N. Chambers Street (R. 87).

The following testimony relates to the accused's apprehension and hence is applicable to all specifications:

The accused was first seen by A. E. Kalin, police officer, Galesburg, Illinois, at about 0715 hours on 20 December 1944 (R. 92,93). Officer Kalin was then looking for the accused as the result of a notice which he had received at about 0700 hours on the same morning and recognized him from the description which had been furnished to him by a girl (R. 103,104,105). Officer Kalin returned to call a squad car but ten minutes later saw the accused again (R. 93,94). When he asked the accused where he was going, the latter replied that he was going to Chicago on the bus (R. 95). Officer Kalin asked him if he were hunting for Lieutenant Johnson, to which the accused replied in the affirmative. Thereupon Officer Kalin placed the accused under arrest (R. 95). When Officer Kalin ordered the accused to start walking back towards the police station, the latter wanted an explanation, but the officer's only reply was that the accused knew what it was all about (R. 95,96,100). The accused made no further protest but answered only, "All right, sir" (R. 96). Shortly thereafter Officer Kalin turned the accused over to Carl W. Nelson, another policeman of Galesburg, Illinois, who was accompanied by Sergeant Dominick Borsano, a military policeman stationed at Mayo General Hospital (R. 96,120). At the time of his apprehension the accused was wearing a regular Army uniform with light trousers, a dark coat and had bars on his shoulder (R. 96,97). Officer Kalin did not remember whether or not he was then wearing an overcoat (R. 96). The point at which the accused was arrested was six blocks from the Marts

apartment, four blocks from the Jensen apartment and six blocks from the Nelson apartment (R. 99). Officer Kalin was at no time close enough to the accused to notice whether he had any liquor on his breath but noted that while the accused walked with a swaying gait, he did not stagger (R. 100,103). He had no opinion, however, whether the accused had been drinking or whether he was drunk or sober (R. 102). The accused was turned over to Officer Nelson and Sergeant Borzano at about 0735 hours on 20 December 1944 (R. 107,119). At that time he was dressed in an officer's uniform with overcoat and wearing a cap with visor (R.114). The only conversation between the accused and the two officers on the way to the police station were the accused's questions of what the police were going to do with him and why he had been picked up and Officer Nelson's reply that he did not know (R. 107,108,113).

On the walk to the station the accused maintained a steady gait, despite the fact that he was suffering from a lame knee (R. 115,128). At the station the accused's speech was clear and coherent and although the odor of alcohol was detected on his breath and it was apparent that he had been drinking, he knew what he was doing all of the time that he was at the station (R. 115,116,127,128). Officer Nelson testified, however, that the accused was "not really sober" and was "not really drunk" (R.116). In the course of the search of the accused's person, Sergeant Borzano found a reddish billfold in his hip pocket in which were the accused's dog tags and AGO card, but no money (R. 108,113,122). An empty quart whiskey bottle was taken from the accused's overcoat pocket (R. 108,113). Officer Nelson found another billfold (Pros. Ex. 1) in the accused's right-hand pants pocket together with a long bladed knife and some money, consisting of one ten-dollar bill, two one-dollar bills, a fifty-cent piece and a quarter (R. 108,109,113,123,125,126). The accused had no other money on his person (R. 114). Sergeant Borzano immediately took possession of the money and the billfold in which he found an identification card with the name George Martz on it (R. 110,111,124). The billfold likewise contained a picture of a white girl and a white soldier and for this reason Sergeant Borzano said to the accused, "Lieutenant, this looks like a white man's pocketbook. Where did you get it?" (R. 124). The accused replied that he did not know (R. 124). All of the various articles taken from the accused's person were placed in an envelope by Sergeant Borzano and were taken by him together with the accused to the Mayo General Hospital where the envelope was turned over to Lieutenant Abraham Bensky who was the Provost Marshal at the hospital on 20 December 1944 (R. 111,112,129,140,141).

Lieutenant Bensky again counted the cash in the envelope handed him by Sergeant Borzano and noted that it contained a ten-dollar bill, two one-dollar bills, a fifty-cent piece and a quarter (R. 142). He likewise identified Prosecution's Exhibit 1 as the billfold which was turned over to him at that time (R. 142). Lieutenant Bensky thereafter returned all of the articles from the accused to Sergeant Borzano who kept them locked up

until he delivered them to Major Nicholas Randolph, the Investigating Officer at Mayo General Hospital (R. 131,144,149,150,151). Lieutenant Bensky testified that he gave the accused a receipt for $12.75 in cash and denied that such receipt had read "12.52" (R. 145). At the time he was interviewed by Lieutenant Bensky, the accused's speech was coherent. Although Lieutenant Bensky could smell liquor upon the accused's breath and knew he had been drinking, in Lieutenant Bensky's opinion the accused was not drunk (R.147).

Major Randolph continued in exclusive possession of the articles taken from the accused's person until they were turned over to the prosecution immediately prior to the commencement of the instant trial (R. 151). Mr. Martz' billfold (Pros. Ex. 1) and the $12.75 (Pros. Ex. 2) were both received in evidence without objection (R. 154,155).

4. The evidence for the defense may be summarized as follows:

Robert Sprinkle, staff driver, Mayo General Hospital, drove Miss Nelson from her place of employment to the hospital on 21 December 1944 for the purpose of giving her an opportunity to identify the accused (R. 197, 200). While they were returning from the hospital, she informed Sprinkle that on the way out she had been a little afraid that she would be unable to identify the man but that when she walked into the room there was no trouble at all and she could identify him very easily (R. 200).

Second Lieutenant Donald E. Gray, Medical Administrative Corps, Mayo General Hospital, on the morning of 21 December 1944, dressed in a long officer's overcoat and officer's hat with visor, and then stood with the accused for the purpose of identification by an unknown girl (R. 201, 203,204). Lieutenant Gray is not a negro although he is approximately the same height as the accused and has a swarthy complexion (R. 204,205). Lieutenant Gray has long heavy black hair and not short, curly hair (R. 205).

On the morning of 20 December 1944 Everett Coffee, driver of a cab of the DeLuxe Cab Company, drove Miss Charlett to her home from the Victory Restaurant (R. 207,208). In accordance with a prearranged plan at about 0600 hours on the same morning, Mr. Coffee returned to Miss Charlett's home. After attempting to waken her by knocking on the window, he finally located her at a neighbor's home where she was crying and "hollering" and appeared to be very nervous (R. 208,209). At that time Miss Charlett informed him that a "negro" lieutenant had just left her. After she had described the man, Mr. Coffee told her that he believed that he knew him and may have informed Miss Charlett of the accused's name (R. 210,212,217).. Mr. Coffee drove Miss Charlett to the Victory Restaurant where her employer called the police (R. 210). Mr. Coffee's remark to Miss Charlett was based upon the fact that he had previously seen the accused at about 0330 hours on 20 December 1944 at Ollie's Barbecue Stand, located at 420 S. Henderson Street, Galesburg, Illinois (R. 212,213,217). Mr. Coffee

had driven to the barbecue stand in response to a call from another passenger but there noted the accused was sitting with two white soldiers and a woman (R. 213). At that time the accused asked Mr. Coffee to have a drink with him and stated that they would also go back into town with him (R. 212,213). While Mr. Coffee waited for him, the accused tap danced with one of the white soldiers, played the victrola and drank (R. 213, 219,220). Shortly thereafter another cab driver appeared who stated that he had received a call from the accused. For that reason Mr. Coffee left the barbecue stand with his own passenger at about 0400 hours (R. 213,214, 218). Mr. Coffee described the accused while at the barbecue stand as weaving back and forth and having a little difficulty in walking and stated that in his opinion the accused was "happy" and was drunk (R. 214,215,220, 221). At one point in his conversation with the accused Mr. Coffee asked him why he didn't go home. The accused merely laughed and said that he would go home after a while (R. 215). On cross-examination Mr. Coffee admitted that the accused "did a pretty good job" of the tap dancing, keeping time to the music and that his speech was clear and coherent (R. 220,223).

The accused was likewise observed by Ronnie Mickens, cook at Ollie's Barbecue, 420 S. Henderson Street, when he entered the stand alone at about 2330 hours on 19 December 1944 (R. 240,241). At that time the accused purchased a sandwich and left shortly thereafter but returned again at about 0215 hours on 20 December 1944 (R. 241). Again the accused stayed but a few minutes but returned at 0345 hours with a sergeant, a corporal, and a white girl (R. 242). Mr. Mickens observed that upon this occasion the accused stayed at the barbecue stand until about 0430 hours when the accused, together with the two enlisted men and the white girl, left in a cab (R. 242,243).

The accused was first seen by Carrie Noble, the bartenderess at the South Prairie Social Club, Galesburg, Illinois, when he entered the club alone at about 2000 hours on 19 December 1944 (R. 225,226,229). The accused remained there until about 2300 hours, during which time he bought several drinks both for himself and two other persons. All such drinks sold for forty cents a shot (R. 225,229,230). At the time the accused first came to that Club, he had a twenty-dollar bill with him (R. 226,229). When he left he stated that he was going to "Miss Ollie's place" at 420 S. Henderson Street, where Miss Noble again saw the accused after 0100 hours on 20 December 1944 (R. 226,227). Miss Noble stayed at Ollie's Barbecue Stand until 0300 hours and when she left she noted that the accused was still there (R. 227,230,231).

During the evening of 19-20 December 1944, another colored officer was staying at Miss Noble's Hotel. She described him as being a little, light, old, brown-skinned "fellow", not very tall, very thin and with a little

moustache (R. 228). He was wearing light officer's trousers, a short overcoat and an officer's cap with visor (R. 228). She did not know what time he had left the hotel.

Virginia Pearson, ticket agent for Burlington Trailways Bus Company, Galesburg, Illinois, who was on duty during the morning of 20 December 1944, observed a colored officer other than the accused at the bus depot at about 0725 hours on that date (R. 233,234). She described such officer as rather short and well built and as wearing a light officer's coat with wrap-around belt and soft cap (R. 234,235). About three or four minutes thereafter, or at about 0730 hours, Miss Pearson observed the accused who came into the bus depot and inquired when the next bus left for Monmouth, although he did not purchase a ticket (R. 235, 237,238). Miss Pearson described the accused at that time as not being in a state of excitement or fatigue, as being calm and as talking coherently in an ordinary tone of voice (R. 235-237). She also stated that the accused walked quite regularly as far as she could see and that while he talked to her he stood quite erect although at ease more or less (R. 237). The Burlington bus depot is located seven blocks by actual count from Miss Nelson's residence at 679 E. Main Street (R. 239).

The accused, after his testimonial rights had been fully explained to him, elected to be sworn as a witness (R. 248,249). He testified as follows: The accused at the time of the trial was 26 years of age, married, and had one son one year of age (R. 249,250). He attended college for two and a half years and had been commissioned in the United States Army for 2 years and 3 months (R. 250). At the time of the trial he had been at Mayo General Hospital for two and a half months receiving treatment for a knee injury which he had sustained on maneuvers in Louisiana in 1942. Previous to that time he had been hospitalized in the Riggs General Hospital at Louisville, Kentucky (R. 250).

On the evening of 19 December 1944 he signed out at his ward at the hospital for the commencement of a six-day leave at about 2045 hours (R. 251,275). At that time he had $40.00 on his person (R. 272). He first stopped at the South Side Social Club, where he had an engagement to meet a young lady, arriving there at approximately 2110 hours (R. 251,255). Although he remained at the club for about two hours, the young lady did not appear (R. 251,256). During this time, however, he became acquainted with a Miss Puckett and her "boy friend" and he bought approximately seven or eight rounds of drinks for himself and the other couple (R. 251,272). The accused then rode with Miss Puckett and her friend in the latter's car to another place on the west side where they had more drinks and from there to Ollie's Barbecue (R. 251). In the meantime the accused had purchased a bottle of whiskey (R. 272). The accused stayed at Ollie's Barbecue for an unknown length of time. When he finally called a cab to leave, he anticipated catching a train leaving Galesburg for Macon, Illinois, at

0300 hours 20 December 1944 (R. 251,252,273,274). The accused rode directly in the cab to the railroad station but found that he had missed the train (R. 252,264,274). He then went to the DeLuxe Cafe where he met a sergeant and a corporal (both of whom he had met at the hospital) and a girl who suggested that they all go back to Ollie's Barbecue (R. 252). After spending 15 or 20 minutes at the DeLuxe Cafe, the four persons called a cab and returned to the barbecue stand some time after 0300 hours (R. 252,260). On arriving at the barbecue stand, the cab driver was instructed to return within an hour (R. 252). The accused denied that he did any dancing while at the barbecue stand (R. 261). When the cab returned the accused and the two enlisted men took the girl home and then returned to the DeLuxe Cafe where the accused ordered coffee for the two enlisted men (R. 252,264). The accused could not remember the time of any of these various activities but remembered distinctly being at the DeLuxe Cafe with the two white soldiers and that the proprietor of the cafe refused to let them put whiskey in their coffee (R. 263,264,265,266). The accused believed that he had left the DeLuxe Cafe accompanied by the two enlisted men but left them shortly thereafter and proceeded to the railroad station alone (R. 252,266,267,271). After placing his overcoat on the bench in front of him, the accused sat in the men's lounge of the station and went to sleep (R. 253,258). The accused claimed that he spent the entire time, after thus leaving the DeLuxe Cafe until he went to the bus station, in sleeping in the railroad station. He specifically denied that he had seen or been in the homes of any of the persons who had testified for the prosecution (R. 267,268).

Thereafter when he awakened at a time he could not specify, the accused felt better and went to the Burlington Trailways Bus Depot to inquire concerning a bus (R. 253,270). While at the station the accused saw another lieutenant whom he had seen at the hospital but did not speak to him (R. 270,271). The accused was placed under arrest immediately, after he had walked out of the bus depot. He was then taken to the police station where he was searched (R. 253,254). During the search of his person, the officers first found a quart whiskey bottle in his pocket, then his own brown leather wallet from his left hip pocket, then money, cigarettes, handkerchiefs and matches, and finally a black wallet (R. 256,259,268). The accused did not know where on his person the black wallet was found but told the officers that he had never seen it before (R. 256,260,279). The bills were taken from his shirt pocket and the change from a trousers pocket, amounting in all to $12.52 (R. 257,275). The accused claimed that all of this money was his own and he explained that he never carried it in his billfold (R. 257,269,274). He also claimed that he had at first been given a receipt for $12.52 but that thereafter he had been required to return it and had never received another (R. 258,275). The accused disclaimed any knowledge of the location of any of the addresses set out in the first four specifications of Charge I (R. 254,255). He claimed that on the night in question he had enough whiskey to be drunk inasmuch as he went to sleep, which is the usual result of his being drunk (R. 255). Accused did not

know how much money he had spent between the time he left the hospital until he was apprehended but remembered that he had about $15.00 left at the time he left Ollie's Barbecue Stand in order to catch the three o'clock train, and that he had $12.52 on his person at the time he was apprehended (R. 273). On the night in question the accused was wearing pinks, field jacket, overcoat and garrison or service cap (R. 278).

At about 1100 hours on 20 December 1944, specimens of the accused's blood and urine were taken by Sergeant Victor Grope at Mayo General Hospital, which specimens were turned over to Lieutenant Victor Kilmer, Sanitary Corps, who performed quantitative tests for the presence of alcohol in accordance with procedures set out in Army manuals, the findings of which tests were recorded in Defense Exhibit 1 (R. 287,288,293,294,295). Lieutenant Kilmer explained that the findings of blood alcohol - "2.0 mg per cc" - reflected a measurement of weight showing the number of milligrams in one one-thousandth of a liter (R. 296).

Captain Lent C. Johnson, Medical Corps, Chief of Laboratory, Mayo General Hospital, after detailing his qualifications, testified that he had supervised the making of the tests in question and had analyzed them (R. 280,281,282,300-302). He testified that in his opinion 1.5 milligrams of alcohol per cc would result in drunkenness and that an alcoholic content of 2.5 milligrams per cc would result in a person being "dead drunk, approaching insensibility" (R. 306). Captain Johnson gave, as his opinion, that while an analysis would give information of alcoholic content only as of the time the blood was drawn, the alcoholic content would necessarily be of a greater amount prior thereto if the individual had consumed no alcohol for a period of time before the drawing of the blood (R. 308). In response to a hypothetical question he testified that, if the accused had taken his last large drink of alcohol immediately prior to his arrest, his peak alcoholic level would have been somewhere between 0800 and 0830 hours that morning, but that if his last drink of alcohol had been taken at about 0300 or 0330 hours, the peak would have been some time between 0400 and 0500 hours (R. 311). He also stated as his opinion that the amount of alcohol consumed did not necessarily bear any close relationship to the effect on the individual but that the level of the blood alcohol in such individual would bear a very close relationship (R. 303). Captain Johnson's conclusions that an alcoholic content of 2.0 milligrams per cc resulted in a drunken state were based upon personal observation, experimental investigation and the interpretation accepted as evidence in Federal courts (R. 304).

5. The accused stands convicted of (a) three offenses of housebreaking, (b) two offenses of assault with intent to rape, (c) one of larceny, and (d) one of assault and battery. All of the offenses appear to have been committed within a radius of six or eight city blocks in the City of Galesburg, Illinois, and between the hours of 5 and 7 o'clock on the morning of 20 December 1944.

The record of trial clearly discloses that the buildings described in Specifications 1, 2 and 3 located at 533 E. Berrien Street, 679 East Main Street and 537 E. Main Street, respectively, in Galesburg, Illinois, were entered by someone without authority during the early hours of 20 December 1944. It also clearly discloses that that person committed an assault upon Miss Charlett, upon Miss Nelson and upon Harvey B. Jensen. Likewise it appears that a billfold and $12.75 were stolen from the trousers pocket of George D. Martz while his trousers were in his apartment.

The first question deserving discussion is whether the evidence showed beyond any reasonable doubt that it was the accused who committed any or all of these offenses. It was the accused's uncorroborated contention that he was asleep in the Galesburg railroad station at the time of these occurrences. Apart from the larceny charge (which is shown only by circumstantial evidence) four witnesses who had ample opportunity to see and observe the accused unequivocally and unhesitatingly identified the accused as the person involved in the offenses charged against him. The four witnesses, Miss Charlett, Miss Nelson, Mr. Jensen and his wife, Mrs. Jensen, had no reason or motive falsely to accuse this Army officer as the person who unlawfully entered their respective homes. The presence of a negro officer was unusual in that neighborhood. The only other negro officers seen in that locality did not answer to the description of the accused. In view of the overwhelming evidence of identity, which was not impeached and which was contradicted only by the uncorroborated denial of the accused, the court properly and justly concluded that the accused was not asleep in the railroad station when the offenses were committed, but was the person who committed them. This presents for determination the question whether those acts constituted the criminal offenses alleged in the various specifications.

a. Housebreaking (Specifications 1, 2 and 3).

Housebreaking is unlawfully entering another's building with intent to commit a criminal offense therein. It is not essential that there be a breaking, but the intent to commit some criminal offense must be alleged and proved (MCM, 1928, par. 149e).

It was clearly shown by competent evidence that the accused did, without any right or authority enter the buildings described in these specifications alleging housebreaking. Miss Charlett and Miss Nelson identified the accused as the person who appeared in and therefore must have entered their respective apartments at the times and places alleged in Specifications 1 and 2 of Charge I. The entry of the Martz home (Specification 3 of Charge I) was shown by circumstantial evidence. In order for the accused to remove Mr. Martz's billfold and money from the pockets of his trousers hanging by the door of his apartment it was necessary for him to enter the building. The only element of these offenses remaining to be

proved was the intent to commit the respective criminal offenses alleged in the specifications under discussion. The existence of this intent at the time of the entry may be inferred as a fact upon proof of the commission or attempted commission of the criminal offenses alleged after the entry. In fact the proof of the commission of the criminal offense after entry is the best, and in this case the only, evidence of the existence of the intent to commit that crime at the time of the unlawful entry (9 C.J. 1079, MCM, 1928, par. 149e). Therefore, lacking other proof, it is necessary, in order to complete the proof of the three offenses of housebreaking, that the record show beyond any reasonable doubt that the accused after entering the buildings attempted to commit rape upon Miss Charlett and then upon Miss Nelson, and that he committed larceny in the home of Mr. Martz. As these three offenses form the basis of three of the other specifications (Specs. 5, 6, and 7) we will pass to the determination of the legal sufficiency of the evidence to support these specifications. If the findings of guilty of these three specifications (5,6 and 7) may legally be sustained then the findings of guilty of Specifications 1, 2 and 3 should also be sustained without further discussion.

b. Assault with intent to rape (Specifications 5 and 6).

An assault with intent to rape is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished.

> "No actual touching is necessary. Thus, when a man entered a woman's room and got in the bed where she was and within reach of her person for the purpose of raping her, he committed the offense under discussion although he did not touch the woman. The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice." (MCM 1928, par. 149 l)

As stated in 44 Am. Jur. 915,

> "Two essential ingredients must co-exist to constitute the crime of assault with intent to commit rape; they are: (1) an assault and (2) an attempt to commit the act charged. As a general rule, it may be said that if an assault is made under such circumstances that the act of sexual intercourse, if it had been accomplished, would have been rape, the accused is guilty of assault with intent to commit rape."

The commission of an assault was clearly shown in both instances. The overt act amounting to an assault was committed when the accused forcibly grasped both women without their consent. The more difficult question is: Did he

at that time intend to commit rape? This intent may be inferred from all of the circumstances shown by the evidence, such as the character and degree of the force applied, his words, his threats, and his entire conduct at the time, and place of the occurrence.

The record in both instances presents the picture of an uninvited negro male who silently enters the bedroom of a young white famale who had retired for the night and is lying in her bed dressed in night dress. This occurs during the darkness of an early morning. With reference to Miss Charlett accused "got on top of" her with the full length of his body on top of hers as she lay on her back. He suggested that he undress and get in bed with her. He fondled and caressed her. He endeavored to remove her clothing and the bed covering and at the same time pinned her down beneath him with his hands and body. He threatened her and put his hand over her mouth when she screamed. With reference to Miss Nelson accused's actions were somewhat along the same lines except that she eluded him before he could get on top of her. She managed to get her body out of the bed while he held her wrists. When asked what he wanted, he said, "I want you." He actually lay down on the bed and tried to hold her in it. He did not desist in his efforts until she managed to break loose and ran screaming from the house. There were numerous other details summarized in the preceding paragraph 3, tending to show his intent, which need not be repeated here. Altogether they present a convincing picture of the accused's attempt to commit rape upon both Miss Charlett and Miss Nelson. It is difficult to reach any other conclusion. The evidence excludes every reasonable hypothesis except the one of the accused's guilt of the offenses charged, to wit, that the accused intended at the time to commit rape upon these women.

> "In all such cases the intent with which an assault is committed is a fact which can only be inferred from the accused's acts and surrounding circumstances. It is, in other words, a question of fact for the jury and not a question of law for the court, except in a case where the facts proved afford no reasonable ground for the inference drawn." (People v. Moore, 100 Pac.688.)

In attempting to evaluate the intent with which the accused entered these apartments, it is proper to take into consideration the fact that the accused was a negro and that Miss Charlett and Miss Nelson were white, and consequently because of difference in race, the accused could hardly have presumed that he could have effected sexual intercourse with them with their consent. In CM 195035 (Talley, 1942) (2 B.R. 181) the following principle from Brittain v. State, 153 S.E. 622, was quoted with approval by the Board of Review:

> "The doctrine of the court's charge to the jury that, upon the question of intention, social customs, founded on

race differences, and the fact that the man was a negro and the girl a white person, might be taken into consideration, is undoubtedly correct."

In the Talley case the Board of Review sustained findings of guilty of assault with intent to rape, where the accused entered the living quarters of an officer's wife and said to her, "Turn out the lights, I want to talk to you. If you call, I will shoot." all spoken while making an assault upon her with a loaded pistol.

In the case here considered the court had the opportunity to hear and observe the witnesses. It has found that the accused did intend to rape these women when he assaulted them. We find nothing in the record that would justify disturbing its findings. The accused's conduct strongly indicates that when he assaulted these women he intended to have carnal knowledge of them, and in order to do so he intended to use such force as might be necessary to overcome any resistance. All of the elements of the crime of assault with intent to rape were therefore established by the evidence beyond any reasonable doubt (CM 233183, 19 B.R. 349; CM 239839, 25 B.R. 273; CM 260611, Wilkinson; Hammond v. United States, 127 Fed. 2nd 752; Wharton's Criminal Law, Vol. I, 12th ed., par. 748).

c. Larceny (Specification 7).

Larceny is defined as the taking and carrying away by trespass the personal property of another with intent to deprive the owner permanently of his property. It was clearly established by the testimony of George D. Martz that he left his billfold containing $12 in paper currency and 75 cents in change in the pockets of his trousers hanging by the door of his apartment before he retired for the night, and when he looked for the money and the billfold in the morning they were gone. The taking and carrying away of the personal property of Mr. Martz was therefore shown. The circumstances of hearing someone leaving the house and seeing a man dressed in military uniform disappearing around the side of the house indicated the presence of an intruder and trespasser. Within a few hours thereafter the accused dressed in military uniform was found in possession of Mr. Martz's billfold and currency of the same amount and denomination that was taken from Mr. Martz's trousers pockets. The accused gave no explanation of his possession of these stolen articles other than to say that he was unaware of their possession, intimating that some unknown person put them in his pocket while he was asleep in the railroad station. Such an explanation is unconvincing and taxes one's credulity. The circumstantial evidence permitted of only one reasonable conclusion, that the accused knowingly had possession of the stolen property and, in view of the lack of any reasonable explanation, that he was the one who stole the billfold and the money. Unexplained possession of recently stolen property is sufficient evidence of larceny of that property on the part of the possessor

(CM 108998, CM 122216, CM 122458, Dig. Op. JAG, sec. 451 (37)). And where it is shown that the property has been stolen from the interior of a building in which the accused had no right to enter, unlawful entry with the intent to steal may be inferred and therefore the same evidence to prove the larceny is sufficient also to prove the housebreaking (12 C.J.S. 738, Smith v. State, 212 S.W. 660).

We, therefore, find no difficulty in concluding that the evidence of record was ample and legally sufficient to support the findings of guilty of Specifications 3 and 7 involving the larceny of Mr. Martz's billfold and money and the unlawful entry by the accused to commit the larceny.

d. Assault (Charge II and its Specification).

The accused has been found guilty of wrongfully striking Harvey B. Jensen on the face with his fist in violation of Article of War 96. The evidence clearly showed that at the time and place averred in the specification a negro officer unlawfully entered the apartment of Mr. and Mrs. Harvey B. Jensen while they were asleep in bed. They were awakened by his activities and Mr. Jensen endeavored to capture the intruder. In his efforts to escape the intruder struck him with his fist in the face and made his getaway. The Jensens identified the accused as the person who had thus entered their bedroom and struck Mr. Jensen. Again the accused's only defense was that of mistaken identity. The weight of the evidence favors the conclusion of guilt. Both witnesses had an ample opportunity to see and closely observe the intruder under a light which Mr. Jensen turned on for that purpose. The findings of the court should not be disturbed.

Throughout the trial it was suggested by the cross-examination of the prosecution witnesses and by some of the witnesses for the defense that the accused was so intoxicated that he was not able to entertain the specific intents involved in and required to be proved in all of the specifications of Charge I. In our opinion there is no merit in this case to such a defense. The general rule of law pertaining to the subject has been stated as follows:

> "The general rule is that drunkenness is no excuse for crime when the offense consists merely in doing a criminal act without regard to the intention. The fact that a person is intoxicated at the time of commission of the crime charged furnishes no defense to a prosecution and punishment for such crime, unless it is so excessive, or has continued for such a length of time as to dethrone the reason, overcome the power to control his actions, and destroy the power -- for the time being at least -- to distinguish between right and wrong in relation to the particular act charged or to form a criminal intent, or to entertain malice." (I Wharton's Criminal Law, 12th ed., 599)

"Although voluntary intoxication is not an excuse for crime, it has an important bearing on the question of guilt as regards any crime of which a specific intent is an essential element. Of course, the mere fact that a person was intoxicated at the time he did a criminal act, does not show that he was incapable of forming an intent, for a man may be drunk and at the same time be able to deliberate. But intoxication may be so extreme as to suspend entirely the power of reasoning and when such is the case, the subject is incapable of forming an intent, and therefore cannot be held guilty of a crime which involves intent, unless the intent was formed before the intoxication." (15 Am. Jur. 30).

In discussing drunkenness as a defense, the following language has been used by the Board of Review in a case involving uttering a worthless check:

"Drunkenness is a defense only where it negatives specific intent, and the burden of proof is upon the accused to prove that his state of drunkenness was such as to prevent his forming the design to defraud." (CM 188861, Dig. Ops. JAG, 1912-40, sec. 451 (28))

In applying these general rules to the specific offense of assault with intent to rape the following authorities should be noted:

"If the prisoner's mental faculties were so overcome by intoxication at the time of an attempt to rape that he was not conscious of what he was doing, or if his actions and the means used were naturally calculated to effect his purpose, nevertheless, if from intoxication, he had not sufficient capacity to entertain the necessary intent, such intent cannot be inferred from his acts. If, however, he retained sufficient mental capacity to know what he was doing and why he was doing it, then the attempt to rape may be inferred from his acts, the same as if he were sober." (44 Am. Jur. 926)

The evidence relating to the accused's alleged intoxication in this case may be summarized as follows: Miss Charlett testified that while the accused was in her apartment he talked coherently, although he appeared to have had enough to drink to make him feel as though he should have everything he asked for (R. 186,187). Patrolman Kalin, who apprehended the accused, refused to give an opinion as to whether or not the accused was intoxicated but testified that he did not stagger as he walked (R. 102,103). Patrolman Nelson and Sergeant Borzano, who observed accused almost immediately after his apprehension, testified that the accused walked with a steady gait, that his speech was clear and coherent, and that he knew what he was doing (R. 115,116,128). Lieutenant Bensky who talked with the accused at Mayo

General Hospital shortly after his apprehension was of the opinion that the accused was not drunk and stated that his speech was coherent (R. 147). The witnesses for the defense testified as follows upon the subject: Everett Coffee, a taxi driver, who saw the accused at about 0345 hours on the morning in question testified, "Well, I would say the man was happy. I don't know what, really what, to say. I can say the man was drunk. Then I would say the man was drunk." (R. 214,215.) However, on cross-examination he admitted that the accused's speech was clear and understandable, that he had only slight trouble in walking and that he did "a pretty good job" of tap dancing (R. 220,223). Virginia Pearson, with whom the accused talked at the bus station at about 0730 hours on the morning in question, testified that the accused talked coherently, in a calm ordinary tone, that he walked "regularly" and stood erect (R. 236,237). Accused described his condition as having had enough whiskey to be drunk and that he then went to sleep (R. 255).

In addition to this objective testimony, the defense properly introduced in evidence the results of a blood test taken at Mayo General Hospital at about 1100 hours on the day in question. This test reflected that there was then present two milligrams of alcohol per cubic centimeter of the accused's blood. It has been determined that in terms of percentage, such test reflected that the accused's blood then contained .2% alcohol. Captain Johnson, who qualified as an expert, testified that 1.5 milligrams of alcohol per cubic centimeter resulted in drunkenness, and that a content above 2.5 would result in dead drunkenness.

From these authorities it is apparent that the accused was at most only in the lower stages of intoxication as shown by the blood tests and that the alcoholic content as shown by such blood tests had not reached the point where it could be considered as controlling or conclusive. Hence the court was fully justified in falling back upon the objective evidence of the witnesses who observed the accused's demeanor prior to, during the course of, and subsequent to the offenses with which he was charged. The court therefore could properly accept as true the testimony of the prosecution's witnesses as well as some of those who testified on behalf of the accused to the effect that he was at all times coherent in his speech, walked with little or no defect and apparently was in full command of his faculties. His actions in connection with all of the incidents testified to were not those of a mind bereft of all reason, but on the contrary showed a willful consciousness of what he was doing and that his actions were wrongful. For example, his quiet, tip-toed, though precipitate retreat from the Jensen apartment and his insistence in both the Nelson and Charlett apartments that the young women in question should make no noise, all indicate that he fully understood that his actions were wrongful and that if he were apprehended, he would be punished. In other words, in each instance, to use the language of State v. Truett, supra, the accused knew what he was doing, was able to appreciate the character of his act, and knew that it was unlawful and

wrongful. Hence, his intoxication was no defense.

6. War Department records show the accused to be 26 years and 5 months of age, married, and the father of one child. He graduated from high school and for two years attended college. For three years he operated a theatrical booking agency. On 4 December 1941 he was inducted into the service and served in the Engineers as an enlisted man, attaining the grade of Staff Sergeant, until 28 October 1942, when he was appointed a second lieutenant, AUS, at Fort Belvoir, Virginia. During the summer of 1942 he accidentally dislocated his knee when he fell during extended order drill in Louisiana and was hospitalized in May 1943 and again in October 1943. An operation was performed on the knee in November 1943. On 1 June 1944 he was found physically fit for duty and assigned to Camp Ellis, Illinois for duty.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK - CM 274609

1st Ind.
FEB 26 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 Webster L. Harraway (O-1105494), 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 the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the confinement be reduced to 7 years and that the sentence as thus modified be carried into execution.

3. The United States Penitentiary, Leavenworth, Kansas, should be designated as the place of confinement.

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

Myron C. Cramer,

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Sentence confirmed but confinement reduced to seven years. G.C.M.O. 137, 11 Apr 1945)

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

10 APR 1945

(243)

SPJGK - CM 274647

UNITED STATES v. Staff Sergeant SATURNINO L. TRUJILLO (39831365), Hobbs Army Air Field, 3017th Army Air Forces Base Unit (Pilot School, Specialized 4-Engine), Hobbs, New Mexico.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Hobbs, New Mexico, 9 January 1945. Dishonorable discharge and confinement for fifteen (15) years. Penitentiary.

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

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

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

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

Specification: In that Staff Sergeant Saturnino L. Trujillo, Section C, 3017th Army Air Forces Base Unit (Pilot School, Specialized 4-Engine), did, at Hobbs Army Air Field, on or about 2 December 1944, wrongfully and unlawfully take and carry away one Colt's single action 32 calibre pistol, of the value of about $20.00, property of Private First Class Carlton D. Anderson.

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

Specification 1: In that Staff Sergeant Saturnino L. Trujillo, * * *, did, at the Military Police Station in Hobbs, New Mexico, on or about 2 December 1944, with intent to do him bodily harm, commit an assault upon Staff Sergeant Isaac P. Rohanna, by pointing a dangerous weapon, to wit: a cocked 32 calibre single-action Colt's pistol, at the said Staff Sergeant Isaac P. Rohanna.

Specification 2: In that Staff Sergeant Saturnino L. Trujillo, * * *, did, at Hobbs, New Mexico, on or about 2 December 1944, with intent to commit a felony, viz.: murder, commit an assault upon Sergeant Clarence D. Todd, by wilfully and feloniously firing four shots from a 32 calibre single-action Colt's pistol

at the said Sergeant Clarence D. Todd.

Specification 3: In that Staff Sergeant Saturnino L. Trujillo, * * *, did, at Hobbs, New Mexico, on or about 2 December 1944, with intent to commit a felony, viz.: murder, commit an assault upon Private Vernon A. Christner, by wilfully and feloniously firing four shots from a 32 calibre single-action Colt's pistol at the said Private Vernon A. Christner.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence was introduced of any previous conviction. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of nineteen (19) years. The reviewing authority approved only so much of the findings of guilty of Specifications 2 and 3 of Charge II as involved in each instance findings of guilty of an assault with intent to do bodily harm with a dangerous weapon, approved the sentence, but reduced the period of confinement to fifteen (15) 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; it is unnecessary, therefore, either to set out or to discuss the evidence relating to this Charge and Specification. The offense involved is that of a wrongful and unlawful taking of property belonging to another, not amounting to larceny. The value of the property involved was limited by the pleading to $20.00. The findings of guilty of this Charge and Specification therefore cannot support any portion of the sentence to confinement in excess of six months.

4. The evidence for the prosecution relating to Charge II and its three specifications is, briefly summarized, as follows:

Specification 1. At curfew, 11:30 p.m., on 1 December 1944, the accused was in the Ramona Club, Hobbs, New Mexico, engaged in drinking. Private Vernon A. Christner, a military policeman, at that time called accused's attention to curfew and told him that he would have to leave (R. 51). Accused did not leave, and some 20 minutes later, about 11:50 p.m., Staff Sergeant Isaac P. Rohanna, also of the Military Police, twice told him to leave the club (R. 24). Accused refused to leave, so Sergeant Rohanna and Private Christner forcibly removed him from the club, placed him in their car and carried him to Military Police headquarters in Hobbs (R. 24). Arrived at headquarters, accused became belligerent and cursed the military police, whereupon Sergeant Rohanna ordered him searched and locked up (R. 24). Accused was forcibly searched and his money and personal effects were taken from him and placed in an envelope which was in turn sealed. Accused was then placed in the "holdover" (R. 24). About 2:15 a.m. (2 December), Sergeant Rohanna had accused brought before him preparatory

to releasing him, but accused refused to sign a receipt for his personal effects and was returned to the "holdover." Sergeant Rohanna stated that when accused was tendered his property conditioned upon his signing the receipt accused said, "No I don't want my property * * * I will come back in the morning and get it." To which Sergeant Rohanna replied, "Well, if that is the attitude you want to take, I will just put you back in the lock-up and let you sweat it out for a while, and maybe then you will sign it" (R. 25). Accused was again locked up, but a few minutes later Sergeant Rohanna concluded to release him anyway. Accused again refused to sign a receipt for his property and was informed that he could get it later that morning at the Office of the Provost Marshal. Private Christner and Private First Class Harvey May drove accused to his barracks and there released him (R. 52,62). They had "a little argument" with accused on the way to the base (R. 67), but no one struck him prior to the time he was released (R. 55).

Both Sergeant Rohanna and Private Christner expressed the opinion that accused was sober upon this first occasion that they had him in custody, and the only offense for which accused was "booked" was that of being out after curfew (R. 26,38).

About 3:20 o'clock of the same morning (2 December), accused voluntarily reappeared at military police headquarters. At this time he had a cocked pistol in his hand which he pointed at Sergeant Rohanna, who was sitting at a desk, and demanded his (accused's) property. Sergeant Rohanna obliged by delivering accused's property to him. Recounting the incident, Sergeant Rohanna said that he was scared - was in fear for his life - and didn't know what to do, so immediately got the envelope containing accused's property, removed and replaced the property, and then stepped away from it, all as directed by accused. The accused then picked up the envelope and placed it in one of his pockets. During all of this time accused had the pistol cocked and pointed at Sergeant Rohanna's chest (R. 27).

After placing the envelope containing his property in his pocket, accused asked the whereabouts of the other military police and was informed by Sergeant Rohanna that they were out on patrol. What thereafter transpired between him and accused was recounted by Sergeant Rohanna as follows:

> "* * * 'Well,' he says, 'I am going out and get them and I will come back and get you,' so he backed to the door and opened the door and started out and then he hesitated a minute and came back in and he says, 'God-damn you, I am going to shoot you,' and I says, 'No, Sergeant, don't do that. You have got what you want, don't do that,' and I faided away behind the counter. I didn't go clear down, just part way, and he says, 'Where did you say the other M.P's were?' I says, 'They are out on patrol.' He says, 'I am going out and get them and I am coming back and

get you. Don't do any telephoning or no calling, I am coming back to get you,' and there wasn't any more said, so he went out * * *" (R. 27).

The testimony of Sergeant Rohanna was corroborated in its material phases by Private Clyde R. Moore, who was present in military police headquarters at the time of the above-mentioned occurrence (R. 32,33). Both Sergeant Rohanna and Private Moore expressed the opinion that accused was sober at the time (R. 28,35).

A few minutes after accused left military police headquarters, or at about 3:30 a.m., Sergeant Clarence D. Todd and Private Christner, who were at the time on routine patrol in a reconnaissance patrol car, saw accused cross a street, recognized him as having been in custody earlier that night or morning, and stopped their car near a filling station within about ten feet of accused (R. 41,42,53,54). Sergeant Todd was driving the car and Private Christner was riding beside him (R. 41). Sergeant Todd opened the car door and started to get out to speak to accused. As he did so, accused turned and pointed a revolver at him and said, "God-damn you" (R. 42). Sergeant Todd jumped back in the car, closed the door, ducked, and told Private Christner to get down, which he did (R. 42,54). At that time they heard one shot fired (R. 42,54). Sergeant Todd thereupon, while still lying down in the seat, began backing the car around the corner of the filling station (R. 42,54). While the car was being backed, two more shots were fired (R. 42,54). Sergeant Todd then began driving away from the vicinity and a fourth shot was fired (R. 43).

Both Sergeant Todd and Private Christner stated that their car was standing still in a well lighted area within ten or twelve feet of accused at the time the first shot was fired and estimated that they were approximately 35 feet from accused when the second shot was fired, 50 feet when the third shot was fired, and 80 feet when the fourth shot was fired (R. 43,45,54-55). Neither Sergeant Todd nor Private Christner saw any of the shots fired (R. 43,49,64). Private Christner stated that he would not say accused fired at them or even in their direction (R. 64). He and Sergeant Todd examined their car and found no bullet holes or marks (R. 44,45,63). Sergeant Todd said that if accused was experienced in the use of firearms he should have been able at least to hit the car with some of the shots if he had really wanted to (R. 45). Private Christner expressed the opinion that a strange gun might cause one to miss so large an object even at such close range (R. 63).

Civilian police were summoned and Private Christner returned with them to the vicinity of the shooting (R. 55). They saw accused enter a nearby hotel and entered behind him. As accused was about to enter a room, Private Christner, who had approached quite close, called to him; and as accused turned, Private Christner, who said that he saw the butt of a gun

protruding from the front of accused's coat, struck accused across the head with a night-stick with sufficient force to cause him to begin to sag to the floor and to inflict a gash that required five stitches to close (R. 56,57,82). A pistol was removed from accused's person and found to contain two cartridges that had not been fired and the hulls of four cartridges that had been fired (R. 57,58,70). The gun, cartridges, and hulls were introduced in evidence (R. 12,60; Pros. Exs 1 to 7, incl.). Private First Class Carlton D. Anderson, the owner of the pistol, stated that he cleaned it during the afternoon of 1 December and did not himself fire it afterwards (R. 9,14). At the time the pistol was taken from accused it was apparent from powder markings that it had been fired four times since being cleaned (R. 14,15,21). The gun was old and worn and could be fired from half-cock as well as from full-cock (R. 10).

A pre-trial statement, voluntarily made and signed by accused before the investigating officer after having been duly warned, was introduced in evidence over the objection of defense counsel. It was objected to on the ground that it was hearsay, in that, the matters therein contained were things that had been told accused by others and were not within his own knowledge (R. 79). The accused took the stand as a witness for the limited purpose of testifying on the point. He stated that he had no independent recollection of any of the matters set out in his signed, pre-trial statement; that it was based entirely on what others had told him the following day (R. 80). He stated that he believed he told the investigating officer that he did not recall the occurrences under inquiry (R. 88), but the latter said not (R. 89). Accused's pre-trial statement was, in pertinent part, as follows (R. 90, Ex. 8):

> "At the time I left the MPs here at the camp I went through my barracks, got my hat, went down to the armament shop and got a weapon and went out to the gate. I got a ride into town, went down to the MP station, pulled the gun on the Sergeant there and told him to give me my personal belongings. I left the station after he gave me everything and went towards town and went down by the Frey Hotel. I met two MPs near the gas station. The driver stepped off the car and when he saw me take the gun out he got back on and started off. I shot the weapon four different times. I waited then and went around the block and went to the hotel by the Frey Hotel. When I was in the hotel the MP hit me over the head with his club and took me to the desk and a couple of civilian cops who were with him took my weapon away and took me back to the station.
>
> "I had been in town drinking since 2030 to 2330 and I had had quite a bit to drink and in my opinion the reason I acted the way I did and did what I did was because I was drunk."

Private Christner expressed the opinion, based on accused's appearance and the manner in which he walked, that accused was sober at the time

of the encounter at the filling station (R. 65). Captain Elvin L. Fitzsimmons, Medical Corps, subjected accused to a sobriety test about 4:45 a.m. on the day in question, and stated that it was his conclusion that accused was at the time under the influence of alcohol to a mild degree. Accused was not sober, neither was he drunk to a degree that would render him incapable of distinguishing right from wrong (R. 74). Captain Fitzsimmons stated that the sobriety test which he employed was not considered to be very accurate (R. 74). The elapsed time after the incident giving rise to the test was very material, and the reaction of various nationalities to the stimuli of liquor varies greatly (R. 75). The German, Spanish, Italian, and French peoples can tolerate liquor much better than the Anglo-Saxons (R. 75).

5. For the defense.

Captain Paul M. Corman, Medical Corps, examined accused on 19 December 1944. Based on his examination of accused, accused's past history, his military and combat record, and what accused told him, he expressed the opinion that accused was suffering from amnesia due to drunkenness on the night and morning of 1-2 December (R. 93). He was not of the opinion that the effects on one's nervous system from having been in combat would render one more susceptible to the effects of alcohol, but was of the opinion that one might act differently under the influence of liquor after having been in combat, particularly as regards the use of firearms, because such a one would have less inhibitions than one who had not been in combat (R. 93). Captain Corman was further of the opinion that accused had not used alcohol extensively enough to be suffering from an alcoholic psychosis; nor did he find accused to be suffering from any mental disease (R. 96). He stated that the only history given him by accused that might indicate a psychiatric condition was accused's representation that he seemed unable to control his emotions since returning from combat, citing as an example his conduct in slapping a civilian in a railroad station for remarking that there were too many soldiers (R. 97).

Letters and special orders were introduced in evidence showing the following: On 18 April 1944 accused's commanding officer stated that accused had been relieved from combat flying after prolonged combat duty and recommended that accused be returned to the United States for rest and rehabilitation (R. 97, Def. Ex. A). On 19 April 1944, accused's Squadron Flight Surgeon certified that accused showed evidence of moderately severe combat fatigue as a result of prolonged combat duty, and recommended that accused be returned to the zone of the interior for a period of not less than 30 days for rest and rehabilitation (R. 98,Def. Ex. B). On 7 January 1944 accused was awarded the air medal for exceptionally meritorious achievement while participating in five separate bomber combat missions over enemy occupied continental Europe; and for similar achievement on five additional flights in each instance, he was on 3 and 15 February 1944, respectively, awarded the Oak Leaf Cluster (R. 98, Def. Exs. B,D,C,).

6. Under the facts as summarized, it is clear that accused was properly found guilty of Charge I and its specification. As to the three specifications under Charge II it is the opinion of the Board of Review that the evidence is legally sufficient to support only so much of Specifications 1 and 2 as involves a finding of guilty of assault with a dangerous weapon in violation of Article of War 96, and is legally insufficient to support a finding of guilty of any offense under Specification 3.

Specification 1 of Charge II. The specification is similar to that in CM 195931, Willis, which appears to be the first in which a Board of Review recognized "assault with a dangerous weapon" as a lesser included offense of assault with a dangerous weapon with intent to do bodily harm. The opinion in that case reads in pertinent part as follows:

> "2. Under Charge I and its Specification, accused was tried for an assault alleged to have been committed, with intent to do bodily harm, 'by pointing a dangerous weapon, to wit, a revolver, at said Bane'. The Specification is defective in that it fails to allege the commission of any acts by accused which, alone, would warrant any inference at law that accused in committing them had the intent to do bodily harm as alleged, and the proof fails to remedy the defect in that no evidence was introduced to show that accused attempted to use the pistol for any purpose other than as a threat by pointing the weapon as alleged. The evidence is therefore legally insufficient to sustain a finding that accused committed a felonious assault in violation of the 93rd Article of War, but legally sufficient to support a substituted finding that accused committed an assault with a dangerous weapon at the time and place alleged, as a lesser included wrongful act in violation of the 96th Article of War."

In the present case the particular incident which appears to be the basis of this specification was the return of the accused to the office of the Military Police with a cocked pistol in his hand, which he pointed at Sergeant Rohanna, and his demand that his personal property, which the MP's had taken from him at the time of his temporary detention, be returned to him. There is no evidence that any threats whatsoever were made, and nothing to indicate that accused intended to do Sergeant Rohanna any physical harm. These facts remove this case from the principle, of which the Board approves, that where an assault with a dangerous weapon is accompanied by threats of physical violence unless the person assaulted complies with orders or instructions which the assailant has no authority to give or impose, the offense is properly classified as an assault with a dangerous weapon with intent to do bodily harm. Accused's subsequent outburst, as he was leaving the room, unaccompanied by any overt act, and his threat to return subsequently and get the sergeant, form no part of this specification, in the opinion of the Board, but even if they do they negative rather than establish a present intent to do bodily harm. It is, therefore, the opinion of the Board, that

accused's offense was solely an assault with a dangerous weapon.

Specifications 2 and 3 of Charge II are based upon accused's actions in allegedly firing four shots at Sergeant Todd and Private Christner, respectively. Clearly the finding of guilty of Specification 3 may not be sustained. As far as the record shows accused did not even know that Private Christner was present, had no conversation with him, did not point the pistol at him and did not shoot at him. The Staff Judge Advocate in recommending the disapproval of the finding of guilty of an assault with intent to commit murder, stated that the record did not justify a conclusion that accused had fired at any one. The Board agrees unqualifiedly with this conclusion. Consequently, it is the opinion of the Board that there is no legal evidence to support the finding of guilty of any form of assault upon Christner.

As to Specification 2, the assault upon Sergeant Todd, in the opinion of the Board, was merely an assault with a dangerous weapon. Again the conclusion of the Staff Judge Advocate, that the record does not establish that accused fired at either the sergeant or any one else, thus exonerating accused of the charge of assault with intent to commit murder, likewise exonerates him of the charge of assault with intent to do bodily harm. There can be no middle ground: accused either fired at the sergeant and/or Christner or did not do so. If he did fire at them, then the charge would properly be assault with intent to commit murder; if he did not fire at them, then there is nothing to indicate that he intended to do them or either of them bodily harm, and, in addition, there is definite inferential proof that he was not trying to do them any bodily harm of any type.

"Assault with a dangerous weapon" has now been recognized as an offense, distinct from simple assault and assault with a dangerous weapon with intent to do bodily harm, but as a lesser offense of the latter, since the opinion in the Willis case, rendered 8 July 1931. There has been no modification of or deviation from this ruling. Since, as a matter of fact, an assault with a dangerous weapon is far more serious than a mere threat or an assault while unarmed or the various other types of assault, which, in the normal course of events, should not lead to serious injury, it is proper that it should be treated more seriously and the Board sees no reason for deviating from this fixed view of the office. While the Board believes that such an assault does not normally warrant the same severe punishment imposed on one who commits an assault with a dangerous weapon with intent to do bodily harm, under the provisions of paragraph 104c of the Manual for Courts-Martial, the same maximum sentence applies. Broken down into its elements, the first paragraph of 104c provides:

> "The punishment stated opposite each offense listed in the table below is hereby prescribed as the maximum limit of punishment (1) for that offense, (2) for any included offense, if not so

listed, and (3) for any offense closely related to either, if not so listed" (underscored numerals supplied).

The punishment for assault with a dangerous weapon is not prescribed in the Table of Maximum Punishments. Certainly, in order to prove an assault with a dangerous weapon with intent to do bodily harm it is necessary to prove an assault with a dangerous weapon. Assuming, then, that the Judge Advocate's Office is correct in holding that an assault with a dangerous weapon is more serious than a simple assault and may be punished as a more serious offense, it is certainly a lesser included offense of assault with a dangerous weapon with intent to do bodily harm. Consequently, under the provisions of paragraph 104c, indicated as (2) above, the same maximum punishment is applicable to it as to the offense of "assault with a dangerous weapon with intent to do bodily harm," namely, five years' confinement.

It would be far more equitable if the maximum punishment applicable to an assault with intent to do bodily harm, namely, confinement for one year, could be applied. Since, however, assault with a dangerous weapon is not a lesser included offense of assault with intent to do bodily harm, the Board reluctantly concludes that it is bound by the provisions of the Manual and must be governed by the previously quoted provision (2) that the maximum punishment set forth in the Table is applicable not only to the offense but to any lesser included offense, when the Table does not designate the punishment for such lesser included offense.

Under these views the sentence may not exceed 10 years and 6 months on the following basis:

Specification of Charge I	6 months
Specification 1 of Charge II	5 years
Specification 2 of Charge II	5 years.

7. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Specification 3 of Charge II, legally sufficient to support only so much of the findings of guilty of Specifications 1 and 2 of Charge II and of Charge II as involves findings of guilty of assault with a dangerous weapon in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge I and its Specification, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for ten years and six months.

_____, Judge Advocate.

(Dissent), Judge Advocate.

_____, Judge Advocate.

10 APR 1945

(252)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General

SPJGK - CM 274647

UNITED STATES v. Staff Sergeant Saturnio L. TRUJILLO (39831365), Hobbs Army Air Field, 3017th Army Air Forces Base Unit (Pilot School, Specialized 4-Engine), Hobbs, New Mexico.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Hobbs, New Mexico, 9 January 1945. Dishonorable discharge and confinement for fifteen (15) years. Penitentiary.

DISSENTING OPINION of EARLE HEPBURN, Judge Advocate

I concur with the majority of the Board of Review in its opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification (unauthorized use of a pistol). A conviction of this offense may not legally support a sentence of confinement in excess of six months, as it is closely related to larceny of property of a value of $20 or less, which offense is listed in the Table of Maximum Punishments and limited as indicated (MCM 1928, par. 104c, p. 99).

I also concur with the majority of the Board in its opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 3 of Charge II as approved by the reviewing authority (assault with intent to do bodily harm with a dangerous weapon upon Private Vernon A. Christner) or of any lesser included offense, for the reason that there was no evidence that the accused committed any assault of any kind upon Private Vernon A. Christner, who was hiding inside of the patrol car; that he ever shot the pistol at him or in his direction; or that he intended to frighten him.

There still remains to be legally justified a sentence of 14½ years of confinement.

Specification 1 of Charge II presents the following question of law: Does the pointing of a loaded pistol at another and ordering that other to do something which he is not required to do, which order is complied with because of fear, and the pistol is not discharged because the order is

complied with, constitute any offense under the Articles of War, and, if so, is the offense any greater than "assault" in violation of the 96th Article of War and limited to three months punishment by confinement in the Table of Maximum Punishments (MCM, 1928, par. 104c)?

Specification 2 of Charge II presents this question: Does the firing of a pistol in an unknown direction with the inferential intent to frighten another constitute any offense under the Articles of War, and, if so, is the offense any greater than "assault" in violation of the 96th Article of War limited in punishment as indicated above?

Both problems may be discussed together as in both cases the accused intentionally frightened his victims by means of a weapon.

The act constitutes an assault.

The most popular definition of the term "assault" in "an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another" (4 Am. Jur. p. 125). It has often been defined as "an attempt to commit a battery" (Clark and Marshall on Crimes, par. 198).

Thus in Johnson v. State, 35 Ala. 363, 365, the court held:

> "An assault is an attempt or offer, to do another personal violence, without actually accomplishing it. A menace is not an assault, neither is a conditional offer of violence. There must be a present intention to strike."

In State v. Davis (23 N.C. 125, 35 Am. D. 735) the court held an assault to be:

> "An intentional attempt, by violence, to do an injury to the person of another. It must be intentional; for if it can be collected, notwithstanding appearances to the contrary, that there is not a present purpose to do an injury, there is no assault * * * And it must also amount to an attempt: for a purpose to commit violence, however fully indicated, if not accompanied by an effort to carry it into immediate execution, falls short of an actual assault."

Other jurisdictions, particularly the Federal courts, have held that the frightening of another with a weapon may also constitute an assault notwithstanding the absence of any attempt to commit a battery and notwithstanding the absence of the present ability to commit a battery. These decisions are usually based upon a definition of "assault" by Bishop in his Criminal Law. He defines assault as "any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being" (Section 23 of 9th Edition).

There are therefore two well recognized definitions of assault.

McClain recognizes the existence of these two classes of assaults. In his Criminal Law (Section 231) he states:

"Some authorities treat an assault as a form of attempt, and the definitions given are based on the idea that the offense consists in an attempt to commit a battery or other physical injury. Other authorities, however, recognize the offense as consisting of putting another in fear of violence. It is believed that each of these cases constitutes an assault, and the two must be considered as distinct branches of the crime and discussed separately. The recognition of this distinction will explain somewhat the confusion among the cases."

Some State statutes recognize both definitions (La. Crim. Code, 740-36).

Under Bishop's definition of assault it is clear that pointing a gun or other similar weapon, loaded or unloaded, at another, in a threatening manner is an assualt (Section 23).

One of the leading cases on the subject, wherein the accused pointed an unloaded weapon at another in a threatening manner, is Price v. United States (156 Fed. 950). The court held:

"But, while the evidence does not show that the defendant committed the crime of an assault with a dangerous weapon, it is yet sufficient to prove him guilty of the minor offense of assault. It is true, as contended by counsel for appellant, that it has been adjudged in many cases that pointing an unloaded pistol at another accompanied by a threat to shoot, does not constitute an assault. This was so held in Klein v. State, 9 Ind. App. 161, 36 N.E. 763, 53 Am. St. Rep. 354; Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42, and People v. Sylva, 143 Cal. 62, 76 Pac. 814, relied upon by the defendant, and other cases may be cited to the same effect. The cases from Indiana and California are based upon a statute in force in each of these states, defining an assault as 'an unlawful attempt coupled with a present ability to commit a violent injury upon the person of another.' Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42, does not rest upon any statute, but lays down the broad rule 'that there can be no criminal assault without a present intention, as well as present ability, of using some violence against the person of another.' We do not concur in this statement of the law, and in our opinion the true rule is stated by Mr. Bishop in his work on Criminal Law (volume 2 [3d Ed.] sec. 53), in the following language:

'There is no need for the party assailed to be put in actual peril, if only a well-founded apprehension is created; for his suffering is the same in the one case as in the other, and the breach of the public peace is the same. Therefore, if within shooting distance one menacingly points at another with a gun, apparently loaded, not loaded in fact, he commits an assault the same as if it were loaded. There must in such a case be some power actual or apparent, of doing bodily harm, but apparent power is sufficient.'

"This view is sustained by many cases, only two of which will be cited: Commonwealth v. White, 110 Mass. 407; Beach v. Hancock, 27 N. H. 223, 59 Am. Dec. 373." (pp. 952-953)

Under such reasoning the effect of an accused's conduct on the victim would be the same whether the gun was loaded or unloaded. The wrongful intent of the accused is also the same. Therefore, under the Bishop definition adopted by the Federal courts, the intentional putting another in fear with a loaded or unloaded gun should constitute an assault.

The weight of authority favors that conclusion, consequently the findings of guilty of an assault in the case under discussion should be sustained in both Specifications.

But not an assault with intent to do bodily harm.

Conceding that the accused committed an assault under both Specifications, did the assault rise to such a degree as to constitute an assault with intent to do bodily harm with a dangerous weapon?

The question will be divided into two parts: (1) Does the record support the findings "with intent to do bodily harm? (2) Does it support the findings "with a dangerous weapon"?

In answer to (1) with reference to Specification 1, when the accused pointed the pistol at Sergeant Rohanna it was solely for the purpose of frightening him into returning his (the accused's) belongings. Clearly his intent was to frighten and not to do bodily harm. If he had intended bodily harm by his act there was nothing to prevent him from discharging the weapon. And so, too, with reference to the other Specification, when he fired the pistol in an unknown direction - but apparently not at Sergeant Todd - he could not have intended to do bodily harm. The intent to frighten could properly be inferred. The only way of doing bodily harm with the pistol under the circumstances was to shoot Sergeant Todd. This could only be accomplished intentionally by pointing the pistol at him or in his direction. As there was no evidence that the accused did that, there was no evidence of any intention to do bodily harm. It should always be borne in mind that the intent to do bodily harm is one of the essential elements of the charges and it must be proved beyond any reasonable doubt. There is no proof of such intention in the record.

McClain's admonition, recited above, regarding the two classes of assaults is appropriate to the occasion. In my opinion the term assault when used in the 93rd Article of War, where it is coupled with specific intents, means only the popular definition of assault as a form of an attempt and not the kind of assault based upon putting another in fear. The Manual for Courts-Martial emphasizes in numerous places that the phrase "assault with intent" is synonymous with "attempt". Thus, an assault with intent to murder is an "attempt to murder" (p. 178), and an assault with intent to rob is an "attempt to rob" (p. 179). While it is silent on the question of whether an assault with intent to do bodily harm must be an attempt to do bodily harm, such a conclusion is logical, and it would simplify the determination of many cases wherein this question has been raised. The Manual does, however, state that one of the essential elements of proof

of this offense is that the weapon was used in a manner likely to produce death or great bodily harm (p. 180). These words strongly indicate that it must be shown that the accused attempted to do the bodily harm. Thus, in the case of a pistol, that accused actually discharged it or at least attempted to discharge it. The pistol could do no harm as such unless it was discharged. "The mere fact that a weapon is susceptible of being so used is not enough" (R. 180).

In order to sustain a finding of "intent to do bodily harm", the evidence must clearly show a present intent to do bodily harm and not one contingent upon the happening of some event. To put it in other words, it must show an attempt to do bodily harm. I therefore concur with the conclusion reached by the majority of the Board that the record of trial is not legally sufficient to support the findings of guilty of "intent to do bodily harm" in Specification 1 (assault with intent to do bodily harm with a dangerous weapon on Sergeant Rohanna) and in Specification 2 (the same on Sergeant Todd) of Charge II as approved by the reviewing authority.

The conclusion that the pointing of a loaded firearm at another with intent to frighten that other into doing something that he is not required to do does not constitute an assault with intent to do bodily harm with a dangerous weapon was reached in similar previous cases: CM 195931 (1931); CM 240041, 25 B. R. 345; and CM 230478, 17 B.R. 375. There are other dicisions to the contrary: CM 170158 (1926); CM 232925, 19 B.R. 245, and CM 235227, 21 B.R. 342. In the latter two cases the point was not discussed. The civil courts are also divided on the subject. See also collection of cases attached to CM 170158 and 74 A.L.R. 1206. In my opinion this confusion is caused by the failure to observe the existence of the two definitions of assaults.

If the pointing of a loaded weapon at another with intent to frighten can be held to be an assault with intent to do bodily harm with a dangerous weapon, then it is just as logical to hold that the same act constitutes an assault with intent to murder. The weapon is a deadly weapon and the intent to use it in the manner indicated would more logically show an intent to kill rather than to do bodily harm. Such a conclusion I do not believe would be tolerated. In the discussion of the subject of assault with intent to murder the Manual for Courts-Martial (par. p. 178) clearly indicates that such a conclusion would be erroneous. There it is defined as an "attempt to murder" and -

> "To constitute an assault with intent to murder by firearms it is not necessary that the weapon be discharged; and in no case is the actual infliction of injury necessary. Thus, where a man with intent to murder another deliberately assaults him by shooting at him, the fact that he misses does not alter the character of the offense. Where the intent to murder exists, the fact that for for some reason unknown the actual consummation of the murder is

impossible by the means employed does not prevent the person using them from being guilty * * * Thus, where a soldier intending to murder another loads his rifle with what he believed to be a ball cartridge and arms and discharges his rifle at the other, it is no defense that he, by accident, got held of a blank cartridge."

In answer to (2) above - whether the record can legally support the finding "with a dangerous weapon "- I am of the opinion that it cannot. True, a pistol is a firearm manufactured for the purpose of shooting a bullet which will kill or do great bodily harm if discharged at another. It is therefore considered a "deadly" weapon and in common parlance "dangerous". But in the law of assaults it is not, and it does not become "dangerous" until it is actually used in a manner likely to produce death or great bodily harm. This thought is clearly expressed in the Manual (page 180) where it recites the required proof of the offense:

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

A pistol is not used in a manner likely to produce death unless it is discharged. Pointing it at another is not enough. Nor is it likely to produce death unless it is pointed in the direction of another when it is discharged. Therefore firing it in the air to frighten another would not be using it in a manner likely to produce death. In neither event would the weapon be "dangerous".

This question was fully discussed and determined in CM 271426, <u>Cannon</u>, where the accused used a carbine as a club. It was held:

"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 th t 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."

For the foregoing reasons I am of the opinion that the only offense that can be legally sustained under these Specifications is assault in violation of the 96th Article of War. This is punishable by confinement limited to three months (Table of Maximum Punishments) and therefore the sentence of confinement of the accused for these two offenses should not exceed six months. His total sentence of confinement is therefore limited to one year and any sentence of confinement in excess of that period is illegal.

To hold that the accused may be legally found guilty of a "lesser included" offense of "assault with a dangerous weapon" ignores the principle of law governing the interpretation of the word "dangerous" and erroneously concludes that an "assault with a dangerous weapon" in violation of the 96th Article of War is a lesser included offense of "assault with intent to do bodily harm with a dangerous weapon". No such crime existed at common law. It is purely statutory. It is not mentioned in the Articles of War. For that reason it is not contained in the list of offenses in the Table of Maximum Punishments. "Assault with a dangerous weapon" appears in the criminal codes of some few states and in the District of Columbia - but when it does so appear the same jurisdiction does not also make "assault with intent to do bodily harm with a dangerous weapon" a criminal offense. The converse is also true. In those jurisdictions where statutes make an "assault with intent to do bodily harm with a dangerous weapon" an offense, they do not also make an "assault with a dangerous weapon" an offense (See Illinois Criminal Code Ch. 38, par. 60). The reason is apparent. They are one and the same crime described differently. One is not a lesser included offense of the other. Nevertheless neither can be legally proved without showing an intent to kill or to do bodily harm.

In 1825 Congress made an "assault with a dangerous weapon" a criminal offense (4 Stat. 121, Sec. 22). At that time an "assault with intent to do bodily harm with a dangerous weapon" was not specifically made a crime. It was not necessary because any case that would fall within the terms of the latter also fell within the terms of the former. The Federal courts in relating the proof necessary to show a violation of this statute of 1825 required the presence of a present intent to do harm. In United States v. Small, Fed. Cas. 16,314, the court held:

> "Thus a small pistol, when loaded is undoubtedly a dangerous weapon, and if pointed toward a person within striking distance, with a present intention of discharging it, an assault with a dangerous weapon has been committed." (Underscoring supplied)

The foregoing statute of 1825 was repealed. In its place is a statute (35 Stat. 1143, 18 U.S.C., par. 455) which is similar to the 93d Article of War. It uses the phrase "assault with intent to do bodily harm with a dangerous weapon" and omits altogether "assault with a dangerous weapon". It purports to cover all felonious assaults. The conclusion that the two offenses are synonymous is obvious.

When Congress adopted the Criminal Code of the District of Columbia, Section 22-502 in 1901 it used the same phraseology of the act of 1825 and made an "assault with a dangerous weapon" an offense punishable by imprisonment for not more than 10 years (par. 3, 1091, 31 Stat. 1321; 22 D.C. Code 502). The offense "assault with intent to do bodily harm with a dangerous weapon" does not appear in the Code. The reason is again obvious. It is the same offense.

It should also be observed that Congress decreed that "assault with a dangerous weapon" in the District of Columbia is punishable by 10 years confinement while "assault with intent to do bodily harm with a dangerous weapon" in the Articles of War and in 18 U.S.C. 455 is punishable by no more than 5 years confinement. This should convince anyone that the former is not a lesser included offense of the latter.

Notwithstanding the foregoing and without explanation the Board held in 1931 that an assault with a dangerous weapon is a lesser included offense of an assault with intent to do bodily harm with a dangerous weapon in violation of Article of War 96 (CM 195931). This is erroneous for the reasons set forth above.

It has also been held that an "assault with a dangerous weapon" is not an assault nor any offense closely related to assault and therefore the punishment for the offense is not governed by the Table of Maximum Punishments but is governed by the D.C. Code quoted above (CM 230478, 17 B.R. 375; CM 240041, 25 B.R. 345).

In my opinion these conclusions are erroneous because (1) they ignore the mechanics clearly set forth in the Manual for Courts-Martial, par. 104c, page 96, and (2) they violate the terms of the same Manual in par. 152c.

(1) The Manual for Courts-Martial, 1928, par 104c, page 96, provides:

> "c. Maximum punishments. - The punishment stated opposite each offense listed in the table below is hereby prescribed as the maximum limit of punishment for that offense, for any included offense if not so listed, and for any offense closely related to either, if not so listed. Offenses not thus provided for remain punishable as authorized by statute or by the custom of the service."
>
> "The description of each offense listed must be construed in connection with the Article of War under which such offense is listed." (Underscoring supplied.)

If the mechanics thus set forth were followed, that is, if the Table were consulted for the offense or for "any offense closely related" if not listed, before consulting other Federal statutes, it is irrefutable that the only offense that can be sustained in this case whether it is called "assault" or "assault with a dangerous weapon" is a modified offense under the 96th Article of War, and is an "assault" and that that term appears in the Table. To the most doubtful the offense is "closely related to" "assault". There should be no necessity for going outside of the Table because the offense is clearly listed in the Table. There was no attempt by the auther of the Table to break down the term "assault" into various kinds of assaults descriptive of the manner in which the assault was committed. It is reasonable and logical to conclude that the term "assault" was intended to cover all assa lts under the 96th Article of War.

"The intent of the law maker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. * * * No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify and judicial addition to the language of the statute." (U.S. v. Goldenberg, 168 U.S. 95, 102-3, See also Wallace v. Cutten, 298 U.S. 229,237; U.S. v. Trucking Co., 310 U.S. 534, 543; U.S. v. Mo. Pac. Ry. 278 U.S. 269,277; Yorke v. U.S. 173 U.S. 439.)

Because of a desire to punish an offender more severly than that permitted by the Table a practice has gradually crept into the decisions of the Board of Review of creating under the 96th Article of War numerous classes, kinds, or types of assaults, such as aggravated assaults, indecent assaults, assaults with dangerous weapons, and others. This practice is not recognized by the Manual and really constitutes judicial legislation. Such practice leads to confusion and lack of uniformity of punishment. It converts a simple obvious solution of the limitation of punishment of these cases into complex problems difficult of solution. It places a strained and narrow construction on the word "assault" in the Table and upon the clear language used in paragraph 104c of the Manual. To say that these various assaults are not an "included offense" or an "offense closely related" to the term "assault" appearing in the Table is contrary to what is obvious and apparent. If the President had intended that the soldier should be subject to a greater punishment tahn three months for an "assault with a dangerous weapon" he could have easily listed such a crime in the Table for Maximum Punishments under either the 93rd or 96th Articles of War. The failure to do so shows the lack of such intent and the offense should therefore fall where it logically and clearly belongs, under the term "assault".

(2) Furthermore, if the opinion of the majority members of the Board is sustained in the instant case the practical effect thereof will be to subject this soldier, in the State of New Mexico, to the laws of the District of Columbia. This is contrary to the District of Columbia Code and contrary to the Manual for Courts-Martial (Par. 152c, pp. 188-189), which specifically limits the application of the District of Columbia Code to the District of Columbia.

For the foregoing reasons I dissent from the opinion of the majority of the Board of Review insofar as it is inconsistent with the views wherein expressed. In my opinion the record of trial is legally sufficient to sustain only a finding of guilty of an assault with reference to Specification 1 and Specification 2 of Charge II, and to support a sentence of confinement not in excess of one year.

Earle Adams Judge Advocate.

26 MAY 1945

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

TO: The Secretary of War

1. The record of trial and accompanying papers in the case of Staff Sergeant Saturnino L. Trujillo (39831365), Section C, 3017th Army Air Forces Base Unit (Pilot School, Specialized 4-Engine), together with the holding thereon of the Board of Review signed by only two of the three members, the third member dissenting therefrom, are transmitted herewith, pursuant to Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724) and the act of 1 August 1942 (56 Stat. 732), for your action.

2. The holding of the Board of Review finds that the record of trial is legally sufficient to support the findings of guilty of Charge I and its specification, legally sufficient to support only so much of the findings of guilty of Specifications 1 and 2 of Charge II and of Charge II as involve findings of guilty of assault with a dangerous weapon, in violation of Article of War 96, legally insufficient to support the finding of guilty of Specification 3 of Charge II, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for ten years and six months.

3. I do not concur in that portion of the holding respecting the findings under Specifications 1 and 2 of Charge II and of Charge II but, for reasons hereinafter set forth, I am of the opinion that the record of trial is legally sufficient to support findings of guilty of assault with intent to do bodily harm with a dangerous weapon, in violation of Article of War 93, as to each of those specifications. Otherwise I concur in the holding of the Board as to the remaining findings and as to the sentence.

4. As approved by the reviewing authority, Staff Sergeant Trujillo was found guilty of wrongfully taking a pistol, in violation of Article of War 96, and of assaults upon each of three soldiers, each assault being with intent to do bodily harm with a dangerous weapon, in violation of Article of War 93. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for nineteen years, which sentence the reviewing authority approved but reduced the confinement to fifteen years and designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

5. The evidence shows that accused was in a downtown club in Hobbs, New Mexico, after curfew one evening and refused to leave the place when asked to do so by military police. He was thereafter forcibly removed, taken to the military police headquarters and placed in the "holdover." During these events he became angry and cursed the military police personnel. About two hours later,

he was released by one Sergeant Rohanna but upon his refusal to sign a receipt for his personal property which had been taken from him, his belongings were retained at the station. About an hour after he had been taken to his barracks, he returned to the military police headquarters. He had a cocked pistol in his hand which he pointed directly at Sergeant Rohanna and said, "O.K., Sergeant -- get my property." Rohanna testified he was in fear of his life and immediately got the envelope containing the property of accused, removed and replaced the property, and then stepped back, all as directed by the accused who then picked up the envelope. During this time he kept the cocked pistol pointed straight at Rohanna's chest. Accused then said he was going out and "get" the "other M.Ps" and would come back and "get" Rohanna.

Shortly thereafter Military Policemen Todd and Christner, while on routine patrol in a reconnaissance car, saw accused out on the street and pulled the car up to within about ten feet of him and stopped. As Todd started to get out of the car, accused pointed the pistol at him and said, "God-damn you," and Todd immediately jumped back in the seat, pulled the door shut and ducked. At the same time a shot was fired and Todd put the car in reverse, while lying down on the cushion, and backed around a corner as two more shots were fired. Altogether four shots were fired by the accused but none struck either Todd or Christner or the car.

There was some evidence that accused had been drinking and some opinion expressed that he may have been drunk, but the preponderance of evidence was to the effect that he was sober. In any event, the court and reviewing authority were amply justified in concluding that accused was not drunk to such an extent that he was incapable of entertaining the specific intent necessarily an element of the offenses of which he was convicted.

6. The Board of Review holds this evidence is legally insufficient to support a finding of an intent to do bodily harm either as to the assault against Rohanna or as to the assault against Todd. I agree that the fact-finding authorities, the court and the reviewing authority, in weighing the evidence, might very well have so decided. However, they determined that accused did entertain such an intent and, in my opinion, such finding being warranted by the evidence, should be sustained.

7. In this type of case it is not the function of the Board of Review to weigh the evidence or to determine controverted questions of fact (AW 50½ and note 3, p. 216, MCM, 1928), but since the findings of guilty, insofar as the element of intent to do bodily harm is concerned, rest upon an inference of fact, it is the duty of the Board to determine whether there may be found in the competent evidence of record any reasonable basis for that inference (CM 212505, Tipton; CM 228831, Wiggins; CM 238972, Lowry). Such intent is primarily a question of fact which in this case, as in most cases,

must be established circumstantially and by consideration of all relevant facts and circumstances attending the assault. Pointing a loaded, cocked pistol directly at Rohanna, keeping it so poised and directed while compelling Rohanna, in fear of his life, to do various acts he was not required to do, furnished at least some evidence of a threat to do bodily harm. If this conduct constituted a threat, as I think it did, then the assault against Rohanna falls within the principle which the majority of the Board approves, namely, that where an assault with a dangerous weapon is accompanied by oral statements (or by actions clearly) indicating threats of physical violence which the assailant proposes to carry into effect unless the person assaulted complies with orders or instructions which the assailant has no authority to give or impose, the offense is properly classified as an assault with a dangerous weapon with intent to do bodily harm.

Furthermore, in a similar case, CM 170158, Harper et al, a finding of guilty of assault with intent to do bodily harm was upheld where accused used an automatic pistol to compel sentries to give up their rifles and submit to being tied. No verbal threat to harm them was made. It was held that the evidence justified the conclusion that accused intended to do bodily harm to the sentries unless they consented to throw down their rifles and submit to being tied and that the law regards an assault as made with intent to do bodily harm when such assault is accompanied by a demand made or condition imposed by the assailant without lawful right to make or impose such demand or condition (citing State v. Mitchell, 116 N.W. 808).

The intent of accused is to be determined not simply by what he said but by what his actions fairly and reasonably show that he intended. Actions may very well be more graphic, more indicative of ultimate intent, than mere words. After having trouble with Rohanna at the club earlier in the evening and again at the station at two different times, accused was undoubtedly embittered toward him and to hold that his conduct, judged in the light of all attendant circumstances, so clearly negatives any intent to do bodily harm that such a finding must be set aside seems to me to be illogical and contrary to common experience with human nature.

8. As to the assault upon Sergeant Todd, the evidence shows that accused said he was going to "get" the "other M.Ps" and that when he saw Todd he pointed the gun "right at" him, began cursing him and as Todd jumped back into the car and ducked, accused fired the weapon. It is true that accused did not hit Todd or the car in which he was riding with any of the four shots he fired. But the fact the bullets did not strike Todd does not conclusively negative intent to do bodily harm (CM 257252, Warman). A short while before this accused expressed an intent to "get" him and just because he did not actually hit him we can not hold, as a matter of law, and in the face of a finding that he did intend to do him bodily harm, that no such intention ever existed. The evidence furnished grounds upon which an intent to do bodily harm may logically and reasonably be inferred.

9. Under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724) and the act of 1 August 1942 (56 Stat. 732), you have authority to confirm the action of the reviewing authority with or without remission, mitigation or commutation or to disapprove any finding of guilty and you may disapprove the sentence, in whole or in part.

10. Staff Sergeant Trujillo, after six months' overseas duty in combat flying was returned to the United States for rest and rehabilitation. On 7 January 1944 he was awarded the Air Medal for exceptionally meritorious achievement while participating in five separate bomber combat missions over enemy occupied continental Europe, and for similar achievements on five additional flights, he was on 3 and 15 February 1944, respectively, awarded the Oak Leaf Cluster. No evidence of previous convictions was offered in evidence.

11. I recommend that the findings of guilty of Specification 3, Charge II, be disapproved, that only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for ten years and six months be approved. In view of the splendid combat record of the accused, I further recommend that the period of confinement be reduced to five years, that the sentence as thus modified be carried into execution, but that the execution of that part of the sentence involving dishonorable discharge be suspended until his release from confinement, and that the Eighth Service Command Rehabilitation Center, Camp Bowie, Texas, be designated as the place of confinement.

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

Myron C. Cramer

2 Incls
1. R/T & accompanying papers
2. Form of Action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings disapproved in part, and sentence disapproved in part, reduced, and suspended in part, all in accordance with recommendation of The Judge Advocate General, by order of the Under Secretary of War, 25 June 1945)

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

SPJGN CM 274670

7 MAR 1945

UNITED STATES v. Second Lieutenant COY E. TAYLOR (0-818080), Air Corps.	FOURTH AIR FORCE Trial by G. C. M., convened at Van Nuys, California, 22 January 1945. Dismissal, total forfeitures and confinement for one (1) year. Disciplinary Barracks.

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 Charges and Specifications:

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

Specification: In that, Second Lieutenant Coy E. Taylor, Provisional Squadron "A", 441st Army Air Forces Base Unit did, at Metropolitan Airport, Van Nuys, California, on or about 30 November 1944 make a claim against the United States by presenting to Lieutenant Colonel Charles I. Boynton, FD, Finance Officer at March Field, Riverside, California, an officer of the United States duly authorized to pay such claims, a claim in the amount of $67.50 for rental allowance and subsistence allowance from 4 November 1944 to 28 November 1944, which claim was false and fraudulent in that from the period of 4 November 1944 to 28 November 1944 the said Second Lieutenant Coy E. Taylor was not married and said claim was then known by said Second Lieutenant Coy E. Taylor to be false and fraudulent.

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

Specification: In that Second Lieutenant Coy E. Taylor, Provisional Squadron "A", 441st Army Air Forces Base Unit did, at Metropolitan Airport, Van Nuys, California, on or about 29 November 1944 with intent to deceive Lieutenant Colonel Robert T. Smith, officially state to the said Lieutenant Colonel Robert T. Smith that he was married on 4 November 1944, which statement was known by the said Second Lieutenant Coy E. Taylor to be untrue in that he was not married until 29 November 1944.

The accused pleaded guilty to Charge I and its Specification and not guilty toCharge II and its Specification and was found guilty of both Charges and the 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 one year. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused submitted a pay voucher for the month of November 1944, containing the following entry:

> "DEPENDENTS:
>
> "(3) Lawful wife Gloria M. Taylor, RT #2, Dallas, Texas (Married 4 November 1944)". (R. 7-9; Pros. Exs. 1, 2).

Payment was made on this instrument on 30 November 1944 (R. 7-8). Although the accused did marry in November of 1944, the ceremony was not held until the 29th (R. 12). By alleging the earlier date he received excessive rental and subsistence allowances to which he was not entitled totaling $67.50 (R. 7).

On the morning of his wedding day he called upon Lieutenant Colonel Robert T. Smith, the acting commanding officer of the 441st Air Force Base Unit, and requested to "be taken off" a shipment which was due to leave on 1 December 1944 for Hamilton Field preparatory to going overseas. The reason advanced by the accused was that "he got married the first part of the month . . . . . and consequently since it was only 3-1/2 or 4 weeks before that, he wanted to stick around and spend more time with his wife". Lieutenant Colonel Smith replied that "it was pretty late for that" but went on to say that he "would think it over" and that, if the accused would produce his marriage certificate and if "the orders weren't already out", a change might be effected. Having received this half-promise, the accused withdrew (R. 10). Several hours later at about 3:00 or 4:00 p.m. he returned and, upon further demand being made of him, produced a marriage certificate dated 29 November 1944. Lieutenant Colonel Smith immediately pointed out that, "According to this, you were married today." By way of answer the accused expressed surprise and asserted that, "They must have made a mistake on it because I was married on the 4th of November" (R. 11).

4. Upon being apprised of his rights, relative to testifying or remaining silent, the accused took the stand on his own behalf. He and his "girl friend" had attempted to marry on 4 November 1944 but at the last moment, because of her extremely youthful appearance, they had been

denied a license and instructed that they would have to prove her age by a birth certificate (R. 13, 15). Since he had told every officer in his squadron that he would be wed that day and since he feared that they would ridicule him in the event that they learned that the ceremony had not been consummated, he posed as a married man pending the arrival of the requisite document from Lansing, Michigan. A few days "before the pay vouchers were to be signed," he was called in and advised that his changed status should be entered on the records. Since he "didn't care much about it," he permitted "November 4" to be "put down". He then thought that, "if /he/ signed that pay voucher and made a mistake on it, /he/ could just tear it up and have a new one made on it." When he subsequently learned that the instrument could not be recalled, he intended to repay the excess amount received by him but he "never did get a chance." (R. 13, 15). Reimbursement was finally made by him in December of 1944 and his voucher for that month reflected the true date of his marriage (R. 14-15).

Shortly before going to see Lieutenant Colonel Smith, he was informed that twenty-two men would not go overseas but would be retained at the field. Believing that he would be one of the group selected to stay, the accused and his "girl friend" decided "to get married on the 29th." What happened on that day was narrated by him as follows:

> "* * * I called the field the next morning at 9:30, and the lieutenant said, 'Get yourself out here; you're going.' And I came out and found myself on orders to go but found there was a possibility to get off if there was somebody else who would go. And the captain on operations said to go see Colonel Smith, and I came out to see Colonel Smith and asked him if I could get off, and he wanted to know why I waited to the last minute. I started to tell him that Lt. Hanton said there was no reason I should worry about it, and he said, 'Who told you this?' and I didn't want to get the lieutenant into trouble. So I just told him I heard about it in a roundabout way and I had made plans to get married. And so after I told him I had been married on the 4th to keep the lieutenant, Lieutenant Hanton, out of trouble. I told him I had been married on the 4th because it was on the forms. He said he wanted to see the marriage certificate. We had already planned to get married, and we went down and got married. That's about the whole thing. Naturally he would have thought it was funny if I had come in and told him, 'I am going to get married today.' He would have said, 'You know you're getting shipped out. Why get married now?' And that's why I didn't come in to see Colonel Smith before, because Lt. Hanton told me that. Naturally I had no intention of making a false statement."

At the time of the trial the accused's wife was "going to have a baby". When his "trouble started" she had taken steps to obtain an annulment,

but more recently she had indicated that, "if things will not be too bad," she would live with him again (R. 14).

5. The Specification of Charge I alleges that the accused did on or about 30 November 1944 make a claim against the United States which "was false and fraudulent in that from the period of 4 November 1944 to 28 November 1944 the said /accused/ was not married and said claim was then known by said /accused/ to be false and fraudulent." This offense was laid under Article of War 94. The Specification of Charge II alleges that the accused did "on or about 29 November 1944 with intent to deceive Lieutenant Colonel Robert E. Smith" make a false official statement known by the accused to be untrue. This was set forth as a violation of Article of War 95.

The accused in his voucher for November of 1944 falsified the date of his marriage and thereby procured an overpayment to himself of $67.50 in rental and subsistence allowances. Although he may have sincerely intended to marry on 4 November 1944, he acquiesced in the entry of that date several days subsequent to it when he knew that it was untrue. His alleged fear that the postponement of his marriage would incite the ridicule of his fellow officers does not constitute an extenuating circumstance. When compelled to choose between the jibes of his friends and the falsification of his records and voucher, he was required to follow the path of honesty. In selecting the momentarily less unpleasant course of fraud and deception as manifested by his false claim he clearly violated Article of War 94.

The statement to Lieutenant Colonel Smith was a deliberate falsehood designed to mislead a superior officer acting in an official capacity. The offense was rendered particularly flagrant by the accused's persistence in his misrepresentation after he had been confronted with the evidence of his own marriage certificate. The Specification of Charge II has been proved beyond a reasonable doubt.

6. The accused, who married a second time after divorcing his first wife, is about 23 years old. Upon completing the eighth grade, he attended the American Armature College, an electrical school. From 1937 to 1941 he was employed as an automotive electrician. He had enlisted service from 15 January 1942 to 5 December 1943 when he was commissioned a second lieutenant. From 28 February to 29 February 1944 he was absent not in line of duty because of illness diagnosed as "gonorrhea, new acute."

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

violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 94.

Abner E. Lipscomb, Judge Advocate

Robert J. Lamar, Judge Advocate

Samuel Morgan, Judge Advocate

SPJGN-CM 274670 1st Ind.

Hq ASF, JAGO, Washington 25, D. C. MAR 23 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 Coy E. Taylor (0-818080), 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 that the forfeitures be remitted, 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. S/War
Incl 3 - Form of Executive action

(Sentence confirmed but forfeitures remitted, by order of the Under Secretary of War. G.C.M.O. 201, 9 Jun 1945)

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

SPJGQ
CM 274678

5 APR 1945

UNITED STATES v. Private ANDREW J. ELLIS, JR., (34085375), MP Unassigned, Attached Unassigned to Detachment of Patients, Service Command Unit 1985, Dibble General Hospital, Menlo Park, California	NINTH SERVICE COMMAND HEADQUARTERS FORT ORD Trial by G.C.M., convened at Dibble General Hospital, Menlo Park, California, 27 December 1944 to 30 December 1944. Confinement for life. Penitentiary.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Andrew J. Ellis, Jr., MP Unassigned, attached unassigned to Detachment of Patients, Service Command Unit 1985, Dibble General Hospital, Menlo Park, California, did, at Burlingame, California, on or about 16 November 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Hugh Rose, a human being by stabbing him with a knife.

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

Specifications 1, 2, and 3: (Findings of not guilty)

Specification 4: In that Private Andrew J. Ellis, Jr., MP Unassigned, attached unassigned to Detachment of Patients, Service Command Unit 1985, Dibble General Hospital, Menlo Park, California, did, at Burlingame, California, on or about 16 November 1944, feloniously take, steal and carry away a wallet, value less than $20.00, and $70.00 currency of the United States, the property of Hugh Rose.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of the Specification of the Charge and of the Charge, and of Specification 4 of the Additional Charge and of the Additional Charge, but not guilty of Specifications 1, 2, and 3 of the Additional Charge, and "of the lesser included offense of uttering a forged instrument in violation of the 96th Article of War as pertains to Specifications 1, 2, and 3 of the Additional Charge". No evidence of previous conviction was introduced at the trial. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

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

The accused was, during the month of November 1944, a member of the Detachment of Patients at Dibble General Hospital, Menlo Park, California (R. 295,296). Three miles north of Menlo Park is Redwood City. San Mateo is about eight miles north of Redwood City and two miles north of San Mateo is Burlingame, the scene of the homicide charged.

On 15 November 1944, the accused and the deceased, Hugh Rose, came into the Redwood City Smoke Shop at some time between 6 and 6:30 p.m. (R. 166,167) and, while there, drank some beer variously estimated to have been between two and five bottles apiece, each apparently paying for his own (R. 167,168,169). Neither of them appeared to be intoxicated (R. 167). They remained for about an hour playing a dice game and engaging in conversation, during which they spoke of "going out", and discussed how much money they could afford to spend (R. 168). They counted their money and the accused said he had "about seven or nine dollars" in his wallet, but, although Rose said he had money, he also had some bills to pay and therefore did not have very much to spend, so he suggested that they go to his apartment because he had a "fifth" there (R. 168,170). They left the Smoke Shop at about 7:30 p.m. (R. 167)

At about 9:30 or 10:00 p.m. on the same evening the accused and Rose entered the bar of the Colonial Club in Burlingame, California, and there had two drinks apiece (R. 140,142). They then left and returned in about half an hour remaining there until approximately 11:50 p.m. during which time they each had three or four additional drinks. They were drinking "Granddad", which is whiskey of 100 proof (R. 142,143). Rose paid for the drinks on the first occasion and for most of those consumed when they returned (R. 143,144). Both the accused and Rose appeared to be friendly with one another and there was no indication of a quarrel between them. Neither was drunk and each appeared to be in the full exercise of his mental capacities when they left (R. 145,147,148).

The deceased, Rose, lived at #1532 Howard street in Burlingame, California and the adjacent house on the east was occupied by Mr. and Mrs. Whitton P. Davis. The bedroom of the Davis home is only fifteen feet from, and directly opposite to the kitchen of the Rose apartment (R. 207, 215,216).

On the night of 15 November 1944, Mr. and Mrs. Davis had gone to bed at approximately 10:30 o'clock. The top half of the window of the bed room was open for ventilation (R.208,209). At midnight both were awakened by loud noises (R. 210,216) and the playing of a radio(R. 216) in the Rose apartment, the kitchen window of which was open about 1½ feet from the bottom (R. 211), the shade being drawn only about 1 foot from the top (R. 216). There was a light, either in the kitchen (R. 216) or shining into the kitchen from the front room (R. 210). Two men were mixing drinks and talking in the kitchen with their backs toward the Davis bedroom (R. 216,222). Both men appeared then to be fully clad (R.221). To Mr. Davis it sounded "like they had been drinking and there was a loud party going on"; but it did not seem as though there was any quarrelling at that time (R. 221). To Mrs. Davis "they seemed to be friendly" (R. 221) and she "thought" one of the men was Mr. Rose (R.221). Within a short time the men went through the doorway into another room of the apartment and the light was extinguished (R. 217).

Mr. and Mrs. Davis went back to bed but both slept only fitfully thereafter (R. 210,221) because the loud voices and radio continued (R. 217, 221). At 1:45 a.m., according to the bedroom clock (R. 217,219), Mrs. Davis was again awakened by the noise of scuffling in the kitchen of the Rose apartment (R. 217). She heard Rose say, in a "loud and strained" voice: "What are you doing out there?"(R. 217,218). This was followed by the sounds of a scuffle whereupon she awakened her husband who immediately went to the window (R. 211,217) while she sat on the end of the bed (R. 217, 221), and both observed that there was no light in the Rose apartment at this time (R. 211,217). Davis heard "people moving around and bumping into things" and some object fell to the floor with a crash (R. 209,214). The noise sounded as though it came from the kitchen, but since it was dark he could not be certain that the "fight" took place in the kitchen (R. 212,213). For a few moments there was a scuffling, and then he heard Rose say, above the level of the general noise, "What are you trying to do to me? Cut it out, cut it out." (R.209,211). He did hear two angry voices (R. 215), but except for these words he could not distinguish what was being said (R. 214).

Mrs. Davis heard the sound of furniture being knocked about and it sounded as though they might have been struggling and falling (R. 220) and "there was a sound of voices and fighting"(R. 217). She distinctly heard Mr. Rose cry out "in a very loud and very high" and "excited" manner: "What are you doing to me? For Christ sake, cut it out, cut it out." (R. 217-219).

The scuffle lasted for about five minutes (R. 210,211,218) and then, at 2 a.m. "the fighting ceased and everything was quiet" thereafter (R. 218).

At about 3:30 or 3:40 a.m., 16 November 1944 (R. 123, 127), Oliver Holiman, of San Bruno, California was driving his sedan along the El Camino highway (State Highway No. 101) accompanied by Ralph Nice of Palo Alto, California (R. 119,127). In the vicinity of Atherton (which is approximately 2 miles north of the theater in Menlo Park), the accused "flagged" them for a ride and was accommodated, getting into the rear seat of the sedan (R. 120,122,127). He stated that he was going to Dibble Hospital (R. 120,121), and when asked why he was out at that time of the night he explained that his clothing was blood soaked because of a fight he had been in with two Mexicans in South San Francisco (R. 120,128). He further said that the Mexicans had attacked him with knives, although he was unarmed and in the company of a girl whom he apprehended the Mexicans intended raping. Two soldiers came to his assistance, however, whereupon he "beat it" (R. 121,128). Both Holiman and Nice expressed concern about his physical condition but the accused assured them his wounds had been dressed (R. 120). He repeatedly mentioned that he was covered with blood (R. 128,129), but accounted for this by saying it "had come from his nose" (R. 121). Both Holiman and Nice looked around and observed what appeared to be blood on his clothes, and his hands were bloody (R. 121,129). Holiman thought there was a peculiar alcoholic odor about the accused, but it was hard to distinguish whether it was whiskey or wound dressing (R. 123,124), but Nice could smell liquor (R. 129). The accused appeared weak, nervous, and frightened, but spoke coherently (R. 123,125,129) and although "he talked like a nervous man" and with difficulty, Nice would not say he was "intoxicated" or "drunk" (R. 125,129). Holiman identified the accused at the trial (R. 122) but Nice was unable to do so (R. 129). The accused got out of the car at the Fox theater in Menlo Park, stating that he was going to the Dibble Hospital (R. 121).

At 2:30 a.m. on the morning of 16 November 1944, Private First Class Archie K. Bluethman, ward attendant at Dibble General Hospital, made a bed-check and found the accused missing (R. 296,300,301). Later, at a time which he estimated to be approximately 3:30 a.m., he was attracted by the sound of water running in the latrine and upon investigation he found the accused taking a bath in the tub. The accused told him he had been in a fight with some Mexicans in South San Francisco and that "he had gotten blood on him that way, and he was washing it off". The water in the bath tub was slightly pink in color. The accused's clothes were lying by the side of the tub (R. 296,297). He did not appear to be drunk, but, in his conversation, "sounded like he was very much sober" (R. 299,300).

At approximately 7:30 a.m. of the same day Adolph Klein, school traffic officer of San Mateo, California, while on his way to work, found a wallet lying on the curb at the corner of Clark Drive and El Camino Real in San Mateo(R.113,114). El Camino Real is a part of Highway 101 (R.125), which passes through Burlingame within 60 yards of the Rose apartment(R.266). He picked it up and upon examination of the contents discovered that it was the property of Mr. Rose (R. 114,116). The zipper was open and there was no money in the wallet(R. 117,118). He turned it over to the police department on 19 November 1944 and identified it at the trial (R.116,117). The wallet and photostatic copies of the contents were admitted in evidence (R. 117,175, 263,286; Pros. Ex. J.).

At approximately 9:15 a.m. on 16 November 1944, Leonard G. Kemp, District Manager of the chain of grocery stores of one of which Hugh Rose, the deceased, had been manager(R.131-133), went to the home of Rose in Burlingame to discover why Rose had not opened his store that morning (R. 133). As he went up on the porch of the house he saw blood on it leading to the front door (R. 134,135).

At this point, Captain John J. Hartnett, of the Burlingame, California police, who had been directed to investigate a homicide arrived on the scene (R. 77,80,134). Both he and Kemp entered the Rose apartment and were later joined by other police officers and the coroner(R.81,134,152,153).

There was a pool of blood by the front door in the living room and blood all over the floor leading on into the kitchen where the body of Hugh Rose was found dead lying in a pool of blood (R.81,134,154,155,271). The house was in general disarray (R.154), and showed signs of a "terrific struggle" (R.155,162). Draperies which had separated the front room into the bedroom and living room had been torn down and were thrown down and lying partially over a floor lamp, a day bed and the floor(R.134,154,155,274). There was blood upon the bed, which looked as though someone had slept in it (R. 156), considerable blood on the sheet of the day bed, and upon two pillows lying at the foot end(R. 135,156,274), some upon the day bed or couch (R.135,156) and a clock had been knocked to the floor (R.274). The floor from the door of the living room to the body was smeared with blood as though Rose had dragged himself from the door to where he had succumbed, and there were bare foot prints in the blood (R. 275). In the kitchen there was a glass of whiskey (R. 135,139) and a half-pint bottle of whiskey on the table with about 1 or 1½ inches of the contents remaining(R.140).

The body of the deceased, clad only in the upper part of pajamas, the lower part of which, stained with blood, were in back of the body(R. 135, 137,280), was "in a sort of kneeling position", face down, and the coroner had difficulty in turning it over because rigor mortis had set in (R.139, 156,157). It was so covered with blood from head to foot, that it was impossible to determine where the wounds were, or what had caused death, though there was a visible wound in the neck(R. 157). The body was then removed to a mortuary where Dr. Warren L. Bostick, a physician and surgeon, performed an autopsy, at 2 p.m. in the presence of the coroner(R.157,196, 197,200). Fourteen stab wounds were found upon the body(R. 158), of which the major ones were described by Dr. Bostick, as follows:

> "Above the left clavicle, in about its mid-portion, was a, one 2 inch wide gash, that extended down beneath the collar bone, nicked the main arteries to the left arm, known as the subclavian arteries, and then this sharp margin hole went down into the lung and just nicked the top of the left lung. There was a great deal of blood all around this side of the body. Another gash of equal seriousness was found in between the fifth ribs on the left. This gash measured approximately three to four inches in width and passed through the chest cavity, down to the lung, where a similar gash was seen. A third almost equally serious wound was found in the right back, at the level of the sixth rib, and this was a

particularly significant wound in my investigation. It had apparently been caused by a single jab, and its measurements I think are pertinent. It measured one-half inch in width and passed through the back muscles and into the underlying lung, for a total distance of three and three-quarters inches. The other lacerations on the body extended mostly into the underlying muscles, but probably none of them directly contributed to his death. I might indicate there were lacerations on his hand and a scuff mark on his left knee." (R. 198)

In his opinion death was due to shock, exsanguination, and collapse of the lungs following multiple stab wounds of the neck and chest and lacerations of the main arteries to the left arm. The wound in the neck, or either of two other wounds - one in the back on the right, and one in the left side of the chest in front - would have caused death (R. 199); but the one which rendered the deceased unconscious within approximately three minutes after its infliction and which was the most rapid cause of his death was the laceration which perforated the lungs and caused them to collapse. Regardless of this, however, he would have died within five minutes from the severance of the subclavian artery, during which time he could have been moving around, and the small lacerations around the hand and the scuff mark on the knee indicated that he had been engaged in actively warding off injuries before his death (R. 200,201). The instrument causing the wounds "had to be" at least 3 3/4" in length and of no greater width than ½" and it was sharp-margined; whether bilaterally so or not, the witness could not say (R. 199).

By stipulation photographs of the body of the deceased, taken at the time of the autopsy, (Pros. Ex. R and S) and photographs of the rooms of the Rose apartment taken between 10 and 10:30 a.m. on 16 November 1944 (Prox. Ex. K through Q) were admitted in evidence (R. 159-162).

As a result of preliminary investigations Captain Hartnett, of the Burlingame police, at about 4:30 p.m., 16 November 1944, went to the Dibble General Hospital in search of a man called "Andy" (R. 78,79) where he located the accused (R. 82). Captain Mountford Reedy, Provost Marshal of the hospital (R. 53) and Second Lieutenant Burley Carlson, Administrative Corps, on duty at the hospital, accompanied him (R. 81,82,107). Captain Reedy informed the accused: "Now this is an investigation, and you understand that anything you may say or do, can be held against you", but he did not tell him that he did not need to make any statement(R.100,235), nor did he read Article of War 24 to him; the accused, however, said "I understand" (R. 108). In answer to Captain Hartnett's questions as to where he had been on the evening of 15 November 1944, the accused made certain admissions all of which were later incorporated in a written, signed statement (R. 84).

Captain Hartnett had noted a peculiar heel mark in the blood on the front porch of the Rose apartment on the morning of 16 November 1944, so he requested permission to examine the accused's shoes. The shoes then

worn by the accused (Pros. Ex. F), were removed and delivered to Captain Hartnett (R. 85). A field jacket (Pros.Ex. G), a shirt (Pros. Ex H),and a pair of trousers (Pros. Ex.I), were identified by the accused as his clothing(R. 88) and he explained the presence of blood upon the jacket by saying that two weeks prior he had been in a fight with Mexicans in South San Francisco, who had come after him with a knife; that during the fight he had suffered a nose-bleed; that two military police interfered and took all of them into custody but, after taking the names of the parties, released him and turned the Mexicans over to South San Francisco police; but he could not explain why there was blood on the shirt and trousers (R. 86,88).

Taking the shoes of the accused to the scene of the homicide, Captain Hartnett compared the heel of the right shoe with the imprint of a heel in the blood on the floor of the porch and found that the three holes in the front of the heel corresponded with the imprint thereof in the blood (R. 85,284). At the trial defense counsel was permitted to introduce, out of order, a photograph of the heel print on the porch(R.285; Def.Ex.8)although Captain Hartnett stated that it was not a good picture, having been taken with a Graflex and not a reproducing camera, and that the holes therefore, are too indistinct to be observed (R. 285).

At about 5:10 p.m. 16 November 1944,(R.293) Captain Hartnett and Captain Reedy took the accused to the guardhouse of the Libbie General Hospital (R.292) where, in the presence of Sergeant Theodore B. Green, of the military police detachment, a wallet (Pros. Ex. U) taken from the accused's bathrobe (R. 223), was shown to the accused who admitted that it was his (R. 223), and money in the amount of $96.00 taken from it was counted in the accused's presence (R. 223,294). The wallet was admitted in evidence without objection (R. 224,264).

Between 11 p.m. and midnight on 16 November 1944, Captain Hartnett, accompanied by A. S. Whitmore, Chief Criminal Deputy in the office of the District Attorney of San Mateo County, returned to the Libbie Hospital where they were joined by Captain Reedy and George Cockrell and John F. Hastings, special agents of the Provost Marshal (R. 89,97,104,163,246). They jointly continued their investigation and in doing so, questioned the accused intermittently between 11:30 p.m. and about 2 a.m. (R. 98). No further or additional warning or explanation of his rights was given to the accused at this time, Captain Reedy stating that he had warned him previously during the afternoon (R. 101,105,106,164). Although Mr. Whitmore first testified that no one advised the accused at the time that he did not have to make a statement(R.105,106), upon being recalled he explained that, in his prior testimony, he thought he was being interrogated regarding a warning under Article of War 24, a proceeding with which he was unfamiliar. He then stated that he had advised the accused that he was a deputy district attorney of San Mateo County and that the accused was not required to answer any of his (Whitman's) questions if he did not desire to do so and that if he did answer any questions they could be used against him at a later date (R. 242). After considerable evidence was taken as to its voluntary nature (R. 91-96,100-109,242-255), a signed and sworn statement of the accused was admitted in evidence, over objection of defense counsel (R. 255, Pros Ex. W.)

In substance the accused admitted therein that he had left the hospital at 2 p.m. 15 November 1944, and had gone to Redwood City where he drank five or six bottles of beer in the Smoke Shop. At 5:30 he was joined by the deceased, for whom he bought a beer and with whom he played poker dice for 15 or 20 minutes. He recalled no conversation regarding the amount of money each had in his possession. They left and went by train to San Mateo where they had dinner with a woman who was manager of the Purity Store. From San Mateo they went by bus to Burlingame where they had a couple of drinks at the deceased's apartment after which they visited persons who took care of the deceased's child, where they each had a glass of beer. They then went to the Colonial Club at about 8:30 p.m. and remained there until 11:45 p.m. during which time they drank $7 or $8 worth of 50¢ drinks - each paying alternately for them. The accused had $15 or $20 when he left the hospital. From the Colonial Club they returned to the deceased's apartment at the deceased's suggestion that he had something to talk about with the accused although the accused said he had to return to the hospital. They arrived at the house at 12:15 and the accused undressed at once, put on pajamas and then poured drinks, but the accused drank no more because he "thought he had plenty". They were sitting in the living room, the accused by the radio with his shoes off. The deceased drank one drink, and after preparing another, showed the accused a letter sent by Corporal Hasselbeck to the deceased's wife, and asked him whether he recognized it. The accused read a few lines and said he had not seen the letter before. The deceased commenced to argue, raising his voice. The accused asked the deceased why he thought the accused had anything to do with the letter. He made no answer but as he turned and went into the kitchen he said, "There's no man going to take my wife away from me". Then the accused heard a car horn outside and went to the window to investigate. About 45 minutes had passed since they had arrived. As the accused turned from the window he saw the deceased standing within two feet of him holding a knife aloft in his right hand. The blade was 2½ inches long. The accused grabbed him, threw him down by knocking his feet from under him, and took the knife from him, prying it from his hand. Then, according to the accused, "everything just - I just got excited and went mad, crazy, I guess. First thing I know; I had stabbed him." He stabbed the deceased in the back once or twice while he was on the floor lying face down. The deceased lay on the floor for about a minute, then got up and staggered into the bed room, where he continued to stagger around. The accused did not follow him and when the deceased came out of the bedroom "kicking" he thought he had better put on his shoes and get out. Just then the deceased wheeled, went down on his knees and "that's the last time (the accused) saw him", and neither had said anything to the other after the stabbing. He walked through the living room to the front door but he saw the deceased's wallet lying on a chair and took it as he passed. Only the living room lights were burning and he turned them off as he left. He had turned off the radio before he put on his shoes. The accused then walked out of the house and on to El Camino (Real) where he caught a ride to San Mateo. There he got out of

the car and walked to Bay Meadows where he was given a ride to Redwood City, Here he obtained a ride with two men who took him into Menlo Park, arriving there at a little after 2:00 a.m. He first stated that after he arrived at the hospital, he took off his clothes in the baggage room and gave them to some one who was there, after which he took a bath because he had blood on his feet and on his hands and arms. He had a conversation with the ward boy about a fight which he (the accused) had been in. Later he said that when he came back to the hospital he went to the end of his ward where the showers were located and undressed in the latrine, dropping his clothes to the floor. He finished his bath at about 3 a.m. and then went to bed. He had transferred $70.00 which was in the deceased's wallet to his own before he got into the first car at Burlingame, and then had thrown the deceased's wallet from the car before he got out of it in San Mateo. He identified a field jacket, shirt, and a pair of trousers, a pair of socks, and a pair of shoes, shown him by the investigators, as clothing he had worn on the night of 15/16 November 1944, admitted that following the stabbing he had put his bloddy hands into the pockets of the field jacket during the night and that the blood on the socks was due to his walking around on the bloody floor of the deceased's apartment while in stocking-feet, and that the blood on the shoes was occasioned the same way. He denied that he was in love with the deceased's wife, or that she had ever admitted being in love with him, although they had been out together frequently, going to San Francisco on one occasion. Mrs. Rose had however told the accused she was going to divorce the deceased. He denied ever having had sexual relations with Mrs. Rose.

Mrs. Hugh Rose testified that she believed she and the deceased were married in 1938 (R. 171). She is a grocery clerk, though not working at the time of her husband's death because she was then visiting her mother in Colorado (R. 171,174,182). She did not remember whether she had known the accused for 1, 2, or 2½ months before her husband's death, but said she had met him in a bar while accompanied by the deceased (R. 176,177). Thereafter, upon joint invitation of Mr. and Mrs. Rose, the accused had come to their apartment for Sunday dinners on several occasions, and he had come to the store where both the Roses worked (R. 178). The accused had also spent the night in their apartment two or three times, on which occasions he had slept on the single bed in the same room with Mr. and Mrs. Rose; but, inasmuch as they had always been drinking she could not remember whether she ever got into bed with the accused (R. 178,179). If she did she had forgotten it (R. 179), and she could not recall ever having had sexual intercourse with him (R. 192). She had gone to moving picture theaters with the accused and to cocktail bars. She remembered his kissing her three or four times, but "it didn't mean anything" (R.179,180). On one occasion she and the accused had gone to San Francisco to visit her mother but they did not stay overnight (R. 181,182). She admitted that Corporal Hasselbeck had been to the Rose apartment once or twice, and had slept there once (R. 183,190). She was, however, "not particularly fond of"

either him or the accused because she "happened to be in love" with her husband, and she denied considering divorcing her husband (R.184). She did write to both, but they were not love letters(R. 183,184). Her husband always did considerable drinking but he could not "hold" liquor very well and it generally made him drunk (R. 193).

A letter written by Mrs. Rose to the accused, which was found in his trouser pocket, was admitted in evidence without objection (R. 303: Pros. Ex. C-1). This was not the letter shown by the deceased to the accused prior to the killing (R. 303: Pros. Ex.W).

It was shown that the deceased acknowledged receipt in full of pay due him as Manager of the Purity Store on 15 November 1944, in the amount of $69.01, for the week 11-5-44 to 11-11-44 (R.258-260;Pros.Ex. X, Y, A-1, B-1). It was also established that the customary business practice of the company for whom the deceased worked is to require the employees to sign the payroll as they receive the money and that normally the deceased would have been paid for the week 11-5-44 to 11-11-44 on Wednesday, 15 November 1944 (R. 186,187,289-291,294). It was stipulated and agreed that the deceased made no bank deposit in the account of "Mr. and Mrs. Hugh F. Rose" in the Redwood City Branch, Bank of America, subsequent to 8 November 1944, and that said account shows deposits of $75.00 and $90.00, on 1 and 8 November 1944, respectively (R. 391).

4. A motion by counsel for the defense for findings of not guilty as to the specification and the Charge was denied (R. 309).

Evidence adduced by the defense is substantially as follows:

Arthur R. McCaskill, of Burlingame, California, who had known the deceased for about 7 years and had numerous business dealings with him, saw him in company with the accused in the Colonial Club at about 10:45 p.m. on 15 November 1944. Over a period of approximately 10 minutes he observed them and conversed with them. He did not offer to buy them a drink because he "thought that they had plenty". He did not, however, observe them walk, as they were sitting at the bar on stools (R. 246-248).

Mrs. H. L. Plummer testified that she had known the accused for "3 years or better", having first met him when he was stationed at Mather Field, Sacramento, California. The accused familiarly referred to her as "Mom". Later the Plummers moved to Menlo Park and it was because of the accused's desire to be near them that he was sent to Dibble General Hospital after his return from overseas. The family noticed quite a difference in the accused after his return, evidenced in his nervousness and moodiness (R.351-354). The accused had entrusted 13 ($25.00) War Bonds to the Plummers and he had loaned them $100.00 out of the proceeds of some of these bonds. It was arranged that whenever the accused thereafter needed money he would request it of Mrs. Plummer and on about 10 or 12 October 1944 he had made such a request and she had repaid him $15.00 (R.352,353.)

Dr. Joseph Catton, San Francisco, California, a specialist in nervous and mental diseases and disorders, having been retained by the defense and paid a fee of $250.00 (R. 357-359), examined the accused for "somewhere between an hour to two" on 7 December 1944, over a similar period on 15 December 1944, and for 1/2 to 3/4 hour on 23 December 1944. He discussed the accused's family and personal past history with the accused, listened to his story, made a complete physical examination of him, gave him routine tests and examined his case history at Dibble Hospital (R. 361-366). From these investigations he found that the accused is a constitutional psychopath, suffering with a psychoneurosis; that by a psychometric test he has a mental age of 11 years 7½ months and an intelligence quotient of 72.6. Normal age level is 16 years and the normal intelligence quotient is 90 to 110. He classified him as being a high grade moron. As to his mental responsibility at the time of the homicide it was the witness' opinion that the accused was not at the time free from mental defect, disease or derangement but that he had "a state of constitutional psychopathic inferiority ... of mental defect and ...also of hysteria" which "interfered with his ability to distinguish right from wrong, but how seriously (he) don't know" (R. 372). He was convinced also, that at the time of the killing there was "a very substantial interference with his ability to adhere to the right". This he believed because a man of the accused's type is "more subject to acute emotional responses or passions than the average man and...hasn't the mental processes to help him cool off or control himself in the face of those things". In the witness' opinion "he didn't have any such ability...but I can't draw the final hair line as to whether he had any or not" (R. 373).

In his testimony, Dr. Catton related admissions by the accused to him of substantially every fact admitted by the accused in his statement (Prox. Ex. W) with one addition, viz: that when he turned from the window and saw the deceased brandishing a knife, the deceased made a homosexual proposition to which the accused answered "no soap" and immediately, because of the circumstances, became "afraid, angry, mad, excited and likewise, crazy" as a result of which he stabbed the deceased(R.363-366).

On cross examination Dr. Catton stated that the accused had first told him two stories about the night of 15/16 November 1944, both involving alibi's "in an effort to escape punishment" (R. 375). He further stated that normally, high-grade morons are held to be legally responsible (R. 378). In response to a question by the court he said that the accused does not have a psychosis (R. 380) and he was capable of intelligently cooperating with his counsel in his defense. (R. 302).

The accused, having been informed of his rights, made an unsworn statement (R. 384-390). This statement signed by the accused was admitted "in evidence" at the request of the accused (R. 390,391:Def. Ex. 18).

In almost every respect, in so far as the charges against the accused are concerned, and except as noted hereafter, this unsworn, but signed written statement is a reiteration of the extra-judicial statement made by the accused under oath. Indeed, the accused admitted that "the statement that is already in evidence, which was taken November 17, 1944, is substantially correct" (R.387). With reference to the killing he

specifically raised the matter of self defense as follows:

> "I do not know what made me turn around. It might have been my instinct that danger was present or possibly I heard Hugh Rose there quite close to me. When I turned around, I saw Hugh Rose standing about 2 feet from me. He had his arm in an upraised position, in this manner (indicating), with a knife in his hand. I could not see the handle of the knife, but I could see the blade. I was afraid that Hugh Rose was about to kill or seriously injure me with this knife. He had it poised and he was in such position that if he made one step or half a step and brought that knife down, it could and possibly would have struck me in some fatal spot. I, believing it was necessary in order to save my life, grasped Hugh Rose's right hand, the hand holding the knife, and used a ju-jitsu hold on him and threw him to the floor. He laid on the floor right at the door, in the place where the pool of blood is shown in the photograph, Prosecution's exhibit L. I was still fearful that Hugh Rose might be able to attack me with this knife. I therefore, struggled with him, and succeeded in wresting the knife from his grasp. Still believing that it was necessary in order to save myown life, I stabbed Hugh Rose as he lay there on the floor, and as I was on the floor with him, and then I went sort of crazy and everything. My mind went blank. As I said in the written statement taken at the District Attorney's office, 'I just got excited and went mad, crazy, I guess'. I remember that I stabbed him once or twice. I do not remember stabbing him any more times than that." (R. 389).

The unsworn statement admits the taking of the deceased's wallet but nothing is said therein about abstracting money from it and later throwing the wallet away (R. 390).

5. In rebuttal the prosecution introduced in evidence, without objection, an order appointing a board of medical officers to examine the accused (R. 392: Pros. Ex. D-1).

Major Clarence H. Godard, Medical Corps, Chief of the Neuropsychiatric Section, Letterman General Hospital, San Francisco, California, one of the members of the board, testified that the board made thorough psychiatric examinations of the accused on 7 and 20 December 1944. The report, written by the witness and signed by all members of the board discloses that, in their opinion, the accused is a psychopathic personality with a borderline mentality deficiency (R. 394). The tests indicated a mental age level of 11-12 years and an intelligence quotient of 81. This does not include him in the army level of morons or feeble minded persons. The accused cannot be considered psychotic or insane and must be considered responsible for his actions (R. 395,396). Specifically the findings stated that "his condition was never, at any time in the past or present, the result of abnormal or psychotic thinking but was based on moderate intellectual defect". It was concluded that he was capable of

conducting his defense and, although he had been drinking prior to the killing, "he was not sufficiently intoxicated to be considered psychotic nor suffering sufficient mental derangement to be unable to distinguish right from wrong or control himself from wrong actions"(R. 396). The accused did know the difference between right and wrong and could have adhered to the right (R. 404).

Major Bernard L. Diamond, Medical Corps, Assistant Chief of the Neuropsychiatric Section, Dibble General Hospital, testified that he made a complete and thorough psychiatric and neurological examination of the accused on 22 November 1944 at which time he concluded that the accused was, at that time and at the time of the homicide, mentally sane and legally responsible for his actions in that he was able to distinguish right from wrong and adhere to the right(R. 406,407). The accused's response to alcohol was no different than that of a normal individual, and it in no way affected him in his ability to distinguish right from wrong and adhere to the right (R. 408,409).

6. Before discussing this case upon the merits, it becomes necessary, in the light of vigorous objection by defense counsel, to determine the admissibility of the accused's extra-judicial statement and the effect of its admission upon the substantial rights of the accused.

Since a confession not voluntarily made must be rejected, the first question to be resolved is whether the accused's statement constituted a confession. As to this it must be said, after a careful examination of the whole instrument, that, of the offense of murder laid in the Specification and the Charge, it constitutes no more than a series of admissions against interest, any or all of which were admissible as such without regard to the principles of law which safeguard confessions (Par. 114b, MCM 1928); but as to the larceny alleged in Specification 4 of the Additional Charge it was, in fact, a complete confession of every element of the crime.

When, therefore, it became evident that the accused had been confronted by a group consisting of a civilian Captain of police, an investigator from the Office of the District Attorney, the military Provost Marshal, and two agents of the military Central Security District, it was incumbent upon the court to inquire further into the circumstances in order to be assured of the voluntary character of the accused's statement under the rule that when a confession has been made by an enlisted man to a military superior or to the representative or agent of a military superior, further inquiry into the surrounding circumstances will ordinarily be required (Par. 114a, MCM 1928). Such inquiry was made at great length and, notwithstanding its disclosures, the statement was erronously admitted in evidance.

The only warning given to the accused by any of the military personnel was the cautionary advice of the Provost Marshal about eight hours previous to the time when the statement was made and it consisted

merely of the words, "Now this is an investigation, and you understand that anything you may say or do, can be held against you". It certainly was not shown that the accused was ever informed of his rights within the purview of Article of War 24 and the principles applicable to the examination of military personnel in military proceedings. Even though the accused stated then that he "understood" and the later statement commences and ends with admissions that all requirements had been fulfilled to show its voluntary character, this is not necessarily sufficient.

> "Evidence that the accused stated that he made the confession freely without hope of reward or fear of punishment, etc., or evidence that the accused was warned just before he made the confession that his confession might be used against him or that he need not answer any questions that might tend to incriminate him is evidenc, but not conclusive evidence, that the confession was voluntary". (Par. 114a, MCM 1928).

Moreover, if a warning was given by the civilian representative of the district attorney that any answers made by the accused to questions asked by him could be used against him later, and that he wasn't obliged to answer them unless he so desired, it cannot be accepted as adequate advice to the accused of his rights under Article of War 24 as it was limited, in terms, to the interrogation by the deputy district attorney and did not purport to include the interrogation later made by the Provost Marshal and the two agents of the military security division; nor did it specifically advise the accused that he need make no statement whatever. The latter were, at the time and place, "officers conducting an investigation" under military authority notwithstanding the presence of the representative of the district attorney and the police chief and, as such, were bound by military rules and procedure in warning the accused before taking a confession.

With no more information as to his rights than the evidence of record discloses, it cannot be said that the accused, who is shown to be an individual of low mentality, voluntarily submitted to the interrogations of the five civilian and military officials all of whom alternately questioned him for a period of about 3 hours, while in the guard house and in the middle of the night, or that he voluntarily supplied the information contained in the statement. For these reasons it sould have been excluded.

However, its admission cannot now be said to constitute such an invasion of the accused's rights as to constitute fatal error inasmuch as the accused's own admissions to a witness for the defense, all of which were adduced by the defense at the trial, as well as his own unsworn

statement at the conclusion of the case, are substantial repetitions of the facts contained in the extra-judicial statement which, taken together with all other evidence, conclusively established the murder and the theft.

Disregarding, therefore, all admissions and the confession contained in the extra-judicial statement, it is next necessary to determine whether the denial of the motion at the conclusion of the prosecution's case in chief, for a finding of not guilty of the Specification and the Charge was proper. It is clearly apparent that it was.

> "If there be any substantial evidence which, together with all reasonable inferences therefrom and all applicable presumptions, fairly tends to establish every element of an offense charged or included in any specification to which the motion is directed, the motion as to such specification will not be granted" (Par. 71d, MCM 1928).

There was ample evidence, however circumstantial in character, which fairly tended to establish every essential element of the Charge of murder to require the denial of the motion. No motion was directed to the Specification which alleged larceny and any deficiency of evidence on this charge at the conclusion of the prosecution's case was supplied by the defense.

When the accused, by his unsworn statement, admitted that he stabbed the deceased with a knife in the deceased's apartment some time after midnight on the night of 15-16 November 1944 and, after doing so, took the deceased's wallet and fled, any doubt about the connection of the accused with offenses charged because of the circumstantial character of the evidence for the prosecution was, completely resolved.

Beside issues of fact upon the accused's guilt or innocence of the offenses charged, those of insanity, intoxication and self defense arose from the evidence of record and require determination:

(a) <u>Insanity</u>:

In resolving the question of sanity we are guided by the provisions of the Manual for Courts-Martial as follows:

> "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."

and,

> "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." (Par. 78<u>a</u>, MCM 1928)

On this matter an experienced psychiatrist testified on behalf of the defense that, in his opinion, the accused was not, at the time of the offense, free from mental defect, disease, or derangement, in that he suffered with a psychoneurosis or constitutional psychopathic inferiority and hysteria which "interfered with his ability to distinguish right from wrong though how seriously (he) don't know". Likewise, he was of the opinion that the defect caused "a very substantial interference" with his ability to adhere to the right, though he could draw no final hair line "as to whether he had such an ability or not". He founded his judgement upon his belief that a man of the accused's type is "more subject to acute emotional responses or passions than the avera e man ... and hasn't the mental processes to help him cool off, or control himself in the face of those things".

Two medical officers testified on behalf of the prosecution, one of whom was a member of a board of three appointed prior to trial under the provisions of AR 600-500 and Par. 35c, Manual for Courts Martial. In their opinion the accused was able, at the time of the crimes alleged, to distinguish right from wrong and adhere to the right.

All of the medical experts agree that the accused is of low mentality bordering on moronic classification, but even the defense witness admitted that high grade morons (in which class he places the accused) are normally held to be legally responsible for their crimes, and that the accused has no psychosis and was capable of intelligently cooperating in his defense.

Under these circumstances the duty and responsibility of resolving any conflicts in the evidence rested with the court and in determining the question of reasonable doubt as to the sanity of the accused they were fully authorized and expected to utilize their common sense, and their knowledge of human nature and of the ways of the world in weighing the evidence in the matter (Par. 78a, MCM 1928; Holloway v. United States, U.S.C.A., No 8822, decided 26 February 1945).

The issue should have been decided as an interlocutory matter (Pars. 51c, and 75a, MCM 1928; AW 31). Instead, the entire court, in closed session and before making any other findings, determined that the accused was, at the time of the offenses alleged, "not mentally incompetent and was so far free from mental defect, 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 and to control his wrong actions" and "capable of conducting his defense intelligently and of assisting and cooperating with defense counsel". This was a complete and meticulous adjudication of the issue and the procedure obviously constituted no violation of any substantial right of the accused.

(b) Intoxication:

It is a general rule of law that voluntary drunkenness is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense. Such evidence should

be carefully scrutinized, as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act (Par 126a, MCM 1928).

Tested by these principles it is inconceivable that the accused was so far under the influence of intoxicating liquor at the time of the offense as to be unable fully to comprehend what he was doing, when his own admissions are examined. Regardless of the amount of liquor which he says he consumed prior to the murder, or which other independent and disinterested testimony shows he drank, he evidenced a remarkable memory of time, places and events and this in turn conclusively demonstrated a perspicacity at the time of the murder and the theft which was wholly incompatible with one in a state of such intoxication as would prevent him from understanding the full purport and consequence of his criminal acts.

(c) Self-Defense:

Murder is the unlawful killing of a human being with malice aforethought. A homicide which is committed in self-defense on a sudden affray is excusable and therefore, not unlawful. But, to excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or to prevent great bodily harm to himself and the danger must be believed on reasonable grounds to be imminent (Par. 148a, MCM 1928). It is evident that the defense contends that a reasonable man placed in the position under the circumstances portrayed by the accused, had good reason to believe that his own welfare was sufficiently in imminent danger to justify him in resorting to the taking of life to prevent bodily harm to himself or losing his own. But the rule stated is qualified by the important principle that, before one may take life in defense of his own, he must have retreated, if not in his own house, as far as he safely can (MCM 1928 supra).

The Manual for Courts-Martial adopts the doctrine of retreat for excusable self-defense cases, i.e., those arising from "mutual combat". Presumably the intention is to adopt it also in cases of justifiable self-defense, i.e., those where the accused is feloniously assailed (CM 235044, Winters, 21 B.R. 265). Accordingly, even though the accused was the victim of a felonious attack by the deceased, as claimed, it was, nonetheless, his duty to retreat if he safely could (CM 235044, Winters, supra, CM 237641, Brackins, 24 B.R. 71).

It is incredible that, under the circumstances detailed by the accused, he could have believed, on reasonable grounds, that it was necessary for him to slay the deceased for the reasons he advanced and in the manner chosen. There had been no grievous quarrel between the accused and the deceased prior to the killing. True, the deceased had been

arguing with the accused about a letter sent to the deceased's wife by a third person, and , apparently with reference thereto, had said that he would permit no man to take his wife away from him. Then, without further words, and after the deceased had gone into another room, the accused maintains that he suddenly found himself confronted, some time thereafter, by the deceased who was brandishing a knife. To a medical officer who was a witness for the defense, he stated that the deceased made a homosexual proposal at the time. The two were then in a room which gave access to the open by a front door, near at hand. Instead of making any retreat whatever, the accused threw the deceased to the floor by knocking his legs from under him, and while the deceased was on the floor forcibly disarmed him. Thus the accused was then in possession of the only weapon as to which there is any testimony and his assailant was lying defenseless on the floor. Under such circumstances any reasonable apprehension of imminent danger completely disappeared and nothing could then have justified the accused in resorting to the brutal killing during which he inflicted 14 wounds upon the deceased who had his back turned to him.

Having concluded that the killing was unlawful, the next inquiry is whether it was perpetrated with malice aforethought or is voluntary manslaughter only.

> "Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark)

> "Malice aforethought may exist when the act is unpremediated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony". (Par. 148a, MCM 1928).

Moreover, malice is presumed from the use of a deadly weapon (Par. 112a, MCM 1928). Although a knife may not inherently be a deadly weapon it becomes one when so used that it is likely to cause death or serious bodily injury (Wharton's Criminal Law, 12th Edition, Sec. 850: Acers v. United States. 164 U.S. 388, 41 L. Ed. 481: CM 223574 Rowe, 14 B.R. 35).

The contention of the defense counsel that, if the accused was found legally responsible for the homicide, he could be found guilty of voluntary manslaughter only is not tenable. Voluntary manslaughter is where the act causing death is committed in the heat of sudden passion caused by provocation such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man and it must be committed under and because of the passion, and the provocation must not be sought or induced as an excuse for the killing (Par. 149a, M.C.M. 1928).

> "The law recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by the provocation, and not from malice, he may strike a blow before he has had time to control himself and therefore does not in such case punish him as severely as if he were guilty of a deliberate homicide" (underscoring supplied) (idem).

Among instances of adequate provocation given in the Manual for Courts-Martial is assault and battery; but insulting or abusive words and gestures are given as instances of inadequate provocation(idem).

Thus it is apparent that neither the insulting or abusive words of the deceased, if they can be deemed to have fairly imputed to the accused a design on his part to alienate the affections of the deceased's wife, nor the claimed proposal to indulge in a homosexual act, can be considered as constituting adequate provocation under the law.

Nor was the threatening attitude of the deceased as described by the accused, such an assault as would justify a reduction of the grade of the homicide because of any anger or passion suddenly engendered thereby when viewed in the light of the consequent violent and merciless actions of the accused.

> "In no case will an assault, however violent, mitigate the offense if there was malice. And malice may well be inferred if the retaliation was outrageous in its nature, either in the manner or the circumstances of it, and beyond all proportion to the provocation, 'because', as it has been said, 'it manifests rather a diabolical depravity than the frailty of human nature'" (Clark and Marshall, Crimes, Sec. 257 (b)).

So, also, where the mortal blow is deliberately given after one party, who has gotten the better of the other, holds him prostrate, defenseless and helpless, it is murder and not manslaughter, even though the killer received a prior blow from the deceased (Wharton, supra, Sec.604).

Accordingly, viewed in the light most favorable to the accused, it has not been made to appear that the accused acted in the heat of sudden passion caused by adequate provocation.

Although the accused was the only eye-witness of the homicide there is other evidence which renders his account of the surrounding circumstances implausible. Neighbors of the deceased saw two men in his apartment at about midnight on the fateful date. They were then fully clad and appeared to be engaged in a noisy, but not quarrelsome, drinking party. The deceased was recognized by his voice. Eventually the lights in the apartment were turned off and the apartment was thereafter in darkness. At about 1:45 one of the neighbors distinctly heard the deceased say "in a loud and strained voice": "What are you doing out there?", and this was followed by a scuffle in the dark in which the deceased cried out in "a very loud and very high" manner: "What are you doing to me? For Christ sake, cut it out, cut it out." Such language, under the circumstances, is extremely significant and is not indicative of an aggressive demeanor on the part of the deceased at the time but strongly suggests that he was the victim of a sudden, surprise assault. This is further borne out by the strange fact that, by the accused's own admission, the deceased was then only partly clad in a pajama coat while the accused, except for his shoes, was fully dressed, even to the wearing of a field-jacket. When all these circumstances are compared and carefully weighed it is an inescapable conclusion that the homicide was a willful, deliberate, malicious and brutal murder and the court was fully justified in so finding.

It is reasonably manifest that the charge of larceny (like others of which the accused was found not guilty) was joined with the charge of murder for the purpose of showing a motive for the killing. While motive for a crime may be shown it is a general rule that proof of a motive for the commission of an offense charged does not show guilt nor does the want of proof of such motive establish the innocence of the accused (Wharton, supra, sec. 156 and 420).

However, irrespective of the evidence tending to show motive or lack of motive for the larceny and entirely disregarding the accused's extra-judicial confession thereof, the evidence shows beyond reasonable doubt that he did steal the deceased's wallet and money as alleged. This conclusion rests somewhat on circumstantial evidence which is, however, not only consistent with his guilt but wholly inconsistent with his innocence (Sec. 395 (9) Dig. Op. JAG, 1912,-1940). The accused admitted that he had between $15.00 and $25.00 in his possession when he left the hospital on the day of the murder. How much money he spent in the course of the evening appears only in his extra-judicial statement. He also admitted taking the deceased's wallet immediately after the murder and later transferring the money contained therein to his own wallet and

throwing the wallet away. Other evidence established the fact that the deceased had signed a pay roll on that day acknowledging the receipt of $69.01 and although he had made periodic weekly deposits of amounts which indicated that he banked his earnings, he had made none subsequent to 8 November 1944. Both the accused and the deceased were observed during the evening counting the money in their wallets, at which time the accused admitted having "$7 or $9" and the deceased stated that although he had money, he needed it to pay bills. The wallet of the deceased was found empty on the morning of the murder on a highway, admittedly traversed by the accused in leaving the scene of the crime and ten miles distant from it. When the accused's wallet was searched later in the afternoon it was found to contain $96.00 in currency.

This chain of evidence is conclusive and legally sufficient to support the findings as to the Specification 4 of the Additional Charge.

Inasmuch as the element of malice was already shown by proof of the facts surrounding the homicide, it is unnecessary to consider whether it might be implied from the fact that the killing was perpetrated in the commission of another folony.

7. Careful consideration has been given to a brief submitted by counsel for the defense to the reviewing authority. There is no merit in the contention that the findings of guilty as to the Specification and Charge are illegal for the reason that the accused was not convicted by a unanimous vote of the court. (Hancock v. Stout, U.S. Circuit Court of Appeals, 4th Circuit, No. 5304, decided 20 December 1944) All other matters raised have been determined in the foregoing review.

8. The Charge sheet discloses that the accused is 22 years of age, but a birth certificate which accompanies the papers submitted in the record shows that he was 20 years and 2 months of age at the time of the offenses charged. He served from 16 July 1941 to 24 September 1941 with Company "O", 2d Medical Battalion. His current service after reenlistment on 25 September 1944 was in the Corps of Military Police, subsequent to November 1944, part of which was at an airfield overseas where he was injured in a motorcycle accident, after which he was returned to the United States for hospitalization.

9. The court was legally constituted and had jurisdiction of the accused and the offenses charged. No errors injuriously affecting the substantial rights of the accused were committed at the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. A sentence to imprisonment for life is authorized upon conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War

42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States. (18 USC, 452,454).

Fletcher R. Andrews Judge Advocate
Herbert R. Frederick Judge Advocate
(sick in quarters) Judge Advocate

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

SPJGK
CM -274812

7 MAY 1945

UNITED STATES v. Second Lieutenant MEL J. TRACY (0-573602), Air Corps.	)	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Yuma, Arizona, 7, 8, 9 December 1944. Dismissal, total forfeitures, and confinement for one year and six months.

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

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

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

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

Specification: In that Second Lieutenant Mel J. Tracy, Air Corps, did, at or near Yuma, Arizona, on or about 2 November 1944, wrongfully, unlawfully and feloniously kill Charles Thomas Terry by negligently and recklessly driving an automobile on to and against the said Charles Thomas Terry.

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

Specification 1: In that Second Lieutenant Mel J. Tracy, Air Corps, did, at or near Yuma, Arizona, on or about 2 November 1944, wrongfully and unlawfully operate an automobile upon a public highway in said city of Yuma, Arizona, while under the influence of intoxicating liquor.

Specification 2: (Finding of not guilty).

Before accused pleaded to the general issue, defense counsel challenged the jurisdiction of the court on the grounds that the "mandatory" provisions of Article of War 70 had not been complied with, and specifically upon the grounds that the charges were not investigated in substantial compliance with the 70th Article of War, it being contended that the witnesses were not examined in the presence of the accused, and that accused was not informed of the name of the accuser, of the name of the witnesses, of his right to cross-examine witnesses against him, or of his privilege to

present witnesses in defense or mitigation; and further that the accused was not served with a copy of the charges at the time they were forwarded to the officer exercising general court-martial jurisdiction (R. 10,11). This plea having been denied, defense counsel moved to strike the specification of Charge I on the grounds that the averments thereof, particularly the allegations of negligence and recklessness were mere conclusions of the pleader and not a pleading of an ultimate fact, and were therefore legally insufficient to state an offense; it being further contended that the specification did not sufficiently apprise accused of the offense intended to be alleged to enable him to properly defend against it, and that in the absence of a pleading of the ultimate facts relied upon to constitute negligence and recklessness, accused was unable to test the sufficiency in law of the charge or specification (R. 25,26). This motion having been also denied, defense counsel moved to strike Specification 1 of Charge II on the grounds that the offense therein alleged was improperly joined with a more serious offense, contrary to the provisions of the Manual for Courts-Martial, and was therefore an unreasonable multiplication of charges. Upon the denial of this motion, defense counsel moved that the specification be amended by substituting the word "drunk" for the words "under the influence of intoxicating liquor." (R. 29,32.) This motion was also denied.

All of his special pleas having been denied, accused pleaded not guilty to and was found guilty of all Charges and Specifications, except Specification 2 of Charge II, of which he was found not guilty. 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 one year and six months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Special Pleas.

The special pleas interposed by the defense will be first disposed of before discussing the case on its merits.

In support of the plea to the jurisdiction, the defense called as a witness the officer who investigated the charges. From his testimony, it appears that the investigating officer interviewed accused only one time and that was at the station hospital on or about 5 November. He did not have with him at the time the charge sheet or a copy thereof, and did not at any time deliver to accused a copy of the charge sheet (R. 17,21). He told accused the name of the accuser and the Articles of War under which the specifications were drawn, and that the offenses alleged were manslaughter and driving while drunk. He did not recall for certain whether he gave accused the names of any of the witnesses, but stated that he told accused they consisted of officers who attended a party with accused during

the evening of the accident. It was his belief that he named some of the witnesses to accused. He advised accused of his rights under the 24th Article of War, told him that he was going to interview witnesses and advised him of his right to be present and to cross-examine them if he desired, and also of his right to have witnesses called and examined in his behalf (R. 16,17). Accused told him that he had no desire to be present while the witnesses were questioned or to cross-examine them, and did not request that any witnesses be called or examined in his behalf (R. 22,23). For the purpose of the plea to the jurisdiction, it was stipulated that, as originally prepared, and as they existed at the time of the investigation, the charges included one specification under the 93rd Article of War alleging manslaughter, and one specification under the 96th Article of War alleging unlawful failure to stop at the scene of an accident; and that the specification alleging the unlawful operation of a motor vehicle while under the influence of intoxicating liquor (Specification 1 of Charge II), laid under the 96th Article of War, was not included in the charges until after the investigation and after the charges had been forwarded to the appointing authority for reference to trial (R. 21,22).

At the conclusion of the evidence in support of the plea, the trial judge advocate made the following statement:

> "* * * I would like to determine from Defense Counsel whether they feel that they have not had adequate time to prepare for trial and if they would desire adequate time and further investigation of this case made?"

To which defense counsel replied as follows:

> "* * * it often isn't a question of whether you have time enough, but it is who got to the witness first and got a written statement which they will not change even though their later recollection is best. Now, counsel is a practicing lawyer and knows that theoretically we have many rights and practically we have darned few at times, so I think the inquiry is ill-directed. We are ready for trial, as I announced a moment ago, except for the plea to jurisdiction" (R. 23).

It appears from the foregoing that while accused was not in fact charged with operating a motor vehicle while intoxicated at the time the charges were investigated, he was nevertheless informed that that was one of the charges pending against him. Being so advised, he still expressed himself as having no desire to be present while the witnesses were examined, or to cross-examine them. The offense of driving while intoxicated and the offense of manslaughter are alleged to have been committed on the same date and the evidence shows that the specification with reference to driving while intoxicated has reference to the identical trip during which deceased was killed. Inquiry into accused's state of sobriety at the time of the homicide was so pertinent as to be almost necessary in any proper investiga-

tion of the charge of manslaughter, and the matter was investigated. We are of the opinion that the investigation which was made under the circumstances shown in the instant case constituted a substantial compliance in this respect with Article of War 70, but in any event, it is now well established by the decisions of this office that investigation of charges is procedural and not jurisdictional (CM 235407, Claybourn, 22 B.R. 1, at 33-34; CM 244760, Cihos, 29 B.R. 1, at 9). It was not essential that the witnesses be examined in the presence of the accused after he expressed his preference of not being present and his lack of desire to cross-examine them (CM 237032, Nelson, 23 B.R. 231, at 248; CM 238138, Brewster, 24 B.R. 173, at 176). Failure to serve the charges upon accused could at most only have been grounds for a continuance, which accused did not request and appeared not to desire (CM 210678, Sharp, 9 B.R. 305 at 323-4). The plea to the jurisdiction was properly denied.

The specification of Charge I alleges that accused "wrongfully, unlawfully, and feloniously" killed deceased by "negligently and recklessly" driving an automobile against him. It was not, in our judgment, essential that the specification set out in detail in what such negligence and recklessness consisted. (See in this connection State v. Watson, 216 Mo. 420, 115 S.W. 1011.) The accused made no claim of surprise at any stage of the trial and it does not appear that he was in any way prejudiced by the form of the pleading. The motion to strike this specification was properly denied.

While the offense of driving while intoxicated may be considered minor when compared to that of manslaughter, it is nevertheless a serious offense and one that should not be lightly disregarded. Furthermore, the charging of this offense in Specification 1 of Charge II tended to explain the circumstances of the more serious charge of manslaughter, and was properly charged in conjunction with it (par. 27, M.C.M., 1928). The motion to strike Specification 1 of Charge II was properly denied. Likewise, the court correctly declined to amend the specification by substituting the word "drunk" for the words "under the influence of intoxicating liquor." It is apparent from the record that it was intended to charge as an offense in violation of Article of War 96 a violation of an Arizona statute making it a misdemeanor to drive an automobile upon a public highway of that state while "under the influence of intoxicating liquor" (Arizona Code Annotated, 1939, Section 66-402).

4. Evidence for the prosecution.

On the night of 2 November 1944, Charles Thomas Terry, a civilian, estimated by a doctor who examined him to be about 16 years of age, was struck by an automobile owned and operated by accused, and as a result of injuries so inflicted died before reaching a hospital (R. 108,111,112). A skull fracture and resulting hemorrhage caused by a blow on the head was the immediate cause of his death (R. 108). He also received a compound fracture of his left leg between the ankle and knee, nearer the ankle (R. 111).

[Note: The really compelling evidence upon which the assertion is made that accused was the owner and operator of the automobile that struck and killed the deceased is circumstantial in nature, but it so clearly establishes that it was accused's automobile that struck the deceased and that accused was driving it at the time, that these things are stated and will be treated as facts, and no effort will be made to set out the circumstances proving the points, except as they appear incidentally in treating of other phases of the case. The question was not contested at the trial, the accused inferentially admitting that it was his automobile that inflicted the fatal injuries and that he was driving it at the time. There was also evidence, which was controverted, that accused made a pre-trial admission to the same effect.]

The accident occurred a short distance outside the city limits of Yuma, Arizona, on Highway 80, between 11th and 12th Streets (R. 57,76, 110,115). The time, as best it can be arrived at from the estimates of the various witnesses and other evidence, was approximately 9:45 p.m. (R. 88,161,163).

Numerous witnesses described the highway at and near the scene of the accident, as well as the condition and appearance of accused's automobile after the collision; and a drawing made to scale by an architect and a photograph, both depicting the highway and adjacent property at the scene of the accident, were properly identified and introduced in evidence without objection (R. 56, Ex. 1; R. 82, Ex. 2), as were also photographs of accused's automobile and its windshield, taken from various angles after the collision (R. 86, Exs. 3,4,5,6; R. 263, Exs. 11,12). Photographs of three different pieces of metal found at the scene of the accident were also introduced in evidence without objection (R. 166-167, Exs. 7,8,9). It was stipulated that these three pieces of metal came off of accused's automobile (R. 170), and evidence was introduced as to where each piece was found (R. 165-167, Ex. 1). In addition, an official map of the City of Yuma, Arizona, was introduced in evidence (R. 174, Def. Ex. A). It appears also that the court, with the consent of the prosecution and the defense, and at the suggestion of defense counsel, inspected both the automobile, which had been preserved in the same state in which it was found a few minutes after the collision, and the scene of the accident (R. 274,276,277,279).

Highway 80 is a through, heavily travelled, hard-surfaced, Federal highway, being the principal highway connecting Yuma with those portions of the country lying to its East (R. 57,171). Its course at the scene of the accident is North and South. Eleventh and Twelfth Streets, which run East and West, cross Highway 80 at right angles, and 12th Street lies south of 11th Street. In so far as the record discloses, and judged by the various exhibits, Highway 80 is straight and level between 11th and 12th Streets. The hard-surfaced portion of the highway is of asphalt composition and is 18 feet wide, with a line down its center as a traffic guide (Ex. 1).

Abutting the hard surfaced portion of the highway on each side, and virtually on a level with it, there is a level strip of firmly packed gravel that extends a distance of 15 or 20 feet from the edge of the asphalt to adjacent building fronts and property lines (R. 49,50,57). Witnesses stated that one could walk on these gravelled strips or areas with comparatively the same ease and comfort as on the asphalt itself (R. 49,56). There were no sidewalks, as such, on either side of the highway, nor any street lights along the highway at the time in question (R. 55,56,58). Patrolman M. N. Chaffey, Arizona State Highway Patrol, stated that pedestrian traffic along the highway in the area in question varied with conditions but was usually quite heavy when there were events transpiring in the vicinity that attracted people (R. 55). A carnival was in progress two blocks south of the scene of the accident on the night the accident occurred and had been in progress for approximately a week prior thereto (R. 171). Counting each street crossing as two points of entry, there were 28 major points of entry for traffic of all kinds into the highway between the scene of the accident and the place where accused's automobile was discovered after the accident, this being across the street from the hotel in which accused lived (R. 176). There were some business establishments and some residences along both sides of the highway between 11th and 12th Streets, but neither side of the highway was built up solidly (Exs. 1,2). Patrolman Chaffey stated on direct examination that he had made an examination of the block and area for the purpose of determining the approximate frontage along the highway devoted to business and residential purposes, and estimated that "it would be approximately seventy-five per cent business and twenty-five per cent residences in that area" (R. 55). On cross-examination, he admitted that he had reference only to the comparative proportion of business structures to residential structures and that he did not take into consideration the vacant lots in the area (R. 58). The court was requested, and consented to take judicial notice of Section 66-101 of the Arizona Code, the following portions of which were thereupon read as being pertinent in fixing the speed limit for vehicles in the area where the accident occurred (R. 54,55):

> "Section 66-101. Speed Limit on Highways.
>
> No person shall drive a vehicle upon a highway at a speed greater than is reasonable and prudent, having due regard to the traffic, surface and width of the highway and the hazard at intersections and any other conditions then existing. Nor shall any person drive at a speed which is greater than will permit the driver to exercise proper control of the vehicle and to decrease speed or to stop as may be necessary to avoid colliding with any person, vehicle, or other conveyance upon or entering the highway in compliance with legal requirements and with the duty of drivers and other persons using the highway to exercise due care; provided, that this provision shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident. Subject

hereto and except where lower speed is specified herein, the driver of a vehicle shall not drive the same at a speed in excess of that specified as follows:

* * * *

"(b) Twenty (20) miles per hour: 1. In any business district as defined herein,

"(c) Twenty-five (25) miles per hour: 1. In any residence district as defined herein."

/Note: Section 66-401, Arizona Code, 1939 Ed., is, in pertinent part, as follows:

"Words and phrases defined. In this and the preceding eight articles (Secs. ***66-101***), unless the context or subject matter otherwise requires.

* * * *

"'Business district' shall mean the territory contiguous to a highway when fifty per cent (50%), or more, of the frontage thereon for a distance of one-fourth of a mile, or more, is occupied by buildings in use for business;

"'Resident district' shall mean the territory contiguous to a highway not comprising a business district when the frontage on such highway, for a distance of one-fourth of a mile, or more, is mainly occupied by dwellings, or by dwellings and buildings in use for business;"/

At the time of being struck by accused's automobile, the deceased, together with Corporal Harold H. Hoffman, was walking north along the east (or right-hand) side of Highway 80 (R. 115,116). Accused was proceeding in the same direction and approached deceased from the rear (R. 78,98). At the same time Corporal John G. Burchard was walking north, along the west (or left-hand) side of the highway, and lacked only three or four feet of being abreast of deceased and his companion, being to that extent to their rear at the moment of impact (R. 76,77,79,89; Ex. 1). Only Corporal Burchard claimed actually to have seen the automobile strike the deceased (R. 78,91).

Corporal Burchard stated that he entered Highway 80 from 12th Street and had seen both the automobile and deceased, and also the latter's companion (Corporal Hoffman), before the collision (R. 76,79,83,88,96). His attention was first attracted to the automobile when it was 140 or 150 yards behind, or south of, him by hearing it; he did not recall having previously noticed its lights (R. 79,82,89). Being in hope of catching a ride, he glanced back momentarily at the automobile when he first heard it, but within a few seconds concluded that it was not going to stop for him and thereupon ceased to watch it and more or less dismissed it from his mind; he did not recall that he was even conscious of its sound between then and the time it struck deceased (R. 79,80,90,91). Corporal Burchard estimated

that at the time he momentarily looked at the automobile when it was approximately 150 yards behind him, it was traveling at a speed of from 35 to 40 miles per hour (R. 82,91). The automobile was at the time on the east side of the center line of the pavement but he was unable to say whether it was on or off the pavement; he saw no dust raised by it (R. 80,91). The automobile came back within his vision simultaneously with striking deceased (R. 91,92). Corporal Burchard stated that he heard "a very loud bang" and the "tinkling of glass" when the automobile struck deceased, and saw deceased's body tossed "into the air about twice as high as the automobile itself" and propelled or carried forward in a northerly direction to where it finally came to rest about 9 or 10 feet off the pavement on the east side and 40 or 50 feet north of the point of original impact (R. 78). He momentarily lost sight of the body after it was first thrown into the air, it being obscured from view by the automobile, but then saw it strike the ground and roll (R. 92). He stated that from the moment of impact he was concentrating on watching the deceased and paid no attention to the automobile until after he (Burchard) had crossed the highway to where deceased was lying (R. 80, 81,92,93). He then looked north and saw the automobile about 150 yards away (R. 81,93). It was still proceeding along the highway at about the same rate of speed at which it appeared to be traveling when he first saw it south of the point where the collision occurred, i.e., from 35 to 40 miles per hour (R. 82,93). Corporal Burchard at that time got the impression that there were two people in the car (R. 88,93). He saw the automobile only momentarily at the moment of impact and did not know whether it was then on or off the pavement or how near it was to the center line of the pavement, but was of the impression that it was traveling at about the same rate of speed as when he observed it before and after the collision (R. 94, 106). He did not see its stop-lights go on or see it slow down at any time (R. 94). He did not see the car swerve from its course, and when he observed it after the collision it was on the pavement in the position normally occupied by vehicles traveling north. He did not hear any horn sounded before the collision, nor did he see any light inside the automobile at the moment of impact (R. 79,93). He had paid no particular attention to the deceased and Corporal Hoffman before the accident occurred, had not spoken to them, and did not know whether they were on or off the pavement, or how close together they were walking, or whether they were either talking or smoking, or what they were doing: "They just seemed to be walking" (R. 83,89,94). He had noticed no other vehicle pass between the time he entered the highway and the time of the collision and felt reasonably certain that no others had passed (R. 89). Immediately after the collision he crossed the highway to where Corporal Hoffman was standing near the point of impact, made some remark to him, without, as he recalled, receiving a reply, and went on to where deceased was lying (R. 80,84,99). As he crossed the highway, Corporal Burchard noticed shattered glass where the collision occurred but did not see deceased's hat, which Corporal Hoffman testified was lying between where he (Hoffman) stodd and the edge of the pavement after deceased was struck (R. 84,95). The glass was "well scattered;" "the start of it was on the pavement /and/ the end of it was on the shoulder and it was evenly

distributed there." "I would say the center of it seemed to be right at the edge of the shoulder and the pavement" (R. 95). A man and a woman came from a neighboring house to where deceased was lying within one or two minutes after Corporal Burchard reached there, and shortly afterwards a "Mr. Sharpstein" stopped in an automobile (R. 84,98,105). Corporal Burchard went with Mr. Sharpstein to the sheriff's office to furnish a description of the automobile involved in the collision, and then he and Mr. Sharpstein proceeded to look for the automobile. Within a few minutes after leaving the sheriff's office they found accused's car, a black Buick Coupe, parked at the curb on Main Street in front of the Lee Hotel (R. 85). It appeared to Corporal Burchard to be the car he had seen collide with deceased. It had a "smashed right headlight, a dented-in hood and a shattered windshield, the right side of the windshield" (R. 85). The automobile was parked at a proper angle at the curb along with other automobiles (R. 104,105). It was within six or eight yards of a street light and so parked that the street light shone on its damaged portions (R. 104). There was a hotel parking lot in the rear of the hotel (R. 105). Upon discovering the automobile, Mr. Sharpstein telephoned the sheriff's office, and officers arrived within a few minutes, examined the automobile and proceeded into the hotel to locate the accused. Corporal Burchard estimated that the officers entered the hotel within 15 minutes after the accident occurred (R. 86,87,103).

Upon cross-examination, Corporal Burchard admitted making a statement to "Captain Elridge" the night of the accident, during the course of which he answered the following questions in the manner shown:

"Q. Right at the point of impact where was the man who was hit walking with respect to the paved road?
"A. As far as where the man was walking, I couldn't say, but I did notice that the automobile was fully on the road and was not on the shoulder.
"Q. You would say, then, that the automobile was on the pavement?
"A. Yes, sir.
"Q. And was not on the shoulder at all?
"A. Because I watched the car continue down the road and it was driving straight ahead on the road itself.
"Q. You didn't notice whether the victim was walking on the pavement or not?
"A. No, I did not.
"Q. Would you say from what you saw there that he must have been walking on the pavement in order to have been hit?
"A. Yes, I would" (R. 96).

The witness asked to be permitted to make an explanation and stated that these answers were his conclusions based on his observation of the automobile and its position on the road before and after the collision, and not at the time thereof. Corporal Burchard also admitted that at the coroner's inquest, held the day following the accident, he answered the following questions in the manner shown:

"Q. Now, immediately prior to the impact how near the edge of the pavement did you say, how near the edge of the pavement the victim was walking?
"A. I didn't, but I did notice that the automobile was fully on the road.
"Q. Could you tell whether or not the automobile was being driven on the shoulder of the road or pavement?
"A. I am sure that the car was being driven on the pavement" (R. 97).

He further admitted that on 15 November, in a statement to the investigating officer, he stated:

"When I saw the car approaching it was being driven in a normal position on the roadway and when it struck the man it appeared to be in the same normal position on the road." (R. 98)

Corporal Hoffman stated that at the time of the accident he and the deceased were returning to Yuma together from the carnival, walking north along the right-hand, or east, side of Highway 80 (R. 114,115). The deceased was walking on Corporal Hoffman's left, the side toward the center line of the highway (R. 118,142; Ex. 1). Corporal Hoffman said that he knew that at the moment of impact he himself was walking on gravel, and that he was sure he was on the shoulder of the highway, off the pavement, because, while there was also loose gravel on the pavement, and it was too dark to see the pavement's edge, he was standing beside and east of deceased's hat immediately after the collision, and the hat was off the pavement (R. 116,121, 138,139,143). He estimated that he was three feet off the pavement at the moment the deceased was struck (R. 116,118,138). He stated that he was unable to say where deceased was walking or what position deceased occupied on the highway at the moment of impact, for he himself was at the time looking away from the highway and was engaged in putting cigarettes into a package, and deceased was not within his view; for all he knew, deceased could have stepped out on the pavement in front of the automobile (R. 127, 128,129,134,143). Without having previously heard any warning sound, and without having heard the automobile or noticed its lights, Corporal Hoffman suddenly heard a "loud bang" and, upon looking around, discovered that the deceased had disappeared; he wasunable for a moment to figure out what had happened (R. 117,118,128,129). He first saw deceased's hat lying beside him (Hoffman) and thereafter saw the deceased's body "alongside" a nearby filling station (R. 121,129). Corporal Hoffman said that the automobile did not touch him, did not make him jump, and so far as he knew, did not even come close to him (R. 134,135,139); he did not know how near him it passed, because he saw it for the first time after he heard the noise of impact, and the car was then some distance away (R. 118,129,135,136; Ex. 1). He noticed no dust raised where the collision occurred (R. 139). When he first saw the automobile, it appeared to be slowing down but then regained speed and proceeded on at a speed estimated to be between 40 and 50 miles per hour (R. 120,121,131). Witness continued to watch it until it passed out of sight

(R. 129,130,134). As it proceeded away, the automobile was on the pavement, about three feet inside or west of the pavement's east edge, and was proceeding along a straight line, not swerving (R. 134).

Corporal Hoffman said that he was sure that at the time of being struck, deceased was quite near him because deceased had been walking beside him, about an "elbow" away; they had just had a cigarette together and deceased had just finished saying something (R. 116,117,135). They were not shoving or playing with each other, and nothing occurred between them to cause the deceased to dart aside; they were just walking along, talking and smoking (R.127,134,139). No other automobiles had passed them between the carnival and the place where the collision occurred (R. 129). The weather was good; it was not raining, nor was there any sand blowing (R. 139). The deceased was wearing a dark brown hat, dark brown trousers and a gray coat (R. 138).

After the collision Corporal Hoffman observed glass on the highway at the point of impact and a headlight rim, which was "quite a ways from where the accident happened, between me and the garage" (R. 133). He said that on a later date he stepped the distance from where the bulk of the glass lay to the center line of the highway and also to where it played out on the shoulder of the highway, and found both distances to be three steps (R. 132). At one place in his testimony he said the round metal headlight rim was "right on the edge of the pavement, but in the gravel," while at another, he said it was about three steps off the pavement on the gravel (R. 133,135). The next car to come along after the collision pulled off the road toward where deceased was lying and stopped (R. 137). It was in this car that Corporal Burchard went to town.

Corporal Hoffman and the deceased had met for the first time about 6:30 on the evening of the accident at a skating rink and had thereafter remained together until the accident occurred. Neither of them drank any alcoholic beverage after they met (R. 140). Corporal Hoffman had drunk two glasses of beer about 5:00 p.m. (R. 123,140). He said that his memory was not very good normally, that on the evening in question he was afflicted with a cold and was slightly nauseated from some rides he had taken at the carnival, and "just didn't take notice so much," and was not sure that his recollection of what happened was accurate (R. 124, 127). He admitted on cross-examination that on the day after a day on which he had gone over the ground at the scene of the accident with the Trial Judge Advocate, he undertook to conduct defense counsel to and over the ground, and through mistake conducted them to the wrong place, about a block removed from the scene of the accident, and there made measurements and pointed out various places as being places where certain things happened and where certain objects were found after the collision; and that it was only after his error had been pointed out to him by defense counsel that he arrived at the correct scene of the accident (R. 122,123).

Mrs. Millard Tam stated that from a distance of approximately a half block she heard the collision, and described it as sounding "like two cars' fenders hitting together." She said it was a "loud noise" (R. 160,163).

The descriptions given by various witnesses and the pictures introduced in evidence show the following to have been the condition of accused's automobile after the collision, to wit:

A piece of metal, about 8 or 10 inches long, designed normally to fit and to be clasped or welded on the bumper so as to stand perpendicular over the bolt uniting the bumper to its support on the right side was missing. The place from which it was detached appears to be about 18 inches from the right end of the bumper. The front of the right fender was depressed and the cowling over the radiator appeared to have received a blow on the right side. The right headlight, which rested on the fender next to the radiator cowling, was demolished. Its lens was out, and the outside metal portion of the light, having been split or separated along its bottom, was stripped back and spread fanwise, inside out, against the fender and hood of the car. The hood contained a considerable depression or identation on its upper right side just in front of the windshield, and the windshield itself was severely cracked in its lower right-hand corner, without being knocked out. Hairs were found imbedded in the cracked portion of the windshield (R. 262, Exs. 3,4,5,6,11,12).

Hairs removed from the windshield and some clipped from the head of the deceased were identified and introduced in evidence without objection (R. 263, Exs. 13,14).

Deputy Sheriff Lloyd Mabery, who arrived at the scene of the accident before deceased had been removed, stated that he found deceased bleeding severely about the head, and lying with his head toward the northeast (R. 165). Mr. Mabery marked on Exhibit 1 the spot where he judged the body to have been lying when he arrived, and from this it appears that the body was on the gravel, from eight to ten feet off the pavement (R. 165; Ex.1). He stepped the distance from the body to the southern extremity of the shattered glass on the pavement, and found it to be approximately 72 feet (R. 165,167). He said that the glass was scattered and extended from the center line of the highway eastward onto the gravel for a distance of from three to six feet beyond the pavement, and that also the distance from the southern to the northern extremities of the area covered by the glass was approximately from three to six feet (R. 167). In the vicinity of the shattered glass, south of the most concentrated portion of it, Mr. Mabery saw a small mark in the gravel, just off the pavement, which he described as being "from two and one-half to three inches wide and approximately eight to ten inches long" (R.168,169). Also at the place where he found the glass, he found the metal piece that had been detached from the bumper of accused's automobile (R. 165,166; Ex. 7). It was lying "right on the edge of the gravel, just off the flat top" (R. 166). Between the glass and the place where de-

ceased was lying, Mr. Mabery found the round rim off the right headlight of accused's automobile and also another piece of metal which appears from its picture to have been a thin strip, several inches long and bent near one end, a part also, apparently, of the headlight (R. 166,167, Exs. 8,9). These two pieces of metal were lying within three or four feet of each other, "some distance off the highway" (R. 166). He saw neither footprints on the gravel nor tire marks on the highway at the point where the collision occurred (R. 176).

Earlier in the evening before he collided with the deceased, accused had attended a "stag party" at the Medical Bachelor Officers Quarters at Yuma Army Air Field. The party was for the members of volley ball teams which had participated in a tournament (R. 59). Food, liquor, and "set-ups" were furnished, there being two cases of Bourbon whiskey, but no other specific form of entertainment was provided (R. 59,60). From 75 to 100 officers attended, and "the party consisted of eating and drinking, good fellowship and sociability" (R. 61). The accused arrived at the party about 5:15 p.m. and remained until sometime around nine o'clock (R. 60,64). First Lieutenant Zachary Millsap, Jr., stated that he and accused poured drinks of Bourbon together "about three times" between seven and nine o'clock, and were together roughly half the time between those hours (R. 64-65). Toward the latter part of the evening accused's face was slightly flushed and he was in "gay spirits," "neither drunk nor sober" (R. 65,66). Lieutenant Millsap said that judging from accused's appearance, he would say that accused was "to an extent under the influence of alcohol" but not drunk (R. 66). Second Lieutenant Richard F. McClelland stated that he saw accused at the party and again about 9:00 p.m. at the bar in the Officers Club (R. 145). He expressed the opinion that at the time he saw accused in the Club the latter was drunk (R. 146). Accused was leaning on the bar with a drink before him when Lieutenant McClelland entered the Club and engaged the latter in conversation for three or four minutes, being apparently solicitous to allay supposed hard feelings between them, arising out of some incident involving a girl, which incident Lieutenant McClelland professed not to recall (R. 148). It was upon this conversation and the fact that accused's speech was not as clear and pronounced as usual, and the further fact that accused appeared to be unsteady and using the bar for support, that Lieutenant McClelland formed his opinion that accused was drunk (R. 149). Lieutenant McClelland expressed the further opinion that accused was not then in condition to drive an automobile and that this should have been apparent to anyone (R. 149,150). He did not see accused attempt to walk (R. 149). Richard Hutton, bar tender at the Officers Club, stated that at some time between nine and eleven o'clock on the night in question, he saw accused enter the club and approach the bar. Accused walked straight and erect, not unsteadily, but more brusquely, or in some manner a little different, than usual; his natural swagger was a little more accentuated (R. 70,71,74). Accused's face was more flushed than usual, and his general appearance led Mr. Hutton to conclude that accused had had a few drinks (R. 70). Accused remained in the Club approximately 20 minutes and during that time engaged in a dice game and consumed

two drinks of Bourbon and ginger ale (R. 72,73). Just before taking the second drink he remarked that he was going to take one more drink and go home (R. 73). Mr. Hutton stated that he was not in a position to say whether accused was at the time drunk or sober; accused was able to handle himself (R. 74,75).

Around 10:15 o'clock on the night in question, City Policemen Earl Allen and Leland Lee and a military policeman, together with accused's wife, who had made herself known to the officers while they were examining accused's car, went to accused's room in the Lee Hotel (R. 178,180). A light was burning in the room when they reached it, and in response to a second knock on the door the accused said, "Come in" (R. 180). Accused was found sitting on the side of a bed in his underwear. When the officers entered the room, he began putting on his socks (R. 181). Mr. Allen stated that after a brief interval he walked near accused and "asked him if he was the driver of the car at the time it hit the boy on the mesa," and that thereupon accused turned his head "at kind of an angle," looked up at him, and said, "'Yes' or 'yeah,' or something like that" (R. 180). Accused paused before making his reply, whether before or after looking up, Mr. Allen was unable to recall (R. 190). While attempting to put on his trousers while standing, the accused stumbled, and was prevailed upon to sit down and put them on (R. 181-182). On direct examination, Mr. Allen expressed the opinion that accused was at the time drunk (R. 182). On cross-examination he modified this to the extent of saying that in his opinion accused was "more or less" drunk; "I would say that he had been drinking pretty heavily but I wouldn't say he was beyond knowing what he was doing at the time when I first saw him" (R. 197). There were from 5 to 8 whiskey bottles in the room, apparently containing whiskey, but Mr. Allen saw no glasses or other evidence that any drinking had been done there recently (R. 188,198). The covers on the bed were turned down and the bed's appearance gave some indication that someone may have been lying in it (R. 187). After sitting down to put on his trousers, the accused got up and moved about the room, procured the remainder of his wearing apparel and fully dressed himself without assistance (R. 192,193). After speaking semi-privately with his wife for a moment, he rejoined the officers and walked down the stairs unassisted and without touching the handrail (R. 182,194). He seemed to hesitate at the head of the stairway to get his balance but thereafter walked normally (R. 198,200). They walked by accused's automobile before proceeding to the police station and accused admitted that it was his car (R. 182,194). The car was correctly parked at the curb and had its damaged side toward and within ten or twelve feet of a street light with no other cars between it and the light. There was a hotel parking lot back of the hotel which Mr. Allen did not recall being lighted (R. 201).

At the sheriff's office, during the night and early morning (2-3 November) accused was twice examined by medical officers, once by Captain Robert J. McNeil alone, and again by Captain McNeil and "Captain Ellefson" together. Blood was drawn from him and later tested to determine

its alcoholic content, and he was questioned by Captain Julius E. Eldridge, Provost Marshal.

Seven c.c. of blood were drawn at approximately 12:10 A.M. (3 November), and the report of the test made upon it showed it to contain 2 milligrams of alcohol per c.c. of blood (R. 206,226,229, Ex. 10). The technician who made the test stated that the alcoholic content was more nearly 1.8 milligrams per c.c., but the tests were only recorded to the nearest .5 milligram (R. 229). Evidence was introduced to show that it is commonly accepted by the medical profession that with a level of from 1 to 1.5 milligrams of alcohol per c.c. of blood, one is usually under the influence of alcohol but not definitely intoxicated, while with a level of from 2 to 2.5 milligrams of alcohol per c.c. of blood, one may be regarded as definitely intoxicated (R. 207,208). The fact that two hours or more had elapsed between the time accused took his last drink and the time the blood sample was taken might have no effect upon the results of the test, depending on the amount of liquor in the stomach and the rate of absorption into the blood stream, each individual having a maximum absorption rate (R. 209,210, 212).

Captain McNeil stated that he arrived at the sheriff's office about midnight and found accused asleep on a couch in an adjoining room (R. 203,204). Captain McNeil was unable to awaken accused by calling his name or by shaking him, but with assistance, and by pressing his thumbs against accused's eyeballs, he succeeded after a minute or two in arousing him to a sitting position (R. 204,213,232). After he had remained in a sitting position for about a minute, accused was requested to stand up. He was unable to do so, and upon being assisted to his feet, he stood with difficulty (R. 204,213,232). He was unable to stand on one foot at a time and seemed unable to understand what Captain McNeil was trying to do. He made no coherent replies to Captain McNeil's conversation, just "mumbled and mouthed his words" (R. 269). The pupils of accused's eyes were dilated, and contracted slowly to the light. An attempt was made to have him walk but he was unable to do so, and when he was released he sank back to a sitting position on the couch (R. 204). Captain McNeil made no attempt during this first examination to test accused's reflexes, "because it was quite obvious to me that there was a serious lack of coordination present and I was certain that he was at that time under the influence of liquor, or alcohol, which I knew I was being called to determine" (R. 205). Within two or three minutes after he had sunk back to the couch, accused was again raised to his feet and was then assisted into another room where the blood sample was taken and where he was later questioned (R. 204,214). Asked if in his opinion accused was drunk at the time of this first examination, Captain McNeil said that he preferred to "say that he was seriously under the influence of alcohol and was certainly intoxicated" (R. 205). With reference to the same time, Captain Eldridge, who assisted Captain McNeil in arousing accused and getting him from one room to the other, said that accused "definitely was not normal" and "his appearance to me indicated that he had taken intoxicants of some nature" (R. 232). Captain McNeil

said that at the time the blood sample was about to be taken, which was 15 or 20 minutes after he had first begun working with accused, the latter still had not become fully awake or possessed of his faculties. Accused asked, "What is this all about?", but when Captain McNeil explained what he was doing and why, accused appeared to comprehend and said, "all right, go ahead," and was thereafter cooperative (R. 214). Accused was able to stand after the blood sample was taken and seemed to be "thoroughly aroused" upon discovering the presence of "Colonel Davis, who suggested that he answer some questions" (R. 205,214). Captain McNeil thereupon informed Captain Eldridge that he thought accused was in condition to be questioned and the questioning was begun (R. 223,206). During the questioning, accused seemed befuddled, his answers were confused and sometimes contradictory, and "there seemed to be a very definite clouding of the memory, of his memory for a period of time during the early part of the evening, particularly between eight and ten o'clock * * *", all of which caused Captain McNeil to wonder if he had given his "O.K." for the questioning too quickly (R. 217, 224). Captain McNeil was of the opinion at the time that accused was not in complete possession of all his faculties "but did understand what Captain Eldridge was trying to get to" (R. 217). Captain McNeil said that he was unable to say whether accused's apparent confusion or befuddlement resulted from his condition or because of his desire not to tell all he knew (R. 224). During the course of the questioning or about the time of its termination "Colonel Anderson" (Commanding Officer of the air field) entered the room, and his arrival "apparently had quite a sobering effect upon [accused] because he became much more alert immediately thereafter" (R. 205,261,271,272). Colonel Anderson directed Captain McNeil and Captain Ellefson again to subject accused to a sobriety test, which they did and found that he could stand alone well, that his reflexes appeared normal, and that he could perform well such things as standing first on one foot and then the other, walking a straight line, and touching his nose with his finger while his eyes were closed (R. 218). This second examination was performed about 12:30 o'clock, and Captain McNeil attributed the accused's quick recovery to the shock of seeing Colonel Anderson (R. 218,221). Captain McNeil also stated that sleep accentuated the lethargy induced by intoxicants, and that the fact that the accused was awakened from a sound sleep would account in part for his befuddlement in the beginning (R. 216). Under the same circumstances, i.e., assuming him to have been awakened from a sound sleep and that he had consumed no additional liquor in the interim, accused's condition and appearance would have been the same or worse two hours earlier (R. 216). Captain Eldridge expressed the belief that accused was in possession of all his faculties during the time he was being questioned, "in a faltering sort of way" (R. 266). The questioning was in progress for 20 to 30 minutes and was conducted jointly by Captain Eldridge and a deputy county attorney (R. 272,273).

Over objections of defense counsel, portions of the statement so made to Captain Eldridge and the deputy county attorney, in question and answer form, were introduced in evidence (R. 252,261). Among other things

which he told the officers in this statement, accused said that he arrived at the party at the medical BOQ about five o'clock in the afternoon, had some alcoholic drinks there, not exceeding four, ate there, and left the field about 7:00 p.m. or a little after, and proceeded direct to the Lee Hotel. He estimated that it took him between 20 and 30 minutes to drive from the field to the Hotel. He did not recall having any accident on the way to the hotel, or that anything unusual happened to him. At the time of leaving the field, so far as he knew, his car had no noticeable marks on it, and the windshield had no broken spots in it. Also, so far as he knew, both headlights on his car were burning while he was driving to town. He was doing the driving from the time he left the field until he reached the hotel, and had not been in his room more than 30 minutes when the officers arrived.

The objections urged to the introduction of the statement were, in substance, (1) that the rights accorded to accused by the 24th Article of War were not fully and fairly explained to him before he made the statement, (2) that, due to accused's condition, as well as to the imperfect manner in which the 24th Article of War was explained to him and the fact that the statement was made to and in the presence of superior officers, the statement was not voluntarily made, but was made under duress, (3) that the statement was not voluntarily made, because the suggestion by Colonel Davis (executive officer of the air field) to accused before the latter made the statement, that he "answer some questions," amounted to duress, in that it was tantamount to an order or command, and (4) that after the first few more or less preliminary questions, accused claimed his privilege of not answering further questions, notwithstanding which the questioning continued.

The warning given accused by Captain Eldridge as contained in the statement itself, and the questions and answers with reference to it, were as follows:

"Q. Lieutenant, there are a few questions I want to ask you. Before asking them I want to explain to you your rights under the 24th Article of War. Under the 24th Article of War you do not have to answer any questions I may ask you which may incriminate you, or any questions which may embarrass you or be embarrassing to you, if not material to the issue. Do you understand that?

"A. That's right.

"Q. You understand it thoroughly?

"A. Yes, sir." (R. 252)

Captain Eldridge stated that he did not believe that he told accused that he did not have to answer any questions that might tend to incriminate him (R. 234).

After having asked accused about six questions, Captain Eldridge questioned him as follows and received the answers shown, to wit:

"Q. Who left the field with you?
"A. At the time of the accident?
"Q. No, who left the field with you at the time you left the field tonight? Do you know who was with you?
"A. I do, but may I plead the 24th Article of War?
"Q. You prefer not to answer that question?
"A. I prefer not to, yes sir."

The questioning thereafter continued and accused answered the questions asked him without objection and without further reference to the 24th Article of War.

Later during the questioning the following questions were asked and received the answers shown, to wit:

"Q. You do not wish to state who was with you tonight when you left the field; is that correct?
"A. That's right." (R. 254)

* * *

"Q. You still don't want to say who left the field with you?
"A. No, sir." (R. 258)

No evidence in addition to the testimony of Captain McNeil was offered as to what Colonel Davis said to accused about making a statement. Captain McNeil's testimony was as follows:

"I should say he was thoroughly aroused by the appearance of Colonel Davis, who suggested that he answer some questions * * *." (R. 205)

5. At the time the prosecution rested its case, defense counsel moved for a finding of not guilty of the specification of Charge I and of Charge I upon the following grounds:

"The evidence offered by the prosecution does not support the charge as laid, in that:

"1. It has not shown that any acts of the accused were, in any way, negligent or in any way reckless or in any way wrongful or unlawful.

"2. It has not been shown in any manner that any act of whatever nature performed by the accused was the proximate cause of the death of the deceased." (R. 280)

Defense counsel also moved that accused be found not guilty of Specification 1 of Charge II on the following grounds:

"The prosecution has not produced sufficient evidence to prove the material element of this charge, that is, that the accused was driving on the evening of November 2nd from the Air Base to the Lee Hotel under the influence of intoxicating liquor." (R. 288)

Both motions were denied (R. 287,291).

6. For the defense.

Seven officers, four being majors, two captains, and one a second lieutenant, all of whom were present and saw accused at the volley ball party on the evening in question, stated that when they last saw accused, he was, in their opinions, in possession of his mental and physical faculties and was not drunk (R. 294,303,309,312,315,319,338). The majority of these officers left the party early and did not see accused after 7:30 p.m., but the lieutenant saw him after 8:00 p.m., and Major Clarence E. Johnson, Medical Corps, saw him between 8:30 and 9:00 p.m., as accused was leaving the party (R. 303,322). One of these officers assisted accused to remove some food from his car at the time accused first arrived at the party. He stated that accused had not been drinking before arrival (R. 315). Two of them had planned to ride to town with accused but were required to go before accused was ready to leave the party. One of these left the party about 6:45 p.m., the other about 7:20 p.m. (R. 294,316). Each stated that at the time of taking his departure, he would not have hesitated to ride in accused's automobile, with the accused doing the driving (R. 294,315). Approximately an hour before accused left the party, as a part of the fun being indulged, Major Johnson subjected a number of officers, selected at random, of which number accused was one, to sobriety tests. While not highly scientific, the tests did include some of the standard tests for determining one's coordination and state of equilibrium. Accused passed his test successfully and, in the opinion of Major Johnson, was not drunk at that time (R. 319). When observed by Major Johnson leaving the party, accused was walking perfectly all right; he was not staggering and did not lack coordination. It was by accused's walk, which was normal, that Major Johnson recognized him (R. 322,323).

Second Lieutenant Ray W. McCrary stated that he saw accused in the Officers' Club about nine o'clock on the night in question. He and accused and "Major Dickey" (who since had been transferred to a new station and was not present at the trial) spent approximately fifteen minutes together inside the club; shooting dice and talking, and then, about 9:15 p.m. left the club together (R. 353-354). Accused thereupon departed, remarking that he was going home. Lieutenant McCrary expressed the opinion that both while inside the club and at the time of taking his departure, the accused was in full command of his physical and mental faculties and was not drunk (R. 354). He expressed the same opinion with reference to accused's condition at the time the latter talked to Lieutenant McClelland (witness for the prosecution who expressed the opinion that accused was drunk) inside the club (R. 355). While professing not to recall that accused drank any liquor while inside the club, Lieutenant McCrary admitted that it was possible that accused may have

taken as many as two drinks from his (McCrary's) own bottle.

Private Lewis J. Farrell, who was on guard duty at the main gate to the air field on the night in question, stated that he saw accused drive through the gate and proceed toward Yuma between nine and ten o'clock, and that he noticed nothing unusual about accused's appearance or the manner in which he drove his car. Accused stopped, saluted, and drove on in a normal manner (R. 325).

A warrant officer, William Marshall, who was junior officer of the day on the night in question, was called to the sheriff's office in Yuma after accused was taken into custody. He stated that when he arrived there the accused was standing inside the office with his arms upon a counter, and that he looked as if he had "something on his mind." Accused was directed to go into an adjoining room and as he did so Mr. Marshall did not notice "anything too peculiar about his walking" (R. 332,333). Later, after Captain Eldridge had arrived, upon going into the room for the purpose of having accused return to the sheriff's office, Mr. Marshall found him asleep. He called accused by name and the latter woke up and asked why he was being held. He was thereupon told that he should go into the sheriff's office and that "they would tell him what the trouble was." Although accused's hair was "probably mussed up a little bit," his speech was sufficiently clear and distinct for Mr. Marshall to understand what he (accused) was saying (R. 333,334). Mr. Marshall expressed the opinion that it was around 9:30 p.m. when he arrived at the sheriff's office (R. 336).

Captain Olley D. Ellefson, Medical Corps, who aided in subjecting accused to the second sobriety test at 12:30 a.m. (3 November), stated that at that time accused's eyes were normal to "both light and accommodation" and his coordination reflexes were normal but sluggish (R. 341,344). Captain Ellefson expressed the opinion that accused was at the time just recovering from a state of intoxication, because he staggered just a bit as he got up from the chair in which he had been sitting (R. 344). Accused had an expression of bewilderment and stated that he did not recall driving home or hitting anyone. The only thing he recalled was that upon leaving his car at the hotel he noticed that his right front light was broken, but that did not at the time impress him as being of importance (R. 342). At one point, accused said, "Jesus, I do not remember a thing" (R. 346). Captain Ellefson told accused that he (accused) was in a "jam" and that it would be best for him to tell the officer all he knew, without holding back anything (R. 340). He did not order accused to answer the questions of the examining officers and did not know whether accused answered any further questions after he talked to him (R. 345). He saw accused at the hospital between 1:30 and 2:00 the same morning and at that time, accused walked normally (R. 343).

Five majors and one second lieutenant, all of whom had known accused for from one to two years, testified that accused's reputation as an officer and a gentleman was good (R. 295,309,347,349,351).

The wife of the accused, who is employed at the Rationing Board in Yuma, Arizona, worked until approximately 10:00 o'clock on the night of 2 November 1944, as it was her custom to work every Thursday night until that hour. When she arrived at the Lee Hotel from work that night, she observed policemen examining the car which belonged to her and her husband. It was then approximately 10:15 and, at their request, she went with two policemen and a member of the military police to the room in the Lee Hotel where she and her husband lived. She knocked on the door and after her husband had said, "Come in," she stated to him, "There are some gentlemen here for you." At that time the accused was sitting on the side of the bed in his underwear and immediately after they walked into the room, he started putting on his shoes. Thereupon one of the policemen asked him "Were you driving the car tonight?" and the accused replied, "Yes." She was positive that the officer did not say, "Were you the man that was driving the car that hit the boy on the Mesa?" (R. 406-409). The accused continued dressing and she handed him his trousers. In endeavoring to put them on he stumbled and the police assisted him in sitting down. The accused then put on his shirt and tie and after he had been given permission to say a few words to her privately there, the first words he said were, "Do you know what this is all about and what the hell has happened?" She responded by saying, "Tracy, don't you know what you have done," and he replied, "All I know is I came in and doped myself up and I took one of those darn pills and all I want to do now is lie down on that bed and go to sleep." After telling her to keep her chin up and that he would be all right, he left with the police officers (R. 409-412). She had seen the accused drunk on previous occasions and in her opinion he was not drunk that night, as he did not stagger. She knew that there were some sleeping pills in the room, which belonged to her (R. 412). On cross-examination she stated that she did not know about the details of the accident at the time she talked with her husband in the hotel room; that she was told by one of the policemen that from the looks of the car there had been an accident, but she did not see the damage that had been done to the car until after the accused had left with the policemen (R. 413, 414).

The accused, after being advised of his rights and privileges as a witness, was sworn and testified as a witness in his own behalf. His home is in Denver, Colorado, where he enlisted in the military service on 9 February 1942. He served at Lowry Field as an enlisted man until 17 September 1942 when he was sent to Officers' Candidate School at Miami Beach, Florida. He was commissioned 20 January 1943, and after reporting to the Western Flying Training Command at Santa Ana, California, he was sent to Yuma Army Air Field, Arizona, where he has been stationed since that time. He has been on duty as Assistant Post Mess Officer in charge of the consolidated mess, and also in charge of smaller messes which are used to mess transition pilots. He has received one rating of excellent and two ratings of superior during his tour of duty at Yuma Army Air Field (R. 357,358, Def. Ex. B). He and his wife have lived together in Yuma since the month of March 1943, and had just moved to the Lee Hotel about the 1st of November 1944 (R. 359). He attended the party held at the medical BOQ on the evening of 2 November 1944, arriving

there at about the hour of 5:45 P.M. Food was served at the party as well as Bourbon and cold beer. He ate some of the food from time to time over a period of approximately one hour and had possibly six or seven drinks in the form of highballs made with Bourbon and ginger ale. Such drinks were had throughout the evening until he left the party to go to the Officers' Club at approximately 8:30 that night (R. 360,361). At the Officers' Club he had two mixed drinks which he poured from a bottle belonging to another officer. Such drinks were made in standard highball glasses and he did not believe that he poured more than an ounce or an ounce and a half in each drink. While there he engaged in a dice game with other officers for a short while. He also had a conversation with another Lieutenant at the Club concerning an incident which had occurred at a formal dance at the Officers' Club about two weeks previously relative to a girl that the other officer had been with at the dance. During the conversation with such officer the accused understood what they were discussing and did not feel that he was drunk; in fact, he "didn't have any particular feeling on the subject at that time" (R. 363,364). Thereafter, he left the Officers' Club in his car and drove alone toward Yuma, Arizona. He had no definite recollection of going through the gate when he left the Field, but thought that he stopped as he went through, as it was required that cars stop at the gate (R. 364). He had no difficulty in driving his car and proceeded on Highway 80 to Orange Avenue, thence down Orange Avenue to Main Street to the Lee Hotel. As he was travelling along Highway 80 he passed near a carnival and shortly thereafter lighted a cigarette. Just as the match touched the cigarette there was a sharp loud crack. He was startled and noticed that the windshield of his car was cracked. He believed that he more or less instinctively put on the brakes, as it immediately occurred to him that "someone must have thrown a rock or a rock had been kicked up there by a passing car." He thought something was thrown against the windshield (R. 375). He heard only one sound and it was a very clear crack "almost like you would clap your hands together loudly." At that time he had the radio on and did not recall hearing any noise of metal nor any other sound "like cars sound when they go together." He looked to the left and right and over his shoulder out of the back window but could see nothing (R. 366). He could not distinctly recall speeding up, but shortly thereafter he "got a little angry" as he thought someone had maliciously thrown a rock or something against his car. He did not notice anything wrong with his car lights and was positive he was driving on the right lane of traffic where cars ordinarily travel on the highway (R. 367). He proceeded directly to the hotel after the accident at an estimated speed of 35 miles per hour, although he believed that he had been going a little faster than that before reaching the carnival (R. 368). When he parked his car after driving to the hotel he did not go around and look at it, but went immediately into the hotel leaving his car unlocked (R. 369). As he entered his room he turned on the lights and began undressing. At that time he had a very bad cold, for which he had received treatment at the infirmary on the Field a few days previously. One of the medical enlisted men gave him some medicine which he had been taking (R. 370,371). After he had prepared for bed, he took some cough medicine and took a sleeping pill because he hadn't slept particularly well the night before (R. 371). The

sleeping pill or capsule which he took was pinkish brown in color and after taking the medicine he retired (R. 372). He turned off one of the lights and soon fell asleep (R. 374). The next that he recalled was when he saw some people in the room, but he could not remember hearing a knock on the door. However, he recalled getting up and sitting on the edge of the bed. At that time his wife made some statement to him to the effect that the others present wanted to see him. He could not remember telling them that he had had an accident that night in which he had run over a boy (R. 375, 376). He did recall that he spoke with his wife briefly before leaving the hotel room after the police officers had stepped outside of the door in the hallway (R. 376,377). He had no definite recollection of leaving the hotel with the police officers, but thought that he rode in a jeep with the military police. He vaguely remembered standing at the desk in the Sheriff's office, but did not recall how long he stood there before he was taken into another room. During this time he was trying to get his thoughts collected "wondering what was going on, why I was down there, what had happened." He was "awful groggy" and believed that he fell asleep again (R. 377,378). At that time he seemed to want to do only one thing and that was to sleep. While he was questioned by Captain Eldridge he was unable to get his mind organized and "was on a tangent all the time with (his) own thought" wondering why he was there and what had happened. He remembered asking several people before the questioning began what had happened and why he was there, to which he received no answer. He had no clear recollection of being told about the 24th Article of War, but did remember when Colonel Anderson came in, as the others stood up when he arrived. He also remembered hearing Colonel Anderson ask Captain Eldridge whether the 24th Article of War had been read to him and that Captain Eldridge answered in the affirmative (R. 379-383).

On cross-examination, the accused stated that while he did not count the drinks he had at the party the night of the accident, he was positive that he did not have more than six or seven; that he did not use a jigger in making the drinks, but poured them out of the bottle (R. 383-385). Just prior to the accident on Highway 80 he passed a carnival and he was in the act of lighting a cigarette when he heard a crack against the windshield of his car. Before that time he had been looking straight ahead down the road and did not see anything on it. He heard a noise and saw a cracked windshield, but did not see any object strike the car. It was a sharp crack and while he was curious as to what had happened, he did not stop his car to ascertain the cause as he thought that somebody had maliciously thrown a rock at his car. It never entered his mind to report the matter to the police (R. 386-388). Upon being asked whether he was under the influence of alcohol to any extent at that time, the accused stated that he was, but that he had control of his faculties and knew what he was doing (R. 389). After arriving at the Lee Hotel and parking his car, he did not notice anything wrong with the fender of his car and could not recall looking at the car with the police after they had come for him at the Lee Hotel (R. 391). While he had only a vague recollection of what transpired after he reached the hotel and took

a sleeping tablet, he remembered that he was given a sobriety test by two officers at the Sheriff's office (R. 397). In his opinion he was sober at the time he was questioned by Captain Eldridge (R. 397-399). On being questioned by the court, the accused stated that he was accustomed to drinking socially, largely on weekends rather than during the week. While he did not measure the amount of Bourbon that he put in each drink which he had at the party on 2 November 1944, it was his opinion that the drinks contained from one to one and one-fourth ounces of liquor (R. 401,402). At the time of the collision he felt no change in the speed of the car, and although he was lighting a cigarette at the time, he did not recall moving the steering wheel at that particular time so as to cause the car to move from the line on which it was travelling. Being an habitual smoker, he had often lighted a cigarette while driving. In doing so, he held the steering wheel, together with the match case, with his left hand and struck the match and lighted the cigarette with his right hand (R. 403,404). The accident occurred after he had driven approximately 250 yards beyond where the carnival was being held (R. 404). After passing the carnival he did not observe any people along the highway (R. 404).

Medical testimony was adduced by the defense to the effect that "so-called sleeping powder" belongs to a group of drugs called "barbitates" which includes seconal, nebotal, luminal and phenobarbital; that they act upon the higher nerve centers, producing sleep; that sedatives in pinkish brown capsules usually indicate that it is seconal which is a quick acting sedative or hyponotic (R. 415,419). The reaction to seconal varies with different individuals as "some of them will be in a stupor and awaken three hours afterwards, and some of them only a half an hour" (R. 415,416). The drinking of whiskey before taking the drug could have the effect of quickening reaction thereto, and visible effects might result within 20 to 30 minutes (R. 419). Persons under the effects of seconal might stagger and be confused upon being awakened suddenly. Also their speech would probably be slurred and they would be lacking in coordination (R. 420). An emotional shock might be sufficient to "throw off" the effects of the drug if too great a quantity of it had not been taken (R. 421).

7. Charge I and its Specification: Involuntary manslaughter in violation of Article of War 93.

The Manual for Courts-Martial, 1928 (par. 149a) defines manslaughter and involuntary manslaughter as follows:

> "Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary."
>
> "Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law."

It is thus apparent that there are two separate and distinct ways in which involuntary manslaughter may be committed, (1) by unintentionally causing the death of another while engaged in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, and (2) by unintentionally causing the death of another by culpable negligence while performing a lawful act, or in performing an act required by law.

In the instant case, the specification alleges merely that accused "did * * * wrongfully, unlawfully, and feloniously kill Charles Thomas Terry by negligently and recklessly driving an automobile onto and against the said Charles Thomas Terry." It does not purport to allege the offense of involuntary manslaughter committed by causing death while engaged in the commission of an unlawful act not amounting to a felony, nor is it legally sufficient to have put accused upon notice that he would be called upon to defend against such a theory. The specification is only legally sufficient to charge the offense of involuntary manslaughter committed in the second of the two ways set out above, i.e., by causing death as the result of culpable negligence while engaged in the doing of a lawful act, and it is upon this theory that the conviction must be sustained, if at all. So, even if it be assumed for the sake of argument that at the time of striking deceased accused was driving his automobile upon a public highway while intoxicated, an unlawful act not amounting to a felony under the laws of Arizona, such fact is without significance in passing upon his guilt or innocence, except in so far as driving while intoxicated may be considered as constituting or tending to establish "culpable negligence" on his part, as a proximate cause of deceased's death. This is true notwithstanding Specification 1 of Charge II, of which accused was also found guilty, having reference to the same occasion, charges accused with the offense of driving his automobile upon a public highway while intoxicated. Each specification must be complete within itself, and deficiencies cannot be supplied by the allegations contained in some other specification (CM 202359, Turner, 6 B.R. 87 (91-92); Winthrop's Military Law and Precedents, 2d Ed., Reprint 1920, par. 217, p. 150).

In order that the evidence may be legally sufficient to sustain the finding of guilty of the specification as drawn, two things must appear, viz., (1) that accused was guilty of "culpable negligence" at the time and place in question, and (2) that such negligence was a proximate cause of deceased's death. And it has been heretofore held by the Board of Review that the term "culpable negligence," as used in the definition of involuntary manslaughter, means a higher degree of negligence than mere simple negligence. It was stated in CM 240043, Vislan, 25 B.R. 349, at 352:

> "Simple negligence is not sufficient to convert a homicide into involuntary manslaughter; there must be criminal or gross (culpable) negligence."

(See also CM 202359, Turner, 6 B.R. 87.) Common reason dictates that in

order for one's negligence to subject one to criminal responsibility for a homicide, such negligence must be a proximate cause of the death. The necessity that the evidence establish this causal connection between an accused's negligent act or conduct and the death constituting the basis of the prosecution was expressly recognized by The Judge Advocate General in his dissent from the opinion of the Board of Review in CM 202359, Turner, supra, which dissent became the law of that case. This principle of law has been uniformly recognized by American civil authority (99 A.L.R. 772; 26 American Jurisprudence, Sec. 215, p. 302).

In the case now under consideration there is ample evidence to support the inference that at the time his automobile struck the deceased the accused was in an advanced state of intoxication. The accused himself estimated that during the four hours immediately preceding the homicide he drank from seven to ten drinks of whiskey. Two of these drinks were taken within a few minutes of each other just before he left the Officers' Club. One witness who saw him at the club only a few minutes before accused departed the air field for Yuma expressed the opinion that accused was then drunk, and others stated that even before he took his last two drinks, it was obvious that he had been drinking. When taken into custody a few minutes after the homicide, and for a considerable time thereafter, accused unquestionably was under the influence of some stimulant that seriously impaired the exercise of his mental and physical faculties. He would have it believed that his condition at this time, i.e., after the homicide, resulted from his having taken a sleep inducing drug after arriving at the hotel, but there was no evidence except his own testimony to support this defensive theory, and the court may well have rejected his testimony and have inferred that his condition resulted solely from the whiskey he drank before departing the air field. These enumerated facts and circumstances were sufficient within themselves reasonably to justify the inference of intoxication; and if credence be given, as apparently was done by the court, to accused's claim that he did not realize at the time of the collision that he had struck a human being, then clearly the court was warranted in inferring that at the time of the fatal injury accused was not only highly intoxicated but that he was not keeping a proper lookout to discover the presence of the deceased upon or near the highway. In view of the evident force of the impact and of the fact that the deceased was thrown upon the hood of the car and against the windshield, almost directly in front of where accused was sitting, it is inconceivable that, even though drunk, accused should have failed to see the deceased if he was keeping a proper lookout; and it is likewise inconceivable that, even though not keeping a proper lookout, he should have failed to comprehend and realize with what he had collided, unless he was virtually bereft of his mental faculties. The inference that accused was not keeping a proper lookout is further aided by his own testimony that he was engaged in lighting a cigarette at the moment of impact. On the other hand, if it be inferred that accused did know that he had struck the deceased, then his failure to stop and render aid may be considered as a circumstance tending to show guilty knowledge that the homicide resulted from his own fault (CM 236138, Steele, 22 B.R. 313; State v. Busby (Utah) 131 P(2d) 510, 144 A.L.R. 1468).

The homicide occurred on a public highway, where the deceased had a right to be and where, under the circumstances, the accused reasonably should have foreseen that he might be. Unquestionably accused owed the deceased the duty of exercising reasonable care to avoid injuring him, and reasonably should have foreseen the homicide as a natural and probable consequence of operating his automobile in a reckless manner. Under these circumstances, and the evidence being legally sufficient, as already stated, to support inferences both that accused was highly intoxicated and that he failed to keep a proper lookout, the court was warranted in finding beyond reasonable doubt that accused evidenced a reckless disregard for the rights of others amounting to culpable negligence and that such culpable negligence was the proximate or one of the proximate causes of the fatal injury. While the evidence fails to show that any fixed speed limit was applicable in the district where the homicide occurred, it was the right and duty of the court to consider the speed at which accused was driving as bearing upon the question of whether or not he was negligent in one or both of the respects already mentioned, as well as for the purpose of determining whether the rate of speed was itself of such dangerous and reckless character as to amount to culpable or criminal negligence under the attending circumstances. In arriving at the rate of speed, the court was not bound to accept the estimates of the witnesses who observed the automobile at the time of the collision, but was at liberty to draw such inferences in regard thereto as all of the attending facts and circumstances reasonably warranted.

It is true that the precise cause of the collision was not observed by any witness and that it cannot be determined from the evidence with mathematical certainty, but this does not alter our opinion that under all the facts and circumstances the court was warranted in inferring beyond reasonable doubt that accused's negligence was a proximate cause of deceased's death. No other cause is affirmatively suggested by the record. The only possible theory that could serve to refute the inference that accused's negligence contributed to cause the fatal injury is the bare speculation that the deceased may have negligently or willfully stepped in front of the automobile. Mere contributory negligence on the part of the deceased would not operate as a defense; his negligence, if any, in order to relieve the accused, would have had to be the sole proximate cause of death (CM 217590, Lamb, 11 B.R. 275, at 282-283). The bare possibility, without evidence to suggest it, that the deceased may by his own willful or negligent conduct have been solely responsible for his death does not impress us as being a reasonable hypothesis under the circumstances. If, either because of his drunken condition or because of his failure to keep a lookout, the accused, as he claimed, failed to see the deceased, surely it is logical to infer that such failure contributed to the collision, and it strikes us that it would be illogical to contend otherwise. And again we call attention to the fact that if the accused did know that he had struck the deceased and proceeded away from the scene without stopping to render aid, guilty knowledge that his own negligence had caused the collision may be inferred.

In civil actions for damage for death caused by motor vehicles, where negligence on the part of the defendant is shown and the question of causation arises under circumstances similar to those in this case, application has frequently been made of what is termed the presumption of fact that

a person acts for his own safety (144 A.L.R. 1477). Application was also made of this presumption in the criminal case of State v. Busby, supra, in which the fact situation before the court was much the same as that presented by the record in this case, and it was there held sufficient to support the inference that the deceased did not step or jump in front of the car. We quote the following from that opinion:

> "There is a presumption of fact which is already a part of our common law, that a person acts for his own safety. To repeat: The jury could infer from the evidence that defendant was under the influence of liquor at the time of the impact. It could further infer from his conduct that he was so badly under the influence of liquor that driving in that condition was itself a lack of due regard for the safety of others and that he was, therefore, guilty of criminal negligence. So it could conclude from the presumption that a man acts for his own safety, that the decedent did not step or jump in front of the car. This presumption should at least serve the purpose of warding off the effect of a legal situation in which a conjecture that the cause of the accident was the negligence of decedent, is equally balanced with a conjecture that such negligence, if it existed, was not a cause of the accident if indeed under the circumstances of this case we can say that without such presumption the mind could be in equipoise in that manner. Thus the presumption that a man acts with regard to his own safety having performed the office of negativing the conjecture that the decedent himself was the cause of the accident, the only other deduction is that it was caused by the defendant and if caused through his criminal negligence which as we have seen could be inferred, the jury could find him guilty. If a man so blind as not to be able to see pedestrians on the crosswalk kills one, are we to say that the jury cannot infer that defendant's condition was the cause of the accident because the jury would have to speculate that the deceased may have negligently stepped in front of the car? The above conclusion follows from a finding that the defendant failed to see the pedestrian and was unaware that he had hit him, a fact situation from which, with the evidence of drinking and intoxication, it could be inferred that defendant drove with a marked disregard for the safety of others."

In speaking of the rule that an accused's guilt must be established by evidence beyond a reasonable doubt, the Manual for Courts-Martial (par. 78a, M.C.M., 1928) has the following to say:

> "* * * By 'reasonable doubt' is intended not fanciful or ingenious doubt or conjecture but substantial, honest, conscientious doubt suggested by the material evidence, or lack of it, in the case. It is an honest, substantial misgiving,

generated by insufficiency of proof. It is not a captious doubt, nor a doubt suggested by the ingenuity of counsel or court and unwarranted by the testimony; nor a doubt born of a merciful inclination to permit the defendant to escape conviction; nor a doubt prompted by sympathy for him or those connected with him. The meaning of the rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt; what is required being not an absolute or mathematical but a moral certainty. A court-martial which acquits because, upon the evidence, the accused may possibly be innocent falls as far short of appreciating the proper amount of proof required in a criminal trial as does a court which convicts on a mere probability that the accused is guilty."

When tested by this rule, we are of the opinion that the record in the instant case is legally sufficient to support the finding of guilty of the offense of involuntary manslaughter, in violation of Article of War 93.

Specification 1 of Charge II. The offense alleged against accused by this specification is that of driving his automobile upon a public highway in the State of Arizona while under the influence of intoxicating liquor, in violation of Article of War 96. Under the laws of Arizona, the offense is a misdemeanor, punishable by fine and confinement in jail for not exceeding 90 days (Sec. 66-402, Arizona Code, 1939 Ed.). The record clearly establishes the material allegations of the specification. Not only did accused violate the laws of Arizona, but his conduct in the respects mentioned was inherently of a nature to bring discredit upon the military service, and therefore in violation of Article of War 96.

At the time the prosecution rested its case, there was before the court substantial evidence which, together with reasonable inferences to be drawn therefrom, fairly tended to establish every essential element of the respective offenses charged. The motions by defense counsel for findings of not guilty were therefore properly denied (par. 71d, M.C.M., 1928).

No error was committed by receiving into evidence the statement made by accused the night of the homicide. The statement did not amount to a confession of guilt of any offense charged. Such portions of it as were not exculpatory in nature amounted to nothing more than admissions against interest. The statement was therefore admissible in evidence without any showing of its voluntary nature (par. 14b, M.C.M., 1928; CM 227793, Anderson, 15 B.R. 365). By disposing of the question in this manner, we do not intend to imply that we are of the opinion that the statement was made involuntarily, because such is not the case. Furthermore, it does not appear that accused could have been injuriously affected in any substantial right by the introduction of his statement, because such elements of the offenses as his admissions might have aided in establishing were clearly established by other evidence of record.

8. War Department records disclose that this officer is 31 years of age and married. He is a high school graduate and also attended St. Bede's College for three years. He was an assistant steward in the Brown Palace Hotel, Denver, Colorado, prior to entering the military service. He entered the Air Corps 2 February 1942 and served as an enlisted man until 20 January 1943, at which time, having attended Officer Training School, AAFTTC, he was commissioned as a Second Lieutenant, Army of the United States.

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

_____, Judge Advocate.

_____, Judge Advocate.

(Dissent) _____, Judge Advocate.

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

SPJGK-CM 274812

7 MAY 1945

UNITED STATES v. Second Lieutenant MEL J. TRACY (O-573602), Air Corps.	)	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Yuma, Arizona, 7, 8, 9 December 1944. Dismissal total forfeitures, and confinement for one year and six months.

DISSENTING OPINION by
HERMANN MOYSE, Judge Advocate

I concur in the opinion of the majority of the Board that the record of trial is legally sufficient to support the finding of guilty of Charge II and its Specification and the sentence, but I cannot concur in its finding that the record of trial is legally sufficient to support the finding of guilty of Charge I and its Specification.

I recognize and unqualifiedly approve the principle that a crime may be established by circumstantial evidence or inferences from established facts which exclude any "fair and rational hypothesis" except that of guilt and which negative guilt and that "absolute or mathematical" certainty is not required; but according to my analysis, the opinion of the majority of the Board, which I know was painstakingly prepared after most careful and conscientious study and consideration and after extended discussion among the members of the principles involved, goes far beyond this rule. I am fearful that if the opinion of the majority is approved a rule of law in the administration of military justice will be set up that will subject to any form of punishment, from a simple reprimand to deprivation of life itself, one charged with an offense upon mere surmise or conjecture rather than upon direct or circumstantial evidence or proper and legally justified inferences from established facts. In short, in my opinion the views of the majority violate a salutary principle, consistently upheld in the administration of military justice, which should be strictly adhered to, that "conviction by courts-martial may rest on inferences, but may not be based on conjecture" (CM 233766, Nicholl, 20 B.R. 121, II Bull JAG 238). As pointed out in the opinion cited above, the Board of Review has frequently quoted with approval the following extract from the decision in Buntain vs. State, 15 Tex. Appeals 490:

> "We must look alone to the evidence as we find it in the record, and applying it to the measure of the law, ascertain whether or not it fills that measure. It will not do to sustain convictions based upon suspicions or inadequate testimony. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens".

Because I interpret the opinion of the majority as setting up an undesirable precedent which, I believe, is contrary to both civil and military jurisprudence and which may adversely affect the rights of military personnel placed on trial for every type of offense, I am compelled regretfully but nevertheless emphatically to give expression to this dissent.

The opinion rendered by the majority of the Board contains an admirable statement of all established facts, a clear definition of involuntary manslaughter, and a concise exposition of the distinction between involuntary manslaughter occurring during the commission of an unlawful act not amounting to a felony and that resulting from culpable negligence while performing a lawful act. The majority very properly emphasizes that the offense charged in the present case falls within the latter category, and that accused's conviction may be sustained, if at all, only upon the proof of culpable negligence on his part which was the proximate cause or one of the proximate causes of the homicide. In short, even under the opinion of the majority, while accused's intoxication, if established, may be considered as an element in determining accused's culpable negligence, accused may not be convicted merely on proof that the unfortunate homicide occurred while accused was violating a criminal statute of the State of Arizona, which prohibits the operation of a motor vehicle by one under the influence of intoxicating liquor. That this conclusion, about which there is no disagreement among the members of the board, is correct, is significantly evidenced by the fact that there were physically stricken from the specification, charging manslaughter, after its preparation but some time prior to the service of the charges on the accused, the words "while under the influence of intoxicating liquor", the retention of which might have rendered the extremely vague specification susceptible of the interpretation that there was an intention to charge the commission of involuntary manslaughter by accused while committing an unlawful act not amounting to a felony under the laws of Arizona. I likewise agree with the definition of "culpable negligence" as presented in the majority opinion, and with the view that if it was established that accused was culpably negligent and that his culpable negligence was one of the proximate causes of the homicide, the fact that deceased was guilty of contributory negligence would not bar conviction. I am also in accord with the majority in its view that the record of trial is legally sufficient to justify the conclusion that accused was under the influence of intoxicating liquor at the time of the accident (although I do not believe that the record justifies

the conclusion that accused was drunk in the common acceptance of the term, in view of the preponderance of testimony to the contrary, the fact that accused drove a considerable distance without any intimation, other than from the occurrence of the accident, that he did not have his car under control, and his ability to park his car properly), and that both this fact and the fact that he lighted a cigarette while driving, although a common custom, may and should be considered as negligence. Far from condoning, I condemn these failures on the part of accused properly to fulfill his obligation to the public while driving an automobile. My position is that there is not a scintilla of evidence to show nor a single fact testified to from which the inference may properly or legally be drawn that the disregard of an obligation which the accused owed the public to refrain from driving while under the influence of liquor and to keep a constant lookout was the proximate cause or one of the proximate causes of the deplorable tragedy. Nor is there the slightest trace of evidence that accused drove his car off the paved portion of the highway on to the graveled shoulder, thereby striking the unfortunate young victim of the accident, as apparently urged by the prosecution. If the record contained any facts from which it could properly and legally be inferred that the deceased had been walking on the pavement for a sufficiently long period before the accident to permit a sober person, driving in a careful manner, to have seen him in time to prevent an accident, or from which it could be inferred that accused actually drove off the pavement, I could and would agree with the majority. But the physical facts, as presented by the record, and the testimony of the witnesses negative any such inferences, leaving, as I see it, mere conjecture or surmise as the basis for the conclusions reached by the trial court and the majority of the board.

The most convincing proof of this statement on my part is that a careful examination of the exhaustive and painstaking opinion rendered by the majority fails to disclose the conclusion of the concurring members as to how the tragedy occurred. Nor does the lengthy review by the Staff Judge Advocate throw any light on this vital feature of the case. Naturally, there is no way to determine the line of reasoning followed by the court in reaching its verdict. The net result is that we are presented with a finding, as approved by the majority of the Board of Review, that by reason of accused's intoxicated condition and his failure to keep a proper lookout he in some unknown manner drove his automobile "on to and against" the deceased, either on the paved portion of the road or on the graveled shoulder, thereby causing his death.

If an intentional homicide were charged, the deficiency which I have pointed out would be of little if any importance or moment. One is presumed to intend and is liable for the consequences of one's deliberate acts. In the present instance, however, the accused is charged with an unintentional offense, one alleged to have been committed through culpable carelessness or negligence. How is it possible to determine accused's responsibility when there is lacking any conclusion as to the manner in which death was caused, based either on established facts or on inferences from established facts?

"We must look alone to the evidence as we find it in the record*** It will not do to sustain convictions based upon suspicions or inadequate testimony". Let us apply this principle, previously quoted, to the present record. Deceased, a young civilian of about sixteen years of age, not shown by the record to be suffering from any mental or physical defects or to be under the influence of liquor, apparently had been walking north on the graveled shoulder on the eastern side of a highway, that is, with the traffic, accompanied by an enlisted man, Corporal Hoffman. The paved portion of the highway was approximately eighteen feet wide, and the eastern shoulder was composed of firmly packed gravel, extending about ten to fifteen feet from the eastern edge of the paved portion to the adjacent building fronts and property lines. Just preceding the accident Corporal Hoffman was about three feet east of the pavement, on the shoulder. Deceased was about six or eight inches to his left, and consequently was closer to the paved section. Corporal Hoffman was sure that deceased was quite near him immediately preceding the accident, for they had just had a cigarette together and deceased had just finished saying something. Corporal Hoffman did not hear the approaching car, did not see it approaching, and did not know that it had passed him by when it struck the deceased. Corporal Hoffman was momentarily engaged in placing cigarettes in a package when he heard a bang, and, looking up, discovered that deceased had disappeared. For all he knew, he stated, deceased would have stepped out on the pavement. The automobile did not touch Corporal Hoffman, did not make him jump, and, as far as he knew, did not even come close to him. In short, far from raising a presumption or creating an inference that accused's car drove off the paved section, the testimony of Corporal Hoffman establishes that this could not have happened, for it would strain the imagination to conclude that one walking merely three feet from the pavement would not feel the effects of the passage of a car, proceeding between thirty-five and forty miles an hour, had that car been driven off the pavement sufficiently close to him to strike a companion who a very few moments before had been walking six inches from him and between him and the pavement. Moreover, the only testimony in the record with respect to the path of the car at least fails to suggest, if it does not definitely negative, the speculation, conjecture or surmise that the car left the paved section. Corporal Burchard, another enlisted man, walking on the west side of the road, almost abreast of Corporal Hoffman and deceased, saw the car approaching from the south, on the paved section east of the center line. At that time it was about one hundred fifty yards from him. When he saw it a few seconds after the accident (probably not more than six or seven, assuming the car continued at the rate of thirty-five to forty miles an hour, as testified to by him), it was still on the pavement. Corporal Hoffman similarly placed the car on the pavement when he first saw it, after the accident, going in a straight line and not swerving. But, in addition, there are the physical facts to be considered. Deceased was undoubtedly struck on the left leg between the ankle and the knee, nearer the ankle, and the point of contact with the automobile was unquestionably at least eighteen inches to the left of the extreme right side of the car, (that is, at least eighteen inches to the left of that portion of the car which was closest to the graveled shoulder) where was located a piece of metal, about eight or ten inches long, designed normally to fit and be clasped or welded on to the bumper so as to stand perpendicularly over the bolt uniting the bumper to its support. This was the

piece of metal that was knocked off. It may safely be assumed that deceased, apparently an average individual, measured about eighteen inches from shoulder to shoulder. Consequently if accused had driven off the pavement and struck deceased on his left leg with a portion of his car that was eighteen inches from the right side, he would have passed within a foot or a foot and a half of Corporal Hoffman. Yet the latter did not even realize that a car had passed by him! Further there were no automobile tracks on the shoulder where the accident happened, although it is clearly evident from the picture offered by the prosecution as its Exhibit 1 that the graveled shoulder was of such a nature as to show tracks, a number being discernible in that picture. Finally, the testimony shows that parts of the glass on the right headlight, unquestionably shattered by contact with the body of deceased after it had struck the bumper, were scattered about equidistant on and off the pavement from the principal point of accumulation, WHICH WAS ON THE PAVEMENT. I believe, therefore, that I am not dealing in conjecture when I state that the record shows that accused was not struck while on the graveled shoulder.

As I see it, then, deceased must have come in contact with the car on the paved section of the highway. THERE IS NOT ONE WORD IN THE RECORD THAT DECEASED HAD BEEN WALKING ON THE PAVED SECTION, and, certainly the theory of presumption of safety, quoted and relied upon in part by the majority of the Board to sustain its views and commented on hereinafter (assuming that, as applied by the majority, it is to be accepted as a sound rule of law) negatives the presence of the deceased on the pavement. As found by the majority, the road on which deceased was traveling was normally a "heavily traveled" one, and at this particular period, could logically be expected to have more than normal traffic by reason of the presence of a carnival two blocks south of the scene of the accident, although there appears actually to have been little traffic at the time deceased was struck. It would certainly be violative of the presumption of safety rule to infer that a young man, possessing normal mental faculties, would walk on the paved portion of a road at night <u>with</u> the traffic, that is, with cars approaching him on his side of the road from the rear, when there was a ten to fifteen foot graveled area adjoining it on which he could travel in safety. Nevertheless, the record, in my opinion, is conclusive that the contact actually took place on the paved section. Consequently, since there is nothing in the record to indicate that accused had been walking on the paved section and a presumption that he was not deliberately subjecting himself to the dangers of traffic by walking thereon, the only logical conclusion is that accused must have suddenly stepped out or swerved over into the road, in the path of the oncoming car. It is common knowledge that every year numerous pedestrians are killed by being struck by motor vehicles without any fault on the part of the driver. Despite the "presumption of safety", literally hundreds of people daily gamble with their lives by trying to beat oncoming vehicles across streets and highways and in violating traffic rules, laid down for their protection. I doubt whether there are many operators

of automobiles who have not seen pedestrians walk, sway or swerve into a road, without any warning whatsoever, and without any apparent attention to approaching traffic. As I see the picture, it is not a surmise but a logical conclusion from the record of trial that this is exactly what accused did. Sober or drunk, a driver is certainly not expected to anticipate that a pedestrian, with a ten to fifteen foot space in which to walk comfortably, NOT AT A CROSSING, is suddenly going to appear in his path. Yet, (and again I must call attention to the previously quoted views of this office, "We must look alone to the evidence as we find it in the record*** It will not do to sustain convictions based on suspicions or inadequate testimony") based on the only available evidence we have, supplemented by the physical facts, that is exactly what must have taken place. Only a very few moments before the impact, deceased was walking within six or eight inches of Corporal Hoffman, who was three feet off the pavement. Without attempting to determine exactly what took place, that is, whether deceased walked, swerved or swayed onto the paved section, the location of his injury, that is, on the left leg between the ankle and the knee, suggests very forcefully that, hearing the approach of accused's car and <u>without realizing its proximity</u>, deceased turned around to hail it and in doing so stepped out into the road, where he was struck on his left leg, which would naturally be turned toward the approaching car. Obviously, the situation which I have depicted is a mere conclusion, but, as I see it, it is based on the natural inferences from the evidence that was adduced and the physical facts that were established. As opposed to these views there is merely the dictum of the majority that since accused was drunk and did not see deceased, he was guilty of <u>culpable negligence</u> in driving his car "on to and against" the deceased in some unknown manner, at some unknown spot, and that this alleged culpable negligence was of necessity the proximate cause or one of the proximate causes of the accident. According to my analysis the majority of the Board unintentionally has failed to pass upon the vital question presented, and, with a full recognition of the fact that the law requires that the culpable negligence of the driver of an automobile, involved in a fatal accident, be the proximate cause or one of the proximate causes of the homicide, relies upon accused's lack of sobriety, and, possibly, his striking a match with which to light a cigarette while driving, to establish that necessarily, in the absence of proof to the contrary, and without any proof as to how the tragedy occurred, accused was guilty of culpable negligence which was the proximate cause of the tragedy.

In support of their legal conclusions, the majority quotes the succinctly and admirably expressed definition of "reasonable doubt" as given in the Manual for Courts-Martial. As stated in the beginning of this dissent, I fully agree with this expression of the law. But in defining what is <u>not</u> "reasonable doubt" the draughtsmen of the Manual likewise, in my opinion, laid down what is <u>not</u> reasonable basis for a conviction. The Manual states in part:

> "It [reasonable doubt] is not a captious doubt, nor a doubt suggested by the ingenuity of counsel or court and unwarranted by the testimony; nor a doubt born of a merciful inclination to permit the defendant to escape conviction; nor a doubt prompted by sympathy for him ***."

Paraphrasing this exposition of what is not "reasonable doubt" I believe I am justified in stating as an equally applicable legal principle that conviction should not rest upon some captious conclusion or conclusion suggested by the ingenuity of the prosecuting attorney or court and unwarranted by the testimony, nor a conclusion prompted unintentionally by a prejudice against an accused because of his guilt of another act which offends good morals and violates a sound code of proper conduct.

It is well, too, to consider the full import of the final sentence of the paragraph, dealing with reasonable doubt, quoted at page 29 of the majority opinion:

> "A court martial which acquits because, upon the evidence, the accused may possibly be innocent falls as short of appreciating the proper amount of proof required in a criminal case as does a court which convicts on a mere probability that the accused is guilty."

In unmistakable language, courts are adjured not only to convict where there is only a "possibility" that the accused is innocent, but to acquit where the record of trial shows that there is a "mere probability" that the accused is guilty. I respectfully submit that in the present case this salutary direction has been unwittingly disregarded and that accused is being convicted on a mere possibility that he was guilty of culpable negligence, which caused or was one of the contributing causes of the accident.

These same legal problems were discussed in CM 202359, Turner, 6 B.R. 87, 127). The situation was strikingly like that presented in the case now under consideration. The accused was found guilty of the same offenses with which the accused herein was charged, namely, the operation of an automobile while under the influence of intoxicating liquor, failure to stop and render assistance, and involuntary manslaughter. His conviction was sustained by the Board of Review in a lengthy opinion which considered the factual and legal aspects of the case in minute detail. The Judge Advocate General concurred in the finding that the accused had operated an automobile while under the influence of intoxicating liquor, but disagreed with the other two findings of guilty. In finding the record of trial legally insufficient to support the finding of guilty of involuntary manslaughter, he applied the identical principles which I have sought to apply in the present case. The record was duly submitted to the Secretary of War and by him laid before the President of the United States, who disapproved the findings of guilty of involuntary manslaughter and failure

to stop and render assistance, and approved the finding of guilty of operating an automobile while under the influence of intoxicating liquor, all as recommended by The Judge Advocate General.

While the complete views of The Judge Advocate General are worthy of consideration, the following excerpts are particularly pertinent:

"5. Even if the evidence clearly established that the man struck by accused's automobile was Private Rutan still, in my opinion, it would for another reason fall short of proving the charge of manslaughter.

"I agree with what apparently is the view of the Board of Review that to sustain the conviction of manslaughter in this case the evidence must establish beyond reasonable doubt that the injuries, which resulted in death, were caused by culpable negligence on the part of the accused, or, as it is sometimes expressed, by his reckless, wanton conduct showing disregard of human life.

"6. The evidence, while unsatisfactory in many respects, may, for the purposes of this discussion, be regarded as sufficient to establish the following facts relative to the accident in question:

"The accused at the time and place stated, while somewhat under the influence of intoxicating liquor, was operating his motor car when it collided with a pedestrian, probably on his feet at the time, and seriously injured him. The circumstances appear to have been such that the accused must have known that his car had struck a human being and that the resultant injury was probably serious. Nevertheless, after stopping momentarily he left the scene of the accident without any effort to ascertain the seriousness of its consequences and without rendering any aid or assistance. The vital question then arises whether or not culpable negligence on the part of the accused was the proximate cause of the collision. Unless all reasonable hypotheses consistent with the conclusion that the accident was not caused by culpable negligence on the part of the accused are excluded by the evidence, the charge of manslaughter cannot be sustained.

"Driving an automobile while under the influence of intoxicating liquor may be negligence; but the fact of the driver being in this condition is not necessarily the cause of a collision with a pedestrian.

* * * *

"7. The fact is that it is impossible to know from the evidence what actually caused the accident. One can only surmise and no one may legally be convicted of crime upon mere surmise. The accident may or may not have been due to negligence on the part of the accused and, if due to negligence, the negligence may have been only slight and far from that culpable negligence necessary to sustain the charge of manslaughter in this case. It is just as reasonable to surmise that the pedestrian was struck solely as the result of his own negligence. He may well have been walking along the side of the road and have stumbled or inadvertently stepped directly in front of the automobile. Such hypothesis is far from unreasonable or even improbable, for accidents of that nature, without any negligence upon the part of the motorist, are of almost daily occurrence. The Director of Traffic here informally estimated that about half of the accidents in which pedestrians are struck by automobiles are due solely to carelessness upon the part of pedestrians" (Underscoring supplied).

The conclusion reached by The Judge Advocate General and very apparently approved by the President is so thoroughly founded on sound legal and equitable principles, established not arbitrarily but for the protection of every individual, whether he is a civilian or a soldier, that I am unable to follow the majority of the Board in its unquestionably conscientious determination that the facts in the present case present a situation which justifies the drawing of a distinction between the two cases or a deviation from the views expressed by The Judge Advocate General. I have found no case in which these views have been overruled. CM 252521, Groat 34 B.R. 67, a recent case involving a charge of involuntary manslaughter, resulting from the negligent operation of an automobile, in which a finding of guilty by the trial court of what was termed by The Judge Advocate General "negligent killing," as well as of driving while under the influence of liquor, and of not stopping to render assistance, was upheld, did not require a discussion of the problem with which we are confronted, nor was it discussed, for in that case the evidence showed that the deceased had been walking on the paved section of the road for some time preceding the accident. As previously stated in this dissent, if there were any testimony in this record that the deceased had been walking along the paved section of the road a sufficiently long time prior to the accident to permit a sober driver, operating his car with ordinary care, to have seen him, or that accused's automobile was driven off the paved section and struck the deceased while he was on the graveled shoulder, I would unhesitatingly concur in the views of the majority. Since there is no proof on either score, I feel that the accused should not be convicted on the possibility that in some unexplained way his lack of sobriety was the proximate cause of the homicide.

Without specifically holding that the "presumption of safety" rule should apply in trials before courts martial or in criminal trials before civil courts, the majority, in its opinion, at least creates the impression that it believes that this rule should be made so applicable by quoting, apparently in support of its conclusions, from the opinion of the Utah Supreme Court in the case of State v. Busby, 131 Pac. (2d) 510, 144 A.L.R. 1477, the only instance, as far as an investigation and examination of the digests disclose, in which an appellate court has had occasion to consider or apply this presumption in a criminal case. Assuming that such a rule should be made applicable in criminal proceedings, several features require consideration before concluding that the rule, as applied in State v. Busby, is applicable to the present case. In the first place it should be noted that in the cited case the accident took place at a street intersection in Salt Lake City, and that the court concluded that under the facts as established "the jury could have placed the decedent in the cross walk when he was struck." Secondly, immediately following this statement and immediately preceding the portion quoted in the majority's opinion, appears the following: "There is a duty on the part of the drivers to keep a lookout for pedestrians in the cross walk even though such driver may have a green light. State v. Adamson, (Utah), 125 Pa. (2d) 429." Thirdly, I firmly believe that if a situation, such as the present record discloses, had been presented, the Utah court would not have attempted to apply this doctrine, for it is very apparent that there is a vast difference between deliberately stepping into a cross walk or street intersection in the path of an oncoming car, which one is presumed to have seen, and swaying, swerving or stepping out into a road in the path of an oncoming car, approaching from the rear, which is, therefore, not visible to the pedestrian. Fourthly, as previously pointed out, the presumption of safety bars the conclusion that the deceased in the present case had been walking for any length of time on the paved section of the road, with his back to approaching traffic, in view of the excellent area for safe travel afforded him by the broad graveled shoulder. Finally, it will be noted that the court was not attempting to reach conclusions of fact - it was merely expressing its views as to the right of the jury to reach its conclusions. In a case which requires Presidential confirmation, despite the weight to be given to the findings of a court-martial, the Board of Review must weigh the evidence, reach conclusions on controverted facts and apply legal principles to the facts as found by it. While legally recognized presumptions should be considered by it, where the record of trial does not justify the application of the presumption, it certainly is not and should not be bound by the findings of a court martial, which has relied upon such presumption.

As stated previously, the case of State v. Busby remains unique in permitting the application of this rule to criminal cases. The following two extracts, taken from the notation following the cited case in American Law Report, explains the general rules of law, pertaining to the right or lack of right to apply this presumption:

"It is a general rule, in actions for damages for, or based upon, the death of one killed in an accident, in which there is insufficient evidence to make a case against the defendant submissible to a jury upon the questions of negligence of proximate cause, that the presumption that the decedent exercised due care for his own safety, which arises in the absence of evidence upon that point, cannot be used to create an inference of negligence on the part of the defendant, or to supply evidence, or aid in the establishment, of such negligence, or, except in the type of cases subsequently discussed herein (see heading 'Presumption in relation to proximate cause where there is evidence of defendant's negligence,' infra), to show that the defendant's negligence was the proximate cause of the accident" (Underscoring supplied).

* * * *

"Presumption in relation to proximate cause where there is evidence of defendant's negligence. Where there is evidence of negligence of the defendant sufficient to constitute a case submissible to a jury, in an action based upon death by accident, or one necessarily involving a similar issue, it has been considered that the presumption that the decedent was in the exercise of due care for his own safety, arising and subsisting in the absence of evidence upon that point sufficient to dispel such presumption, may at least serve the purpose of resolving any doubt in the minds of the jurors, in case of equipoise upon the subject created by the defendant's insistence that the proximate cause of the accident was, not his own negligence, but some conduct of the decedent." (Underscoring supplied).

It will be noted that where there is not sufficient evidence to justify the submission of a case to a jury upon the question of negligence or proximate cause, the rule does not apply. Its application is restricted to cases of "equipoise upon the subject" in the minds of the jury. It is impossible, of course, to discuss the various cases in which this rule has been before the court. I find none reported from the State of Arizona, where the present case arose. I feel, therefore, that I am justified in quoting from unanimous decisions by the United States Supreme Court and Circuit Courts of Appeals.

In the case of Looney v. Michigan Central Railroad Company, 200 U.S. 480, 50 L. Ed. 564), Justice McKenna, as the organ of the Supreme Court, laid down the following principles:

"A plaintiff in the first instance must show negligence on the part of the defendant. Having done this, he need not go farther in those jurisdictions where the burden of proof is on the defendant to show contributory negligence. In other words, if

there is no evidence which speaks one way or the other with reference to contributory negligence, of the person killed, then it is presumed there was no such negligence. *** But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another" (underscoring supplied).

In Riess v. Pennsylvania Railroad Company, 107 Fed. (2) 385, Judge Patterson, as the organ of the Circuit Court of Appeals, Second Circuit, held:

"The evidence is too meagre to indicate that the truck was ever motionless on the rails.*** The matter is the merest guess work. If we pass this difficulty and assume that the truck did become motionless on the crossing, we find no basis for the further inference that the truck was in that position long enough for the engineer to have observed it and stopped the train short of the crossing. The fault for this unfortunate fatality is left at large by the plaintiff's proof.*** The presumption that the deceased used due care bears only on the issue of contributory negligence; it does not help the plaintiff on the issue of negligence by the defendant, the defendant being likewise entitled to a like presumption of due care on that issue. The trial court properly held that there was insufficient evidence to take the case to the jury" (Underscoring supplied).

In Mikolajczyk v. Allcutt, 102 Fed. (2d) 82, Judge Maris, as the organ of the Circuit Court of Appeals, Third Circuit, held:

"We are, therefore, compelled to conclude that the plaintiff failed to sustain the burden which the law cast upon her to prove the negligence of the defendant's driver. It was incumbent upon her to produce some evidence to indicate that the accident occurred since its mere happening was not evidence that one of the parties to it was negligent.**** The evidence, however, leaves us completely in the dark as to what actually occurred. All that we know is that the right front portion of the Allcutt truck came into contact with the rear of the Shein truck. We do not know whether the latter was standing still or in motion, nor do we know whether it was on or off the highway or partly on and partly off. It is obvious that any verdict which the jury might have rendered upon the evidence in this case would have been based upon conjecture and not upon fact.

"The presumption that the plaintiff's deceased husband exercised due care does not assist her in meeting the burden of proof of the defendant's negligence. That presumption arises only when

necessary to rebut an inference of contributory negligence. It cannot take the place of evidence as to the manner in which the accident occurred nor can it support an inference that because the decedent must be presumed to have used due care the driver of the Allcutt truck was negligent, since, as we have seen, the mere happening of an accident does not justify an inference that it resulted from the negligence of one of the parties to it" (underscoring supplied).

These citations from opinions by our highest courts, all rendered in cases involving civil liability, emphasize the danger of applying the presumption of safety rule in criminal cases. It is possible to conceive of extremely unusual cases where a court may presume that the deceased did not intend to commit suicide; but it would be a marked deviation from the accepted views of this office, namely, that a verdict should not be based on surmise or conjecture, to apply this doctrine to the present case or to accept it as a general rule for the guidance of courts-martial in the future.

The following holding in the case of Levy v. Vaughan, 42 D. C. App. 146, which involved only the determination of a monetary claim, sums up my views, and in my opinion should apply with redoubled force to a criminal proceeding, in which an individual's liberty is involved:

"Legal responsibility of one person to another cannot be predicated upon evidence from which the jury can draw an inference only by speculation, it being necessary that the evidence be positive to such a degree that the inference naturally arises."

Kenneth Moore, Judge Advocate.

SPJGK - CM 274812 1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUL 10 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial, the opinion of the Board of Review, one member dissenting, and the dissenting opinion, in the case of Second Lieutenant Mel J. Tracy (0-573602), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of involuntary manslaughter in violation of Article of War 93 (Specification of Charge I), and of operating an automobile on a public highway while under the influence of intoxicating liquor (Specification 1, Charge II). 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 one year and six months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion that the record of trial is legally sufficient to support the finding of guilty of Specification 1 of Charge II and of Charge II, and the sentence and to warrant confirmation of the sentence, but I do not concur in the opinion that it is legally sufficient to support the finding of guilty of involuntary manslaughter - Charge I and its Specification. On the night of 2 November 1944 a young civilian, accompanied by an enlisted man, was walking north on the graveled shoulder on the eastern side of an eighteen foot paved highway near Yuma, Arizona. This shoulder was composed of firmly packed gravel, extending about ten to fifteen feet from the eastern edge of the paved portion to the adjacent building fronts and property line. Immediately prior to the accident which gave rise to the charges against accused, the enlisted man was about three feet east of the paved section, on the shoulder, and the civilian was about six or eight inches to his left, and, therefore, closer to the paved section. The enlisted man did not hear the approach of any car, did not see accused's car, and was unaware of the fact that accused's car, which was being driven by accused from the south and therefore from the rear of the pedestrians, had struck his civilian companion. He himself was not touched by the car, the passage of the car did not make him jump, and, as far as he knew, the car did not even come close to him. The young civilian, who, according to the witness, could have stepped out on the pavement, was struck by accused's car and was instantly killed. There were no eyewitnesses to the accident, although another enlisted man, who was across the street and had seen accused's car approaching, did see the deceased being tossed into the air after the car had come into contact with him. The evidence precludes the conclusion that the point of impact was on the graveled shoulder, and shows that the

car was going probably between thirty-five and forty miles an hour, a rate of speed not in violation of the state statutes applicable to the section in which the fatal accident occurred. All physical facts as well as the logical deductions and inferences from the testimony of the witnesses establish that deceased was struck while on the paved section of the road. Accused, about whose sobriety there was much conflicting testimony, but who was found by the trial court to be under the influence of intoxicating liquor, testified that he did not see deceased and was not aware of the fact that he had struck deceased.

The gist of the dissenting opinion, with which I concur, is that accused's conviction of the charge of involuntary manslaughter is based upon surmise, speculation or conjecture. There is no evidence that accused drove off the pavement, and the evidence shows that deceased was on the shoulder immediately prior to the fatal accident. As far as the record discloses, it is reasonable to conclude that the deceased stepped, walked, swerved or swayed onto the pavement, without realizing the proximity of the car, or did one of the other numerous negligent acts of which pedestrians frequently are guilty. The views of this office, concurred in by the President, as expressed in CM 202359, Turner, the facts in which are very similar to those in the present case, are that conviction may not be based upon surmise or conjecture, views which are in accordance with the general jurisprudence of the civil courts as set forth in detail in the dissenting opinion. The following extract from the Turner case summarizes the conclusion reached by this office:

> "The fact is that it is impossible to know from the evidence what actually caused the accident. One can only surmise and no one may legally be convicted of crime upon mere surmise. The accident may or may not have been due to negligence on the part of the accused and, if due to negligence, the negligence may have been only slight and far from that culpable negligence necessary to sustain the charge of manslaughter in this case. It is just as reasonable to surmise that the pedestrian was struck solely as the result of his own negligence. He may well have been walking along the side of the road and have stumbled or inadvertently stepped directly in front of the automobile. Such hypothesis is far from unreasonable or even improbable, for accidents of that nature, without any negligence upon the part of the motorist, are of almost daily occurrence. The Director of Traffic here informally estimated that about half of the accidents in which pedestrians are struck by automobiles are due solely to carelessness upon the part of pedestrians" (Underscoring supplied).

Despite a marked conflict in the views of the witnesses, there is sufficient testimony to support the conclusion that accused operated his car on a public highway near Yuma, Arizona, while under the influence of intoxicating liquor (Specification 1 of Charge II). Such conduct constitutes a misdemeanor under

the laws of Arizona, punishable by confinement in the county jail for not more than ninety days. I therefore recommend that the finding of guilty of Charge I and its Specification be disapproved, and that, in view of accused's previous good record during the three years he had been in the service, both as an enlisted man and as an officer, and the fact that his offense, which was the result of overindulgence at a stag party celebrating an athletic victory, involves no moral turpitude, the sentence be confirmed but commuted to a reprimand and forfeiture of $75 of his pay per month for twelve months.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Finding of guilty of Charge I and its Specification disapproved. Sentence confirmed but commuted to reprimand and forfeiture of $75 per month for twelve months, by order of the Acting Secretary of War. G.C.M.O. 358, 21 Jul 1945)

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

SPJGH-CM 274866

9 MAR 1945

UNITED STATES v. Captain FRANCES A. FUTRELL (L-500021), WAC; Second Lieutenant MARGARET A. CURTIS (L-800033), WAC; and Second Lieutenant GLADYS E. PACE (L-1000610), WAC.	SEVENTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Des Moines, Iowa, 8, 9-10 January 1945. Futrell: Dismissal. Curtis and Pace: Forfeiture of $50 per month for twelve (12) months.

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 one of the officers named above, Captain Frances A. Futrell, and submits this, its opinion, to The Judge Advocate General. Since only the legal sufficiency of the record to support the findings and sentence as to Captain Frances A. Futrell requires consideration of the Board of Review, the legal sufficiency of the record to support the findings and sentence as to the other two officers named above is not considered in this opinion. References in this opinion to "the accused" refer to Captain Futrell only.

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

CHARGE: Violation of the 96th Article of War

Specification 1: (Finding of not guilty).

Specification 2: In that Captain Frances A. Futrell, WAC, did, in Officer's Quarters 34-A, at Fort Des Moines, Iowa, on or about 4 November 1944, knowingly and wrongfully permit enlisted men of the United States Navy to enter into and remain over night in said quarters at said Army

Post, while said quarters were occupied by female commissioned officers of the Army United States, she, the said Captain Frances A. Futrell, being then and there present and being then and there the senior officer assigned to said quarters.

Specification 3: In that Captain Frances A. Futrell, WAC, did, in Officer's Quarters 34-A, at Fort Des Moines, Iowa, on or about 28 October 1944, knowingly and wrongfully permit enlisted men of the United States Navy to enter into and remain over night in said quarters at said Army Post, while said quarters were occupied by female commissioned officers of the Army United States, she, the said Captain Frances A. Futrell, being then and there present and being then and there the senior officer assigned to said quarters.

Specification 4: In that Captain Frances A. Futrell, WAC, did, in Officer's Quarters 34-A, at Fort Des Moines, Iowa, during the night of on or about October 28-29, 1944, wrongfully drink intoxicating liquor with and in the presence of enlisted men of the United States Navy.

Specification 5: In that Captain Frances A. Futrell, WAC, did, in Officer's Quarters 34-A, at Fort Des Moines, Iowa, during the night of on or about November 4-5, 1944, wrongfully drink intoxicating liquor with and in the presence of enlisted men of the United States Navy.

Specification 6: In that Captain Frances A. Futrell, WAC, did, in Officer's Quarters 34-A, at Fort Des Moines, Iowa, during the night of on or about November 18-19, 1944, wrongfully drink intoxicating liquor with and in the presence of enlisted men of the United States Navy.

Specification 7: In that Captain Frances A. Futrell, WAC, did, in Officer's Quarters 34-A, at Fort Des Moines, Iowa, during the night of on or about October 28-29, 1944, wrongfully associate with and entertain enlisted men of the United States Navy.

Specification 8: In that Captain Frances A. Futrell, WAC, did, in Officer's Quarters 34-A, at Fort Des Moines, Iowa, during the night of on or about November 4-5, 1944, wrongfully associate with and entertain enlisted men of the United States Navy.

Specification 9: In that Captain Frances A. Futrell, WAC, did, in Officer's Quarters 34-A, at Fort Des Moines, Iowa, during the night of on or about November 18-19, 1944, wrongfully associate with and entertain enlisted men of the United States Navy.

As directed by the convening authority she was tried together in a common trial with Second Lieutenant Gladys E. Pace and Second Lieutenant Margaret A. Curtis. She pleaded not guilty to all Specifications and the Charge. She was found not guilty of Specification 1 and guilty of the remaining Specifications and of the Charge. No evidence of previous convictions was considered. She 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 who is married, Lieutenant Gladys E. Pace, Lieutenant Margaret A. Curtis, Lieutenant Frances E. Flatts and Lieutenant Aubrey A. Stokes, all negroes, were the sole occupants of Officers' Quarters 34-A, located on the post, at Fort Des Moines, Iowa (R. 23, 30, 79, 137). One Saturday early in October 1944, accused and Lieutenant Curtis brought several sailors to their quarters, and these same sailors were there the following day. Later during that week a meeting was held at the suggestion of accused, attended by all these officers to discuss the question of entertaining enlisted personnel of the United States Navy in the WAC officers' quarters, and the advisability of again inviting these sailors. The accused at that time stated that she knew it was wrong to do this but if they were discreet it would never be discovered. All agreed to the proposal except Lieutenant Flatts (R. 87, 139).

On the week end of 28, 29 October 1944 three negro sailors were entertained in Quarters 34-A. During the course of the evening the accused, the sailors, and some of the other occupants of the house, drank whiskey, played cards and phonograph records. Lieutenant Stokes, the accuser, testified that the sailors remained overnight. She saw two of them, clad only in their underwear, in the dining room at 8 a.m. on the 29th. Lieutenant Flatts, a nonparticipant in the parties, testified that she saw a sailor's "hat" and "jacket" in the dining room that morning. One of the sailors denied that they had stayed overnight and stated that the entire group left the quarters at 1 a.m. and went to a night club, returning about 6 a.m. (R. 88, 89, 134, 142, 179, 186, 196, 202).

The next week end, 4 and 5 November 1944, there was another party in the quarters, attended by three sailors. The accused again was an active participant in the drinking and card playing. Lieutenant Stokes testified that on this occasion the sailors remained all night

and did not leave until Sunday afternoon. This was denied by one of the sailors who testified that he and the other sailors left about 3 a.m. on the 5th and returned about 9 or 10 a.m. the same morning. Lieutenant Flatts testified that when she arose about 9:30 a.m. one of the sailors entered her room uninvited, when she was not fully clad, and that after she told him to leave Lieutenant Stokes "pulled him out" (R. 90, 91, 144, 186, 197, 201).

Two of the sailors visited the quarters on Saturday, 18 November 1944. There was the usual drinking in which the accused participated. There was no direct evidence that the sailors remained overnight on this occasion. The testimony of Lieutenant Stokes and Lieutenant Flatts was contradictory on whether the two sailors who were there on the morning of the 19th were the same two who were present in the quarters the previous evening. About 7 or 8 a.m. Lieutenant Flatts saw one of them in the kitchen who "was not fully clad" although she was not clear as to what items of his clothing he lacked. She ordered him to leave the kitchen because she was wearing only pajamas. One of the sailors testified that on this occasion he, his companion, and accused left the quarters about 2:30 a.m. on the 19th in the latter's car. They drove "in town and had some drinks", returning about 7:30 a.m. They had breakfast and the sailors left immediately thereafter, it then being about 9 or 10 a.m. (R. 91, 146, 178, 188, 195, 201). On cross-examination Lieutenant Stokes admitted that she had an argument with accused about 7 a.m. on the morning of the 19th about the former's urinating on the floor during the night. The two sailors testified on cross-examination that they had seen evidence of this immediately after it happened. Lieutenant Stokes insisted on cross-examination that she had only two or three drinks that night and was not intoxicated (R. 103, 104, 151, 191, 199).

Two WAC officers, occupants of adjoining quarters since 31 August 1944, testified that negro sailors were present in the courtyard of Quarters 34-A during week ends in October and November but they were not able to fix the time with any more preciseness than that. In addition, one of them testified that on more than one occasion she was awakened by loud talking and laughter. She stated that this occurred sometime in October or November but could not identify the voices except to say that they were both male and female and failed to locate them as arising in Quarters 34-A.

4. The accused, after being warned of her rights, elected to be sworn and testify in her own behalf. She stated that she was married to a captain in the Army who was in the Philippine Islands. She entered the service 20 July 1942 and was commissioned with the first class of negro WAC officers at Fort Des Moines. There is no officers' club which negro WAC officers may attend and if they wish to entertain on the post they must do it in their quarters. With this in mind she searched the

Army Regulations and made inquiries as to the existence of any prohibition against entertaining enlisted men of the United States Navy in her quarters, and drinking intoxicating liquor with them there, and was unable to find any. She called a meeting of the occupants of Quarters 34-A to discuss the question of entertaining sailors in the quarters. During the discussion it was brought out that one of the proposed guests was an educated man, the husband of a former WAC officer. As custodial officer she was at all times concerned with the conduct of the occupants of the quarters and their guests, while they were present in the quarters, and she testified that none of the participants at these parties was ever intoxicated or guilty of immoral conduct.

On the morning of the 19th, about 2:30 a.m., she discovered Lieutenant Stokes, clad only in her pajama top, urinating on the floor of the entrance vestibule to Quarters 34-A. Lieutenant Stokes refused to discuss the incident at that time because she was drunk. About 7 a.m. the same morning, when accused asked her to clean it up, Lieutenant Stokes denied that she had done it and stated that she was going to report the presence of the sailors in the quarters and that she would "fix" accused.

On cross-examination and examination by the court accused admitted she had learned during the course of her Army training of a policy against officers and enlisted personnel fraternizing but she stated that she always considered there might be exceptions to this dependent on the peculiar conditions existing on a particular post. When confronted with a statement that she had made during the course of an investigation into the activities at Quarters 34-A she conceded that she had said that "we knew it (entertaining the sailors) was wrong but I guess we thought we could get away with something." She was the senior officer of Quarters 34-A and, as such, was responsible for the conduct of the occupants in the quarters. As to the morning of the 19th she testified that she drove the sailors into town, left them there, procured some sandwiches and returned, the whole trip taking about 45 minutes.

Lieutenant Curtis, after being warned of her rights, elected to be sworn and testify. She saw Lieutenant Stokes, who was intoxicated, urinate on the floor on the morning of the 19th and heard the ensuing argument between Lieutenant Stokes and accused. She never observed any conduct which she would regard as "wrong" at any of the parties attended by the sailors. On cross-examination and examination by the court she testified that the accused had drunk liquor in the presence of the sailors on the three week ends in question. She insisted that at no time had the sailors remained all night at the quarters but on each occasion they had left and returned in the morning.

Lieutenant Pace, after being warned of her rights, elected to be sworn and testify. She corroborated the other defense witnesses in their testimony that nothing of an immoral nature occurred on any of the occasions when the sailors were entertained in their quarters.

5. a. Specifications 2 and 3 of the Charge:

These Specifications in effect charge that the accused permitted enlisted men of the United States Navy to remain in quarters occupied by WAC officers overnight on two occasions, viz: 28 October 1944 and 4 November 1944. The uncontradicted evidence establishes that Quarters 34-A, located at Fort Des Moines, Iowa, was occupied solely by WAC officers; that the accused was the senior officer assigned to these quarters and charged with the duty of preserving good order and decorum therein; that she was present on both of the dates in question; that enlisted men of the United States Navy were entertained in these quarters after midnight of 28 October 1944 and 4 November 1944; that on 29 October 1944 they were present there about 7 a.m. and that on 5 November 1944 they were present there about 9:30 a.m. Lieutenant Stokes testified that on both occasions they remained in the quarters overnight and she stated that about 8 a.m. on the morning of the 29th she saw two of the sailors, clad only in their underwear, in the dining room. Lieutenant Flatts, an obviously reluctant witness for the prosecution, corroborated this evidence by her testimony that on the same morning she saw a sailor's "hat" and "jacket" in the dining room when she awoke. One of the sailors testified that about 1 a.m. on 29 October 1944 the entire party left the quarters and attended a night club, returning about 6 a.m. As to 5 November 1944 this same sailor testified that he and the other sailors departed for "town" about 3 a.m. and returned to the quarters about 9:30 a.m. The court resolved this conflict in the evidence adversely to the accused. Considering that the sailor's testimony was uncorroborated; that neither the accused nor the other two officers who were tried with her referred to the alleged trip to the night club 29 October; that the presence of the sailors in the quarters at 9:30 a.m. on 5 November, when they had left there only a scant six hours before, after a night of drinking, is much more rationally explained by the fact that they remained there overnight than by the story of their departure for town and early return, it is clear that the court was amply warranted in its action despite the existence of testimony tending to impeach Lieutenant Stokes as a witness. It needs no elaborate argument to show that the presence of these men in the circumstances revealed by this record, even in the absence of any immoral conduct, was bound to excite unfavorable comment, a situation it was the plain duty of accused to prevent. The conduct of the accused in failing to prevent these sailors from remaining overnight in these quarters when she had the duty and power to do so, was prejudicial to good order and military discipline. The record amply warrants the findings of guilty of these Specifications and of the Charge.

b. Specifications 4, 5 and 6 of the Charge:

These Specifications charge that the accused drank intoxicating liquor with and in the presence of enlisted men of the United States Navy on three occasions, viz: 28-29 October 1944; 4-5 November 1944; and 18-19 November 1944. The evidence clearly establishes, and it is not denied by accused, that the drinking occurred as alleged. Drinking by a female officer with enlisted men of the Navy at parties that lasted far into the next morning in female officers' quarters on an Army post is, in the opinion of the Board of Review, clearly a violation of Article of War 96. The record in this respect amply sustains the findings of guilty of Specifications 4, 5 and 6 of the Charge and the Charge.

c. Specifications 7, 8 and 9 of the Charge:

These Specifications allege that the accused wrongfully associated with enlisted men of the United States Navy on the same dates on which she was charged with wrongfully drinking with these enlisted men. The evidence reveals that the wrongful association complained of occurred at about the same time, in the same place and with the same sailors as the drinking of which she has been found guilty under Specifications 4, 5 and 6 of the Charge. However, the drinking alleged in Specifications 4, 5 and 6 was but one aspect of the accused's association with these seamen. In addition, she and the seamen ate, danced, played cards and entertained themselves by playing a victrola. Such association with enlisted personnel of the Navy was properly charged under Specifications 7, 8 and 9 and did not constitute an unreasonable multiplication of charges. The record of trial supports the findings of guilty of these Specifications.

6. War Department records show that the accused is married and 33 years of age. She enrolled in the WAAC on 18 July 1942 as an officer candidate. On 29 August 1942 she was appointed third officer, WAAC, and entered upon active duty the same date. She was promoted to first officer effective 23 December 1942 and appointed a captain in the Army of the United States, WAC, on 1 September 1943. She is a college graduate and prior to enrolling in the WAAC was employed as an auditing clerk for the City of Toledo and as a physical instructor. At one time she was editor of a negro newspaper. A confidential report made by the Provost Marshal General at the time her application for enrollment in the WAAC was pending states that "the subject's morals are open to question." She is said to have associated with both negro and white men.

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

of the Board of Review the record of trial is legally sufficient to support the findings of guilty 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. Lamb, Judge Advocate

Robert C. Trueblood, Judge Advocate

SPJGH-CM 274866 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAR 21 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 Captain Frances A. Futrell (L-500021), Women's Army 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
Incl 1 - Record of trial
Incl 2 - Dft ltr for sig S/W
Incl 3 - Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed. G.C.M.O. 158, 24 Apr 1945)

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

SPJGH-CM 274869

12 MAR 1945

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Charlotte, North Carolina, 15 January 1945. Dishonorable discharge and confinement for nine (9) months. Disciplinary Barracks.
Private McDONALD DIXON (34246469), 333d Army Air Forces Base Unit, Morris Field, Charlotte, North Carolina.	

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 Charge and Specifications:

CHARGE: Violation of the 65th Article of War

Specification 1: In that Private McDonald Dixon, Squadron C, 333d AAF Base Unit, having received a lawful order from Corporal Thomas S. Garrison, a non-commissioned officer, who was then in the execution of his office, to go on guard, did, at Morris Field, North Carolina, on or about 30 December 1944, wilfully disobey the same.

Specification 2: In that Private McDonald Dixon, * * *, did, at Morris Field, North Carolina, about 2 January 1945, attempt to assault Corporal Thomas S. Garrison, a non-commissioned officer, with a steel chair, while said non-commissioned officer was in the execution of his office.

Accused pleaded not guilty to the Charge and Specifications. He was found guilty of the Charge and of Specification 1 and not guilty of

Specification 2 but guilty of an "attempt to assault Corporal Thomas S. Garrison, a non-commissioned officer, with a steel chair" in violation of Article of War 96. Evidence of one previous conviction of willfully disobeying a lawful command of a superior officer was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for nine months. The reviewing authority approved only so much of the "findings of guilty of Specification 2 of the Charge as involves a finding of guilty of an attempt to assault the person alleged, at the time and place, and in the manner alleged", approved only so much of the "findings of guilty of the Charge as relates to Specification 2 as involves a violation of Article of War 96", approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The record of trial is legally sufficient to sustain the findings of guilty of Specification 1 of the Charge and the Charge. The question requiring consideration here is whether or not the record of trial is legally sufficient to sustain the finding of guilty under Specification 2 of the Charge and to sustain the sentence.

4. The prosecution introduced evidence to show that on 2 January 1945 an investigation was being conducted by Captain Thomas W. Bonner, accused's squadron commander, in his office in the squadron orderly room relative to accused's alleged disobedience of a lawful order given to him by Corporal Thomas S. Garrison (R. 5, 19). In addition to Captain Bonner, accused and Corporal Garrison were present at the investigation. Although the captain was conducting an official investigation, Sergeant Amos Jenkins, acting First Sergeant, and Corporal Garrison both testified that the latter was "off duty" at the time (R. 7, 8, 12, 19). During final stages of the investigation Corporal Garrison seated himself at a desk in the orderly room to write a statement of the events relative to the alleged disobedience and, after a brief exchange of words between accused and Corporal Garrison, accused picked up a steel chair as he left the captain's office, folded it, "drew it back in his right hand" although he did not raise it to a "striking position" and walked toward Corporal Garrison saying, "you lying son-of-a-bitch, I will kill you" (R. 5, 6, 9, 13, 16-19). Sergeant Jenkins and Sergeant Luther C. Morris promptly intercepted accused. Accused offered no resistance as Sergeant Morris grasped his arm and as Sergeant Jenkins took the chair from him (R. 11, 13, 15-18). Accused had reached a point about two paces from Corporal Garrison when relieved of the chair (R. 19).

5. After having been advised of his rights, accused elected to give sworn testimony in his own behalf. In part he testified as follows (R. 23):

> "Captain Bonner did not call me in his office. He talked to me in the corner of the 1st Sergeant's office and told me he

> would have to put me in confinement for not going on guard, and before he could tell me that the corporal started running his mouth and told me he woke me up. There was a chair sitting there between me and Captain Bonner and Sergeant Jenkins told me to go up to Captain Bonner and I stepped up to him and I moved the chair and still had the chair in my hand; I still had the chair in my hand when Captain Bonner told me I was in confinement. Then Corporal Garrison was still running his mouth and I cursed him. On my way out Morris took the chair and Sgt. Jenkins told me to pack my clothes and I told him they were already packed."

He further testified that he did not pick up the chair to assault Corporal Garrison with it but merely was removing it from his path as he stepped toward Captain Bonner to report to him. He claimed he held the chair in his hands all the time he talked with Captain Bonner and still had it in his hands as he left after the interview (R. 24, 27). He admitted he was angry at Corporal Garrison and that he called him "a liar and a son-of-a-bitch" but denied that he stated he was going to kill him (R. 24, 25).

6. On rebuttal Captain Bonner testified that accused did not pick up the chair when he entered to report, that he did not have the chair in his hands during the interview but that he picked it up after the interview was over (R. 28).

7. The accused was charged under the 65th Article of War with "attempting to assault" Corporal Garrison, a noncommissioned officer, with a steel chair while the latter was in the execution of his office. He was found guilty of an "attempt to assault Corporal Thomas S. Garrison, a non-commissioned officer, with a steel chair" in violation of Article of War 96. Thus, the court found that the corporal was not in the execution of his office at the time the disturbance occurred although the evidence fully established the contrary. Apparently the court's findings were induced by the testimony that accused was "off duty" when the investigation was being conducted. It is quite apparent that the enlisted men who so testified merely meant that the corporal was not performing a scheduled, routine military duty. He was performing a function of his office, however, because he was present at an official investigation to which he had been summoned by his commanding officer. He had been called to the interview to relate to his commanding officer the events of the preceding night when accused had refused to obey the corporal's order to perform guard duty to which he had been detailed. Consequently, Corporal Garrison was in the execution of his office when he attended this interview.

Be the foregoing as it may, nevertheless, the court expressly found that the corporal was not in the execution of his office. In his

action, the reviewing authority approved "only so much of the findings of guilty of Specification 2 of the Charge as involves a finding of guilty of an attempt to assault the person alleged, at the time and place, and in the manner alleged", in violation of Article of War 96. Thus, the question here posed for decision is whether or not there exists such an offense as "attempt to assault" under the 96th Article of War.

An assault is an attempt to do corporal hurt to another (MCM, 1928, par. 149l). Thus, an attempt to assault constitutes an attempt to attempt. In Corpus Juris Secundum, Vol. 6, p. 940, it is stated that:

> "As an assault necessarily includes an attempt, and is, in itself, an attempt to commit a crime, it would seem that there can be no such offense as an attempt to commit a simple assault."

In Bishop's Criminal Law, 9th ed., Vol. 2, p. 43, is found the following statement:

> "The reader has not failed to discern that an assault is in itself a particular kind of attempt. It would seem, therefore, not possible that there should be an indictable attempt to commit a simple assault."

In the case of Wilson v. State of Georgia (1874) 53 Ga. 205, the only case uncovered in our research on this question, the trial court found accused guilty of an "attempt to make an assault." The appellate court held that there was no such crime and reversed the conviction. On page 206 of its opinion the court said:

> "As an assault is itself an attempt to commit a crime, an attempt to make an assault can only be an attempt to attempt to do it, or to state the matter still more definitely, it is to do any act towards doing an act towards the commission of the offense. This is simply absurd. As soon as any act is done towards committing a violent injury on the person of another, the party doing the act is guilty of an assault, and he is not guilty until he has done the act. Yet it is claimed that he may be guilty of an attempt to make an assault, when, under the law, he must do an act before the attempt is complete. The refinement and metaphysical accumen that can see a tangible idea in the words an attempt to attempt to act is too great for practical use. It is like conceiving of the beginning of eternity or the starting place of infinity."

We are fully in accord with the conclusions reached by these authorities. In our opinion there is no such offense as an attempt to commit a simple assault at least at common law.

We are not unmindful of the provisions of Article of War 65 or of the language contained in the Manual for Courts-Martial, 1928, Appendix 4, Form 152. Article of War 65 provides for the punishment of any soldier "who strikes or assaults, or who attempts or threatens to strike or assault" a warrant officer or noncommissioned officer while in the execution of his office. This provision "covers any unlawful violence against a warrant officer or a noncommissioned officer in the execution of his office, whether such violence is merely threatened or is advanced in any degree toward application" (MCM, 1928, par. 135a). The recognized form of specification for one of the offenses against a sentinel is worded in part as follows:

> "In that _____ did * * * (attempt) (threaten) to (strike) (assault) _____, a sentinel in the execution of his duty * * *." (MCM, 1928, App. 4, Form 152).

From the foregoing it would appear that any violence menaced by a soldier toward a warrant officer or a noncommissioned officer who is in the execution of his office, though it falls short of constituting an assault, is a military offense. It further appears that it is a military offense to attempt or threaten to assault a sentinel in the execution of his duty.

The reason for creation of these offenses which were unknown to the common law is not obscure. It is imperative in the expeditious discharge of military duties that higher authority be free to perform all functions of its office and issue all necessary orders and instructions to, and engage in all required official intercourse with, personnel of lower echelons without meeting any threat or menace of violence whatsoever from the latter. This proposition is a natural offspring of the well established parent proposition that all lawful orders of higher military authority shall meet with prompt and complete obedience from lower echelons concerned therewith. Furthermore, it is imperative that all sentinels on duty meet with prompt and proper response and conduct from all military personnel. Discharge of their important duty would be seriously impaired if military discipline were to permit military personnel to offer or threaten violence to them so long as the display of force amounted to something less than an assault.

In those two special situations, military law is concerned with actions against military personnel engaged in the execution of their offices or in the discharge of a particular duty. Here, however, accused was found guilty of attempting to assault a noncommissioned officer not in the execution of his duty. An examination of the authorities on military law has not revealed that, under the customs of the service, such an attempt is other than an attempt to commit a simple assault. Military necessity neither compels nor permits the creation of a special military offense to be known as assault upon a noncommissioned officer not in the execution of his office and the creation thereafter of a further offense

to be known as an attempt to commit such an assault. When not performing the military functions of his office no reason exists for protecting the person of a noncommissioned officer by other legal safeguards than those existing for the protection of civilians. Only the well recognized common law offense of simple assault, and not any special military offense, has been committed when a soldier assaults a noncommissioned officer who is not in the execution of his office whether the act occur on a military installation or at any other place.

It is our opinion that the court found accused guilty, under Specification 2 of the Charge, of an attempt to commit a simple assault, which is not an offense under Article of War 96 or any other Article of War and that, accordingly, the finding of guilty under Specification 2 of the Charge is not sustained. The evidence does sustain the finding of guilty of Specification 1 of the Charge for which the maximum sentence authorized is confinement for six months and forfeiture of two thirds pay per month for a like period. (MCM, 1928, Table of Maximum Punishments, par. 104c).

8. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Specification 2 of the Charge, but legally sufficient to support the findings of guilty of Specification 1 and the Charge and legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months and forfeiture of two thirds pay per month for six months.

Thomas H. Tapley, Judge Advocate

William H. Gaunerell, Judge Advocate

Robert A. Trevithan, Judge Advocate

SPJGH-CM 274869 1st Ind

14 MAR 1945

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

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

1. In the case of Private McDonald Dixon (34246469), 333d Army Air Forces Base Unit, Morris Field, Charlotte, North Carolina, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 2 of the Charge, but legally sufficient to support the findings of guilty of Specification 1 and the Charge and legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months and forfeiture of two thirds of his pay per month for six months, which holding is hereby approved. Upon vacation of the finding of guilty of Specification 2 of the Charge and vacation of so much of the sentence as is in excess of confinement at hard labor for six months and forfeiture of two thirds of his pay per month for six months, and the designation of a post guardhouse as the place of confinement, 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, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 274869).

Myron C. Cramer

1 Incl
Record of trial

MYRON C. CRAMER
Major General
The Judge Advocate General

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

SPJGN CM 274898

9 MAR 1945

UNITED STATES	SECOND AIR FORCE
v.	Trial by G.C.M., convened at Deming Army Air Field, Deming, New Mexico, 23 January 1945. Dismissal.
Second Lieutenant DAVID S. LITSIS (0-797854), 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 Charges and Specifications:

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

Specification: In that Second Lieutenant David S. Litsis, Air Corps, 207th Army Air Forces Base Unit, did, without proper leave, absent himself from his station at Biggs Field, El Paso, Texas, from about 8 December 1944 to about 29 December 1944.

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

Specification: In that Second Lieutenant David S. Litsis, Air Corps, 207th Army Air Forces Base Unit, having received a lawful command from Major Richard T. Akins, Air Corps, his superior officer, to "report to me tomorrow morning at my office at eight o'clock", did, at Biggs Field, El Paso, Texas, on or about 8 December 1944, wilfully disobey the same.

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

Specification 1: In that Second Lieutenant David S. Litsis, Air Corps, 207th Army Air Forces Base Unit, did, at El Paso, Texas, on or about 12 October 1944, with intent to defraud, wrongfully

make and utter to El Paso Officers' Club, Incorporated, a certain check, in words and figures as follows, to wit:

El Paso
Officers' Club

October 12 1944

NAME OF BANK) The Attalla Bank
Attalla, Alabama
CITY STATE

PAY TO THE ORDER OF El Paso Officer's Club, Inc. $15 00 XX

Fifteen and no/100 - DOLLARS

SERIAL NUMBER: 0-797854
ORGANIZATION: 207th AAF
Base Unit

David S. Litsis
SIGNATURE
RANK: 2d Lt.
STATION: Biggs Field

and by means thereof, did fraudulently obtain from said El Paso Officers' Club $15.00, he, the said Second Lieutenant David S. Litsis, then well knowing that he did not have and not intending that he should have sufficient funds in The Attalla Bank, Attalla, Alabama, for the payment of said check.

Specifications 2-11, inclusive: Identical in form with Specification 1 except as to dates and amounts which are as follows:

	DATE	AMOUNT
Specification 2:	10/14/44	$ 30.00
Specification 3:	10/14/44	$30.00
Specification 4:	10/15/44	$ 30.00
Specification 5:	10/16/44	$ 30.00
Specification 6:	10/18/44	$ 30.00
Specification 7:	10/18/44	$ 20.00
Specification 8:	10/21/44	$ 30.00
Specification 9:	10/24/44	$ 20.00
Specification 10:	10/25/44	$ 30.00
Specification 11:	10-26/44	$ 30.00

The accused pleaded guilty to, and was found guilty of, all Charges and 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 only so much of the sentence as provided for dismissal and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that, upon returning to his station on 7 December 1944 from San Antonio, Texas, where he had unsuccessfully attempted to "borrow money" to "pay off some bad checks", the accused called Major Richard T. Akins on the telephone and asked permission to visit St. Louis, Missouri, for the purpose of continuing his quest for funds. Despite the accused's repeated pleas and his assurance that he would "be back in a short time", Major Akins denied the request and "gave a direct order saying, 'You will not go to St. Louis and you will report to me in my office at eight o'clock tomorrow morning'" (R.14-15). Although he understood these instructions, the accused absented himself without leave the following morning and did not report. He was returned to military control at Bolling Field, District of Columbia on 29 December 1944 (R. 11-12, 14; Pros. Exs. 1, 2).

4. After being fully apprised of his rights relative to testifying or remaining silent, the accused took the stand on his own behalf. His story was one of misfortune piled on misfortune. When transferred to Camp Sibert, Alabama, in January of 1944, he owed a debt of some three hundred dollars consisting largely of medical expenses incurred by his wife (R. 16). The following month the Officers' Guest House in which he and his wife were living caught fire and all of their personal belongings were destroyed. Since he carried no insurance, he was compelled to borrow again to re-outfit themselves (R. 17, 27).

Several months later in August of 1944, after his transfer to El Paso, Texas, his wife suffered a miscarriage which not only left her physically incapable of doing any work for a long period but temporarily affected her mind. Since her mental condition was apparently not easily recognizable, he remained unaware of its existence. One of its manifestations was a buying spree on an extravagant scale considerably beyond his means. During October of 1944 she "ran up a large bill" at the White House Department Store aggregating almost six hundred dollars. The accused finally closed the account but the damage had been done (R. 18, 26). While indulging in prodigal spending at the local stores, his wife was also wasting substantial sums of money on long distance telephone calls to her mother in St. Louis. In October of 1944 she incurred toll charges of eighty dollars and in November of 1944 this figure was increased to some one hundred and forty-six dollars (R. 19-20).

To satisfy at least a portion of his indebtednesses the accused made several Class E allotments which by November of 1944 totaled two hundred and forty-five dollars per month. After the deduction of this sum only seventy-five dollars of his pay was available for living expenses. Sixty-five or sixty-seven dollars of this balance was consumed by rent alone (R. 18-19, 23, 25, 28). Previously, in October, his

financial situation was slightly better because his Class E allotments were less, but even then he had only one hundred and seventy dollars for living expenses (R. 23, 28).

In that month his wife threatened to leave him unless he provided her with more money. To placate her he obtained funds totaling two hundred and ninety-five dollars by cashing a series of eleven worthless checks at the El Paso Officers' Club. Seventy-five dollars was applied by him to the satisfaction of a personal loan and sixty-seven dollars to the payment of rent. Although he believed that she would use the balance to pay for some of the clothing which she had purchased, she privately intended to use the money "to go home". In the end neither purpose was fulfilled, for she squandered the sum intrusted to her on some foolish expenditures at "Juarez" (R. 19, 24-26, 29-30). At the time he executed and cashed the eleven worthless checks, which provided the gravamen of the Specifications of Charge III, he "knew /he/ didn't have any funds in the bank" (R. 25).

Although Major Akins had denied him permission to visit Saint Louis, the accused, believing that the penalty for "bad checks was much worse" than for absence without leave, decided to go there anyway. En route the accused changed his mind and proceeded to Washington, D. C., instead. In this last city he took his wife to a specialist and for the first time learned of her mental disorder. She immediately underwent treatment which ultimately effected recovery (R. 21-22, 25, 30-32). Meanwhile, before the accused could contact some friends from whom he expected to borrow sufficient funds to meet his obligations, he was apprehended by the military police and returned to military control (R. 22). None of the money which he owed had been spent for any personal foibles of his own, for he neither smoked, drank, or gambled (R. 24, 26).

5. The Specification of Charge I alleges that the accused "did, without proper leave, absent himself from his station.....from about 8 December 1944 to about 29 December 1944". This offense was laid under Article of War 61. The Specification of Charge II alleges that the accused, "having received a lawful command from Major Richard T. Akins, Air Corps, his superior officer.....did,.....on or about 8 December 1944, wilfully disobey the same". This was represented to be a violation of Article of War 64.

Pressed by his creditors and fearful of being prosecuted for cashing eleven worthless checks, the accused pleaded for leave to visit St. Louis, Missouri, where he hoped to be able to raise sufficient funds to pay all of his liabilities. When his repeated and urgent requests were denied and he was ordered to be present for duty the following morning, he made a calculated decision not to report as directed but to proceed to St. Louis in a last desperate endeavor to borrow the money required to relieve him from his predicament. In his own words, he was "aware that the penalty for bad checks was much worse" than for absence without leave.

Having taken his unauthorized departure, he changed his plans and proceeded to Washington, D. C., where some twenty-one days later he was apprehended by the military police. Whether Major Akins' order was unwise or unnecessarily harsh is totally irrelevant to the issues presented by this record. The accused's first obligations as a soldier were obedience and presence for duty at his station. He has disregarded both, and no excuses or explanations based upon personal hardship can be accorded recognition by military law. The Specifications of Charge I and Charge II are sustained by his pleas of guilty and have been proved beyond a reasonable doubt.

6. Specifications 1 to 11 inclusive of Charge III allege that the accused on various dates during the month of October, 1944, did, "with intent to defraud, wrongfully and unlawfully make and utter to El Paso Officers' Club, Incorporated" eleven worthless checks drawn on the Attalla Bank of Attalla, Alabama, eight of which were in the principal sum of $30.00 each, two in the principal sum of $20.00 each, and one in the principal sum of $15.00, "and by means thereof, did fraudulently obtain from said El Paso Officers' Club" the said sums, "he, the said /accused/ then well knowing that he did not have and not intending that he should have sufficient funds in /said bank/ for the payment of said checks". These acts were set forth as violations of Article of War 96.

No evidence was adduced by the prosecution in support of the Specifications under Charge III. None, however, was essential, for the accused pleaded guilty. Although the practice is not a desirable one, the prosecution may lawfully rely upon such a plea as an admission and hence proof of all of the facts set forth in the Specifications: Dig. Op. JAG, 1912-1940, sec. 378 (3). In this particular instance the accused has added weight to the inferences normally flowing from pleas of guilty by testifying that he "knew /he/ didn't have any funds in the bank at the time". Although the accused has perhaps suffered the fate of a modern Job, hardship alone can no more excuse or justify his procuring needed funds by means of worthless checks than it would excuse or justify larceny or robbery under analogous conditions.

7. The accused, who is married and 22 years old, attended the University of Maryland for one-half year. After enlisted service from 16 March 1942 to 15 February 1943, he was commissioned on 16 February 1943 as a second lieutenant. On 9 February 1944 he was reprimanded and restricted for a period of seven days under Article of War 104 for failure "to settle indebtedness promptly", making "a false official statement to /his/ Commanding Officer", and conducting himself in his "association with certain civilians.....in a manner below the standard expected of an officer.....". A few months later on 3 July 1944 he was tried by general court-martial for "performing acrobatics in a military airplane at an altitude less than 1500 feet about the ground", but was found not guilty.

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 vidation of Articles of War 61, 64, or 96.

Abner E. Lipscomb, Judge Advocates

Robert J. Clannon, Judge Advocate

Samuel Morgan, Judge Advocate

SPJGN -CM 274898

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 Second Lieutenant David S. Litsis (O-797854), 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
1. Rec. of trial
2. Drft ltr for sig S/W
3. Form of action

(Sentence as approved by reviewing authority confirmed, by order of the Under Secretary of War. G.C.M.O. 193, 9 Jun 1945)

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

SPJGN
CM 274926

21 FEB 1945

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Plant Park, Tampa, Florida, 30 January 1945. Dismissal, total forfeitures, and confinement for two (2) years.
Second Lieutenant EDWARD A. MILLER (O-826479), Air Corps.	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Second Lieutenant Edward A. Miller, Army Air Forces Officers Replacement Pool, Atlantic City, New Jersey; attached to Seventh Detachment, 301st Army Air Forces Base Unit, Squadron "R", Third Air Force Personnel Depot, Plant Park, Tampa, Florida, did, without proper leave, absent himself from his station at Plant Park, Tampa, Florida, from about 11 January 1945, to about 15 January 1945.

Specification 2: In that Second Lieutenant Edward A. Miller, Army Air Forces Officers Replacement Pool, Atlantic City, New Jersey; attached to Seventh Detachment, 301st Army Air Forces Base Unit, Squadron "R", Third Air Force Personnel Depot, Plant Park, Tampa, Florida, then Second Lieutenant Edward A. Miller, Squadron "S", 347th Army Air Forces Base Unit, Key Field, Mississippi, did, without proper leave, absent himself from his organization at Key Field, Mississippi, from about 24 November 1944 to about 8 December 1944.

The accused pleaded guilty to, and was found guilty of, the Charge and both Specifications thereunder. After evidence had been introduced of one previous conviction by general court-martial for operating a military airplane in a reckless and careless manner at an altitude of less than two hundred feet above water, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that, while attached to Squadron A, 347th Army Air Forces Base Unit (CCTS) (TR), Key Field, Meridian, Mississippi, the accused absented himself without leave from 24 November to 8 December 1944 (R. 5; Pros. Exs. B, C). Subsequently, after being transferred to Squadron R, 301st Army Air Forces Base Unit, Plant Park, Tampa, Florida, he again absented himself without leave on 11 January 1945 and did not return to his organization until 15 January 1945 (R. 5; Pros. Ex. A).

4. After being apprised of his rights as a witness, the accused elected to remain silent. No evidence was adduced on his behalf.

5. Specification 1 of the Charge alleges that the accused "did, without proper leave, absent himself from his station ... from about 11 January 1945, to about 15 January 1945." Specification 2 alleges that he "did, without proper leave, absent himself from his organization ... from about 24 November 1944 to about 8 December 1944." Both offenses were laid under Article of War 61.

The accused has twice absented himself without leave. This repetition of a serious offense reveals a wanton and flagrant disregard of military authority. Both Specifications have been established beyond a reasonable doubt by the pleas of guilty and the evidence adduced.

6. The accused, who is single and about 20 years old, attended high school for three years. After enlisted service from 2 March 1943 to 11 March 1944, he was commissioned a second lieutenant on 12 March 1944. On 14 October 1944 he was tried by general court-martial for operating a military airplane in a reckless and careless manner at an altitude of less than two hundred feet above water in violation of flying regulations and was sentenced to dismissal. The sentence was commuted on 1 January 1945 to a forfeiture of pay of $75.00 per month for nine months.

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

the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61.

Abner E. Lipscomb, Judge Advocate.

Robert J. Clemmer, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN-CM 274926 1st Ind.

Hq ASF, JAGO, Washington 25, D. C. MAR 3 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 Edward A. Miller (0-826479), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and 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 one year, 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

3 Incls
1. Rec of trial
2. Dft of ltr for sig Sec of War
3. Form of Executive Action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted and confinement reduced to one year. G.C.M.O. 148, 16 Apr 1945)

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

SPJGH
CM 274929

27 FEB 1945

UNITED STATES v. Second Lieutenant THOMAS A. JAMIESON (0-1059509), Corps of Engineers.	FORT LEWIS Trial by G.C.M., convened at Fort Lewis, Washington, 29 January 1945. 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 I: Violation of the 61st Article of War

Specification: In that Second Lieutenant Thomas A. Jamieson, Company B, 42nd Engineer Construction Battalion, did, without proper leave, absent himself from his station at Fort Lewis, Washington, from about 2 January 1945 to about 13 January 1945.

CHARGE II: Violation of the 96th Article of War

Specification: In that Second Lieutenant Thomas A. Jamieson, * * *, an officer in the military service of the United States, did, at Fort Lewis, Washington, on or about 1 January 1945, wrongfully and knowingly borrow $30.00 in lawful money of the United States, from Technician Fifth Grade Leroy D. Day, an enlisted man in the military service of the United States.

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

3. An extract copy of the morning report of Company B, 42d Engineer Construction Battalion, Engineer Training Section, ASFTC, Fort Lewis, Washington, was introduced in evidence with an entry showing accused from duty to AWOL 2 January 1945 and another entry showing accused from AWOL to arrest in quarters 13 January 1945. Master Sergeant James L. Miller, Company B, 42d Engineer Battalion testified that on 2 January 1945 he made a search for the accused "in the area" and was unable to locate him; that the last time he had seen the accused prior to that was 1 January 1945 about 4:30 p.m. It was stipulated by and between the prosecution, the defense and the accused that the accused returned to military control on or about 13 January 1945.

Technician Fifth Grade Leroy D. Day testified that on 1 January 1945 he was acting company clerk of Company B, 42d Engineer Construction Battalion and that accused, a member of that organization, was present in the orderly room on that day. Accused told the witness that he was having difficulty in cashing his pay check and the witness offered to lend him $30 which accused accepted. The accused told the witness that it was more convenient to borrow this money than to try to cash the pay check. The witness understood he would be repaid within a week or two.

4. After being warned of his rights the accused elected to be sworn and testify in his own behalf. He stated that he had the permission of his commanding officer to go to Seattle, Washington, 1 January 1945, and left by bus at 3 p.m. He had been trying to cash his pay check since Saturday afternoon, 30 December 1944. The bank was closed, none of the other officers could help him, and he could not cash it at the officers' mess. Accordingly, when Technician Fifth Grade Day offered to lend him $30, he accepted it and promised to repay it the next morning. On arriving in Seattle he transacted some business and went to the theater. While at the theater, about 9:30 or 10 p.m., he became sick with pains in his stomach. He had the same illness two weeks before on the post and had been treated for it there. Thinking these pains would subside in a short time, as they had done previously, and that he would thereby be able to get the last bus back to Fort Lewis, he took a taxi to a local hotel and engaged a room. About 11:30 p.m. he realized he was physically unable to return to Fort Lewis, and he had a sergeant of the Air Corps wire Sergeant Miller that he would arrive about 9 a.m. the next morning. The following morning, however, his condition was worse, so much so that he thought he had dysentery. The same sergeant thereupon telephoned a friend of accused who came to the hotel and took accused to his home, where he was placed under the care

of a doctor. On the following Friday, 5 January, he was able to leave his friend's home and wire Sergeant Miller $60 with the advice that he could not return to Fort Lewis for 24 hours. Prior to this he was too ill to inform his commanding officer of the reason for his absence. A relapse interrupted his planned departure and he was confined for three or four more days, eventually returning to Fort Lewis on 13 January. He stated that although he fully realized the seriousness of his present situation and that although he had had an opportunity to summon into court witnesses who would substantiate his testimony he refrained from so doing because he promised them that they would not become involved in this case. For that reason he refused to divulge the location of the place he stayed or the name of the doctor who treated him.

On cross-examination and examination by the court the accused stated that he attended the theater alone. He did not know the sergeant who had assisted him at the hotel. The money he telegraphed on Friday the 5th was ration money he had collected and for which his company had to account by that date. He thought that this telegram would go to his superior officer and he never made any other attempt to communicate with him. His failure to report to the hospital at Fort Lawton on Friday, 5 January, the day he sent the telegram, was the result of "faulty judgment" and prior to that he had been too ill.

5. The evidence clearly establishes that the accused was absent without leave from 2 January 1945 to 13 January 1945. The attempted explanation by the accused of his absence was unworthy of belief particularly in view of his unconvincing reason for failing to disclose the name of the friend who sheltered him and the doctor who treated him. The findings of guilty of Charge I and its Specification are, accordingly, fully sustained by the record.

The evidence also establishes, and the accused admits, that he borrowed the sum of $30 from an enlisted man of his organization. Such conduct by an officer constitutes an offense under Article of War 96 (CM 234558, Field, 21 B.R. 41; CM 244263, Bedwell, 28 B.R. 229). The findings of guilty of Charge II and its Specification are, therefore, clearly warranted by the record of trial.

6. War Department records show that the accused is separated from his wife and that he is 39 years of age. He was graduated from high school and attended college for three years but did not receive a degree. He worked as a freight checker in Detroit and he owned a small construction company there. On 30 November 1942 he was inducted into the Army and assigned to an Antiaircraft Unit. Having been born in Scotland he was naturalized on 3 February 1943. He was commissioned a second lieutenant in the Army of the United States 2 September 1943 at the Antiaircraft Artillery School, Camp Davis, North Carolina. On 23 March 1944 he was assigned to the Corps of Engineers.

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 a conviction of a violation of either Article of War 61 or Article of War 96.

Thomas N. Tabby, Judge Advocate

William H. Gambrell, Judge Advocate

Robert C. Trevethan, Judge Advocate

SPJGH-CM 274929 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAR 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 Thomas A. Jamieson (0-1059509), Corps of Engineers.

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

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Sentence confirmed but execution suspended, by order of the Under Secretary of War. G.C.M.O. 221, 13 Jun 1945)

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

(375)

SPJGK - CM 274930

3 MAR 1945

UNITED STATES	)	FERRYING DIVISION AIR TRANSPORT COMMAND
v.	)	
Second Lieutenant WILLIAM B. CURLEY (0-806903), Air Corps.	)	Trial by G.C.M., convened at Gore Field, Great Falls, Montana, 18 January 1945. Dismissal and total forfeitures.

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

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

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

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

Specification: In that Second Lieutenant William B. Curley, Administrative Section B, 557th Army Air Forces Base Unit, did, without proper leave, absent himself from his Station at Gore Field, Great Falls, Montana, from about 20 November 1944, to about 22 November 1944.

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

Specification 1: In that Second Lieutenant William B. Curley, * * *, did, at Great Falls, Montana, on or about 5 October 1944, with intent to defraud, wrongfully and unlawfully make and utter to Murrill's Cocktail Lounge a certain check, in words and figures as follows, to-wit:

THE GREAT FALLS NATIONAL BANK
Great Falls, Montana, Oct 5 1944 No. _____

Pay to the
Order of Murrill's $ 15.00
Fifteen dollars and 00/100 Dollars
Gore Field

William B. Curley
2nd Lt AC 0-806903

and by means thereof, did, obtain from Murrill's Cocktail Lounge the sum of $15.00, he the said Second Lieutenant

William B. Curley, then well knowing that he did not have and not intending that he should have sufficient funds in The Great Falls National Bank for the payment of said check.

Specification 2: Identical with Specification 1 except that the check involved bore date of 11 October 1944, was for $20, and is alleged to have been negotiated on the date it bore.

Specification 3: Identical with Specification 1 except that the check involved bore date of 11 October 1944, was for $50, and is alleged to have been negotiated on the date it bore.

Specification 4: Identical with Specification 1 except that the check involved bore date of 12 October 1944, was for $25, and is alleged to have been negotiated on the date it bore.

Specification 5: Identical with Specification 1 except that the check involved bore date of 16 October 1944, was for $25, and is alleged to have been negotiated on the date it bore.

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

Specification 7: Identical with Specification 1 except that the check involved bore date of 8 November 1944, was for $15, and is alleged to have been negotiated on the date it bore.

Specification 8: In that Second Lieutenant William B. Curley, * * *, being indebted to The First National Bank of Great Falls in the sum of $103.07, plus interest, on account of a loan, which amount became due and payable on 1 October 1944, did, at Great Falls, Montana, from 1 October 1944 to 26 October 1944, dishonorably fail and neglect to pay said debt.

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

Specification: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge III and its Specification, and guilty of all other Charges and Specifications, except that by exceptions and substitutions the period of absence without leave involved in the Specification of Charge I was found to be "from about 20 November 1944 to about 21 November 1944" instead of "from about 20 November 1944 to about 22 November 1944."

No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the finding of guilty of Specification 6 of Charge II, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution relating to the Charges and Specifications of which accused stands convicted is, briefly summarized, as follows:

Charge I and its Specification - absence without leave. At all times pertinent to the issues involved, as well as at the time of trial, accused was in the military service, assigned to duty with Administrative Section B, 557th AAF Base Unit, 7th Ferrying Group, Ferrying Division, Air Transport Command, Gore Field, Great Falls, Montana (R. 6,7, Ex. 1). Duly authenticated extract copies of the morning reports of his organization, containing entries showing accused as from duty to absent without leave as of 0001 hours on 20 November 1944, and as from absent without leave to confinement in the post guardhouse as of 1:00 p.m. on 22 November 1944, were introduced in evidence without objection (R. 7-8, Ex. 2).

Charge II, Specifications 1 to 5, inclusive, and Specification 7 - Bad checks. The several checks as described in the Specifications, all of which were drawn on the Great Falls National Bank, Great Falls, Montana, were properly identified and introduced in evidence without objection (R. 8-13; Exs. 3,4,5,6,7,9). The accused personally negotiated each of the checks to Murrill's Cocktail Lounge, Great Falls, Montana, and in exchange for each received its face value in cash (R. 8-13). The checks were negotiated on or about the respective dates borne by them, to wit: on 5, 11 (two checks), 12, and 16 October, and 8 November 1944. They were promptly deposited for collection and were initially presented to the drawee bank for payment on the following dates, to wit: the check dated 5 October - on 7 October; the two dated 11 October and the one dated 12 October - on 14 October; the one dated 16 October - on 17 October; and the one dated 8 November - on 10 November (R. 15, Ex. 10). Because of insufficient funds to the credit of accused's account, none of the checks was honored (Ex. 10). The five above-mentioned checks given in October were again presented to the drawee bank for payment on 8 November 1944, and payment was by it again refused for the same reason. After these five checks had all been dishonored and returned the first time, accused told Richard P. Murrill, Jr., proprietor of Murrill's Cocktail Lounge, that there would be money in the bank to take care of the checks around 4 November. This conversation apparently took place on or about 18 October 1944, at which time Mr. Murrill cashed for accused an additional check for $15 (R. 12-13, Ex. 8). [Note: Specification 6, Charge II, of which accused was found guilty, which finding was disapproved by the reviewing authority, alleged the same kind of offense in connection with

this check as Specifications 1 to 5, inclusive, and Specification 7 allege with regard to the remaining six checks under discussion.7 This check of 18 October was for the first time presented for payment on 8 November along with the other five checks, and was dishonored (R. 13; Ex. 10). Mr. Murrill explained that he was absent from the city around 4 November and was thereby prevented from presenting the checks for payment at that time (R. 12).

The accused opened a checking account with the drawee bank on 14 March 1944 and maintained it continuously thereafter up to the date of this trial. In April he allotted $75 of his pay per month for deposit to the credit of this account, which allotment continued in effect through July 1944; and effective 1 November 1944, he allotted $150 of his pay per month for deposit to the credit of the account. This latter allotment was still in effect up to the date of trial (Ex. 10). The ledger sheet of accused's account for the period of time from 2 October to 25 November 1944 was introduced in evidence and shows a balance of $120 as of 2 October and deposits of $40, $60, $94.48, and $150, respectively, made on 5 and 10 October and 1 and 15 November, respectively (R. 15, Ex. 11). There was to the credit of accused's account on 5 October (date of first check in question) a balance of $85, which had been completely exhausted on 7 October by the payment of six other checks given by accused. The $60 deposited on 10 October was reduced the same day to a balance of $10 by the payment of four of accused's checks. The balance to the credit of accused's account on 11, 12, and 16 October (dates of four of the checks in question, Exs. 4 to 7, inclusive, said checks aggregating $120) was $9.75. After the deposit of $94.48 on 1 November, the balance to the credit of the account on 4 November (date on or about which accused said there would be money on deposit to take care of all the October checks) was $17.32, and on 8 November (date of last check in question, Ex. 9, for $15) was $2.32.

Mr. Murrill stated that ordinarily about two days elapsed between the time he deposited one of the checks in question and the time it was returned to him after being dishonored (R. 10). He had been accustomed to cashing checks for accused before he cashed any of those involved in the instant case (R. 13). All of the checks in question had been redeemed before trial (R. 14). The total was paid in two payments, the first payment being made in cash and the second payment, made two days before trial, being made by accused's check drawn by an authorized third person (R. 14). A Lieutenant Smith (presumably the trial judge advocate in the instant case) actually delivered the money and check with which the checks were redeemed (R. 14).

Charge II, Specification 8 - dishonorable failure to pay a debt. On 2 May 1944, accused borrowed $100 from The First National Bank of Great Falls, Montana, and executed and delivered to the bank his personal note

for that amount, due 1 June 1944 (R. 16). On 12 June 1944 the bank received a letter from accused in which he informed it that he was a patient in the Fitzsimmons General Hospital, Denver, Colorado, and was unable to pay the note (R. 16-17). A renewal note, due on 2 August 1944, was sent to accused, signed by him and returned to the bank (R. 17). This renewal note having become delinquent, W. H. Williams, assistant cashier of the bank, contacted accused by telephone on 19 August, and accused agreed to pay one-half of the principal and accrued interest and to execute a renewal note for the balance, due 1 October 1944 (R.17). Accused failed to carry out these promises made by telephone, so on 31 August Mr. Williams contacted him in person at the Finance Office at Gore Field (R. 17). Accused thereupon executed a renewal note for the amount of the principal and accrued interest, $103.07, due 10 October 1944, and agreed to arrange with the Finance Department for his September pay to be deposited in The First National Bank, with the understanding that the note should be charged against his account thus created (R. 18). The renewal note had already been executed before this promise was made. Accused's September pay voucher never reached the bank and the note was not paid until 7 December 1944, at which time it was paid in full by Lieutenant Ira M. Smith (trial judge advocate), acting as accused's agent (R. 18).

4. For the defense.

Second Lieutenant Allan F. Nash, Mess Officer at Gore Field, stated that approximately a month prior to 18 November he was requested by superior military authority to give accused something to do in the mess hall, just "to keep him employed," accused being unable at the time to fly (R. 26,27). He accordingly placed accused in charge of serving the midnight meal. Accused was not assigned to this duty nor placed under Lieutenant Nash's command by official orders from headquarters, but continued to serve in the capacity stated, under the immediate supervision and control of Lieutenant Nash. Lieutenant Nash had authority to authorize accused to be absent from his duties but had no authority to grant him a pass to be absent from the post (R. 26). On Saturday, 18 November 1944, accused telephoned Lieutenant Nash and asked if it would be all right if he went hunting. Lieutenant Nash informed accused that it would be all right with him (R. 26,27). Accused did not state how long he would be gone, but Lieutenant Nash understood that he would at least be absent from the midnight meal on 18 November (R. 26). When accused had not returned on 20 November, Lieutenant Nash felt that such continued absence was not justified by the permission which he had given (R. 26).

Upon having explained to him his right to testify under oath, to make an unsworn statement, or to remain silent, the accused elected to testify under oath with reference to the offense alleged in the Specification of Charge I only, i.e., with reference to the charge of

absence without leave (R. 25). He stated that he called Lieutenant Nash on 18 November for permission to go hunting and was informed that it would be all right (R. 27). His plans for hunting having failed to work out, he spent the remainder of the 18th in town, and about midnight went to Butte, Montana, where he remained until Tuesday afternoon (R. 27). On Tuesday, 21 November, he had already purchased a ticket for his return passage by airplane to Great Falls, intending to return to his station, and was at a taxi stand preparatory to going to the airport to board his plane, which was scheduled to leave within approximately fifteen minutes, or at 5:15 p.m., when he was taken into custody by civilian authorities and placed in jail (27,28,29). He was released to military authorities and returned to Gore Field the following day, 22 November (R. 28). The ticket which he (accused) had purchased for his return passage was cashed at the airlines office on 22 November by the lieutenant who returned him to Gore Field (R. 28).

Accused stated further that he was not informed and did not know why he was being arrested by civilian police in Butte until after he had been carried to the police station and the police chief had called Gore Field (R. 30). He was then informed that he was absent without leave. He had not thought that he was absent without leave (R. 30). He knew that his organization was not changed at the time or after he went to work at the mess hall, that Lieutenant Nash was not his commanding officer, and that Lieutenant Nash had "no authority to grant [him] permission to be away from the Post," but thought that Lieutenant Nash "was in a position to give [him] permission" (R. 30). He did not contact the commanding officer of his organization before leaving (R. 30). He was free to leave the field and go to town at any time when not actually on duty (R. 31). At the time of requesting Lieutenant Nash's permission to go hunting, he did not intend to be gone "more than a day or so" (R. 29). His primary purpose in calling was to obtain permission to be absent from the midnight meal on 18 November (R. 29). The job at the mess hall had been procured for him pursuant to his own request for "some occupation to keep [him] busy" (R. 29).

Accused also gave a resume of his military experience. He was inducted on 10 October 1941, studied chemical warfare and served with a Chemical Warfare Battalion until 10 March 1942, at which time he was transferred to the Air Corps, unassigned, to await aviation cadet training (R. 31). He was graduated as a pilot and commissioned a second lieutenant on 28 July 1943 and immediately began B-24 training. After about three weeks of this training, he requested a transfer to single engine aircraft, for which he had previously expressed a preference. He was relieved from duty and some three weeks later was transferred to the Air Transport Command. A series of transfers followed, which he detailed, and he did scarcely any flying for protracted periods of time. He asked

for overseas duty, was "crewed up" and sent to Florida for briefing preparatory to going overseas, and was there turned back because he did not have sufficient flying time to his credit (R. 32). He requested to be sent both to Pursuit School and to Instrument School and both requests were denied (R. 33). He had 200 hours of flying time to his credit when he graduated from cadet training on 28 July 1943 and only flew an additional 195 hours thereafter (R. 33). He was hospitalized for venereal disease (date not shown of record) and had not been on flying status since his release from the hospital on 31 July 1944 (R. 33).

5. Charge I and its Specification - absence without leave, in violation of Article of War 61. The record of trial clearly establishes that accused was absent from his station from 20 to 21 November, as alleged in the specification and found by the court. That such absence was without proper leave was prima facie established by the morning report entries, certified extract copies of which were introduced in evidence. The only evidence of record tending to show that such absence was with proper leave is that offered by the defense that accused obtained the permission of Lieutenant Nash, under whose supervision he was working, to go hunting and did not specify for what period of time he expected to be gone. It is clear, however, from the record as a whole that neither accused nor Lieutenant Nash, who, incidentally, was assistant defense counsel in the instant case, understood or believed that the permission which the latter gave accused on 18 November to go hunting authorized accused's absence from his station during the period in question. It is unnecessary therefore to pass upon what legal effect the permission granted by Lieutenant Nash might otherwise have had upon the question involved. The record is legally sufficient to support the findings of guilty of this Charge and Specification.

Charge II, Specifications 1 to 5, inclusive, and Specification 7 - giving worthless checks with intent to defraud, in violation of Article of War 95. The evidence of record establishes without controversy that, at the times and places alleged in the specifications, accused negotiated for value to the person alleged his six personal checks in the respective amounts alleged, aggregating in amount $150, and failed to have on deposit in the drawee bank sufficient funds to meet said checks, or any of them, when they were presented in due course of business for payment, resulting in the bank's refusing to honor any of them. It is just as clearly established, however, that on each of the respective dates on which he issued the checks in question and continuously thereafter accused was bona fide maintaining a checking account with the drawee bank, and he continued to make substantial deposits to the credit of his said account after he issued the checks. Effective as of 1 November 1944, he even allotted $150 of his pay per month, which must have been most if not all of his monthly pay, for deposit direct to the credit of the checking account against which the checks were drawn. It is true that this money was being checked out almost as rapidly as it was deposited, and it may safely be assumed that accused knew that he was

issuing checks in excess of his bank balance and that he either knew or should reasonably have foreseen that some of them would not be paid upon presentation, but the fact that he was substantially replenishing his account at fairly frequent intervals, thereby making available funds with which the checks might have been paid, places him in a distinctly different position from what might otherwise have been the case. It is apparent that the proprietor of Murrill's Cocktail Lounge cashed the checks described in Specifications 2-5 inclusive and in Specification 7 of Charge II on and after 11 October with knowledge that the check dated 5 October had already been dishonored, and it may reasonably be inferred that he probably anticipated that the checks subsequently cashed by him would not be promptly paid upon presentation. All of the checks were redeemed by accused before trial. Under all of the circumstances, the Board of Review is of the opinion that the evidence of record is legally insufficient to establish beyond reasonable doubt that accused issued the checks in question with intent ultimately to defraud. The record does sufficiently establish, however, that accused's issuance of the checks and his subsequent failure to maintain a sufficient bank balance to meet them was wrongful and due to his own indifference or neglect so as to constitute in each instance a violation of Article of War 96 (CM 249232, III Bull. JAG, July 1944, p. 290). The record is legally sufficient to support only so much of the findings of guilty of Specifications 1 to 5, inclusive, and Specification 7 of Charge II as involve findings of guilty of wrongfully making and uttering the respective checks as described in the specifications, to the person, and at the times and places alleged, and of thereafter wrongfully failing to maintain sufficient funds on deposit in the drawee bank to meet said checks, in violation of Article of War 96.

Charge II, Specification 8 - dishonorable failure to pay a debt, in violation of Article of War 95. While the specification alleges that the debt which constitutes the basis of this prosecution was due and payable on 1 October 1944 and that from 1 October to 26 October 1944 the accused dishonorably failed and neglected to pay said debt, the record discloses that in fact the debt, as renewed and extended, did not become due and payable until 10 October and was not paid until 7 December 1944, which was subsequent to the filing of the charges herein. Theoretically, and as viewed from the standpoint of civil liability, the renewal and extension note that accused executed on 31 August 1944 to mature on 10 October 1944 no doubt became his primary obligation to the bank and either extinguished or so far superseded his prior indebtedness and the evidence thereof as to render the prior history of the debt and accused's disposition toward it of no consequence, and evidence thereof inadmissible for most purposes. The fact remains, however, that the note in question was given to renew and extend a preexisting debt; and for the purpose of passing upon whether accused's failure and neglect to pay this renewal note promptly when due amounted to a dishonorable failure and neglect to pay same within the contemplation of Article of War 95, we think that the court properly heard

evidence as to the complete history of the indebtedness evidenced by the note, and that this history may properly and should be considered in weighing the evidence to determine its legal sufficiency to support the finding of guilty herein. Reviewing this history, we find that on 2 May 1944 the bank loaned accused $100, apparently on his unsecured note, which was to be repaid on 1 June 1944. This initial note having matured, and accused having notified the bank of his inability to pay it, the bank, apparently prompted by its own desire to keep its notes current, prepared and sent to accused a renewal and extension note which he executed and returned to the bank. This renewal note matured on 2 August 1944 and was not paid. Accused neither went to the bank nor voluntarily consulted with its officials with reference to the past due status of the note. When contacted by telephone on 19 August 1944, accused promised to pay one-half of the note and the accrued interest and to execute a renewal note for the balance. While there is no showing that he agreed to do this within any stipulated period of time, the inference to be drawn from the evidence is that he either agreed or left the impression that he would do it immediately. He failed to keep his promise and apparently made no explanation of his failure. His failure to pay the debt or to take steps to put it in current form caused the bank officials sufficient concern that one of them went to the post to see accused on 31 August. At that time accused signed the renewal note which matured 10 October, and agreed to have his pay voucher for September 1944 sent to the bank in question for deposit. This promise to have his September pay voucher sent direct to the bank does not appear to have been the inducing cause for the bank's agreeing to extend the maturity date of the debt, and may even have been without consideration, but it was nevertheless an unequivocal promise made by accused contemporaneously with executing the renewal note, which, had it been kept, would have assured payment of the debt at its extended maturity date. Accused breached his promise to have his September pay voucher deposited in the bank that held his note, did not pay the note at maturity nor until two months after maturity, and when he did finally pay it, such payment was apparently prompted by pending court-martial charges. The rule of law here involved is thus stated in CM 232882, Koford, 19 B.R. 229, at 242:

> "Neglect to pay debts does not violate the 95th Article of War unless the attendant circumstances are such as to make such neglect dishonorable (par. 151, MCM 1928). Failure to discharge a financial obligation is dishonorable and constitutes conduct unbecoming an officer and a gentleman, if it is characterized by fraud, deceit, evasion, and false promises and is of such a nature as to bring dishonor upon the military service. (Winthrop's Military Law and Precedents, Reprint, Footnote 42, p. 715; CM 213993, Casseday; CM 218970, Hendrickson)."

The Board of Review is of the opinion that accused's neglect and failure to pay the debt in question was characterized by evasion and false promises to

an extent sufficient to constitute such neglect and failure a violation of Article of War 95, and that the record is legally sufficient to support the findings of guilty of the Specification and the Charge.

6. The 201 file of this officer is not available and the following data is taken from the review of the Staff Judge Advocate. Accused is 27 years of age and married. He is a graduate of a high school in Louisville, Kentucky, and in civil life was a photographer and salesman. He gives Detroit, Michigan, as his present permanent address. He was inducted into the military service on 10 October 1941, was given training at the Chemical Warfare School, Edgewood Arsenal, was later accepted for training as an aviation cadet, and was commissioned as a second lieutenant, Army of the United States, Air Corps, on 28 July 1943. Under authority of Article of War 104, he has been twice previously punished for absence without leave. Under date of 29 August 1944, accused submitted his resignation in lieu of reclassification, and preliminary action looking to its final acceptance had progressed to the extent of ordering accused to a separation center before the proceedings were halted as a result of conviction in the instant case.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein 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 the Specification of Charge I, and of Charge I, of Specification 8 of Charge II, and of Charge II, but is legally sufficient to support only so much of the findings of guilty of Specifications 1 to 5, inclusive, and of Specification 7 of Charge II as involve findings of guilty of wrongfully making and uttering the respective checks as described in the specifications, to the person, and at the times and places alleged, and of thereafter wrongfully failing to maintain sufficient funds on deposit in the drawee bank to meet said checks, in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof. 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.

Irving G. Fox, Judge Advocate.

Earle Stephens, Judge Advocate.

On Leave, Judge Advocate.

SPJGK - CM 274930 1st Ind.

MAR 7 1945

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William B. Curley (0-806903), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Specification of Charge I and of Charge I, of Specification 8 of Charge II, and of Charge II, but is legally sufficient to support only so much of the findings of guilty of Specifications 1 to 5, inclusive, and Specification 7 of Charge II as involve findings of guilty of wrongfully making and uttering the checks as described in the respective specifications, to the person and at the times and places alleged, and of thereafter wrongfully failing to maintain sufficient funds on deposit in the drawee bank to meet said checks, in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof. The Staff Judge Advocate states in his review that upon two previous occasions accused has been punished under Article of War 104 for absence without leave. Under date of 29 August 1944, accused submitted his resignation in lieu of reclassification, and action toward its acceptance was halted as a result of his conviction of the offenses involved in the instant case. Accused has no proper appreciation of simple honesty or of the responsibilities of a commissioned officer. I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures remitted, by order of the Under Secretary of War, G.C.M.O. 183, 9 Jun 1945)

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

(387)

SPJGK - CM 274975

19 MAR 1945

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Lake Charles Army Air Field, Louisiana, 20, 21, 22 December 1944. Dismissal, total forfeitures and confinement for six (6) months.
First Lieutenant JOHN T. HOLLIS, JR. (O-730912), Air Corps.	

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

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

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

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

Specification: In that First Lieutenant John T. Hollis, Squadron N, Lake Charles Combat Crew Training Station (Medium Bombardment), Lake Charles Army Air Field, Lake Charles, Louisiana, did, at Lake Charles, Louisiana, on or about 13 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Juanita Faiszt.

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

Specification: (Finding of not guilty).

He pleaded not guilty to the Charges and Specifications. He was found not guilty of Charge II and its Specification, guilty of the Specification of Charge I except the words "forcibly and feloniously, against her will, have carnal knowledge of Juanita Faiszt," substituting therefor the words "wrongfully choke Juanita Faiszt and penetrate her privates with his hand without her consent," of the excepted words not guilty, of the substituted words guilty; not guilty of Charge I but guilty of a violation of the 96th Article of War. 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 six months. The reviewing authority approved of only so much of the finding of guilty

of the Specification of Charge I as involves a finding of guilty of assault and battery on the person alleged, and at the time and place alleged, approved the sentence, designated Drew Field, Tampa, Florida, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution in support of the finding of guilty of Charge I and its Specification as approved by the reviewing authority may be summarized as follows:

About 7:30 p.m., 12 September 1944, accused, Lieutenant Charles Garvin, Lieutenant Gene Hartrich, Miss Juanita Faiszt, Mrs. Maxine Reed, and Mrs. Ethel Lee Manuel were in the apartment jointly shared by Miss Faiszt and Mrs. Reed in Lake Charles, Louisiana. After several rounds of drinks from a bottle of whiskey brought by accused, the party proceeded in accused's car to Bat Gormley's Night Club, where more drinking and dancing ensued. Shortly after midnight they left the night club to return home. Upon arriving at her apartment, Mrs. Reed got out of the car, but Miss Faiszt, at his request, accompanied accused in driving Mrs. Manuel and two officers to their respective destinations (R. 10,11,12,22,23,24,25; Def. Exs. 5 and 6). After the others had been carried home, accused and Miss Faiszt stopped at the Yellow Jacket Cafe, where Miss Faiszt had one and accused had several more drinks (R. 26,27). Accused then drove to an area near the ball stadium and parked, telling Miss Faiszt that he wanted to kiss her goodnight. She agreed to kiss him upon the condition that he then drive her home. Accused, however, attempted to kiss her again and began to place his hands upon all parts of her body. When she resisted these advances, accused choked her until she became limp. Each time that she began to struggle with him, he would choke her again. When accused stepped out of one side of the car, Miss Faiszt got out of the other door and began to run. When her ankle turned, accused succeeded in catching her. He pulled her back to the car and threw her upon the front seat. She screamed once and blew the horn but did not attempt to do so again because of her fear of being choked. In the meantime, accused had removed his pants and underwear, and held Miss Faiszt down by placing his knees on her legs and forcing her shoulders down with his hands. He began raising her dress and tore both the dress and slip which she was wearing. Her panties were then torn off by him. While resisting him, Miss Faiszt bit his shoulder, and he immediately retaliated by biting her on the neck. Despite her continued resistance, accused succeeded in forcing her legs apart and lowered his body between them. During this time, Miss Faiszt saw accused's male organ, which was erect. By using both hands to hold her down when

she struggled, and occasionally using one hand to assist his efforts, accused effectuated a penetration of her private parts with his male organ. Because of her continued resistance after penetration, accused finally desisted and stepped out of the car to replace his clothing. Upon returning to the car, there was an exchange of obscene conversation, after which he drove her to her apartment (R. 27-39, R. 130-136; Pros. Exs. 6, 7, 8, 9).

Mrs. Reed was awakened by the entrance of Miss Faiszt and noticed that she was in a disheveled condition and crying in a hysterical manner. The only statement which Miss Faiszt then made to her was "Mac, he was like a wild man. He took me" (R. 13). Later in the morning, Miss Faiszt told her that she was not sure whether there had been a penetration (R. 16, 128). Mrs. Reed reported the incident to the sheriff, who accompanied Miss Faiszt for an examination (R. 128,35). Such examination revealed a swollen labia majoria, indicating that she had been entered but which could have been caused by penetration of something other than a male organ. There were two bruises on her neck, one of them apparently teeth marks (R. 18-22). Miss Faiszt subsequently stated that accused probably put his fingers in her private parts (R. 39).

On 15 September 1944 the accused having been properly warned concerning his right to remain silent voluntarily stated to Captain Luther B. Williams that he was with Miss Faiszt the night of 12-13 September 1944 drinking and dancing. After he had driven the others home in his car he drove to the ball park with Miss Faiszt. "I started trying to seduce her and naturally she did not want to. * * * I was pretty tight. * * * I remember she bit me on the arm and shoulder. She said I choked her. I guess maybe I did when she cussed me. I had my pants unbuttoned. * * * I did not have intercourse with her." He did not remember tearing any of her clothes. It was his intention to seduce her when he took the others home. He telephoned her the next morning and asked her if he could see her to apologize and ask forgiveness. Then it was that she told him what he had done the night before. His statements were reduced to writing and signed and sworn to by him (R. 48; Pros. Ex. 11). On 7 October 1944 he voluntarily signed another statement in which he again denied that he had made any penetration of Miss Faiszt with his male organ but admitted that he tried "to make her" and had inserted his finger in her private parts (Pros. Ex. 10).

4. The accused having been advised concerning his right to remain silent, to make an unsworn statement, or to testify under oath, elected to testify. He related that in 1942 he had graduated from college and immediately entered the military service as an aviation cadet. He was made a pilot and commissioned on 29 September 1942. In February 1943 he went to Africa and for one year engaged in combat missions in Africa, Sicily and Italy. Upon completion of fifty missions he was awarded the

air medal with six clusters, presidential citation, two African campaign ribbons of three stars, and returned to the States (R. 57; Def. Ex. 7). Since his return he was not assigned to any particular duty and because of idleness and nervousness indulged in drinking to excess almost daily. He met Miss Faiszt on the evening of 12 September 1944 in company with others. He had been drinking whiskey that day and drank considerably that night. When they left the night club where the group had been dancing and drinking he was so drunk that he fell. He then drove all of the party home except Miss Faiszt who accepted his invitation to go to another eating and drinking place. There he had three more drinks. After that his memory was hazy as to what took place. He distinctly remembered a ball park where they stopped and he started "necking a little."

"Q. What happened next?
A. I was kissing her. The thing I remember last, was she bit me and made me mad. I don't know what she bit me for, whether she was passionate, she was trying to shove me away, or what. I was pretty well -- I don't remember then; I can't remember what happened from there on.

Q. Were you trying to have intercourse with her?
A. I was doing what a man would normally do--trying to get a little piece of nookie, if he was out with a girl at this hour of the night.

Q. Did you have a little struggle?
A. I don't remember any struggle.

Q. Did you succeed in penetrating her?
A. I did not.

Q. Did you ever have your fingers or hands in her vagina?
A. I had my finger in it.

Q. Did you ever have your penis in her private female organ?
A. I did not. I never did have an erection. I had been that drunk before, and I never did have an erection." (R. 68-69).

An examination of accused and his history resulted in a diagnosis that he was very nervous and emotionally unstable (R. 90). On persons of his type, it is probable that alcohol would result in a diminution of control, and it would be normal to expect his recollection to be hazy after consuming large amounts of whiskey (R. 91). The diagnosis of the base psychiatrist, based upon examination of accused, was severe psychoneurosis (R. 113). The instability of such an individual would be exaggerated under the influence of alcohol (R. 115). A psychoneurotic could have greater

desires for sexual intercourse, and such a condition would not within itself prevent an erection (R. 120).

Nine representative citizens who had known accused for a long time testified as to his good reputation, both in his home town and at the college he attended, for moral and gentlemanly conduct (R. 98-108, 125,126).

5. The accused has been convicted of committing an assault and battery upon Juanita Faiszt in violation of the 96th Article of War. A battery is an assault in which force is applied to the person of another. It is a battery for a man to fondle, against her will, a woman not his wife (MCM, 1928, par. 149l). The evidence is clear and convincing that the accused, to state the case in the mildest term possible, fondled Miss Faiszt without her consent and against her will, and thereby committed an assault and battery upon her at the time and place averred in the Specification. He admitted that he intended to seduce her and that he attempted to do so. Because of his drunken condition he claimed that he could not remember clearly what happened. Miss Faiszt however told a clear story of being forcibly manhandled by the accused in his efforts to seduce her which was corroborated by the condition of her clothes and the bruises appearing on her body shortly thereafter. We find no difficulty in sustaining the conviction. Assault and battery is an offense that violates the 96th Article of War (MCM 1928, par. 152c).

6. War Department records show the accused to be 26 years of age and single. He graduated from high school and the University of Louisiana Polytechnic Institute, immediately thereafter entering military service as an aviation cadet. On 29 September 1942 he completed his training as a bomber pilot and was commissioned second lieutenant, Air Corps, Army of the United States.

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

Percy G. Eyre, Judge Advocate.

Earle Stephen, Judge Advocate.

Thomas M. Moore, Judge Advocate.

SPJGK - CM 274975 1st Ind.

Hq ASF, JAGO, Washington 25, D. C. MAR 27 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 John T. Hollis, Jr. (O-730912), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the forfeitures and confinement be remitted, and that the execution of the sentence as thus modified be suspended during good behavior.

3. Consideration has been given to two letters written by accused's mother, Mrs. J. T. Hollis, to the President, dated 29 January 1945 and 18 February 1945, respectively, and also to a letter from her to The Adjutant General dated 4 March 1945. Consideration has also been given to a letter from Senator Allen J. Ellender to The Judge Advocate General dated 27 February 1945, to a letter from Senator John H. Overton with two inclosures to The Judge Advocate General dated 26 February 1945, also to a letter from him to The Adjutant General dated 26 January 1945 with one inclosure, to a letter from Congressman Overton Brooks to The Judge Advocate General dated 15 March 1945, and to a letter to the President from the Hollis family dated 10 March 1945. All of these letters accompany the record of trial.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

10 Incls
1. Record of trial
2. Drft ltr sig S/W
3. Form of Ex action
4. 2 ltrs fr acc'd mother to Pres
5. Ltr fr acc'd mother to TAG
6. Ltr fr Sen Ellender to JAG
7. Ltr fr Sen Overton w/2 incls to JAG
8. Ltr fr Sen Overton to TAG w/incl
9. Ltr fr Cong Brooks to JAG
10. Ltr fr Hollis family to Pres

(Sentence confirmed but forfeitures and confinement remitted. Execution suspended, by order of the Secretary of War. G.C.M.O. 220, 13 Jun 1945)

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

SPJGN
CM 274989

6 MAR 1945

U N I T E D S T A T E S	)	HEADQUARTERS V CORPS
v.	)	Trial by G.C.M., convened at Headquarters V Corps, Rear Echelon Command Post, in the vicinity of Limbourg, Belgium, 12 December 1944. To be shot to death with musketry.
Private BENJAMIN F. SMITH (32839185), Company F, 38th Cavalry Reconnaissance Squadron (Mechanized).	)	

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

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review 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 75th Article of War.

Specification: In that Private Benjamin F. Smith, Company F, 38th Cavalry Reconnaissance Squadron (Mecz) did, at Monschau, Germany, on or about 21 November 1944 while before the enemy, by his misconduct and neglect endanger the safety of Company F, 38th Cavalry Reconnaissance Squadron (Mecz) and the Squadron Command Post, 38th Cavalry Reconnaissance Squadron (Mecz) which it was his duty to defend, in that he being then assigned to duty as an outpost guard, abandoned his post and duties.

CHARGE II: (Disapproved by reviewing authority).

Specification: (Disapproved by reviewing authority).

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

Specification: In that Private Benjamin F. Smith, Company F, 38th Cavalry Reconnaissance Squadron (Mecz) did, at Monschau, Germany on or about 22 November 1944 desert the service of the United States and remain in desertion until he was apprehended at Monschau, Germany on or about 28 November 1944.

The accused pleaded not guilty to all of the Charges and Specifications. He was found guilty of Charges I and III and the Specifications thereunder. He was found not guilty of Charge II but guilty of a violation of Article of War 96 and guilty of the Specification of Charge II with designated exceptions and substitutions. He was sentenced to be shot to death with musketry. All of the members of the court present at the time the vote was taken concurred in the findings of guilty of Charge I and the Specification thereunder and Charge II and the Specification thereunder with exceptions and substitutions; three-fourths concurred in the finding of guilty of Charge III and the Specification thereunder; and all concurred in the sentence imposed. The Commanding General, Headquarters V Corps, APO #305, disapproved the finding of guilty of Charge II and the Specification thereunder, approved the remaining findings of guilty and the sentence, and, directed in pursuance to Article of War 48 and 50½, that the execution thereof be withheld. The Commanding General of the Army in the European Theater of Operations approved the sentence and forwarded the record of trial for action of the President under Article of War 48. In transmitting the record he wrote,

> "I am constrained, by my responsibility to millions of loyal men who serve with unselfish devotion the needs of their country, to recommend that the death sentence be confirmed and executed, as exemplary punishment for this accused's treacherous and base betrayal of comrades, jeopardizing the military mission of his command. The sentence of the accused to be shot to death with musketry is just punishment for his faithless abandonment of his post of duty, with disregard for the consequences of his disloyalty to the trust of guarding from surprise night attack by the enemy the security of his comrades and the command committed to his protection; and, later, deserting the service and remaining in hiding through the aid of enemy nationals in enemy country while his own command was engaged in combat on enemy soil."

3a. The evidence for the prosecution relative to the alleged misbehavior of the accused before the enemy shows that on 21 November 1944 the 38th Cavalry Squadron, including Company F of which the accused was a member, was deployed as a holding force on both sides of Monschau, Germany (R. 16). The outpost position of Company F on this sector was located near a building on the outskirts of Monschau referred to as a "slaughter house". In describing this outpost the Commanding Officer of Company F testified that:

"There were two tanks on the outpost at the slaughterhouse. One on either side of it manned twenty-four hours a day. During the night one man was on each tank. There are tanks on either side of these outposts. They are the forward elements of my troops and the friendly forces."

The command post of Company F was located about 200 yards to the rear of this outpost and the squadron command post was about 600 yards further to the rear (R. 17). Except for this outpost near the "slaughter house", there was no security provision for the command posts of Company F and the squadron other than their own personnel. There were no friendly troops between the "slaughter house" outpost and the enemy whose nearest known installation was within a distance of about 500 yards (R. 17). The town of Monschau had been exposed to artillery fire but there had been no fire from small arms in the immediate vicinity of the slaughter house (R. 14, 27). All of the guard detail assigned to duty in the slaughter house outpost, other than the accused and a Private Baxley, slept, when not on duty, in a school house about 100 yards to the rear of the slaughter house. The accused and Baxley, however, had been sleeping in the slaughter house for about a week before the misconduct alleged (R. 31).

Technician Fifth Grade Charles W. Powers testified that on the night of 21 November 1944 he was on guard duty near the "slaughter house" from six to eight o'clock in the evening and from twelve to two o'clock in the morning. A few minutes before two o'clock he left his post near or in the tank in front of the slaughter house and for the second time entered the slaughter house for the purpose of awakening the accused for his tour of duty. The accused and Private Baxley slept in different rooms in the slaughter house. After the accused had been awakened, Powers waited for him until he "got his shoes on and got dressed" (R. 11). Upon leaving the slaughter house with Baxley, whom he had also awakened, Powers saw the accused "behind the stove" (R. 11).

Private Louis A. Walters testified that on the night of 21 November 1944 he served as an outpost guard in a tank "in the back of the slaughter house" (R. 6). He explained that the guards at this post "were supposed to be in the tank" (R. 6). He was scheduled to go on duty from twelve until two o'clock in the morning when he was to be relieved by the accused (R. 7). At about two o'clock "or a few minutes after", the accused came to the outpost at the rear of the slaughter house and said to Walters, "Take off, [I am] taking over". Although unable to see the accused because of the darkness, Walters recognized him by the tone of his voice. Walters immediately left the outpost in charge of the accused and returned to his quarters at the school house (R. 7). On cross-examination the defense sought to impeach Private Walters' testimony that he could not see the accused on account of the darkness by showing that in a pre-trial statement Walters had stated that "Smith came out all dressed, and relieved me, and I went down to the school house where we slept".

Technician Fourth Grade Joseph Tschinkel testified that on the night of 21 November 1944 he was assigned to outpost duty in the tank to the rear of the slaughter house from ten to twelve o'clock in the evening and from four to six o'clock in the morning. According to a guard schedule he was due to relieve the accused at four o'clock. At about that hour he went to the post to the rear of the slaughter house to assume his duties as a guard. Upon reaching the tank he "looked around and didn't find anyone" (R. 15). He immediately entered upon his two-hour tour of duty during which time he did not see the accused (R. 15).

b. The evidence for the prosecution concerning the alleged desertion shows that on the morning of 21 November 1944 the accused was told by the first sergeant of his company that he, the accused, was relieved from duty as an outpost guard, that he was to be tried by a court-martial, and that he was restricted to his quarters. Thereafter the accused's first sergeant ordered him to report on the following evening for work "about the CP". When the time came for the performance of his assigned duties, the accused could not be found in his quarters or in the area occupied by his company (R. 23-24). Thereafter, on 28 November 1944, the accused's first sergeant, upon information given him by Private Baxley, went to a house in Monschau occupied by German civilians which was about two blocks from his company command post and searched for the accused but failed to find him (R. 19-26). Later, on the night of 28 November 1944, the first sergeant returned to the same house accompanied by his company commander (R. 18). The house was occupied by two women and four children who were German nationals (R. 19). According to the testimony of the first sergeant one of the women, when questioned relative to the accused's presence in the house, denied that he was there (R. 26, 28). The company commander, on the other hand, testified that, "No one was questioned in the house" (R. 20-21). There is no dispute, however, that the company commander searched the entire building. In the attic he found a window leading to the roof. Looking through the window he saw the accused behind the chimney. The company commander called to the accused to "come down". The accused hesitated and the company commander called for his gun (R. 20). According to the testimony of the company commander, he said:

> "'Come off there, you son-of-a-bitch'. That was the time he looked at me perhaps a half a minute or a minute, and I said, 'Hand me my gun,' and he said, 'Wait, I'm coming'" (R. 21).

The accused came down and surrendered himself. His hiding place on the roof was about forty feet from the ground (R. 20).

4. The accused, after his rights relative to testifying or remaining silent had been explained to him, testified in his own behalf but limited his testimony to the charge of desertion. He explained that he left his

organization because he had "been told that he was going to be court-martialed for Article of War 75" but that he intended to return in about six days. When his company commander called for him at the house where he had been staying he crawled out upon the roof because,

> "* * * the First Sergeant already told me if the Captain got hold of me he would take care of me. I heard them come and knew it was him - hollering, 'Where in the Hell's that damn Smith.' The First Sergeant come upstairs to search, and he told him to get the hell out of the way and move up fast" (R. 34).

He further testified that he did not take his weapons with him when he left, that he remained in the house during all of the period of his absence except for one trip to his company area, and that he thought it would be better for him to stay "some place within the area" because he "didn't think a fellow would be in desertion if he didn't leave the company area" (R. 34-37).

Private William C. Baxley testified for the defense concerning the charge of misbehavior before the enemy that on the morning of 21 November 1944 he and the accused were asleep in different rooms in the "slaughter house". On that morning Powers came into the room which Baxley was occupying and awakened him. At that time Baxley did not hear Powers call the accused and did not see him as he left the slaughter house for his tour of outpost guard duty. On cross-examination he was asked the question,

> "I am asking you whether it is not true you have been tried, convicted and sentenced by general court-martial for a certain offense which occured after this precise time you have testified about. Is that correct?"

To the above question Baxley answered "Yes Sir" (R. 32).

5a. The Specification of Charge I alleges that the accused did, at Monschau, Germany, on 21 November 1944, before the enemy, endanger the safety of Company F of the 38th Cavalry Reconnaissance Squadron command post, by his misconduct and neglect in abandoning his post and duties as an outpost guard. The Specification is alleged as a violation of Article of War 75.

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

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

Winthrop states that misbehavior before the enemy may consist in,

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

Since the evidence shows that the accused was assigned to outpost duty within a distance of 500 yards of the enemy, it clearly appears in the light of the above definition that the accused was "before the enemy" within the contemplation of Article of War 75.

The evidence further shows that the accused assumed the duties of an outpost guard in or near the tank located behind the slaughter house on the outskirts of Monschau at about two o'clock on the morning of 21 November 1944. Two hours later, at about four o'clock, when Technician Fourth Grade Tschinkel came to the accused's outpost to relieve him, the accused was not there and was not seen by Tschinkel during the following two hours. Although the evidence fails to indicate how long the accused had been absent from his post when Tschinkel came to relieve him, or where he had gone, it clearly establishes that the accused abandoned his post which was only about 500 yards from the enemy and thereby endangered the safety of his post and command within the meaning of Article of War 75.

b. The Specification of Charge III alleges that the accused did, at Monschau, Germany, on 22 November 1944, desert the service and remain absent in desertion until he was apprehended at Monschau, Germany, on 28 November 1944.

The Manual for Courts-Martial defines desertion as "* * * absence without leave accompanied by the intent not to return, or to avoid hazardous duty or to shirk important service". The Manual further states that both the element of absence without leave and an intent not to return to the service are essential to the offense "* * * which is complete when the person absents himself without authority from his place of duty * * * with intent not to return thereto". If an intent not to return is shown to have existed at the inception of the unauthorized absence or at any time during such absence, the offense of desertion is established (MCM, 1928, par. 130).

The evidence shows that on 22 November 1944, after the accused had been restricted to the limits of his quarters and informed that he

was to be tried by court-martial, he absented himself without leave from his organization and hid in a house occupied by German nationals until he was apprehended on 28 November 1944. Although the house where the accused secreted himself was only two blocks from his company command post, the accused's conduct in breaching the restriction imposed upon him and in persistently seeking to avoid detection justified the court in concluding that the accused intended not to return to his organization. The evidence showing that the accused was afraid both of being tried by court-martial and of his company commander tends to strengthen this inference. The profane threats of the accused's company commander and his unwarranted conduct in calling the accused a "son-of-a-bitch", on the occasion of his apprehension, although decidedly reflecting discredit to the company commander, do not change the character of the accused's offense. When considered in its entirety, the evidence shows that the accused intended to abandon the service and amply supports the findings of guilty of the Specification of Charge III and Charge III.

6. The charge sheet shows that the accused is 21 years and 9 months of age and that he enlisted at Binghampton, New York, on 23 February 1943, for the duration of the war plus six months.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. A sentence of death, or such other punishment as a court-martial may direct, is authorized upon a conviction of misbehavior before the enemy, in violation of Article of War 75, or desertion in time of war, in violation of Article of War 58.

Abner E. Lifscomb, Judge Advocate.

Robert J. Cannon, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 274989 1st Ind

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 Private Benjamin F. Smith (32839185), Company F, 38th Cavalry Reconnaissance Squadron (Mechanized).

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.

3. Accused is 21 years and 9 months of age and has been in the military service for approximately two years.

4. Although the evidence in this case differs in several particulars from the evidence in the case of Private William C. Baxley (14161534), it is a companion case to it in that both accused are members of the same organization, both committed the same offenses at approximately the same time and place, both were tried by the same court and both received the same sentence. The record in the present case shows that on 21 November 1944 at about two o'clock in the morning the accused assumed the duties of a guard at Monschau, Germany, at an outpost about 500 yards from the enemy. Two hours later, at about 4 o'clock, when a soldier came to the accused's outpost to relieve him, the accused was not there nor was he seen by this soldier during the following two hours. The accused's act in leaving his outpost before being properly relieved endangered the safety of his post and his organization and constituted misbehavior before the enemy within the contemplation of Article of War 75.

On the day following the above offense the accused breached a restriction requiring him to remain in his quarters by hiding himself in a house in Monschau which was occupied by German civilians. On the sixth day of his absence he was apprehended on the roof of the house where he had been hiding. His conduct warranted the conclusion that he had deserted the service in violation of Article of War 58.

5. The Commanding General of the Army in the European Theater of Operations approved the sentence and forwarded the record of trial for the action of the President under Article of War 48. In transmitting the record he wrote:

> "I am constrained, by my responsibility to millions of loyal men who serve with unselfish devotion the needs of their country, to recommend that the death sentence be confirmed and executed, as exemplary punishment for this accused's treacherous and base betrayal of comrades, jeopardizing the military mission of his command. The sentence of the accused to be shot to death with musketry is just punishment for his faithless abandonment of his post of duty, with disregard for

the consequences of his disloyalty to the trust of guarding from surprise night attack by the enemy the security of his comrades and the command committed to his protection; and, later, deserting the service and remaining in hiding through the aid of enemy nationals in enemy country while his own command was engaged in combat on enemy soil."

6. On VE-Day, 9 May 1945, General Eisenhower by radiogram modified his previous action in this case by recommending that the sentence of death be commuted to life imprisonment. I concur in General Eisenhower's recommendation and recommend that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for life, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for life. G.C.M.O. 331, 10 Jul 1945)

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TITLE

DATE	BORROWER'S NAME	EXT.