OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 48

1945

R
16
B63
v. 48

R
16
B63
v.48

Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume XLVIII

Including

CM 274990 to CM 276696

(1945)

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

Office of The Judge Advocate General

Washington : 1945

03472

CONTENTS OF VOLUME XLVIII

CM No.	Accused	Date	Page
274990	Baxley	6 Mar 1945	1
275196	Stewart	21 Feb 1945	15
275309	Sappington	21 Mar 1945	21
275342	Dobbs	5 Mar 1945	31
275353	Garris	11 Jun 1945	39
275488	Wagner	9 Mar 1945	45
275518	Linville	13 Mar 1945	55
275534	Ellis	10 Mar 1945	65
275535	Wilson	6 Mar 1945	71
275547	Garrett	13 Apr 1945	77
275645	Griffith	2 Mar 1945	111
275648	Creighton	9 Apr 1945	117
275699	Sarapochilo	30 Mar 1945	133
275715	Burleigh	16 Mar 1945	137
275738	Kidder	17 Apr 1945	145
275792	Blair, Carver, Cline, McConnell	2 Apr 1945	151
275842	Hart	13 Mar 1945	157
275928	Hagler	14 Mar 1945	163
275993	Mitchell	16 Mar 1945	171
276025	Farella	17 Apr 1945	181
276032	Howell	12 Mar 1945	211
276203	Walker	5 Apr 1945	215
276208	Campbell	30 Mar 1945	225
276248	Stroud	12 Apr 1945	231
276250	Harvey	9 May 1945	239
276272	Myrick	5 Apr 1945	255
276285	Lucas	17 Mar 1945	265
276297	Lewis	12 Apr 1945	275
276298	McNeil	16 Apr 1945	287
276363	Kempke	13 Apr 1945	305
276374	Beck	28 Mar 1945	317
276386	Newell	15 Mar 1945	325
276435	Meyer	5 May 1945	331
276461	Lehmkuhl	19 Apr 1945	345
276481	Arey	22 Mar 1945	353

CM No.	Accused	Date	Page
276559	Francis	21 May 1945	359
276576	Pilger	23 Mar 1945	379
276617	Inglett	20 Apr 1945	385
276673	Hoffman	30 Mar 1945	393
276696	Clark	5 May 1945	397

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

SPJGN
CM 274990

6 MAR 1945

UNITED STATES	)	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 WILLIAM C. BAXLEY (14161534), Company F, 38th Cavalry Reconnaissance Squadron (Mechanized).	)	

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

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, it 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 William C. Baxley, 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 the reviewing authority).

Specification: (Disapproved by the reviewing authority).

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

(2)

Specification: In that Private William C. Baxley, 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 did remain absent 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. After evidence of one previous conviction for the careless discharge of a weapon in violation of Article of War 96 was received in evidence, he was sentenced to be shot to death with musketry. All of the members of the court present at the time the votes were taken concurred in the findings of guilty and in the sentence. The Commanding General, Headquarters V Corps, APO #305, disapproved the findings of guilty of Charge II and the Specification thereunder, approved the remaining findings of guilty and the sentence, and directed, in pursuance to Articles of War 48 and 50½, that the execution thereof be withheld. The Commanding General of the Army in the European Theater of Operations confirmed the sentence and forwarded the record of trial to The Judge Advocate General for action under Article of War 50½. In transmitting the record he wrote,

"The order directing its execution is withheld, pursuant to Article of War 50½ and for determination that I am authorized to order executed, without commuting, the sentence based in part, perhaps, upon the finding of guilty of a violation of Article of War 75. The record of trial is forwarded for such determination; and, if it be determined that I do not have such authority, then for action by the President under Article of War 48. In this latter event, 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 misconduct 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. 15). The forward outpost position of this sector, which was designed to guard against the infiltration of enemy patrols, was located near a building on the outskirts of Monschau referred to as the "slaughter house" (R. 6-8). All of the guard detail assigned to this outpost duty, except the accused and a Private Smith, slept when not on duty in a school house about 100 yards to the rear of the slaughter house. The accused and Private Smith, however, slept in the slaughter house (R. 14). The command post of Company F was located about 250 yards to the rear of the slaughter house and the squadron command post was about 600 yards further to the rear. Except for the 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 (R. 6). There were no friendly troops between the "slaughter house" outpost and the enemy. The nearest outpost of the enemy was known to be within a distance of 400 yards (R. 16). The Monschau sector had been daily exposed to artillery fire and four days prior to the misconduct in question it had been exposed to the fire of small arms (R. 15).

On the night of 21 November 1944 the outpost near the slaughter house was guarded by two soldiers stationed separately in tanks. One tank was stationed in front of the slaughter house and the second tank was behind it. "On each side of these tanks was a tank manned by two men" (R. 16).

Technician Fifth Grade Charles W. Powers testified that, after midnight on 20 November 1944, he was assigned to guard duty in the forward tank by the "slaughter house" with instructions that his post was inside the tank. At the time he had gone on duty he had been given a "G.I. watch" which belonged to Sergeant Stone who was in charge of the guard (R. 10). At a "quarter to two" Powers went in the slaughter house, where the accused and a Private Smith slept when not on duty, and awakened them. Powers then went back to his post in the tank. At "five minutes to two" he again entered the slaughter house "to make sure" that the accused had awakened. At that time the accused upon being given the "G.I. watch" left the "slaughter house" with the witness and assumed the duties as an outpost guard (R. 6-10).

Private Napoleon Chaves testified that, at about "ten to fifteen minutes to four" on the night of 21 November, he was awakened by the telephone operator in the school building where he and the main body of the guard detail slept. He then went to relieve the guard whose post was in the forward tank by the "slaughter house". He arrived at the tank between "ten and fifteen minutes after four". After getting in the tank and finding no one there, Chaves decided that, since he needed the "G.I. watch", he would attempt to obtain it from the accused. Private Chaves accordingly looked for him in the slaughter house and ... saw him "standing by the fire". When asked for the watch, the accused replied that he did not have it (R. 10-12).

(4)

Technician Fourth Grade Joseph Tschinkel testified that on the night of 20-21 November 1944 at 4 o'clock in the morning he went on guard duty in the tank at the back of the slaughter house, arriving at his post about "ten minutes after four" (R. 13-14). He testified that he was instructed to remain in the tank and that he was not authorized to leave it or go anywhere else until relieved. He also testified that it was the practice for men on duty in the tanks to awaken the men who slept in the slaughter house when their turn for duty arrived (R. 31-32).

b. The evidence for the prosecution concerning the charge of 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 quarters (R. 20). The accused was assigned to work in the kitchen during the next evening but, when the time came for the performance of his assignment, he could not be found. An entry was made in the morning report as of 22 November 1944 showing the accused as absent without leave from his company (R. 17-20; Ex. D). Thereafter, on 28 November 1944, the accused was apprehended by a guard on a highway about one kilometer from Monschau. At that time he was dressed in civilian clothes, carrying an umbrella, and walking in the direction of Monschau. When first questioned, the accused was thought to be a German civilian and was asked if he could speak English. He at once replied that he was "AWOL and returning". He then pulled the civilian shirt aside and revealed beneath it the uniform of an American soldier. The civilian clothes were described as a "black fedora hat, black suit, something like pajama tops underneath with a tie" (R. 24).

4. The accused, after his rights relative to testifying or remaining silent had been explained to him, took the stand in his own behalf but limited his testimony to the charge of desertion. He explained that at the time he was apprehended he was returning to his unit at Monschau where he had stayed for four days in the "top of a house" which was occupied by German civilians. He had dressed in civilian clothes which he had procured from an empty house in order to facilitate his passing through the outpost (R. 33-34). Upon cross-examination he testified that he had been hiding in an attic in a house in Monschau. He had remained there until one o'clock on the afternoon of 28 November 1944 when he went across the field to an empty house in which he procured civilian clothes. He asserted that he had just taken a few days "off" because he knew he was to be tried by court-martial. When he started back toward Monschau, he was apprehended (R. 34-35).

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 400 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 shows further that the accused assumed the duties of an outpost guard at about 2 o'clock on the morning of 21 November 1944. Both the outpost guard who preceded the accused on duty and the guard who followed him on duty testified that they were instructed that they should remain in the tank until they were relieved. From this evidence, as well as from the evidence showing that the accused was in an outpost position only 400 yards from the enemy, it is reasonable to infer that the accused understood that his duty required him to remain in the tank and on the alert for the approach of the enemy until he was properly relieved. Despite this manifest knowledge of his duty he left his post before he was relieved. Although the evidence fails to show how far the slaughter house was from the tank, how long the accused had been absent from his post when discovered, and whether the slaughter house commanded a view of the area from which the enemy might be expected; and, although this failure may leave the true magnitude of the accused's offense in doubt, the affirmative evidence leaves no reasonable doubt that the accused was derelict in his obligations as an outpost guard. The same is true of the evidence

showing that a lax or careless practice existed which permitted the outpost guard to leave his position in the tank and to enter the slaughter house to awaken the guards who slept there. In this connection it should be observed that the guard who preceded the accused on duty twice left his post and entered the slaughter house to awaken the accused and that the guard who followed the accused on duty also left his post to enter the slaughter house to seek a watch from the accused. Regardless, however, of these various circumstances, the accused's conduct in leaving his outpost position at the tank where he was assigned before he was relieved and absenting himself therefrom for an unknown period of time involves misconduct and neglect of duty which endangered the safety of his organization within the contemplation 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 remained absent therefrom until he was apprehended on 28 November 1944. Following his unauthorized absence from his quarters the accused hid himself for four days in the attic of a house which was occupied by German civilians. At about one o'clock on the fourth day of his absence he left this house and went across a field to an empty house where he procured a suit of German civilian clothes. Shortly thereafter he was apprehended while walking in the direction of Monschau on a highway about a mile distant therefrom. Although the accused testified that he had donned the civilian clothes in order to facilitate his passing the outpost which lay between him and his organization, his previous testimony showed that he had been in Monschau for the past four days without surrendering himself. It is reasonable to infer, therefore, that the accused had procured the civilian clothes which he was wearing when apprehended with a view of avoiding detection. The evidence showing that his initial absence was prompted by fear of the consequences of a

court-martial trial, that he concealed himself in the house of German civilians for four days, and that he disguised himself by the wearing of German civilian clothes, prove beyond a reasonable doubt that the accused at sometime during his absence intended to desert the service of the United States, and amply supports the finding of guilty of the Specification of Charge III and Charge III.

6. As shown in paragraph 2 above, the Commanding General of the Army in the European Theater of Operations confirmed the death sentence imposed in this case and forwarded the record of trial for review under Article of War 50½. In his action he stated that the record was forwarded for a determination of his power to confirm the death sentence "based in part, perhaps, upon the finding of guilty of a violation of Article of War 75", and that "* * * if it be determined that I do not have such authority, then for action of the President under Article of War 48". Thus the question was clearly presented for determination whether a commanding general of the Army in the field has the statutory power to confirm a death sentence based upon a finding of guilty of the offense of desertion and upon a finding of guilty of the offense of misbehavior before the enemy.

The conditions governing the confirmation of death sentences are stated in Articles of War 46, 48, and 50. Article of War 46 states in part, that:

> "No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being".

Article of War 48 imposes further restrictions and limitations by providing that:

> "In addition to the approval required by article 46, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, namely:
>
> * * *
>
> (d) Any sentence of death, except in the cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies; and in such excepted cases a sentence of death may be carried into execution, subject to the provisions of article 50½, upon confirmation by the commanding general of the army in the field or by the commanding general of the territorial department or division."

Finally, Article of War 50 provides in part, as follows:

> "When empowered by the President so to do, the com-

(8)

manding general of the Army in the field or the commanding general of the territorial department or division, may approve or confirm and commute (but not approve or confirm without commuting), mitigate, or remit and then order executed as commuted, mitigated, or remitted any sentence which under these articles requires the confirmation of the President before the same may be executed."

The legislative history of the Articles of War concerning the power of confirmation of the commanding general in the field has been summarized in part by Winthrop, as follows:

"The Article of 1806 had required the approval of the President in cases of death sentences, only in time of war. The Act of 1862 made this approval a requisite to the execution of all death sentences. The Act of 1863 engrafted an exception upon this general rule by authorizing the execution of such sentences 'upon the approval of the commanding general in the field,' in cases of 'any person convicted as a spy, or deserter, or of mutiny or murder'" (Winthrop's Military Law and Precedents, 2nd Ed., Reprint 1920, p. 460).

In 1916 there was added to the four offenses specified in the act of 1863 the additional offense of rape. Although the legislative history of these Articles of War fails to disclose the reasons for the selection of the five particular offenses designated in Article of War 48 to the exclusion of other offenses, it does show that Congress has always strictly limited the power of the commanding general in the field over the death penalty. Furthermore, the 1920 amendment of Article of War 50, when read in conjunction with Article of War 48, clearly demonstrates that in 1920 Congress again considered extending the power of the commanding general in the field to confirm death sentences but was unwilling to do so without, at the same time, requiring the commutation of the death sentences confirmed. In other words, by this amendment Congress expressly and pointedly reserved to the President the duty and responsibility of confirming and ordering executed all death sentences except for the five offenses enumerated in Article of War 48.

The relative powers of confirmation of the President and of the commanding general in the field must be interpreted in the light of the history of the restrictions placed upon the field commander and in the light of the approved methods of statutory interpretation. Concerning the principle of such interpretation it has been authoritatively stated that:

"As a general rule, in the interpretation of statutes, the mention of one thing implies the exclusion of another

thing. It therefore logically follows that if a statute enumerates the things upon which it is to operate, everything else must necessarily, and by implication, be excluded from its operation and effect. For instance, if the statute in question enumerates the matters over which a court has jurisdiction, no other matters may be included" (Crawford, Statutory Construction, Sec. 195).

* * *

"As we have hitherto stated, the appropriate and natural office of the exception is to exempt something from the scope of the general words of a statute, which would otherwise be within the scope and meaning of such general words. Consequently, the existence of an exception in a statute clarifies the intent that the statute should apply in all cases not excepted" (Op. Cit., Sec. 299).

Applying the above principles of interpretation to Article of War 48 we are compelled to the following conclusions:

(1) The President has been vested with <u>a general plenary power</u> to confirm and order the execution of a death sentence <u>in all cases</u> for which that penalty may lawfully be imposed. His power in this particular is not limited to any offense or group of offenses and is not restricted by territorial limitations or by conditions of war or peace.

(2) The President has been vested <u>with the exclusive power</u> to confirm and order the execution of all death sentences not based on rape, murder, mutiny, desertion, spying, or any combination of these five offenses.

On the other hand, the power of the commanding general in the field to confirm a death sentence and order its execution is only permissive and is strictly limited to "cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies" and is subject to the paramount authority vested in the President.

In the light of this limited authority does the commanding general of an Army in the field have the power to confirm, without commuting, the present sentence which is supported by legal findings of guilty of both desertion and misbehavior before the enemy? The Supreme Court of the United States in <u>Carter</u> v. <u>McClaughry</u>, 183 U.S. 236, 46 Law Ed. 364, in reviewing a court-martial case stated that:

"And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several

counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only".

As a corollary to the above stated presumption, it must also be presumed that a court, in imposing a sentence, bases it upon all of the findings of guilty which are legal. Acting under this presumption of law as well as the admission of the Commanding General of the Army in the European Theater of Operations in his action that the sentence was based in part "perhaps" upon a finding of guilty of the offense of misbehavior before the enemy and in part upon a finding of guilty of desertion, we must conclude that the sentence is not one which is based merely upon a case of "persons convicted * * * of * * * desertion * * *", but is one based upon desertion as well as another offense for which the death penalty might have been imposed. The same conclusion was reached by the Staff Judge Advocate of the European Theater of Operations who in his review stated that:

"It cannot be said, from the record in hand, that the court would have imposed the death sentence for the desertion alone, or for the misconduct before the enemy alone. It is apparent that the death sentence, which is indivisible (SPJGJ, 1943/10205, 7 July 1943, Bull JAG, July 1943, sec 400), was imposed for both offenses."

It is axiomatic that the plenary power of the commander in chief must take precedence over the limited power of the subordinate commander. When, therefore, as here, there is a conflict or overlapping of powers and responsibilities concerning the confirmation of the death sentence, the plenary power and larger responsibility of the President must prevail. The conclusion of necessity follows that the commanding general in the field does not have the authority to confirm without commuting any death sentence based upon one of the five excepted offenses enumerated in Article of War 48 and upon another offense for which the death penalty is authorized. Since the Commanding General of the Army in the European Theater of Operations, as a commanding general in the field, does not have the authority to confirm the death sentence in the present case which is based in part upon the offense of desertion and in part upon the offense of misbehavior before the enemy, the record of trial must be forwarded to the President for his action under Article of War 48.

7. The Staff Judge Advocate of the European Theater of Operations has asserted in his review that:

"* * * I do not believe it would be consistent either with the intent of Congress or the principles and spirit of military justice for the Theater Commander to disapprove the

finding of guilty of violation of Article of War 75, so adequately supported by the evidence as in this case, for the sole purpose of enabling him to confirm and order executed the sentence of death for violation of Article of War 58. Such action might be regarded as a capricious circumvention by the Theater Commander of the unanswered question as to his authority in these premises and, also, possibly infringe upon the power of the President in such matters."

This statement represents a correct analysis of the legal principle involved. The power to approve and disapprove the findings of guilty which is reposed in the reviewing and confirming authorities was intended to insure justice and not to provide a device for the circumvention of the Presidential confirming power. It would be unlawful, therefore, for a reviewing or confirming authority to disapprove of a finding of guilty for the sole purpose of assuming authority to confirm a death sentence.

7. The charge sheet shows that the accused is 20 years of age and that he enlisted at Camp Forrest, Tennessee on 23 November 1942 for the duration of the war plus six months.

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. 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. Lipscomb, Judge Advocate

Robert J. Conner, Judge Advocate

Samuel Morgan, Judge Advocate

SPJGN-CM 274990 1st Ind

8 MAY 1945

Hq ASF, JAGO, Washington, 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 William C. Baxley (14161534), 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. I also concur in the opinion of the Board that, since the sentence of death imposed in this case is based in part upon the offense of desertion and in part upon the offense of misbehavior before the enemy, the Commanding General of the Army in the European Theater of Operations does not have statutory authority to confirm the sentence without commuting it, and that since he has declined to commute the sentence, the record of trial must be forwarded to the President for his action under Article of War 48.

3. The accused is 20 years of age and has been in the military service for approximately two years and three months.

4. The record shows that on 21 November 1944 the accused assumed the duties of a guard at Monschau, Germany, at an outpost about 400 yards from the enemy. At about the time he was due to be relieved, he was discovered standing by a fire in a nearby building called the "slaughter house". His 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 and hid himself in a house in Monschau which was occupied by German civilians. On the sixth day of his absence he was apprehended about a mile from Monschau walking in the direction of that place. At the time of his apprehension he was dressed in German civilian clothes and was carrying an umbrella. 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 confirmed the death sentence imposed by the court and transmitted the record of trial to my office for action under Article of War 50½. In transmitting the record he wrote:

"The order directing its execution is withheld, pursuant to Article of War 50½ and for determination that I am authorized

to order executed, without commuting, the sentence based in part, perhaps, upon the finding of guilty of a violation of Article of War 75. The record of trial is forwarded for such determination; and, if it be determined that I do not have such authority, then for action by the President under Article of War 48. In this latter event, 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. 318, 9 Jul 1945)

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

SPJGK - CM 275196

21 FEB 1945

UNITED STATES	)	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
First Lieutenant RALPH W. STEWART (O-1795991), Corps of Military Police.	)	Trial by G.C.M., convened at Fort Crockett, Texas, 24 January 1945. Dismissal and total forfeitures.

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

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that 1st Lt Ralph W. Stewart, CMP, Headquarters 1820th Service Unit, 8th SvC, Prisoner of War Camp, Huntsville, Texas was at Prisoner of War Branch Camp, China, Texas, on or about 31 December 1944 found drunk while on duty as temporary Branch Camp Commander.

He pleaded not guilty to and was found guilty of the Charge and its Specification. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence, recommended that it be commuted to dismissal and forfeiture of $50 per month for six months and that the dismissal be suspended during the pleasure of the President, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution may be summarized as follows: It was stipulated that the accused was in the military service of the United States on 31 December 1944 and on the date of trial, assigned to Headquarters, 1820th Service Unit, 8th Service Command, Prisoner

of War Camp, Huntsville, Texas; and that on 31 December 1944 he was on duty as temporary Branch Commander of Prisoner of War Branch Camp, China, Texas, until 1700 hours (Ex. A).

During the morning of 31 December 1944 an enlisted man joined the accused in the "PX" of Prisoner of War Camp at China, Texas, of which the accused was in command, where they drank two bottles of beer. They then went to the officers' quarters located about 20 feet away and drank three or four more bottles of beer together with some whiskey (R. 9-10). The enlisted man became so intoxicated that he could not recall what happened thereafter until the next day, nor could he express any opinion upon the sobriety of the accused after they had consumed the liquids described (R. 11). The whiskey was obtained from a bottle on a table in the tent used as the officers' quarters (R. 13). Another enlisted man joined them in the officers' quarters and drank a bottle of beer and left (R. 18). A few hours later the accused entered the orderly tent about 60 feet away from the officers' quarters and picked up a .45 revolver from a desk where a guard had laid it while he was engaged in writing out a report (R. 42). The accused put two rounds of ammunition in the gun and pulled the trigger of the gun while pointing it at the floor causing it to go off. A soldier walked into the orderly tent and the accused put the muzzle of the gun into his midsection and asked him if he was afraid of the gun. Another enlisted man then took the gun from the accused and locked it up (R. 18, 20, 26, 35, 36, 43). Shortly thereafter the accused walked to the prisoner compound located about 100 feet from the orderly tent and had all of the prisoners fall out in formation. He then talked to them in a loud voice, cursed them, and waved his arms about. An enlisted man dismissed the prisoners and as the prisoners returned to their quarters the accused followed them, waving his arms (R. 18-20, 23-24, 31-34, 36, 43, 61). He then got into his automobile and drove up to the gasoline dump, 300 to 400 feet away. In endeavoring to turn around, the car became stuck in the mud (R. 22). There at 1700 o'clock he was found asleep by the officer who came to relieve him. Shortly thereafter he drove off to his home in the direction of China, Texas (Ex. C). In the opinion of the five enlisted men who observed the accused during the above occurrences he was drunk (R. 19, 20, 23, 28, 29, 31, 34, 37, 43, 47).

4. In defense an enlisted man who observed the accused's actions toward the prisoners testified that in his opinion the accused was not drunk (R. 50). The same witness denied that the accused drank any whiskey while in the officers' quarters earlier during the day (R. 50-51). Captain Charles B. Willis testified that he had known the accused since July 1944 and that from his observation he had never seen the accused drink to excess and that the accused's reputation for sobriety previous to 31 December 1944 was perfect (R. 56).

Mrs. Carolee Stewart, the accused's wife, testified that when the accused arrived home on the night of 31 December 1944, he complained of cramps in the stomach as the result of "a couple of drinks". He

continued to suffer from cramps during the night. In the morning he felt better and went "to work as usual". She administered a mixture of water, vinegar and soda to him. In her opinion he was not drunk (R. 59).

The rights of the accused having been explained to him, he elected to take the stand and testify under oath as a witness (R. 62). He testified that he was 40 years of age and had been in the military service over 16 years, during 13 years of which he was an enlisted man. His character ratings on his discharges as an enlisted man were all "excellent" (R. 62). He was on duty as averred in the specification on 31 December 1944. Because it was New Years' he treated an enlisted man to beer. During his lunch he himself drank three bottles of beer. A Mr. Blanche visited him shortly thereafter and offered him a drink from a quart bottle of whiskey. He took two drinks of whiskey. Mr. Blanche left the partially filled bottle on the table "as a present". Later when he started toward the orderly tent he felt cramps in his stomach. As he entered the tent an enlisted man was "monkeying" with a pistol. He took it away from him and in trying to release the hammer from its cocked position, it slipped and discharged the pistol. He then turned it over to Charge of Quarters and told him to clean it and put it away. Later he observed that no firewood had been delivered in the tent as ordered so he had the prisoners lined up and "bawled them out to a fare-thee-well". His cramps still bothered him and he unsuccessfully tried several remedies. He then took an oil drum in his car to the gasoline dump, where he became stuck in the mud. So he sat in his car and listened to the radio. He must have dozed off as the next thing he knew Lieutenant Quinby, the officer who was to relieve him, shook him. The officer extricated the car from the mud and the accused drove it home. He suffered from cramps most of the night. He denied that he was drunk (R. 63-67).

5. The accused has been convicted of being drunk while on duty in violation of the 85th Article of War. Under this article it is necessary to prove that the accused was on duty and that he was found drunk while on such duty. Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article (MCM, 1928, par. 145, page 159-160).

The accused was admittedly on duty at the time and place averred in the Specification. Five witnesses testified as to his conduct during a part of the time he was on duty and expressed their opinion based upon their uncontradicted observation that he was drunk. The accused denied that he was drunk, admitting however, that he had consumed at least four bottles of beer and two drinks of whiskey during the day. One witness who observed him upon several occasions during the day expressed his opinion that he was not drunk. The man with whom he did most of his drinking admitted that he himself became drunk. It was the day before New Years.

The court had the opportunity to see and observe the witnesses. We can find nothing in the record to justify any change in the court's finding that the accused was drunk. The weight of the evidence strongly favors that conclusion. We therefore have no difficulty in sustaining the findings.

6. All of the members of the court participating in the trial recommended, in view of the accused's military service of over 16 years, his six discharges rating his character as excellent, and his lack of training fitting him to earn a living outside of the service, that consideration be given to suspending the sentence and restoring the accused to duty.

7. War Department records show the accused to be 41 years of age and married. He attended grade school for eight years. For three years he was employed as a locomotive fireman on a railroad, and then during a similar period of time as an inspector in a heat-treating plant. He enlisted in the service on 26 May 1926 and served as an enlisted man, reaching the grade of sergeant, until he was commissioned second lieutenant, Corps of Military Police, Army of the United States, on 9 October 1942. On 1 June 1943 he was promoted to first lieutenant.

8. 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 by the court during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon a conviction of a violation of the 85th Article of War in time of war.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK - CM 275196 1st Ind.

FEB 27 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 Ralph W. Stewart (O-1795991), Corps of Military Police.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. The accused has been convicted of a serious military offense, to wit, being found drunk while on duty as temporary branch commander of a prisoner of war camp. War Department records show that prior to receiving his commission the accused had completed 16 years of honorable service as an enlisted man in the regular Army, with character ratings as excellent. All members of the court participating in the trial have recommended that the sentence to dismissal be suspended. The reviewing authority in his action recommended the suspension of the dismissal during the pleasure of the President and forfeiture of pay of $50 per month for six months. Despite the serious nature of his offenses, in view of the long and honorable military record of the accused, and in further view of the recommendations for clemency by the court and reviewing authority, I recommend that all forfeitures in excess of $50 pay per month for six months be remitted and that, as thus modified, the sentence be carried into execution, but that the execution of that portion thereof adjudging dismissal be suspended during good behavior.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the 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 all forfeitures in excess of $50 per month for six months remitted. Execution of that portion of sentence adjudging dismissal suspended. G.C.M.O. 132, 9 Apr 1945)

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

21 MAR 1945

SPJGQ - CM 275309

UNITED STATES v. First Lieutenant JAMES B. SAPPINGTON (0-1305997), Infantry.	)))))))	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 1 Trial by G.C.M., convened at Fort George G. Meade, Maryland, 7 February 1945. Dismissal.

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

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

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

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

Specification 1: In that First Lieutenant James B. Sappington, Company D, 7th Replacement Battalion, 2nd Replacement Regiment (Inf), did, at Fort George G. Meade, Maryland, on or about 3 October 1944 with intent to defraud, wrongfully and unlawfully make and utter to the Fort George G. Meade Exchange, a certain check, in words and figures as follows to wit:

JAMES B. SAPPINGTON
Lieut. U. S. Army

No. 156

Camp Croft, S.C. Oct 3 1944

Pay
To The
Order Of Post Exchange $ 25.00

Twenty Five - - - - - - - - No/100 - - - DOLLARS

THE COMMERCIAL NATIONAL BANK
67-699 Spartanburg, S. C. 67-699

/s/ James B. Sappington
1st Lt. Inf.

in partial payment of an indebtedness to the said Exchange in the sum of $90.00, he the said Lieutenant Sappington, then well knowing that he did not have and not intending that he should have sufficient funds in the Commercial National Bank, Spartanburg, South Carolina, for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check no. 159, dated 4 October 1944, in the amount of $20.00, payable to the order of Post Exchange, made and uttered to the Fort George G. Meade Exchange, at Fort George G. Meade, Maryland, in partial payment of an indebtedness in the sum of $90.00.

Specification 3: Same form as Specification 1, but alleging check no. 183, dated 18 November 1944, in the amount of $10.00, payable to the order of cash, made and uttered to Lieutenant Emanuel N. Frankel, at Fort George G. Meade, Maryland, and fraudulently obtaining thereby the sum of $10.00.

Specification 4: Same form as Specification 1, but alleging check no. 189, dated 21 December 1944, in the amount of $13.15, made and uttered to the Post Signal Office, at Fort George G. Meade, Maryland, in payment for services rendered.

Specification 5: Same form as Specification 1, but alleging check no. 188, dated 18 December 1944, in the amount of $10.00, payable to the order of cash, made and uttered to Major Charles L. Diamond, at Fort George G. Meade, Maryland, and fraudulently obtaining thereby the sum of $10.00.

Specification 6: Same form as Specification 1, but alleging check no. 191, dated 9 January 1945, in the amount of $50.00, payable to the order of cash, made and uttered to Captain Benjamin H. Sher, at Fort George G. Meade, Maryland, and fraudulently obtaining thereby the sum of $50.00

CHARGE II: 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 II and its Specification, and guilty of Charge I and all Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the finding of guilty of Specification 6, Charge I, except the words "and by means thereof, did fraudulently

obtain from the said Captain Benjamin H. Sher, Headquarters, AGFRD #1, Fort George G. Meade, Maryland, $50.00 in lawful currency of the United States," approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. For the prosecution, the cashier of the Commercial National Bank, Spartanburg, South Carolina, testified by deposition that each of the checks described in Specifications 1 through 6, Charge I, was presented to that bank for payment and returned unpaid because of insufficient funds. The signature on each of said checks appeared to be genuine, and each would have been paid had there been sufficient funds on deposit at the time of presentment. Each of the six checks and a photoprint of the ledger sheet of accused's account with the bank, covering the period from 1 August 1944 to 31 January 1945 were attached to the deposition and identified. On 1 September 1944 the balance in the account was $167.34. There were no deposits during September and on the thirtieth of that month the balance was $7.44. On 2 October there was a deposit of $275.57, on 17 October a deposit of $75, and on 1 November a deposit of $276.97. These were the only deposits between 1 October 1944 and 31 January 1945 (Pros. Ex. A). Further observations concerning the state of the accused's bank account will be made in connection with the several specifications involved.

With respect to Specifications 1 and 2, Charge I, the testimony shows that on 3 and 4 October 1944, accused gave the checks in the respective amounts of $25.00 and $20.00 to the Fort George G. Meade Exchange to take up two checks of like amount which had been given by accused during the previous month of September and had been dishonored. The later checks were deposited by the exchange in the bank and were subsequently returned marked "insufficient funds." About 20 October 1944, accused was called before the exchange officer for a conference about the checks. That officer, after talking with accused, "felt like" accused was entitled to more time, and an arrangement was made to hold the checks in the file until after accused's next pay day. From this talk, he believed accused had no intent to "cheat" the exchange and that he intended to make the checks good. However, after 1 November accused did not pay the checks as he had agreed (R. 9-14; Pros. Ex. B). On 3 and 4 October accused's account with the bank showed a balance of $187.01. On 13 October, at which time the checks were returned by the bank for insufficient funds, his balance was $0.07 (Pros. Ex. A).

It was stipulated that if present, Captain Emanuel N. Frankel would testify that on or about 18 November he gave accused $10.00 and received in return the check described in Specification 3, Charge I. Frankel thereafter indorsed the check and obtained $10.00 for it from the Post Exchange (R. 14-15; Pros. Exs. C, D). On 1 November accused's bank account showed a balance of $278.97. By 14 November the balance was reduced to $6.77. This balance remained until 22 November, when it was further reduced to $6.27. On 27 November, the date of the return of the check by the bank, the balance was $6.27 (Pros. Ex. A).

Accused's telephone bill with the Post Signal Office, for services rendered for the month of 6 November to 5 December 1944, became delinquent, and after a telephone call from the Post Signal Officer, accused, on 21 December 1944, mailed his check for $13.15, described in Specification 4, Charge I, in payment of the bill. The check was subsequently returned by the finance officer marked "insufficient funds," and was redeemed in cash by the Post Signal Office (R. 15-19). On 21 December accused's account with the bank showed a balance of $3.75, and on 30 December, the date the check was returned by the bank, the balance was $2.75 (Pros. Ex. A).

Accused gave the check for $10.00, dated 18 December 1944, described in Specification 5, Charge I, to Chaplain Charles L. Diamond one night at "the club," and received cash in exchange for it. Chaplain Diamond negotiated the check, which was later returned for insufficient funds. He then telephoned accused and allowed him a day to make the check good, but accused failed to see him about it. Not more than a week after giving the $10.00 check, accused redeemed another check in the amount of $25.00 which he had previously given to Chaplain Diamond. Diamond testified that he believed accused would have taken up the $10.00 check also if he had presented it to accused. During the year the witness had known him, accused had redeemed "one check, maybe two or three," which he had given the witness, and the Chaplain "never had any difficulty" (R. 19-22). On 18 December accused's bank account showed a balance of $3.75, and on 3 January, the date the check was returned by the bank, his balance was $2.75 (Pros. Ex. A).

On 9 January 1945, accused gave the check described in Specification 6, Charge I, to Captain Benjamin H. Sher, who gave accused $50.00 in cash to settle some debts accused had incurred in a poker game. Accused did not tell Captain Sher to hold the check, and the witness obtained the money on it the following morning from the Second Regiment Mess Fund. He later had to refund the money when the check was returned by the drawee bank marked "insufficient funds" (R. 22-25). On 9 January and on 13 January 1945, at which time the check was returned, accused's balance with the drawee bank was $0.67 (Pros. Ex. A).

4. Accused, after having his rights explained to him by the president, elected to testify under oath (R. 32). He stated that he had given four or five other checks prior to 3 October 1944 which had been returned for insufficient funds, but had made all of them good except the two he had given the Post Exchange. He owed about $100.00 to other military personnel at the post, part of the indebtedness being evidenced by a $60.00 check to another officer, which had not been deposited for collection. Divorce proceedings were begun against him by his wife in June, and terminated on 28 October 1944. Before the proceedings became final he had paid his wife a $100.00 monthly allowance from his pay, bought a $25.00 war bond each month, and had paid a $100.00 attorney fee for his wife. He had also given his wife an automobile, bonds, cash value of life insurance, and everything except his civilian clothing. Except for the obligations mentioned at the trial, he had no other debts or obligations of any sort (R. 33-36).

Accused fixed the date of the conference with the exchange officer as 4 October 1944 (R. 45), at which time he gave the two checks referred to in Specifications 1 and 2 to replace two prior checks which had been returned for insufficient funds. Accused told the officer he could not pay the checks and asked that they be held until his next pay day. The officer agreed to hold them for him. However, on 1 November he was "being squeezed from more than one side," and did not pay the checks, and on 6 November he entered the Station Hospital as a patient (R. 36).

While still a patient at the hospital, but while on pass in Baltimore, at the races, he borrowed $10.00 from Captain Frankel and $25.00 from a Captain Cromwell, and promised to take up the checks given them as soon as he could get back to his quarters (Specification 3). Three days later he was discharged from the hospital and paid Captain Cromwell, but was unable to locate and pay Captain Frankel (R. 37-38).

At the time he gave the check to the Post Signal Office (Specification 4) he believed he had from $15.00 to $20.00 in his account. The last bank statement he had was received around the middle of November and covered October transactions and apparently those occurring during the early part of November. He did not keep check stubs, relying upon his memory for a record of the account (R. 38-39, 49).

The check to Chaplain Diamond (Specification 5) was given in payment of a debt incurred in a poker game, and Chaplain Diamond agreed to hold it until accused could take it up in cash. A subsequent check for $25.00 given Chaplain Diamond was redeemed in cash by accused. Accused tried to call Chaplain Diamond on the day the latter left word for accused to call, and talked with the Chaplain in the mess hall later that day without any mention being made of the check. The following night Diamond told accused he had turned the check over to the Regimental Adjutant (R. 39-40).

The $50.00 check (Specification 6) was given Captain Sher at 5:30 a.m. on 9 January in payment of a debt of $49.50 incurred by borrowing chips from Sher in a poker game, and Sher agreed to hold the check and allow accused to take it up in cash. At noon that day accused went to see Sher to remind him not to cash the check and to remind him that there were "not sufficient funds in the bank to pay it," but learned that it had already been cashed. Accused then made arrangements with a Captain Ellison to let him have $200.00, with which he intended to pay the check. However, he was restricted to the post and forbidden by written orders from borrowing any more money, and consequently was never able to get the money from Ellison (R. 40-44; Def. Ex. 1).

Through the month of September accused's checks, less allotments, were sent directly to the bank in Spartanburg by the finance officer. His entire pay check was deposited to his account on 2 October and 1 November 1944 because he had stopped allotments to his wife. Because

of the divorce, he stopped making deposits in the bank beginning with November, but sent his wife money pursuant to their agreement. The account was not a joint account. When he gave checks with the understanding that they would be held, he would wait until pay day to pay them, or would "rob Peter to pay Paul, borrow from one to pay another" (R. 53-55; Pros. Ex. A).

5. The evidence clearly established, and accused admitted the making and uttering of each of the checks described in the Specifications. The insufficiency of accused's bank account and consequent return of the checks after presentment to the bank for payment is also clearly established.

The only serious question is whether the alleged knowledge of the state of his account and the alleged fraudulent intent not to have sufficient funds in the bank to meet the checks were proved beyond a reasonable doubt. As to Specifications 1 and 2, Charge I, the record shows that on 3 and 4 October, the dates on which the checks for $25.00 and $20.00 were given to the Post Exchange, accused actually had on deposit in the drawee bank the sum of $187.01. There is nothing in the evidence to show that accused had issued checks previously in an amount sufficient to create an overdraft by the issuance of the two checks in question. For aught that appears, these two checks may have been the first ones drawn against the balance of $187.01, and their dishonor may have resulted from the payment by the drawee bank of other checks drawn and presented in the interim. Under the circumstances, it is our opinion that the elements of knowledge and fraudulent intent were not proved beyond a reasonable doubt (See CM 236017, Selser, 22 BR 265). However, the evidence proves beyond a reasonable doubt the wrongful failure of accused to maintain a sufficient bank balance to meet the two checks dated 3 and 4 October, a lesser included offense under Article of War 96 (CM 249993, Yates, 32 BR 255; CM 237741, Ralph, 24 BR 103; CM 250484, Hebb, 32 BR 397).

As to the remaining Specifications, it is significant that accused admittedly made no deposit after 1 November 1944 and that his balance shrank from $213.27 on 13 November to $6.77 on 14 November and dropped to 67 cents on 8 January 1945 and to 17 cents on 15 January (Pros. Ex. A). By his own admission he received a bank statement around the middle of November. If the statement included transactions through 14 November, it showed on its face that his balance was insufficient to cover any of the four checks thereafter issued by him. If the statement did not include 14 November, it must have been apparent to the accused that his outstanding checks, which cleared on 13 and 14 November, and which presumably had been issued recently enough to be fresh in his memory, would reduce his balance to an extent precluding the honoring of further checks. His whole course of conduct indicates that he was entirely aware of the fact that the last four checks were given with insufficient funds in the bank to meet them, and, although he received his pay for November and December, he carefully refrained

from depositing any of it in his bank account. The court did not believe the accused's story that as to Specification 4 he thought he had fifteen or twenty dollars in his account and that as to Specifications 3, 5, and 6, the lenders agreed not to present the checks for payment but promised to hold them until accused could take them up by paying the amounts in cash. His version of these transactions is in direct conflict with the testimony for the prosecution and only a person of inconceivable naivete would believe him. It is significant that he told a different story with reference to Specification 4. That check was given for a telephone bill, and it must have been obvious even to him that no one would believe an assertion that the payee agreed not to present the check. Thus, by force of circumstances he deemed it necessary to advance inconsistent versions of the various transactions and his testimony is clearly unworthy of belief.

The fact that some of the checks may have been given in payment of pre-existing or gambling debts does not preclude a finding that accused is guilty of the offenses charged, in violation of Article of War 95. Receipt by accused of value for the checks need not be alleged (CM 202601, Sperti, 6 BR 171, 218; Dig. Op. JAG, 1912-40, Sec. 453 (21)). Specifications 3, 4, 5 and 6 were proved beyond a reasonable doubt.

6. War Department records reveal that accused is 39 years of age. The record of trial indicates that he was divorced on 28 October 1944. He has no children. He completed three years of high school and special courses in accounting, auditing and statistics. He worked for nine years as a salesman and office manager in his father's retail music store and ten years as a statistical analyst for the United States Department of the Interior. Accused served from 1919 to 1921 in the Reserve Officers' Training Corps. He was inducted into the Army on 17 May 1942 and was commissioned a second lieutenant in the Army of the United States on 29 December 1942 upon graduation from The Infantry School, Fort Benning, Georgia. He was promoted to the grade of first lieutenant on 7 June 1943.

7. The court was legally constituted. Except as noted, 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 only so much of the findings of guilty of Specifications 1 and 2 of Charge I as involves findings that accused wrongfully failed to maintain a sufficient bank balance to meet the checks therein described, in violation of Article of War 96 and legally sufficient to support the findings of guilty of Charge I and the remaining Specifications thereof as approved by the reviewing authority and 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 Article of War 96.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Fredman, Judge Advocate.

A. G. Piccirilli, Judge Advocate.

SPJGQ - CM 275309

1st Ind
10 APR 1945

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

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant James B. Sappington (0-1305997), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Specifications 1 and 2 of Charge I as involves findings that accused wrongfully failed to maintain a sufficient bank balance to meet the checks therein described, in violation of Article of War 96, and legally sufficient to support the findings of guilty of Charge I and the remaining Specifications thereof as approved by the reviewing authority and to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 225, 13 Jun 1945)

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

SPJGH-CM 275342

5 MAR 1945

UNITED STATES	FERRYING DIVISION AIR TRANSPORT COMMAND
v.	
Second Lieutenant J. E. DOBBS (O-582716), Air Corps.	Trial by G.C.M., convened at Gore Field, Great Falls, Montana, 9 December 1944. Dismissal, total forfeitures and confinement for two (2) years.

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

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

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

CHARGE I: Violation of the 93d Article of War

Specification: In that Second Lieutenant J. E. Dobbs, Headquarters and Headquarters Squadron, 557th Army Air Forces Base Unit (7th Ferrying Group), Ferrying Division, Air Transport Command, did, at Gore Field, Great Falls, Montana, from about 1 June 1944 to on or about 18 July 1944, feloniously embezzle by fraudulently converting to his own use the sum of $1,929.43, lawful money of the United States, the property of Bachelor Officers' Quarters Fund, 7th Ferrying Group, Gore Field, Great Falls, Montana, intrusted to him by the Commanding Officer, 557th Army Air Forces Base Unit (7th Ferrying Group), Ferrying Division, Air Transport Command.

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

Specification: (Finding of not guilty)

Accused entered "a plea of Confession and Avoidance to Charge I, Specification 1, in that he admits the converting to his own use the sum of $1,929.43, property of the Bachelor Officers' Quarters Fund, 7th Ferrying Group, Gore Field, Great Falls, Montana, but states in avoidance that he did not do it with 'Fraudulent Intent'", and he pleaded not guilty to Charge I and to Charge II and its Specification. He was found guilty of Charge I and its Specification and not guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. In view of the court's findings of not guilty under Charge II and its Specification, only the evidence pertaining to Charge I and its Specification will be hereinafter summarized.

The prosecution introduced evidence to show that on 2 June 1944, accused was relieved from duty as Assistant Officer in Charge, and was detailed to duty as Officer in Charge, Battalion Officers' Quarters, 7th Ferrying Group, Gore Field, Montana (R. 7, 8; Pros. Ex. 2). From that date until at least 15 July 1944, accused was custodian of the Bachelor Officers' Quarters Fund and was the only person entitled to draw checks on the Fund's bank account which was held in the Great Falls National Bank, Great Falls, Montana (R. 9, 10,18). The Bachelor Officers' Quarters Fund was made up of "dues" and "fees" paid by single officers living in the Bachelor Officers' Quarters, "charges" made to any married officer living there and "fees" or "charges" paid by transient officers using those facilities temporarily (R. 11).

Accused was assisted in his work as Officer in Charge, Bachelor Officers' Quarters, by Private First Class Elizabeth E. Leeper and Staff Sergeant Raymond Krasucki (R. 23, 27). Private Leeper's duty was to receive payments of all "dues" and "charges", issue receipts therefor, make

all entries and postings of receipts and disbursements in the journal and ledger and total the cash receipts daily. From time to time she would turn over accumulated cash receipts to Sergeant Krasucki whose duty it was to deposit them in the Fund's bank account (R. 23, 25, 28). During the period from 2 June 1944 to 15 July 1944, in totaling the daily cash receipts of the Fund Private Leeper consistently found that the daily cash on hand was less than the daily total receipts and that the daily difference in amounts would be equaled by the face amount of a personal check of accused or his statement of indebtedness to the Fund which she would find with the cash. She was accustomed to separate accused's checks and statements from the cash, place them in an envelope in the cash drawer and deposit only the cash in the Fund's bank account. This was in accordance with accused's instructions, he having informed her that he would take care of his checks and statements personally (R. 24, 26, 27, 35). At no time did Private Leeper or Sergeant Krasucki appropriate any of the cash receipts to his or her own use (R. 25, 28).

On 6 June 1944, Technical Sergeant Svend A. Pedersen, the noncommissioned officer in charge of the Officers' Club, requested accused to redeem three or four of his checks which were held by the club. Accused in turn asked Sergeant Pedersen if the Officers' Club would cash his check for $600 and, when informed it would not, accused then asked to use the club's banking stamp and, after stamping its impression on a check, he departed but returned within an hour and redeemed his checks for cash (R. 22, 23). The club's banking stamp made checks stamped with it payable to the First National Bank, Great Falls, Montana (R. 20, 21).

On 14 July 1944, Second Lieutenant Charles M. Wider, Assistant Budget and Fiscal Officer, commenced an audit of the Bachelor Officers' Quarters Funds (R. 8, 9). He found that the daily deposits to the Fund's account in the Great Falls National Bank were consistently less than the daily receipts. According to the journal and ledger entries, the Fund had received a total of $5,208.95 from 31 May 1944 to 18 July 1944 but there had only been deposited in its bank account a total of $3,879.52 over the same period, leaving a difference of $1,329.43. Lieutenant Wider examined the safe and the office carefully to locate any documents which might explain this difference but he found none nor did he find the checks accused previously had been accustomed

to place in the cash drawer. (R. 12, 13, 31; Pros. Ex. 3). Among the records Lieutenant Wider did find a check for $600, dated 6 June 1944, drawn on the Bachelor Officers' Quarters Fund account in the Great Falls National Bank, payable to the Officers' Mess, signed by accused and on the reverse side bearing the stamped indorsement of the Officers' Mess making it payable to the order of the First National Bank, Great Falls, Montana (R. 13, 15, 20, 21; Pros. Exs. 4, 7). Although this check had not been endorsed by the First National Bank, it had been cashed by Great Falls National Bank, probably being accepted by a new teller who failed to observe the absence of the endorsement (R. 18, 19; Pros. Exs. 4, 6). No disbursement in the amount of $600 had been entered on the journal and Lieutenant Wider could find no invoice, voucher or other memorandum to support this expenditure (R. 13, 14, 31). Furthermore, the officer in charge of the Officers' Mess had no knowledge of any such check being delivered to his office or of any such obligation owed by the Bachelor Officers' Quarters Fund to the Officers' Mess (R. 21).

Lieutenant Wider informed accused of the discrepancies he had discovered and accused voluntarily admitted that he had taken money from the cash drawer when he needed it and "put it to my own use" (R. 15). When asked about the $600 check accused replied that he had taken a blank check to the Officers' Mess, had there stamped an impression of its endorsement stamp on the reverse side, had then made out the check to the order of the Officers' Mess and had cashed it at the bank and had pocketed the money received therefor (R. 14).

Accused had altered no records nor had he prepared any false ones to conceal his peculations. He frankly admitted everything when Lieutenant Wider asked him if he could explain the shortage that the audit indicated and stated further that he was receiving sufficient funds by telegraph to make restitution (R. 17, 32, 33). He had previously made some mention to Private Leeper that he was telegraphing for funds to take care of his personal checks that had been placed in the cash drawer (R. 26). As a matter of fact, on or about 19 July 1944, accused did deposit $1,929.43 in the Great Falls National Bank to the account of the Bachelor Officers' Quarters Fund thereby making full restitution of the money appropriated by him (R. 15, 16, 19; Pros. Ex. 5).

4. The defense presented no evidence and, after his rights had been fully explained to him, accused elected to remain silent (R. 35-37).

5. At the inception of the trial defense counsel challenged three members of the court, one of whom was the law member, for cause on the grounds that they had served on the court which previously tried and convicted Louis V. Sams, then a first lieutenant, in a "closely related" case. Defense counsel did not examine any of the challenged members to determine if in fact they entertained any bias, prejudice, or conviction which would prevent them from according accused a fair and impartial trial. The court voted on each challenge in separate closed session outside the presence of each challenged member. None of the challenges were sustained by the court. Thereafter defense counsel moved that the case be tried by a court convened at a place other than Gore Field and composed of members not stationed at Gore Field or assigned to the 557th AAF Base Unit because the case had been widely discussed at that field, was quite similar to the Sams case and because the three members who previously heard the Sams case would be unable to consider the present case untainted by their deliberation in the former one. The motion was denied by the law member who stated that, if it should appear during the trial that the two cases were so closely related that the accused could not receive a fair trial from the court, defense might reassert its motion.

To consider the substance of the challenges and the motion in their proper perspective, a brief statement must be made about the Sams case. Sams, formerly a lieutenant in the Army, was accused's predecessor as Officer in Charge of Bachelor Officers' Quarters and served as custodian of the Bachelor Officers' Quarters Fund from November 1943 until succeeded by accused under orders dated 2 June 1944. Accused had served under Sams as Assistant Officer in Charge. During the time he served as custodian of this Fund, Sams embezzled the sum of $2,047.75 therefrom, making false entries and preparing detailed false records, vouchers and invoices to conceal his peculations. He was tried by court-martial convened at Gore Field, 23 September 1944, for embezzlement and for making a false official statement on a voucher relative to disbursements from this fund, was convicted of both offenses and was sentenced by the court to dismissal, total forfeitures and confinement for six years (See CM 267440, Sams).

One of the recognized grounds of challenge for cause is that the challenged member "should not sit as a member in the interest of having the trial and subsequent

proceedings free from substantial doubt as to legality, fairness, and impartiality", an example being when the challenged member has "participated in the trial of a closely related case" (MCM, 1928, par. 58e). The burden of maintaining such a challenge rests upon the challenging party (MCM, 1928, par. 58f). Thus, the question which confronts us here is whether the presence of these three members on the court creates a "substantial doubt as to the legality, fairness, and impartiality" of accused's trial.

Apart from the abundant evidence introduced by the prosecution, accused, himself, by his irregular plea and by the vicarious admission made by his counsel in closing argument (R. 37, 38), freely admitted that he had extracted the alleged sum of money from the Bachelor Officers' Quarters Fund and appropriated it to his own use. The only defense he asserted was to deny any intent to defraud. He claimed that he always intended eventually to restore all monies appropriated by him. Thus, the only question actually presented to the court for determination was whether, as a matter of law, accused's defense was a valid one. The court had no disputed question of fact to resolve. As will be hereinafter shown, the question of law was correctly determined. Furthermore, no errors were committed by the law member in his rulings during the trial. His impartial conduct of the trial compelled defense counsel, in his closing argument, to state that "we feel that we have had a very fair handling particularly by the law member" (R. 37). Accordingly, the record of trial raises no doubt, much less a "substantial doubt", that accused received a legal, fair, and impartial trial from this court.

In view of the foregoing, it becomes unnecessary for us to determine whether or not the Sams case was "closely related" to the instant one. It is our belief that, although the cases may have certain similarities since they involved embezzlement from the same fund by two custodians thereof, one of whom succeeded the other, nevertheless it cannot be said that they are related cases. The offenses were not committed concurrently nor is there any evidence of any conspiracy existing between the two culprits. The conduct of each accused was separate and distinct from that of the other. The evidence establishing commission of the offense in the Sams case was different from and unrelated to the evidence offered in the instant case. The similarity between the two cases would not ipso facto disqualify a member of the

court which heard the Sams case from serving as a member of the court in the instant case. The burden was on the defense to prove in fact that any such member was disqualified from serving on the court and that it did not do.

In view of the foregoing, it is our conclusion that the challenges and motion of the defense were properly denied.

The evidence conclusively establishes that accused extracted the alleged sum of money over a period of time from funds of the Bachelor Officers' Quarters with which he had been entrusted and that without authority he appropriated it to his own use. That accused may have intended eventually to make restitution, which he did, of the funds appropriated by him constitutes no legal defense to the charge of embezzlement. When a person having the care and control of funds for others makes an unauthorized use thereof, even though it be under the guise of borrowing and with the intent that the use be but temporary, he has committed the offense of embezzlement (CM ETO 1302, 3 Bull. JAG 189; CM 254947, Dailey, 3 Bull. JAG 344; CM 267843, Bonar). The evidence sustains the finding of guilty of the Specification of Charge I.

6. Accused is 26 years of age and is married. He attended business college for one year in 1936 and thereafter was employed successively as a bookkeeper, furniture salesman and insurance agent until his induction into military service in January 1942. On 16 October 1943 he was commissioned a second lieutenant after graduation from the Officer Candidate School, Army Air Forces Eastern Technical Training Command, Miami Beach, Florida. Although on the charge sheet accused's serial number appears as 583716 as it does in other places in the record of trial, nevertheless it is apparent from certain official orders in the record of trial and from the records of the War Department that his correct serial number is 582716.

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

Thomas N. Tappy, Judge Advocate

William H. Gamble, Jr., Judge Advocate

Robert C. Trewethan, Judge Advocate

(38)

SPJGH-CM 275342 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAR 23 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 J. E. Dobbs (0-582716), 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 approved and carried into execution and that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement.

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

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed. G.C.M.O. 184, 9 Jun 1945)

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

SPJGK - CM 275353

11 JUN 1945

UNITED STATES	)	7TH HEADQUARTERS AND HEADQUARTERS DETACHMENT SPECIAL TROOPS, FOURTH ARMY
v.	)	Trial by G.C.M., convened at Camp Bowie, Texas, 27 January 1945. Dismissal.
Second Lieutenant JAMES A. GARRIS (O-1116905), Corps of Engineers.	)	

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

---

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: In that 2D LT JAMES A. GARRIS, Headquarters 1162d Engineer Combat Group, then of 1475th Engineer Maintenance Company, did, at Camp Bowie, Texas, on or about 1 September 1944, wrongfully gamble with Staff Sergeant George W. Velton, Technician Fourth Grade James E. Huntley, First Sergeant Marple C. Johnson, and Technician Fourth Grade Craven H. Crump, enlisted men of his organization.

Specification 4: In that 2D LT JAMES A. GARRIS, * * *, did, while enroute from Salina, Kansas, to Brownwood, Texas, on or about 17 December 1944, wrongfully gamble with Technician Fourth Grade Lee E. Struthers, an enlisted man of his organization.

Specification 5: In that 2D LT JAMES A. GARRIS, * * *, did, at Camp Bowie, Texas, on or about 19 December 1944, with intent to deceive MAJOR DANIEL M. COOK, IGD, Inspector General, 7th Headquarters and Headquarters Detachment, Special Troops, Fourth Army, officially state to the said Major Cook in answer to the question, "Have you on any occasion gambled

with enlisted men?", "No sir, I have played pinochle and bridge with them but have never gambled with enlisted men", which statement was known by the said 2d Lt Garris to be untrue.

He pleaded not guilty to the Charge and all of its Specifications. He was found not guilty of Specifications 1 and 2, but guilty of Specifications 3, 4 and 5 and guilty of the Charge. No evidence was introduced of any previous conviction. He was sentenced to be dismissed from the service. The reviewing authority approved only so much of the findings of guilty of Specifications 3 and 4 as involves findings of guilty of wrongfully gambling with enlisted men at the times and places alleged in violation of Article of War 96, approved the sentence, and forwarded the record of trial for action under Article of War 48.

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

The accused on the dates alleged in the Specifications and at the time of trial was in the military service of the United States in the grade of second lieutenant on duty with the 1275th Engineer Maintenance Company stationed at Camp Bowie, Texas (R. 10).

Sergeant C. H. Crump testified that he was in the same military organization with the accused for about 5 months and that at some time thought to be during the first week of September 1944 after duty hours in the orderly room of the company at Camp Bowie, Texas, the accused "gambled" with him and four other sergeants by playing "blackjack" for stakes from a dime to a dollar (R. 23).

Sergeant Rene Neveseta, a member of the same company, testified that on 17 December 1944 he saw the accused in a Pullman compartment en route from Kansas to Texas "gambling" with Sergeant Struthers. He is not familiar with card games and therefore could not tell what game they were playing (R. 29). He concluded that they were gambling because he saw cards being dealt and money on the table between them. He did not see any money exchanged as a result of any wagers. He observed them for "just a matter of a few minutes" (R. 28). Shortly thereafter the accused passed by where the witness was sitting and he asked the accused how he made out in the game. The accused stated that he had "made a little" (R. 29).

On or about 19 December 1944 Major Daniel M. Cook, Inspector General for 7th Headquarters, in compliance with an order to make an investigation of the 1475th Engineer Maintenance Company, interviewed the

accused. He asked the accused, "Have you on any occasion gambled with enlisted men?" The accused answered, "No, sir, I have played pinochle and bridge with them but have never gambled with enlisted men" (R. 11-12). Major Cook could not recall whether the above answer was made under oath or not, but it was his invariable rule in examinations to administer the oath (R. 13). An enlisted man who made a record of the conversation testified that the accused had been "sworn in" before giving his answer (R. 32).

4. The accused having been advised by the court of his rights as a witness elected to remain silent.

5. The accused has been convicted of two alleged offenses of gambling with enlisted men in violation of Article of War 96 and of making a false official statement in violation of Article of War 95.

Gambling with enlisted men.

Gambling with enlisted men by an officer constitutes a violation of the 96th Article of War. It has consistently been held to be conduct prejudicial to good order and military discipline (CM 241176, 26 B.R. 218, CM 241438, 26 B.R. 299, Winthrop, 1920, p. 727). The uncontradicted testimony of Sergeant Crump clearly proved that the accused was gambling by playing a game known as "blackjack" with Sergeant Crump and four other enlisted men at the time and place alleged in Specification 3 for monetary stakes. Gambling is defined as playing any game for any sum of money or other property of value, or betting or wagering money or other property of value upon the result of a game (CM 203609, 7 B.R. 244).

The record is therefore legally sufficient to support the finding of guilty of this Specification. With reference to Specification 4 the evidence is also legally sufficient to support a finding of guilty. The circumstances related by the witness of seeing the cards being dealt, the money on the table, and the accused's subsequent remark that he had "made a little" on the game excludes any other reasonable hypothesis than that he was gambling with the enlisted man.

False official statement.

With reference to Specification 5, the making of a false official statement by one in the military service with intent to deceive has long been recognized as an offense which may be charged as a violation of the 95th or the 96th Article of War as the facts and circumstances may warrant (CM 265678, CM 270070). In the case under discussion the accused denied that he had ever gambled with enlisted men when he was asked by a superior officer if he had ever done so. The evidence clearly discloses that the investigation was of an official character. It is a fair and reasonable

inference to draw from this fact that the accused's statement was official. If it was false the intent to deceive may be inferred. Therefore the only issue warranting discussion is whether it was false. It was shown to be false by testimony of Sergeant Crump to the effect that upon one occasion believed to be during the preceding September the accused had played blackjack for monetary stakes with him and four other enlisted men and by another witness that he saw the accused playing cards for money on 17 December 1944, just two days previous to the making of the statement. Such testimony uncontradicted and unimpeached in any way is sufficient to support a conviction of the accused not only for gambling but also for knowingly making the false statement as averred.

6. War Department records show the accused to be 30 years of age, single, and a high school graduate. He was engaged in road construction and road maintenance work in civil life for about three years. He entered military service on 2 May 1942 and was commissioned second lieutenant, Corps of Engineers, AUS, on 19 April 1944 at Camp Belvoir, Virginia.

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 as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon a conviction of a violation of Article of War 95 and authorized for a conviction of a violation of Article of War 96.

On Leave
, Judge Advocate.

Earle Stephen, Judge Advocate.

Herman Mayer, Judge Advocate.

SPJGK - CM 275353 1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUN 27 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James A. Garris (O-1116905), Corps of Engineers.

2. Upon trial by general court-martial this officer was found guilty of gambling with enlisted men (two specifications) and of making a false official statement, in violation of Article of War 95. He was sentenced to be dismissed the service. The reviewing authority approved the findings of guilty of the offenses of gambling with enlisted men as a violation of the 96th Article of War only, 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 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. Accused was convicted on the testimony of one witness that on one occasion he participated in a game of "blackjack" for monetary stakes in the orderly room of his organization with five noncommissioned officers, and played a card game for monetary stakes with a noncommissioned officer on a troop train on another occasion. During an official investigation of the organization the accused was asked if he had ever gambled with enlisted men, to which he replied, "No sir, I have played pinochle and bridge with them but have never gambled with enlisted men." The accused's conduct in playing cards with enlisted men for money and his false statement with reference thereto constitute serious military offenses, but in view of his military service of more than three years without any record of a previous conviction, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $50.00 pay per month for six months, and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Sentence confirmed but commuted to reprimand and forfeiture of $50 per month for six months. G.C.M.O. 322, 9 Jul 1945)

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

SPJGN-CM 275488

9 MAR 1945

U N I T E D S T A T E S	)	THE INFANTRY SCHOOL
	)	
v.	)	Trial by G.C.M., convened at Fort Benning, Georgia, 9 February 1945. Dismissal, total forfeitures and confinement at hard labor for five (5) years.
	)	
Second Lieutenant ROBERT A. WAGNER (O-1313674), Infantry.	)	

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 Robert A. Wagner, Company "H", First Parachute Training Regiment, Fort Benning, Georgia, did, without proper leave absent himself from his organization and station at Fort Benning, Georgia, from about 11 December 1944 to about 16 December 1944.

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

Specification 1: In that Second Lieutenant Robert A. Wagner, Company "H", First Parachute Training Regiment, Fort Benning, Georgia, for the purpose of obtaining the approval, allowance and payment of a claim against the United States, by presenting same to Major S. G. Harriss, Jr., Finance Officer at Fort Benning, Georgia, an officer of the United States duly authorized to approve, allow and pay such claims, did, at Fort Benning, Georgia, on or about 31 October 1944, make and use a certain paper writing, to wit: a War Department Form Number 336-Revised (Pay and

Allowance Account), which said paper writing as he, the said Second Lieutenant Robert A. Wagner, then knew contained statements that he had a lawful wife, to wit: Carrie Grimes Wagner, residing at Paso Robles, California, and was entitled to subsistence and rental allowances for the month of October 1944 in the amount of $43.40 and $60.00 respectively, which statements were false and fraudulent, in that the said Second Lieutenant Robert A. Wagner was, during the period for which said allowances were claimed, unmarried and was entitled only to subsistence and rental allowances of $21.70 and $00.00 respectively, and which statements were then known by the said Second Lieutenant Robert A. Wagner to be false and fraudulent.

Specification 2: In that Second Lieutenant Robert A. Wagner, Company "H", First Parachute Training Regiment, Fort Benning, Georgia, for the purpose of obtaining the approval, allowance and payment of a claim against the United States, by presenting same to Major S. G. Harriss, Jr., Finance Officer at Fort Benning, Georgia, an officer of the United States duly authorized to approve, allow and pay such claims did, at Fort Benning, Georgia, on or about 30 November 1944, make and use a certain paper writing, to wit: a War Department Form Number 336-Revised (Pay and Allowance Account), which said paper writing as he, the said Second Lieutenant Robert A. Wagner, then knew contained statements that he had a lawful wife, to wit: Carrie Grimes Wagner, residing at Paso Robles, California, and was entitled to subsistence and rental allowances for the month of November 1944 in the amount of $42.00 and $60.00 respectively, which statements were false and fraudulent, in that the said Second Lieutenant Robert A. Wagner was, during the period for which said allowances were claimed, unmarried and was entitled only to subsistence and rental allowances of $21.00 and $00.00 respectively, and which statements were then known by the said Second Lieutenant Robert A. Wagner to be false and fraudulent.

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

Specification 1: In that Second Lieutenant Robert A. Wagner, Company "H", First Parachute Training Regiment, Fort Benning, Georgia, did at Fort Benning, Georgia, on or about 31 October 1944, wrongfully and unlawfully fail to maintain sufficient funds in the Bank of America, Camp Roberts, California, for payment of a certain check in substantially the following words and figures:

BANK OF AMERICA

Camp Roberts, Calif. Oct 23 1944 $15 00/100

PAY TO Cash OR BEARER

Fifteen and 00/100 - - - - - - - - - DOLLARS

H Co. 1st P.T.R. /s/ Lt Robert A. Wagner
01313674

Indorsed on the back thereof:

/s/ Clem Fortune

and other unintelligible indorsements, the said Second Lieutenant Robert A. Wagner, having made and uttered said check at Columbus, Georgia, on or about 23 October 1944 to Lilley Ames Corporation of Georgia, Columbus, Georgia, and by means thereof having obtained $15.00, lawful money of the United States, property of the said Lilley Ames Corporation of Georgia.

Specification 2: In that Second Lieutenant Robert A. Wagner, Company "H", First Parachute Training Regiment, Fort Benning, Georgia, did at Fort Benning, Georgia, on or about 15 November 1944, wrongfully and unlawfully fail to maintain sufficient funds in the Bank of America, Camp Roberts, California, for payment of a certain check in substantially the following words and figures:

64-61 BANK OF AMERICA 64-61
6 6

Camp Roberts, Calif. Oct 27 1944

PAY TO THE ORDER OF Cash $10 00/100

Ten and 00/100 DOLLARS

NO. _____ /s/ Lt Robert Wagner
01313674

Co H 1st PTR.

Indorsed on the back thereof:

/s/ Jordan & Holmes Mo. Co.
By Leon W. Jordan

and other unintelligible indorsements, the said Second Lieutenant Robert A. Wagner, having made and uttered said check at Columbus, Georgia, on or about 27 October 1944 to Jordan & Holmes Motor Company, Columbus, Georgia, and by means thereof having obtained $10.00, lawful money of the United States, property of the said Jordan & Holmes Motor Company.

Specification 3: In that Second Lieutenant Robert A. Wagner, Company "H", First Parachute Training Regiment, Fort Benning, Georgia, did, at Columbus, Georgia, from about 15 October 1944 to about 10 November 1944 wrongfully cohabit with a woman, one Dorothy J. Freeman, not his wife.

The accused pleaded not guilty to, and was found guilty of, all of the 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 ten years. The reviewing authority approved the sentence but reduced the period of confinement to five years and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that in April of 1943 the accused met and became enamored of Mrs. Carrie Tucker Grimes. Whether because of this new influence in her life or because of an irreparable breach which already existed, she on 22 June 1943 obtained a divorce from her husband, Mr. Lester Gordon Grimes. A few months later in October of 1943 she and the accused began living together in Paso Robles, California, without the formality of a wedding. Although he introduced her to his acquaintances as his wife, she never meant to enter into the status of a common-law marriage. Even if her intentions had been more laudable, she would not have become his lawful spouse; for the State of California neither authorized or recognized such marriages (R. 18; Pros. Ex. 6).

Their cohabitation continued until May of 1944. In July of 1944 they saw each other for the last time, and in August he wrote his final letter to her (Pros. Ex. 6). In the meantime he had been assigned and transferred to Company "H" of the First Parachute Training Regiment at Fort Benning, Georgia. Although he had never entered into either a formal or common-law marriage with Mrs. Grimes, he submitted an "information sheet" at his new station listing her as his wife (R. 12, 15). On the basis of this representation pay vouchers were prepared for his signature by the officers' pay section for the months of October and November, 1944. Although these instruments set forth her name as his dependent and lawful wife, he executed both of them and acquiesced in their presentation to the Finance Office in their falsified form (R. 10, 12, 16; Pros. Exs. 4, 5). Relying upon the genuineness of his alleged

marital status, the Finance Office authorized and disbursed to him subsistence allowances of $43.40 and $42.00 for October and November, respectively, and rental allowances of $60.00 for each of these months (Pros. Exs. 4, 5). As a single officer he was entitled to subsistence allowances of only $21.70 and $21.00 for the periods mentioned. Since he was furnished with quarters by the Government, he had no rightful claim as a bachelor to any rental allowance (R. 11).

While at the DeSoto Hotel in St. Louis, Missouri, on the night of 7 October 1944, which was a Saturday, he observed Miss Dorothy J. Freeman, a beauty operator, in the dining room. He introduced himself and joined her at dinner. Before many hours had passed she was accompanying him to Columbus, Georgia (R. 31; Pros. Ex. 8). Upon arriving there, she obtained a room at the Ralston Hotel. Three days later the accused rented a room for himself and for her in the home of Mrs. Earl Farris at 3011 Rose Avenue. He introduced Miss Freeman to his landlady and to other tenants as his wife and was seen with her on the premises in the late evening (R. 27-31; Pros. Ex. 8). Although he at first "came in" every night about 6 o'clock, he before long "got cool" toward her and reduced the number of his visits to "two or three times a week". While their romance flagged, she "ran out of money and had to come home". He had supplied her with some funds and she had earned more by working, but it was necessary for her to wire her bank for her railroad fare. When she parted from him on 10 November 1944, she was "under the impression that he was coming to St. Louis on the 17th of November" following his graduation (Pros. Ex. 8). Until this last date they had continuously occupied the room at 3011 Rose Avenue as husband and wife (R. 27-31; Pros. Ex. 8).

Previously, on 23 October 1944, he entered the place of business of the Lilley-Ames Corporation in Columbus, Georgia, and asked Mr. Clem Fortune, the sales manager, "to cash a check". When Mr. Fortune indicated that he would be willing to provide the requested accommodation, if the sum involved was not "too much", the accused signed and presented an instrument in the sum of $15.00, drawn on the Bank of America, Camp Roberts, California. In exchange, Mr. Fortune paid the face amount in currency out of funds belonging to the Lilley-Ames Corporation (R. 18-21; Pros. Ex. 7, D). After being endorsed by him and deposited, the check was returned because of "insufficient funds". (R. 20; Pros. Ex. 7). As of 1 November 1944, the date of presentation, the accused had a net balance with the drawee bank of only $3.21 (Pros. Ex. 7, B). Before the return of the instrument Mr. Fortune received a letter from the accused warning him that payment might be refused (R. 21). Ultimately, after a telegram had been sent to the accused at his company, redemption was made with a "good check" by a "Captain Harrison" (R. 20, 22).

A second check drawn on the Bank of America, Camp Roberts, California, in the sum of $10.00 was executed by the accused on 27 October 1944 and cashed by the Jordan & Holmes Motor Company of Columbus, Georgia (R. 23, 25-26; Pros. Exs. 7, E). This instrument was also dishonored because of insufficient funds and upon being redeposited was again rejected (R. 24; Pros. Ex. 7). Despite repeated demand in writing, restitution was never made (R. 24, 26). On 15 November 1944, when the check was first received by the drawee bank, the accused had only $2.71 on deposit in his account (Pros. Ex. 7, B).

Whether as a result of these various derelictions or for other reasons, he absented himself without leave from his company on 11 December 1944 (R. 7; Pros. Ex. 1). Five days later on 16 December 1944, he was apprehended in Birmingham, Alabama, by an investigating officer for the Provost Marshal of that city (R. 7-8; Pros. Ex. 2). He was returned that day to Fort Benning and placed in confinement (R. 9; Pros. Ex. 3).

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

5. The Specification of Charge I alleges that the accused "did, without proper leave absent himself from his organization and station .....from about 11 December 1944 to about 16 December 1944." This was set forth as a violation of Article of War 61.

The evidence is uncontroverted that the accused on 11 December 1944 absented himself from the company to which he was attached as a student officer. His return to military control five days later resulted from his apprehension and not from any voluntary act on his part. The Specification has been proved beyond a reasonable doubt.

6. Specifications 1 and 2 of Charge II allege that the accused, "for the purpose of obtaining the approval, allowance and payment of a claim against the United States...." did on or about 31 October and 30 November 1944 "make and use...certain paper writing/s/" containing statements which he then knew "to be false and fraudulent". These offenses were laid under Article of War 94.

Neither the accused nor Mrs. Grimes ever intended to be married to one another either ceremonially or at common law. They were seeking the pleasures of the moment but carefully avoiding the responsibilities and obligations of wedlock. Although he introduced her as his wife, his purpose was to facilitate their illicit relations and not to elevate her to the status of his lawful spouse. Even if he had been moved by the latter, more noble objective, his act would have been futile, for the State of California did not countenance common-law marriages.

Since she was not his spouse and was never meant by him to be more than his paramour, his execution of pay vouchers in which she was falsely represented to be his wife was obviously fraudulent. The only reasonable inference to be drawn from it was that he desired to, and did, enrich himself at the Government's expense to the extent of $120 in rental allowances and $42.70 in subsistence allowances. The evidence establishes a brazen violation of Article of War 94 and supports both Specifications of Charge II beyond a reasonable doubt.

7. Specifications 1 and 2 of Charge III allege that the accused on or about 31 October and 15 November 1944 did "wrongfully and unlawfully fail to maintain sufficient funds in the Bank of America, Camp Roberts, California, for payment of" two checks drawn on that bank, one in the sum of $15.00, dated 23 October 1944, made and uttered to, and cashed by, the Lilley-Ames Corporation of Columbus, Georgia, the other in the sum of $10.00, dated 27 October 1944, made and uttered to, and cashed by, the Jordan & Holmes Motor Company also of Columbus, Georgia. These were represented to be violations of Article of War 96.

At the outset of the trial defense counsel moved to strike both Specifications of Charge III on the ground "that they do not allege a military offense; there is no allegation of intent *** Unless there is some bad intent it is obvious there is no offense ***". Since the making and uttering of the two instruments described and the failure to maintain sufficient funds for their payment have been proved beyond a reasonable doubt, this contention raises the only question requiring discussion. A full and complete answer is to be found in the following quotation from III Bull, JAG, July 1944, p. 290, sec. 454 (67):

> "The negotiation by an officer of worthless checks without intent to defraud is conduct of a nature to bring discredit upon the military service in violation of A. W. 96 (CM 224286 (1942), 14 B. R. 97, 1 Bull, JAG 215).
>
> * * * * *
>
> "A member of the military establishment is under a particular duty not to issue a check without maintaining a bank balance or credit sufficient to meet it. Proof that a check given for value by a member of the military establishment is returned for insufficient funds imposes on the drawer of the check, when charged with conduct to the discredit of the military service, the burden of showing that his action was the result of an honest mistake not caused by his carelessness or neglect."

The burden referred to has not been sustained in this case.

8. Specification 3 of Charge III alleges that the accused did "from about 15 October 1944 to about 10 November 1944 wrongfully cohabit with a woman, one Dorothy J. Freeman, not his wife." This offense was also laid under Article of War 96.

The uncontradicted evidence establishes that throughout the period from about 10 October to 15 November 1944 the accused lived with Miss Dorothy J. Freeman as husband and wife. Since they had not been wed and apparently did not intend to enter into a common-law marriage, their cohabitation was illicit and discreditable to the military service. The Specification has been proved beyond a reasonable doubt.

9. The accused, who is divorced, is about 27 years old. After being graduated from high school in 1934, he was intermittently employed during the ensuing seven years as a "second loader" and in other capacities by a logging company. He had enlisted service from 18 June 1941 to 9 March 1943 when he was commissioned a second lieutenant. Since the last date he has been on active duty as an officer.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Articles of War 61, 94, or 96.

Abner E. Lipscomb, Judge Advocate.

Robert J. Gilmer, Judge Advocate.

Samuel Morgans, Judge Advocate.

SPJGN - CM 275488 1st Ind

3 APR 1945

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

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert A. Wagner (0-1313674), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted and the period of confinement reduced to two years, that the sentence as thus modified be ordered executed, and that the United States Penitentiary, Atlanta, Georgia, be designated as the place of confinement.

3. Consideration has been given to a letter dated 19 February 1945 from the Honorable Wayne Morse, member of the United States Senate, inclosing a letter from the accused dated 14 February 1944 requesting clemency.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

4 Incls
1. Record of trial
2. Ltr for sig. S/War
3. Form of action
4. Ltr fr Sen. Morse w/Incl

(Sentence as approved by reviewing authority confirmed but forfeitures remitted and confinement reduced to two years. G.C.M.O. 211, 11 Jun 1945)

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

SPJGH-CM 275518

13 MAR 1945

UNITED STATES	INFANTRY REPLACEMENT TRAINING CENTER
v.	Trial by G.C.M., convened at Camp Joseph T. Robinson, Arkansas, 2 and 3 February 1945. Dismissal, total forfeitures and confinement for five (5) years.
Second Lieutenant WILLIAM E. LINVILLE (0-1326858), Infantry.	

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 93d Article of War

Specification: In that Second Lieutenant William E. Linville, Company B, 113th Infantry Training Battalion, 78th Infantry Training Regiment, did, at Camp Joseph T. Robinson, Arkansas, on or about 30 December 1944, feloniously take, steal and carry away one pair of trousers, value about $14.00, one pink shirt, value about $12.00, and one green shirt, value about $12.00, of a total value of about $38.00, the property of First Lieutenant Russell G. Sherman, Company B, 113th Infantry Training Battalion, 78th Infantry Training Regiment.

CHARGE II: Violation of the 96th Article of War

Specification: In that Second Lieutenant William E. Linville, * * *, did, at Camp Joseph T. Robinson, Arkansas, on or about 17 December 1944, wrongfully convert to his own use one sleeping bag case, value about $5.00, one sleeping bag,

kapok, value about $19.14, and two wool sleeping bag liners, value about $21.78, of a total value of about $45.92, property of the United States.

CHARGE III: Violation of the 95th Article of War

Specification 1: In that Second Lieutenant William E. Linville, * * *, did, at Camp Joseph T. Robinson, Arkansas, on or about 30 December 1944, feloniously take, steal and carry away one pair of trousers, value about $14.00, one pink shirt, value about $12.00, and one green shirt, value about $12.00, of a total value of about $38.00, the property of First Lieutenant Russell G. Sherman, Company B, 113th Infantry Training Battalion, 78th Infantry Training Regiment.

Specification 2: In that Second Lieutenant William E. Linville, * * *, did, at Camp Joseph T. Robinson, Arkansas, on or about 17 December 1944, wrongfully convert to his own use one sleeping bag case, value about $5.00, one sleeping bag, kapok, value about $19.14, and two wool sleeping bag liners, value about $21.78, of a total value of about $45.92, property 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, total forfeitures and confinement for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. From 3 December 1944 to Sunday, 17 December 1944, accused's organization was on bivouac (R. 23, 31). The acting S-4 for the organization, Second Lieutenant Graham Gardner, had secured a quantity of sleeping bags, property of the United States, for use on the bivouac and accused was in possession of one during that period (R. 35, 38, 57). On the 22d or 23d of December 1944, Lieutenant Gardner, in accounting for the sleeping bags he had drawn, discovered a shortage of one bag and four "inserts." About 28 December 1944 he mentioned the shortage to accused, stating that he would have to pay about $60 for "the [missing] sleeping bags" and also informed accused of his (Gardner's) impending transfer from the post. Accused had not been authorized to retain possession of a sleeping bag after conclusion of the bivouac and, during their conversation, accused did not tell Lieutenant Gardner that he had a sleeping bag in his possession (R. 33, 34, 36). On cross-examination Lieutenant Gardner admitted talking to one Captain McFadding about the missing sleeping bags but denied that he told him that he had "taken care of" the shortage and denied that he had ever stated that if there were any more sleeping bags found in the organization someone else would have to take care of them (R. 37).

On 4 January 1945, First Lieutenant Russell G. Sherman, who was assigned to the same company as accused, discovered that he was missing one pair of green trousers and one green shirt. A search was made for these articles by Lieutenant Sherman and two other officers and in a "Val Pac" in accused's hutment they found a pink shirt wrapped in a newspaper. Lieutenant Sherman's name and his identification mark were written therein and he identified it as his and estimated it had a value of about $12. The accused did not have Lieutenant Sherman's permission to use this shirt (R. 7-9, 22). A further search of accused's hutment revealed a sleeping bag case, two "wool inserts", and a "kapok lining" in a barracks bag (R. 21-23). Lieutenant Gardner identified these items as "similar" to and "the exact same type" as the sleeping bags he had drawn and issued at the time of the bivouac (R. 35, 37). The court took judicial notice of the value of these items as set forth in the Quartermaster Price List (R. 36). After checking at the Officers' Club to ascertain what clothing accused had sent to be cleaned, Lieutenant Sherman and another officer visited the D & D Cleaners, requested to see the clothing listed there under accused's name and were shown a pair of green trousers and a green shirt. Lieutenant Sherman's name was written on the trousers on two places and the accused's name had been superimposed on it. Lieutenant Sherman identified the trousers as his, and testified that they had a value of about $14. The shirt they recovered was a "Jason" shirt, size 15½ x 35, "similar" to a shirt of the same size and type that Lieutenant Sherman owned. There were no distinguishing marks on the shirt and Lieutenant Sherman was unable to make further identification of it. Lieutenant Sherman testified that the shirt had a value of $10. He had not given accused permission to borrow either the shirt or the trousers (R. 10-16, 20, 24, 25). Several days prior to his discovery that these items of clothing were missing, Lieutenant Sherman told accused he (Sherman) was being transferred from the post and was to leave on 5 January 1945 (R. 19).

On cross-examination Lieutenant Sherman recalled a conversation he had with accused on 30 December about attending a party that night. He denied that accused had mentioned the fact that his clothing had not returned from the "dry cleaners" and that, in reply, he suggested that accused could borrow his clothing. He never found a note in his "hut" stating that certain items of his clothing had been borrowed by accused (R. 17, 19).

4. Accused, after being warned of his rights, elected to give sworn testimony in his own behalf. He stated that after return from bivouac on Sunday, 17 December, he aired his sleeping bag pursuant to orders issued to that effect and that thereafter he rolled it up and placed it under his bed. On the following Friday he was in charge of a detail to collect the sleeping bags from the personnel of the company. Collection was not completed on that day. The next day accused was given another duty to

performand about noon he was informed that all the sleeping bags had been collected. On checking, however, he found that he, Second Lieutenant Wallace J. Leahey and Lieutenant Sherman still had theirs. Later that afternoon when Lieutenant Gardner told Captain McFadding, the company commander, in the presence of Lieutenant Sherman and accused that he had made up his shortage, the latter pointed out to him that that was impossible because they had not all been returned. Lieutenant Gardner replied that he had taken "seven bed rolls out of one pile and put them on my own." The following week a "showdown" inspection was held and another sleeping bag was found. Captain McFadding then stated that if any more were found he would demand an explanation, whereupon Lieutenant Leahey and accused decided they would turn in their sleeping bags "themselves." Accused planned to return his (apparently to the Quartermaster) when he returned flame throwing equipment on 6 January (R. 45, 47).

With respect to Lieutenant Sherman's clothing, accused testified that on Friday, 29 December, while discussing a forthcoming party with Lieutenant Sherman, he stated to Lieutenant Sherman that his "pinks" had not been received from the cleaners and that his "greens" were not fit to wear whereupon Lieutenant Sherman offered to loan him some clothing. The following night, while on duty as "contact officer", he decided to attend the theater and in Lieutenant Sherman's absence borrowed a "suit of greens" from him. It was raining, the trousers became soiled, and he felt obliged to have them cleaned. On Sunday, 31 December, before he sent the clothes to the cleaners, he sought to tell Lieutenant Sherman that he had them but the latter hurried away before he could do so. When he sent the clothing to be cleaned he marked his own name on the trousers to insure their safe return. He had discovered through experience that clothing might not be returned if it was not marked with the name of the sender. Monday was New Year's Day and Lieutenant Sherman apparently was absent from the post. On Tuesday and Wednesday accused was not present in the company area during the day but on Wednesday night he did look for Lieutenant Sherman. Unable to locate him he left a note in his "hut" informing him that the clothing he had borrowed would return from the cleaners the following day. Later the same night he revisited Lieutenant Sherman's hut still searching for him and at that time he borrowed "the tan shirt." The next morning he had to teach a class in flame throwing which necessitated his leaving the company area about 6:30 a.m. Realizing that Lieutenant Sherman would miss "the tan shirt" when he read the note about the other clothing accused had borrowed, and knowing that he would be angry because he had not given accused permission to take the shirt, accused folded it -- "it was folded neat" -- and put it away. Lieutenant Sherman never spoke to him about the missing clothes. Accused further testified that it was a common practice among the officers to borrow clothing without asking permission of the owner in advance (R. 48-50). However, he admitted that he had never previously borrowed any clothing from Lieutenant Sherman and that he knew the lieutenant was scheduled to leave the post on 5 January (R. 51, 52).

On cross-examination and examination by the court accused stated he and Lieutenant Leahey decided to return their sleeping bags, along with certain flame throwing equipment, directly to the Quartermaster on 6 January so as not to create difficulty for Lieutenant Gardner with the company commander (R. 52).

Captain John W. McFadding, accused's company commander, testified that he heard Lieutenant Gardner discuss the shortage in his accounts (it was a "high topic of conversation") and say that "he was clear" which the witness understood to mean that "he was clear as far as the Quartermaster was concerned and whatever charges he had." He believed accused was present when Lieutenant Gardner made this statement. However, he never heard Lieutenant Gardner say that if any more sleeping bags were found someone else would have to return them (R. 41). Witness rated accused as a "superior" officer stating that he performed extra duties on his own initiative (R. 42). On cross-examination he stated that about a week or ten days after they returned from bivouac he ordered a "showdown" inspection in his company to locate any Government property which should have been turned in and he believed that all the company officers -- accused included -- assisted in this inspection (R. 43).

5. The court called Lieutenant Wallace J. Leahey as a witness, first warning him that he need not answer any questions that might incriminate him. Lieutenant Leahey testified that he returned his sleeping bag after bivouac and stated emphatically and repeatedly that he never had any discussion with accused about returning sleeping bags. He denied that at the time the sleeping bag was discovered in accused's "hut" he was in possession of one, stating that his "hut" had been inspected before accused's (R. 57-60).

The court also called as a witness Captain Francis J. Allen who was assigned to the Supply Section of the Infantry Replacement Training Center. He testified that his records showed that on 5 January 1945 Lieutenant Gardner paid $61.85 for shortages in his supply account in connection with the bivouac and that one of the items for which he paid was "Bag, sleeping, wool liner, quantity 3, unit price $10.89, total amount $32.57" (sic). Prior to this date Lieutenant Gardner's accounts had not been "cleared" (R. 65, 66).

6. a. <u>Specification of Charge II and Specification 2 of Charge III</u>:

Under these two Specifications accused is charged with wrongfully converting to his own use "one sleeping bag case, value about $5.00, one sleeping bag, kapok, value about $19.14, and two wool sleeping bag liners, value about $21.78", offenses under Articles of War 96 and 95 separate and distinct from either larceny or embezzlement (CM 246616, <u>Holdstock</u>, 30 B.R. 121). Competent and trustworthy evidence

introduced by the prosecution at the trial demonstrates that on or about 3 December 1944 accused had temporary possession of the alleged Government property, that on or about 23 December 1944, these articles were to have been returned to the issuer, that, although accused knew that the issuing officer was soon to be transferred to another station and was seeking those articles that had not been returned, he failed to inform the issuing officer that he had the alleged articles in his possession and made no effort to return them. This property was found in accused's possession only after an official search of the officers' quarters had been conducted on or about 4 January 1945.

Accused's defense was that military duties and other matters prevented his return of these articles, that he informed the issuing officer he still had them and that he had finally decided to return them directly to the Quartermaster on 6 January 1945. He also testified that Lieutenant Leahey was as dilatory as he in returning similar articles and that, after discussing the matter, they both agreed to return them on 6 January 1945. However, accused's testimony is contradicted in most all material respects. Lieutenant Leahey flatly denied having properly failed to return his equipment and having any such conversations as testified to by accused. The issuing officer denied that accused ever informed him that he was possessed of unreturned equipment although accused knew the matter was the subject of deep concern in the company. On all the evidence the court was fully warranted in concluding that accused retained this equipment and wrongfully converted it to his own use.

To establish the value of the sleeping bag and accessories, the trial judge advocate requested the court to take judicial notice of the Quartermaster Price List. Of any relevant official price list the court was entitled to take such notice (MCM, 1928, par. 125). An examination of the Quartermaster Corps, Price List of Clothing and Equipage, reveals the unit price of the articles to be as alleged (par. 4, AR 30-3000, 16 October 1944). Furthermore, it has become well settled that the replacement cost of military equipment as evidenced by official price lists is the proper value to be ascribed to such equipment in matters involving the larceny thereof (CM 194353, Hyden, Swift, 2 B.R. 133). There was no duplication of offenses in charging accused's conduct under both the 95th and 96th Articles of War since each constitutes a separate offense but in fixing the appropriate punishment it should be considered as a single offense (CM 230222, Daly, 17 B.R. 331). The evidence sustains the findings of guilty of these two Specifications.

b. Specification of Charge I and Specification 1 of Charge III:

The Specification of Charge I alleges the larceny of a pair of trousers and two shirts from a fellow officer, in violation of Article of

War 93. The same conduct of accused is alleged in Specification 1 of Charge III as a violation of Article of War 95. The prosecution's evidence amply establishes that accused did take the alleged clothing without the permission of the owner thereof. Accused's possession of them was only discovered after a search had been made of his quarters during which one of the shirts was found neatly folded, wrapped in paper and stowed away in accused's luggage. The trousers and the other shirt were found in a cleaning establishment on 4 January 1945 with accused's name written on the trousers over that of the owner. Accused knew that Lieutenant Sherman was to be transferred from the post on 5 January 1945 but he had never informed him either that he had borrowed the lieutenant's clothing or that they were in a cleaning establishment. Accused's explanation that he was only borrowing the clothing for temporary use hardly squares with his secretive preservation of one of the shirts. Upon all of the evidence the court was warranted in concluding that accused feloniously intended to deprive the owner permanently of his property after having taken possession thereof without permission (See MCM, 1928, par. 149g).

The only testimony as to the value of this property was that of the owner thereof. He was not shown to be especially qualified to offer such testimony. In so far as the record reveals the witness may have been testifying to market value or to personal intrinsic value or to the original cost. Under such circumstances, this testimony cannot be considered competent evidence as to market value of the property at the time of its theft. There was no duplication of charges against accused in alleging the same conduct as offenses under both Articles of War 93 and 95 inasmuch as one is an offense of a civil nature and the other a purely military offense (CM 218924, Foster, 12 B.R. 173). The evidence is sufficient to sustain so much of the finding of guilty under each Specification as involves the theft of the property alleged of a value undetermined.

7. War Department records show that the accused is single and 28 years of age. He is a college graduate and prior to entering the Army worked as an instructor and demonstrator of machinery. He was inducted into the Army on 28 August 1942. On graduation from The Infantry School, Fort Benning, Georgia, on 31 October 1944, he was commissioned a second lieutenant, Army of the United States and entered on active duty the same day.

8. The court was legally constituted and had jurisdiction of the accused and the subject matter. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves a finding of guilty of larceny by accused, at the time and place alleged, of the property described in said Specification of some undetermined value; legally sufficient to support only so much of the finding of

guilty of Specification 1 of Charge III as involves a finding of guilty of felonious taking, stealing and carrying away by accused, at the time and place alleged, of the property described in said Specification of some undetermined value; legally sufficient to support all other findings of guilty; and legally sufficient to support the sentence and to warrant confirmation thereof. The sentence imposed is authorized upon a conviction of a violation of either Article of War 93 or Article of War 96. Dismissal is mandatory upon a conviction of a violation of Article of War 95.

Thomas N. Taffy, Judge Advocate

William H. Gambrell, Judge Advocate

Robert C. Trevethan, Judge Advocate

SPJGH-CM 275518 1st Ind MAR 31 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 William E. Linville (0-1326858), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves a finding of guilty of larceny by accused, at the time and place alleged, of the property described in said Specification of some undetermined value; legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge III as involves a finding of guilty of felonious taking, stealing and carrying away by accused, at the time and place alleged, of the property described in said Specification of some undetermined value; legally sufficient to support all other findings of guilty; and legally sufficient to support the sentence and to warrant confirmation thereof. In view of the relatively small value of the property taken, I recommend that the sentence be confirmed but that the forfeitures be remitted and the period of confinement be reduced to two years and that as thus modified 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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures remitted and confinement reduced to two years. G.C.M.O. 192, 9 Jun 1945)

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

SPJGK
CM 275534

10 MAR 1945

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Drew Field, Tampa, Florida, 30 January 1945. Dismissal.
Second Lieutenant DELMONT J. ELLIS (O-584342), Air Corps.	)	

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

---

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

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

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

Specification 1: In that Second Lieutenant Delmont J. Ellis, Squadron A, 342nd AAF Base Unit, Perry Army Air Field, Perry, Florida, having been restricted to the limits of Perry Army Air Field, Perry, Florida, did, at Perry Army Air Field, Perry, Florida, on or about 1 December 1944, break said restriction by going to Perry, Florida.

Specification 2: In that Second Lieutenant Delmont J. Ellis, * * *, was, at Perry, Florida, on or about 1 December 1944, in a public place, to wit, at or about Dixie Taylor Hotel, drunk while in uniform.

CHARGE II: Violation of the 69th Article of War. (Finding of not guilty.)

Specification: (Finding of not guilty).

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

Specification: In that Second Lieutenant Delmont J. Ellis, * * * did, without proper leave, absent himself from his organization at Drew Field, Tampa, Florida, from about 3 January 1945 to about 4 January 1945.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge II and its Specification, guilty of Charge I and its Specifications, and Additional Charge and its Specification, except the words "from about 3 January 1945 to about", substituting therefor the word "on," of the excepted words, not guilty, of the substituted word, guilty. Evidence was introduced of two previous convictions of the accused by general courts-martial. On 25 September 1944 he was found guilty of (1) failing to obey a lawful command in violation of the 96th Article of War, and (2) of leaving without authority his properly appointed place of duty in violation of the 61st Article of War, for which he was sentenced to be restricted to the limits of his post for three months and to forfeit $50 per month for a like period. On 22 November 1944 he was found guilty of (1) absenting himself without leave for a period of two days in violation of the 61st Article of War and (2) failing to obey a lawful command in violation of the 96th Article of War, for which he was sentenced to be restricted to the post for six months and to forfeit $75 per month for a like period. In the instant case he was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution in support of the specifications of which the accused was found guilty may be summarized as follows:

The accused was restricted to the limits of his post for a period of three months by sentence of a court-martial sitting at Dale Mabry Field, Tallahassee, Florida, on 25 September 1944 (R. 14, Ex. A). He was subsequently transferred to Perry Army Air Field, and on 22 November 1944 he was placed in arrest to the limits of that post by order of the base commander while awaiting action on a court-martial sentence pronounced on that date. The accused acknowledged receipt in writing of the written notice of arrest which was given to him by the Base Adjutant (Exs. B and D).

The accused was seen in front of the Poinsetta Restaurant by the Base Adjutant on the morning of 1 December 1944 between the hours of 8:00 and 8:30 o'clock. The accused, who was in the company of two enlisted men, was unsteady on his feet while walking and gave the appearance of staggering (Ex. B). Lieutenant Harold Breitstein, Provost Marshal, Perry Army Air Field, acting on verbal orders of the Base Commander, went into Perry to bring accused back to the post. He found him in a room in the Dixie Taylor Hotel, which was situated about a block from the Poinsetta Restaurant. He appeared to be very drunk and refused to return to the base without an order from the Base Commander. The accused had a quart bottle of beer in the room which he insisted on drinking. The Provost Marshal remained in the room from approximately 9:00 to 11:30 o'clock that morning coaxing the accused to return with him. He finally telephoned the Base Commander, who gave the accused a direct order to return. The accused told him that he would not leave the hotel room because it was his quarters. Notwithstanding this refusal accused did thereupon return to the post. The Base Commander had not authorized the

accused to leave the limits of Perry Army Air Field (Exs. C and D).

An extract copy of the morning report of accused's organization indicated that the latter was absent without leave from 1500 on 3 January 1945 until 0745 on 5 January 1945 (Ex. E).

4. For the defense it was stipulated that if present and sworn Lieutenant Colonel Dale Brannon, Director of Operations and Training, Dale Mabry Field, Tallahassee, Florida, would testify that the accused had served in an excellent manner as a supply officer at Dale Mabry Field, Florida, from 28 January 1944 to 25 April 1944, and that because of his efficiency in this capacity he was transferred to Perry Army Air Field to perform the duties of a supply officer (R. 23). Although not excused from duty by his immediate superior at the Perry Army Air Field he did not report to duty on 1 December 1944 (Def. Ex. 1).

At Drew Field, Florida, on the afternoon of 3 January 1945 about 3 p.m. the accused's immediate superior officer, Lieutenant T. R. Funk, gave the accused permission to remain away from his place of duty at that Field for the remainder of the afternoon because previous to that date he had worked steadily for 15 days (R. 24). He did not authorize him to remain away the following day, 4 January 1945, but the accused did not report for work and could not be found on the Field during that day (R. 26).

The accused elected to take the witness stand under oath, and to testify concerning Specifications 1 and 2 of Charge I and the Specification of the Additional Charge (R. 32). On the evening of 30 November 1944, at Perry Army Air Field, the accused played cards and indulged in excessive drinking at the Officers' Club from about 8:00 o'clock until after midnight (R. 35,41). Because of his intoxicated condition he could not remember leaving the club and did not remember going into the town of Perry. The only incident he remembered pertaining to his visit to town was the Provost Marshal coming to his hotel room. He did not remember walking in front of the Poinsetta Restaurant, nor talking to the Base Commander on the telephone (R. 34,35). He knew that he was restricted to the limits of his post at the time, and that he had not been given authority to leave said limits (R. 35,36). At Drew Field, on 3 January 1945, he was given the afternoon off beginning at 1500 by Lieutenant Funk, and on the following day he did not report for work because he did not feel well and so decided to take the day off to perform errands on the post, although he did not have permission to do so (R. 34). He slept in his bed on the night of 3 January 1945 (R. 39).

5. In rebuttal, the Adjutant of Squadron A, 327th AAFBU, Drew Field, was called as a witness and testified concerning his efforts to locate on that field the accused on the afternoon of 3 January 1945 to inform him

that he was to appear for a court-martial the following day at 9:00 o'clock. The accused could not be found on that day, and a more careful search was made for him the following day, but his presence was still undiscovered (R. 46). He was next seen at 7:45 on the morning of 5 January 1945 when he reported for work in the Supply Section (R. 47).

6. With reference to Charge I it was conclusively established that the accused was restricted by proper authority to the limits of Perry Army Air Field for a period of time including 1 December 1944; that these restrictions were in effect on that date; and that nevertheless the accused left Perry Army Air Field on that date and was seen in Perry, Florida, which is outside of the limits of that Field. The accused did thereby violate the restrictions lawfully imposed upon him. Such conduct was prejudicial to good order and military discipline and therefore constituted a violation of Article of War 96. The accused admitted that he became so intoxicated during the night of 30 November 1944 that he could not recall anything after midnight until the following morning when he found himself in a room in a hotel in Perry. Lieutenant Breitstein said he was drunk between 9 and 11:30 a.m. of the morning of 1 December 1944. The Base Adjutant saw him, in uniform, on the sidewalks of the town walking in an unsteady gait toward a restaurant between 8 and 8:30 of the same morning. Such evidence is ample to support a finding that the accused was drunk in uniform in a public place as alleged in Specification 2 of Charge I. Being drunk in uniform in a public place by one in the military service brings discredit upon the service and such conduct has consistently been held to constitute a violation of the 96th Article of War.

With reference to the Additional Charge and its Specification, it was admitted by the accused and by his own witnesses that he failed to report for work at the place where he had for 15 days previously been working and where on 4 January 1945 he was required to be. It was therefore established that the accused on that date absented himself without authority from his organization at Drew Field as found by the court. Such an act violates the 61st Article of War (MCM, 1928, par. 132, p. 146).

7. War Department records show the accused to be 39 years and 7 months of age and married. He graduated from high school and for two years attended Ohio State University. In civilian life he was employed for over 10 years as sales manager of petroleum products for G. W. Ellis & Sons, Inc. in Ohio. On 27 May 1942 he entered into the military service and served as an enlisted man, attaining the grade of technical sergeant, until he was commissioned second lieutenant, Air Corps, AUS, on 8 January 1944 at OCS, Miami Beach, Florida. On 25 September 1944 he was convicted by a general court-martial of violating the 96th Article of War by failing to obey a lawful command and the 61st Article of War by leaving without authority his properly appointed place for duty. On 22November 1944 he was convicted by a general court-martial of violating the 61st Article of War by absenting himself without proper leave for a period of two days, and the 96th Article of War by failing to obey a

lawful command.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK-CM 275534 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 Second Lieutenant Delmont J. Ellis (0-584342), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed 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. G.C.M.O. 185, 9 Jun 1945)

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

SPJGN-CM 275535

6 MAR 1945

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Will Rogers Field, Oklahoma City, Oklahoma, 3 February 1945. Dismissal and total forfeitures.
Second Lieutenant DOUGLAS L. WILSON, JR. (0-567109), 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 94th Article of War.

Specification: In that Second Lieutenant Douglas L. Wilson, Jr., Squadron A, 348th Army Air Forces Base Unit, did, at or near Oklahoma City, Oklahoma, during the period of 15 to 19 December 1944, wrongfully and knowingly sell the following items:

1 Handle-Socket Wrench, Ratchet Male, 3/4 inch Square Drive, value about $4.35,
1 Bar-Socket, Wrench extension, 3/4 inch Drive, 8 inches, value about $0.76,
1 Socket-12 point, 3/4 inch square drive, 1 7/16 inch Box Open, value about $0.68,
1 Socket-12 point, 3/4 inch square drive, 1 1/2 inch Box Open, value about $0.75,
1 Socket-12 point, 3/4 inch square drive, 1 1/4 inch Box Open, value about $0.39
1 Socket-12 point, 3/4 inch square drive, 1 3/8 inch Box Open, value about $0.66,
1 Socket-12 point, 3/4 inch square drive, 1 1/8 inch Box Open, value about $0.35,
1 Socket-12 point, 3/4 inch square drive, 1 inch Box Open, value about $0.27,
2 Jackets, Flying, Winter, Type B-3, value about $25.39 each,
1 Pair of Shoes, Flying, Winter, Type A-6, value about $10.00,
1 Trousers, Flying, Winter, Type A-3, value about $22.00,

of the total value of about $90.99, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that Second Lieutenant Douglas L. Wilson, Squadron A, 348th AAF Base Unit, did, at or near Will Rogers Field, Oklahoma City, Oklahoma, about the months of November and December 1944, wrongfully borrow a sum of money from Private George H. Houghton, who was then in the same office and section as was said Second Lieutenant Douglas L. Wilson, Jr., and has failed to liquidate said debt, such conduct being to the prejudice of good order and military discipline.

He pleaded guilty to, and was found guilty of, both 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 from 1 October 1944 until late in December of 1944 accused was an assistant to First Lieutenant Wilburn H. Ohle, the Personal Equipment Officer at Will Rogers Field, Oklahoma City, Oklahoma (R. 7, 8). Property in the Personal Equipment Office included, among other things, so-called "pool" clothing which was set aside and furnished for the use of transient flying officers, and for which accused had signed a memorandum receipt as the responsible officer. At the time accused issued pool items he took memorandum receipts from the officers receiving the property (R. 7-9).

Accused went on leave from Will Rogers Field, apparently in late December of 1944, and since he was soon to be transferred to another station, an inventory of the pool property was taken during his absence by Lieutenant Ohle to facilitate accused's transfer upon his return from leave (R.8). The inventory was accomplished by comparing the items in the supply room with the memorandum receipts which had been taken by accused (R. 9). This check revealed that of the property for which accused was responsible, a flying suit, consisting of a jacket, trousers and shoes, was missing from the supply room and was not accounted for by memorandum receipt (R.8). An additional flying jacket was also missing from the supply room although it was not an item for which accused was responsible (R. 9). Second Lieutenant Edward H. Davis, Jr., testified that he also worked in the Personal Equipment Office and that on 14 December 1944, at the request of

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

SPJGN-CM 275535

6 MAR 1945

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Will Rogers Field, Oklahoma City, Oklahoma, 3 February 1945. Dismissal and total forfeitures.
	)	
Second Lieutenant DOUGLAS L. WILSON, JR. (O-567109), 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 94th Article of War.

Specification: In that Second Lieutenant Douglas L. Wilson, Jr., Squadron A, 348th Army Air Forces Base Unit, did, at or near Oklahoma City, Oklahoma, during the period of 15 to 19 December 1944, wrongfully and knowingly sell the following items:

1 Handle-Socket Wrench, Ratchet Male, 3/4 inch Square Drive, value about $4.35,
1 Bar-Socket, Wrench extension, 3/4 inch Drive, 8 inches, value about $0.76,
1 Socket-12 point, 3/4 inch square drive, 1 7/16 inch Box Open, value about $0.68,
1 Socket-12 point, 3/4 inch square drive, 1 1/2 inch Box Open, value about $0.75,
1 Socket-12 point, 3/4 inch square drive, 1 1/4 inch Box Open, value about $0.39
1 Socket-12 point, 3/4 inch square drive, 1 3/8 inch Box Open, value about $0.66,
1 Socket-12 point, 3/4 inch square drive, 1 1/8 inch Box Open, value about $0.35,
1 Socket-12 point, 3/4 inch square drive, 1 inch Box Open, value about $0.27,
2 Jackets, Flying, Winter, Type B-3, value about $25.39 each,
1 Pair of Shoes, Flying, Winter, Type A-6, value about $10.00,
1 Trousers, Flying, Winter, Type A-3, value about $22.00,

of the total value of about $90.99, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that Second Lieutenant Douglas L. Wilson, Squadron A, 348th AAF Base Unit, did, at or near Will Rogers Field, Oklahoma City, Oklahoma, about the months of November and December 1944, wrongfully borrow a sum of money from Private George H. Houghton, who was then in the same office and section as was said Second Lieutenant Douglas L. Wilson, Jr., and has failed to liquidate said debt, such conduct being to the prejudice of good order and military discipline.

He pleaded guilty to, and was found guilty of, both 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 from 1 October 1944 until late in December of 1944 accused was an assistant to First Lieutenant Wilburn H. Ohle, the Personal Equipment Officer at Will Rogers Field, Oklahoma City, Oklahoma (R. 7, 8). Property in the Personal Equipment Office included, among other things, so-called "pool" clothing which was set aside and furnished for the use of transient flying officers, and for which accused had signed a memorandum receipt as the responsible officer. At the time accused issued pool items he took memorandum receipts from the officers receiving the property (R. 7-9).

Accused went on leave from Will Rogers Field, apparently in late December of 1944, and since he was soon to be transferred to another station, an inventory of the pool property was taken during his absence by Lieutenant Ohle to facilitate accused's transfer upon his return from leave (R.8). The inventory was accomplished by comparing the items in the supply room with the memorandum receipts which had been taken by accused (R. 9). This check revealed that of the property for which accused was responsible, a flying suit, consisting of a jacket, trousers and shoes, was missing from the supply room and was not accounted for by memorandum receipt (R.8). An additional flying jacket was also missing from the supply room although it was not an item for which accused was responsible (R. 9). Second Lieutenant Edward H. Davis, Jr., testified that he also worked in the Personal Equipment Office and that on 14 December 1944, at the request of

accused, he drew a flying jacket from the supply room and delivered it to accused. Lieutenant Davis did not sign a memorandum receipt at the time (R. 21).

The accused had procured certain tools from the Supply Branch at Will Rogers Field for which he had signed memorandum receipts. These tools, consisting of one ratchet wrench, one socket wrench extension, and six sockets, were never returned (R. 12).

Accused spent a portion of his off-duty hours working as a mechanic in the garage of the Oklahoma Transportation Company, Oklahoma City, Oklahoma. Private George H. Houghton, an enlisted man under accused's supervision at Will Rogers Field, likewise worked at the garage as a mechanic during off-duty hours and shared a locker with the accused (R. 14, 15, 17, 18). While working for the transportation company accused made the acquaintance of another employee there, Mr. Earl Squires, who expressed the desire to buy a flying suit. Accused thereupon took from his locker such a suit, consisting of a jacket, trousers and shoes and, stating that these items belonged to him, sold them to Squires for fifty dollars. Another flying jacket was seen at that time in accused's locker (R. 14). Squires kept the flying suit, which he had purchased, for a few days and then turned it over to Mr. Frank L. Dougherty, an "F.B.I." agent, who in turn delivered it to the military authorities at Will Rogers Field (R. 6, 15-21; Ex. B).

Mr. Charles W. Abernathy, a fellow-employee at the transportation company, expressed admiration for the tools with which accused was working. Accused, representing that they belonged to him, sold a ratchet wrench, a wrench extension, and six sockets to Abernathy for fifteen dollars (R. 16). These items, too, were later picked up by Mr. Dougherty and delivered by him to the authorities at Will Rogers Field (R. 6, 16, 22; Ex. C).

Accused was approached by still another company employee, Mr. Harry Chaffee, who wished to buy a flying jacket. According to Chaffee's testimony, accused stated "that he had sold some other stuff and he had to wait until that cooled off before he could sell it to me" (R. 17). Accused later called Chaffee by telephone, stating that he (accused) was being transferred and that Chaffee could now make the purchase. The jacket was left with Private Houghton who, pursuant to accused's instructions, delivered it to Chaffee. The money which Chaffee was to pay for the jacket was to be retained by Private Houghton and applied on a debt owed to him by accused. This debt amounted to twenty-three dollars and represented small loans made by Houghton to accused "from day to day" (R. 17-20). No money was paid by Chaffee when Houghton delivered the

jacket to him and no part of the debt owed by accused to Private Houghton had been liquidated at the time these charges were preferred. Houghton, however, was subsequently repaid in full (R. 20). The flying jacket which Chaffee purchased was later taken from him by military policemen and delivered to the authorities at Will Rogers Field (R. 21, 22; Ex. A).

4. Accused, after his rights relative to testifying or remaining silent had been explained to him, elected to make a sworn statement. He testified that the defense counsel had advised him that it would be difficult for the prosecution to prove that the property involved in this case was Government property and not merely similar to Government property. Accused went on to say, "I made my mistake, Gentleman, - I was weak, but, By God, I'm man enough to admit it. It is Government property. I sold it, and these statements have all been true and correct" (R. 22, 23).

5. The Specification of Charge I alleges that the accused "did, at or near Oklahoma City, Oklahoma, during the period of 15 to 19 December 1944, wrongfully and knowingly sell" certain property of the United States, furnished and intended for the military service thereof, of the total value of about $90.99. This property consisted of flying clothing, including a complete flying suit and an additional flying jacket, and certain tools, including a ratchet wrench, an extension, and six sockets. This offense was laid under the 94th Article of War. The Specification of Charge II alleges that the accused "did * * * wrongfully borrow a sum of money from Private George H. Houghton, who was then in the same office and section as was" accused and that accused "has failed to liquidate said debt * * *." This was set forth as a violation of Article of War 96.

The record clearly establishes, and the accused by his plea of guilty has admitted, every element of the offenses charged. The property allegedly sold by accused was clearly identified as Government property and its value established by ample and competent evidence. The facts constituting the three distinct transactions of sale were established by the testimony of credible witnesses. Accused was not willing to consummate the third sale until the earlier ones had "cooled off", but, when he discovered that he was being transferred to another station, he instructed Private Houghton to complete the sale for him. Not only did the accused fail to question any part of the overwhelming evidence against him, but he himself testified that the evidence for the prosecution was "true and correct" (R. 23).

There is likewise no controversy as to the facts supporting the Specification of Charge II. The accused borrowed money "from day to day"

from Private Houghton who worked under him in the Personal Equipment Office. There are numerous precedents for the proposition that it "is prejudicial to good order and military discipline for an officer to borrow money from an enlisted man in the same organization. The obligation that flows from indebtedness to a subordinate tends to weaken authority. It can become the cause of improper favor. It impairs the integrity of required relationships" (CM 230736, Delbrook (1943), 18 BR 29: II Bull. JAG, Apr. 1943, p. 144). The Specification of Charge I and the Specification of Charge II were proved beyond a reasonable doubt.

6. The accused is about 23 years of age and is married. He took ROTC training his last two years in high school, from which he graduated in 1939. After enlisted service in the Regular Army from 4 February 1941 to 27 October 1942, accused was commissioned a second lieutenant on 28 October 1942. On 25 July 1944 he was reprimanded and ordered to pay a forfeiture of $75.00, under Article of War 104, for being drunk and disorderly, resisting arrest and disobedience to orders.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 94 and of Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Robert J. Connor, Judge Advocate.

Samuel Morgan, Judge Advocate.

(76)

SPJGN - CM 275535 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 Douglas L. Wilson, Jr. (O-567109), 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 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
1. Rec of trial
2. Dft ltr for sig S/W
3. Form of Action

(Sentence confirmed but forfeitures remitted. G.C.M.O. 205, 9 Jun 1945)

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

(77)

13 APR 1945

SPJGV-CM 275547

UNITED STATES v. Captain WALLACE F. GARRETT (0-905159), Air Corps.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Maxwell Field, Alabama, 27-30 December 1944 and 2-3 January 1945. 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 93rd Article of War.

Specification 1: In that Captain Wallace F. Garrett, Air Corps, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Cadet Mess #1, Maxwell Field, Alabama, on or about 12 August 1944, feloniously take, steal and carry away an unknown quantity of meat, of a value in excess of two dollars ($2.00), property of the Aviation Cadet Student Fund, AAF Pre-Flight School, Maxwell Field, Alabama.

Specification 2: In that Captain Wallace F. Garrett, Air Corps, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Cadet Mess #1, Maxwell Field, Alabama, on or about 24 November 1943, feloniously take, steal and carry away an unknown quantity of meat, of a value in excess of two dollars ($2.00), property of the Wing Fund, AAF Pre-Flight School (Pilot), Maxwell Field, Alabama.

Specification 3: In that Captain Wallace F. Garrett, Air Corps, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Cadet Mess #1, Maxwell Field, Alabama, on or about 24 December 1943, feloniously take, steal and carry away an

unknown quantity of meat, of a value in excess of two dollars ($2.00), property of the Wing Fund, AAF Pre-Flight School (Pilot), Maxwell Field, Alabama.

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

Specification 1: In that Captain Wallace F. Garrett, Air Corps, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, on or about 12 August 1944, wrongfully take and use for his own personal purposes, and without proper authority, a certain automobile, to wit: A Ford Station Wagon, property of Aviation Cadet Student Fund, AAF Pre-Flight School, Maxwell Field, Alabama, of a value of more than fifty ($50.00) dollars.

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

Specification 1: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit Maxwell Field, Alabama, did, at Maxwell Field, Alabama, from about 18 January 1944 to 15 August 1944, with intent to deceive Major Merrill Doss, submit or cause to be submitted official reports on Quartermaster Form 237, Driver's Trip Ticket and Performance Record and WD Form 48, Driver's Trip Ticket and P.M. Service Record, of trips taken and mileage recorded by a Ford Station Wagon, Number 1287, property of Aviation Cadet-Student Fund, AAF Pre Flight School, Maxwell Field, Alabama, formerly known as Wing Fund, which said reports were false and were known by the said Captain Wallace F. Garrett to be false, in that same did not truly and correctly record the mileage and trips made in said station wagon.

Specification 2: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, between the approximate dates of 20 January 1944 and 5 August 1944, with intent to deceive officially certify to the correctness of the payrolls dated January 15, 31, February 15, 29, March 15, 31, April 15, 30, May 15, 31, June 15, 30, July 15, 31, of the Aviation Cadet-Student Fund, AAF Pre-Flight School, Maxwell Field, Alabama, for Cadet Mess No. 1, which payrolls were known by the said Captain Wallace F. Garrett to be untrue, in that employees of the Aviation Cadet-Student Fund, namely, Christine Reese, Elvina Hubbard, Maggie Lee Washington, Walter Mason, Annie Ruth Jackson, or some of them, were paid for services rendered to said Aviation Cadet-Student Fund, which were, in fact, never rendered, and were known by the said Captain Wallace F. Garrett to have not been rendered.

Specification 3: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, on or about 20 June, 5 July, 20 July, 5 August 1944, with intent to deceive officially certify to the correctness of the payrolls of the said Aviation Cadet-Student Fund, dated 15 June, 30 June, 15 July and 31 July 1944, which payrolls were known by the said Captain Wallace F. Garrett to be untrue, in that Christine Reese, an employee of said Aviation Cadet-Student Fund at Cadet Mess No. 1, was paid for services supposed to have been rendered to the said Aviation Cadet-Student Fund, which were in fact never rendered, and were known by the said Captain Wallace F. Garrett to have never been rendered.

Specification 4: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, between the approximate dates of 20 February 1944 and 4 March 1944, with intent to deceive officially certify to the correctness of the payrolls of the said Aviation Cadet-Student Fund, dated 15 February 1944, and 29 February 1944, which payrolls were known by the said Captain Wallace F. Garrett to be untrue, in that Elvina Hubbard, an employee of said Aviation Cadet-Student Fund at Cadet Mess No. 1, was paid for services supposed to have been rendered to the said Aviation Cadet-Student Fund, which were in fact never rendered, and were known by the said Captain Wallace F. Garrett to have never been rendered.

Specification 5: (Finding of not guilty).

Specification 6: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, between the approximate dates of 20 January 1944 and 6 August 1944, with intent to deceive officially certify to the correctness of the payrolls of the said Aviation Cadet-Student Fund, dated January 15, 31, February 15, 29, March 15, 31, April 15, 30, May 15, 31, June 15, 30, July 15, 31, which payrolls were known by the said Captain Wallace F. Garrett to be untrue, in that Walter Mason, an employee of said Aviation Cadet-Student Fund at Cadet Mess No. 1, was paid for services supposed to have been rendered to the said Aviation Cadet-Student Fund, which in fact were never rendered, and were known by the said Captain Wallace F. Garrett to have never been rendered.

Specification 7: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, between the approximate dates of 20 December 1943 and 6 August 1944, with intent to deceive officially certify to the correctness of the payrolls of the said Aviation Cadet-Student Fund, dated December 15, 30, January 15, 31, February 15, 29, March 15, 31, April 15, 30, May 15, 31, June 15, 30, July 15, 31, which payrolls were known by the said Captain Wallace F. Garrett to be untrue, in that Annie Ruth Jackson, an employee of said Aviation Cadet-Student Fund at Cadet Mess No. 1, was paid for services supposed to have been rendered to the said Aviation Cadet-Student Fund, which in fact, were never rendered, and were known by the said Captain Wallace F. Garrett to have never been rendered.

Specification 8: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, between the approximate dates of 12 February 1944 and 30 March 1944, and between the approximate dates of 15 May 1944 and 26 June 1944, with intent to deceive Major Merrill Doss, wrongfully cause one Pvt. Billy Franklin, an enlisted man in the military service of the United States, to make an official report of mileage and trips on a Ford station wagon, No. 1287, property of the Aviation Cadet-Student Fund, AAF Pre-Flight School, Maxwell Field, Alabama, formerly known as Wing Fund, AAF Pre-Flight School, (Pilot), Maxwell Field, Alabama, on trip tickets to the said Major Merrill Doss, which report was untrue and was known by the said Captain Wallace F. Garrett to be untrue.

Specification 9: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, between the approximate dates of 31 March 1944 and 13 May 1944, with intent to deceive Major Merrill Doss, wrongfully cause one Cpl. Coy R. Stuart, an enlisted man in the military service of the United States, to make an official report of mileage and trips on a Ford station wagon, No. 1287, property of the Aviation Cadet-Student Fund, AAF Pre-Flight School, Maxwell Field, Alabama, formerly known as Wing Fund, AAF Pre-Flight School (Pilot), Maxwell Field, Alabama, on trip tickets to the said Major Merrill Doss, which report was untrue and was known by the said Captain Wallace F. Garrett to be untrue.

Specification 10: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, on or about 28 March 1944, with intent to deceive Major Merrill Doss, wrongfully cause one Pvt. Billy Franklin, an enlisted man in the military service of the United States, to change the official report of mileage on a Ford station wagon, property of the Aviation Cadet-Student Fund, AAF Pre-Flight School, Maxwell Field, Alabama, formerly known as Wing Fund, AAF Pre-Flight School (Pilot), Maxwell Field, Alabama, on trip ticket of 20 March 1944 to said Major Merrill Doss, which report as changed was untrue and was known by the said Captain Wallace F. Garrett to be untrue.

Specification 11: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, between the approximate dates of 1 June 1944 and 15 August 1944, with intent to deceive wrongfully cause one Pvt. Dean Shambaugh, then Sgt. Dean Shambaugh, an enlisted man in the military service of the United States, to make an official report on the Cadet Mess No. 1 attendance rolls of the above dates, inclusive, to the said Aviation Cadet-Student Fund, that one Christine Reese, an employee of said Aviation Cadet-Student Fund, at Cadet Mess No. 1, was present on the above dates, inclusive, which report was known by the said Captain Wallace F. Garrett to be untrue, in that the said Christine Reese was absent from duty at Cadet Mess No. 1 between the said dates.

Specification 12: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, between the approximate dates of 1 December 1943 and 15 August 1944, with intent to deceive wrongfully cause one Pfc. William W. Lester, an enlisted man in the military service of the United States, to make an official report on the Cadet Mess No. 1 attendance rolls of the above dates, inclusive, to the said Aviation Cadet-Student Fund, that one Annie Ruth Jackson, an employee of said Aviation Cadet-Student Fund was present on the above dates, inclusive, which report was known by the said Captain Wallace F. Garrett to be untrue, in that the said Annie Ruth Jackson was absent from duty at Cadet Mess No. 1 on the said dates.

Specification 13: (Finding of not guilty).

Specification 14: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, between the approximate dates of 28 January 1944 and 28 February 1944, with intent to deceive wrongfully cause one Pfc. William W. Lester, an enlisted man in the military service of the United States, to make an official report on the Cadet Mess No. 1 attendance rolls of the above dates, inclusive, to the said Aviation Cadet-Student Fund, that one Elvina Hubbard, an employee of said Aviation Cadet-Student Fund was present on the above dates, inclusive, which report was known by the said Captain Wallace F. Garrett to be untrue, in that the said Elvina Hubbard was absent from duty at Cadet Mess No. 1 on the said dates.

Specifications 15 to 50: (Findings of not guilty).

Specification 51: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, on or about 6 July 1944, wrongfully use his authority over one Joe Ross, a civilian employee at Cadet Mess No. 1, in that the said Captain Wallace F. Garrett did discharge and cause to be discharged the said Joe Ross from his job at Cadet Mess No. 1 for the reason that the said Joe Ross refused to pay an usurious rate of interest demanded by one Pvt. Francis J. Rosenbaum, then T/Sgt. Francis J. Rosenbaum.

Specification 52: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, on or about 4 December 1943, wrongfully use his authority over one Katie Holston, a civilian employee at Cadet Mess No. 1, in that the said Captain Wallace F. Garrett, did discharge and cause to be discharged the said employee, Katie Holston, from employment at Cadet Mess No. 1, for the reason that the said Katie Holston refused to continue doing housework at the quarters of Major Edward E. Zimmerman for the salary paid her by Aviation Cadet-Student Fund, AAF Pre-Flight School, Maxwell Field, Alabama, formerly known as Wing Fund, AAF Pre-Flight School (Pilot), Maxwell Field, Alabama.

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

Specification 1: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, between the dates of 1 April 1943 and 15 August 1944, wrongfully obtain and use for his personal benefit certain food including meats, cheese, fruit, ice-cream, bread, milk, vegetables, of a value of about $710, property of Aviation Cadet-Student Fund, AAF Pre-Flight School, Maxwell Field, Alabama, formerly known as Wing Fund, AAF Pre-Flight School (Pilot), Maxwell Field, Alabama.

Specification 2: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, on or about 27 April 1943, wrongfully obtain and use for his personal benefit certain foods, namely, steak, of a value of about $.89, property of Aviation Cadet-Student Fund, AAF Pre-Flight School, Maxwell Field, Alabama, formerly known as Wing Fund, AAF Pre-Flight School (Pilot), Maxwell Field, Alabama.

Specification 3: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, on or about 6 July 1944, wrongfully obtain and use for his personal benefit certain foods, namely, chickens, pickles and bread, of a value of about $12.50, property of Aviation Cadet-Student Fund, AAF Pre-Flight School, Maxwell Field, Alabama.

Specification 4: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, on or about 25 July 1944, wrongfully obtain and use for his personal benefit certain foods, namely: tender loin steaks, of a value of about $1.50, property of Aviation Cadet-Student Fund, AAF Pre-Flight School, Maxwell Field, Alabama.

Specification 5: (Stricken by Court).

Specification 6: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, between the approximate dates of 1 April 1943 and 15 August 1944, wrongfully take and use for his own personal purpose, and without proper authority, two station wagons, property of Aviation Cadet-Student Fund, AAF Pre-Flight School, Maxwell Field, Alabama, formerly known as Wing Fund, AAF Pre-Flight School (Pilot), Maxwell Field, Alabama, t

wit: Frequent trips to quarters of said Captain Wallace F. Garrett at Dalraida, Alabama, daily trip from Mess Hall No. 1 to Quarters #437, Maxwell Field, Alabama, and frequent trips to home of one Christine Reese, Montgomery, Alabama.

Specification 7: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, on 15 August 1944, wrongfully take and use for his own personal purpose and without proper authority, an International Station Wagon, property of Aviation Cadet-Student Fund, AAF Pre-Flight School, Maxwell Field, Alabama, to wit: one trip to quarters of said Captain Wallace F. Garrett at Dalraida, Alabama.

Specification 8: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, from about 1 June 1944 to 15 August 1944, for his own personal gain and benefit, wrongfully cause one Christine Reese, a civilian employee of the Aviation Cadet-Student Fund, AAF PreFlight School, Maxwell Field, Alabama, to perform personal services for him, the said Captain Wallace F. Garrett, for which she, the said Christine Reese, was paid by the Aviation Cadet Student Fund.

Specification 9: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, from about 1 April 1944 to 1 July 1944, for his own personal gain and benefit, wrongfully cause one E. W. Cheney, a civilian employee of the Aviation Cadet-Student Fund, AAF PreFlight School, Maxwell Field, Alabama, to perform personal services for him, the said Captain Wallace F. Garrett, for which he, the said E. W. Cheney, was paid by the Aviation Cadet-Student Fund.

Specification 10: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, from about 28 January 1943 to 28 February 1944, for his own personal gain and benefit, wrongfully cause one Elvina Hubbard, a civilian employee of the Aviation Cadet-Student Fund, AAF PreFlight School, Maxwell Field, Alabama, then known as Wing Fund, to perform personal services for him, the said Captain Wallace F. Garrett, for which she, the said Elvina Hubbard, was paid by the Aviation Cadet-Student Fund, then known as the Wing Fund.

Specification 11: (Finding of not guilty).

Specification 12: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, from about 1 January 1944 to 15 August 1944, for his own personal gain and benefit, wrongfully cause one Walter Mason, a civilian employee of the Aviation Cadet-Student Fund, AAF PreFlight School, Maxwell Field, Alabama, formerly known as Wing Fund, to perform personal services for him, the said Captain Wallace F. Garrett, for which he, the said Walter Mason, was paid by the Aviation Cadet Student Fund, formerly known as Wing Fund.

Specification 13: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, from about 1 August 1943 to 15 August 1944, for his own personal gain and benefit, wrongfully cause Charles Coleman, Roosevelt Braxton and Abraham Williams, civilian employees of the Aviation Cadet-Student Fund, AAF PreFlight School, Maxwell Field, Alabama, formerly known as Wing Fund, to perform personal services for him, the said Captain Wallace F. Garrett, for which they, the said Charles Coleman, Roosevelt Braxton and Abraham Williams, were paid by the Aviation Cadet-Student Fund, formerly known as Wing Fund.

Specification 14: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, between the approximate dates of 1 August 1943 and 15 August 1944, wrongfully use Army personnel under his direct supervision, in that the said Captain Wallace F. Garrett did wrongfully order and cause one Pvt. Francis J. Rosenbaum, then T/Sgt. Francis J. Rosenbaum, to service slot machines which had been placed in various establishments through the negotiations of said Captain Wallace F. Garrett.

Specification 15: In that Captain Wallace F. Garrett, Section B, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, between the approximate dates of 27 April 1943, and 15 August 1944, neglect his duty assignment as Mess Officer, Cadet Mess No. 1, Maxwell Field, Alabama, in that between the said dates he did suffer to exist in said Mess Hall that was at all times operating under his supervision and control, the following practices: a loan business to civilian employees at usurious interest rates, absenteeism which was not reflected on the attendance rolls, Cadet Mess

No. 1 food and labor used for private purposes, sale of cigarettes intended for Aviation Cadet-Student Fund, Army Air Forces Pre-Flight School, Maxwell Field, Alabama, purposes.

Specification 16: (Finding of not guilty).

Specification 17: (Motion of defense for finding of not guilty sustained).

Before the accused pleaded to the general issue, motions were filed by the defense to strike several Specifications. Specification 5, Additional Charge II was stricken by the court. The accused then pleaded not guilty to all Charges and the remaining Specifications. After the prosecution had rested, the court sustained a motion by defense counsel for a finding of not guilty of Specification 17, Additional Charge II. At the conclusion of the trial, accused was found guilty of all the Specifications except Specifications 5, 13, 15 to 50, inclusive, of Additional Charge I; Specifications 11 and 16 of Additional Charge II. He was found guilty of Specification 2, Additional Charge I except the words "Maggie Lee Washington". He was found guilty of all the Charges. No evidence of previous convictions was considered. 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 ten years. The reviewing authority approved only so much of the finding of guilty of Specification 1 of Additional Charge II as involves a finding of guilty of wrongfully obtaining and using for the accused's personal benefit, certain food of a value in excess of $50. The sentence was approved, but five years of the confinement imposed were remitted and the record of trial was forwarded for action under Article of War 48.

3. Accused was found guilty of 31 Specifications out of 71 with which he was charged. Voluminous testimony was introduced and over 100 exhibits were admitted in evidence. The testimony, which was given by more than 60 witnesses, is complex and intricate. For the sake of clarity we have grouped it under seven main topics:

I - Facts not in dispute
II - Larceny and appropriation of food
III - Unauthorized use of motor vehicles
IV - Unauthorized use of personnel (a) Civilian
(b) Military
V - Making and Wrongfully causing False Official Reports to be made
VI - Unlawfully causing discharge of civilian employees

VII - Neglect of duty in permitting the practice of

(a) A loan business at usurious rates
(b) Absenteeism not reflected in payrolls
(c) Food and labor used for unauthorized purposes
(d) Unlawful sale of cigarettes

I. FACTS NOT IN DISPUTE

4. Accused was mess officer of Aviation Cadet Student Mess #1, Maxwell Field, Alabama, from April 1943 to 17 August 1944 (R. 593; Def. Ex. #2). The mess served about 3000 cadets at each meal and sometimes more (R. 554); and employed about 300 civilians and about 100 soldiers (R. 39, 546). Two lieutenants were assigned as assistant mess officers and each one was in charge of a wing. Sergeant Francis J. Rosenbaum was transferred to Mess #1 at about the same time with accused. Prior to the transfer both had been working at Mess #8 (R. 48). Upon transfer Sergeant Rosenbaum was made a technical sergeant and was the senior non-commissioned officer of the mess (R. 601). The conduct of the Mess #1 was considered by the commanding officer of the field as "most efficient" (R. 452).

Accused lived at DalRaida, Alabama, about eight miles from the field (R. 50), where he occupied a room in the house of Mrs. Nina Gassenheimer (R. 598, 673). At Maxwell Field quarters No. 437 had been assigned to him. His quarters were about half a mile from Cadet Mess #1 (R. 576).

The food for the mess was drawn from the Quartermaster by the Auditing Department. Mess #1 was required to keep a storeroom and to issu to cooks such items as were necessary for the menu approved for each meal (R. 454). The cadet fund was made up by each cadet paying in his subsistence allowance (R. 35). The treasurer of the cadet fund acted as procuring agent and paid all the bills for food and payrolls (R. 35). The employees were paid in person after they were identified (R. 454). The payrolls of civilians showed the name, the date of attendance and the rate of pay. Civilian employees were paid every two weeks (R. 37) and each payroll amounted to about $10,000 (R. 39). The payrolls were certified by the mess officer (R. 35). Two station wagons were purchased by Cadet Mess #1 for its official use: A Ford, model 1941, on 11 May 1943 (R. 37) U.S.A. No. 1287 (R. 388), and an International, Model 1941, on June 28, 1943, (R. 38), U.S.A. No. 1382 (R. 388).

Beginning 17 January 1944, instructions were issued to accused requiring the regular quartermaster form and trip ticket be maintained on each station wagon (R. 366; Pros. Ex. 91). The trip tickets used recorded the different trips made by a particular vehicle during its dispatch each day.

Cigarettes were purchased from the commissary to be given to cadets and employees at Christmas time and at other times (R. 65, 66).

Major Zimmerman was Base Mess officer of all the messes at Maxwell Field, Alabama.

II. LARCENY AND APPROPRIATION OF FOOD

For the Prosecution:

Sergeant Rosenbaum was mess sergeant of Cadet Mess #1 under the direct supervision of Captain Garrett from 1943 to 15 August 1944 (R. 48). During that period food was taken from the mess for his personal use as well as for accused, Major Zimmerman and Colonel Nelson (R. 49, 194). The food taken for accused was either placed in his car or delivered to his home in DalRaida, Alabama. Accused owned a De Soto coupe, and sometimes drove a Lincoln Zephyr (R. 50). Hams were placed in accused's car about once or twice a month (R. 50); chickens were likewise delivered about twice a month; steaks about twice a week, also a small amount of cheese, oranges and canteloupes. Turkeys were sent for Thanksgiving and Christmas (R. 52). All of the above supplies were sent from the regular stock of Cadet Mess #1 at the instruction of accused (R. 53).

In July 1944 five or six chickens were used during an airplane trip. This food was taken under instruction of accused and Major Zimmerman (R. 56, 174, 211). Roast beef sandwiches were sent from the mess for another airplane trip which was taken in May (R. 59, 173, 174). 13 August 1944 was the last time that food was taken to the home of accused (R. 57). About half a dozen steaks were sent Saturday, 12 August, and a cooked ham was sent the following day, Sunday, 13 August 1944. At the direction of accused, a turkey was sent in 1944 to Major Zimmerman, Base Mess officer. Steaks were also delivered about twice a week to Colonel Nelson, Post Engineer (R. 61). Rosenbaum testified that he shipped for his own account, to Washington, hams and chocolate syrup by railway express, which totaled about 300 to 400 pounds (R. 65). The testimony of Sergeant Rosenbaum is corroborated in part as follows: Private Grieco, a butcher of the mess, testified that he prepared about six one-pound selected steaks once or twice a week and placed them in the ice box for

Sergeant Rosenbaum (R. 131). Chickens were boned and placed in the ice box about once a week for the sergeant (R. 133). Another butcher, Private L. L. Horn testified that since January 1944 instructions were given to cut about two or three times a week, five or six T-bone steaks for accused (R. 148, 149, 157, 217, 218). The meat was wrapped and put in the ice box and later placed in one of the station wagons (R. 149, 154). Once or twice when hams were prepared, Sergeant Rosenbaum said they were "for the big boss". Accused was known as the "big boss" (R. 141). From the last of 1943 to August 1944, one or two hams a month were baked under special instruction of Sergeant Rosenbaum. The hams varied in size from eight to fourteen pounds (R. 142). During Thanksgiving and Christmas 1943 some turkeys were prepared from the stocks of the mess for Sergeant Rosenbaum (R. 142). An occasional turkey was brought in from outside sources and it was dressed in the mess and taken out (R. 143). Rosenbaum was seen many times carrying bags, packages or boxes from the office and different ice boxes and placing them in the automobile of accused and in the automobile of Miss Bramblett (a civilian clerk working in the office) (R. 163). Oranges, tomatoes and cantalopes were set aside for Sergeant Rosenbaum (R. 164). The head cook, Staff Sergeant C. E. Willis, received instructions from Sergeant Rosenbaum to cook and prepare hams in a special way, with brown sugar, pineapple juice and after baking they were rolled in dough. The hams prepared for the cadets were just baked off, the same way as those prepared for the recreation hall (R. 189). Twenty-five or thirty hams were prepared in the manner desired by Sergeant Rosenbaum (R. 190) and they were taken out of the mess (R. 172). This practice continued to the time of the investigation (Aug. 1944) (R. 173).

On 12 August 1944 Sergeant Rosenbaum ordered Corporal Bryant, one of the cooks, to cook a ham for accused (R. 166). The ham was overcooked and ruined and another one was cooked in its place (R. 167, 177). This ham was delivered by Private Stuart, a driver for the mess, to accused's home at DalRaida in a station wagon on 13 August 1944 (R. 182). It was placed by driver on the kitchen table. The accused was there in the kitchen (R. 183). On another occasion, during the month of April, a chicken was delivered to the home of accused by the same driver. It had been given to him by Sergeant Rosenbaum at the mess (R. 183). An average of three times a week, food was given to Colonel Nelson, post engineer (R. 194). Corporal A. Bernard, a K.P. pusher, testified that he was instructed by Rosenbaum to wrap tenderloin T-bone steaks from the ice box of the Cadet Mess #1, four and five at a time, and to put them in accused's car (R. 207). On 27 April 1943, after accused ascertained there were no steaks available that day at the mess, he ordered the mess steward to buy some steaks for him at the commissary. Accused had no points and the steaks

were charged to Cadet Mess #1. The steaks were delivered by the commissary to the mess steward who signed a receipt for them and gave the steaks to accused (R. 198-200; Ex. 60). The cost of the steaks 89¢ was included in the subsequent check paid by the mess (R. 205) to the commissary.

For the defense:

Accused admitted the purchase at the commissary of steaks for 89¢ but testified that since the steaks were too thin he left them at the mess (R. 572).

The food was brought to the airplane by Sergeant Rosenbaum without his knowledge, and only after inquiry did he find out that it came from the mess. On this occasion accused cautioned Rosenbaum about taking food from the mess (R. 574). Accused denied on the witness stand any responsibility and any knowledge of food being taken from the mess for private use (R. 571).

Employees of a meat market in Montgomery testified that accused was a frequent purchaser of meats and that he purchased turkeys for Christmas and Thanksgiving (R. 496).

III. UNAUTHORIZED USE OF MOTOR VEHICLES

For the Prosecution:

Station wagons of Mess #1 were used for personal trips (R. 87, 88, 89). A station wagon was driven to DalRaida about once a week. No trip tickets or records of any sort were kept for these trips in 1943 (R.88). Station wagons were used to send personal laundry to the home of Christine Reese once a day except Sundays (R. 89, 395). The ham delivered to accused's home at DalRaida on 13 August 1944 and the chicken in April were transported in a station wagon (R. 182, 183, 184). The Ford station wagon was used by accused to make personal trips in town (R. 187). Private William S. Franklin, a driver, testified that he drove accused in a Ford station wagon the first time to DalRaida in June 1943 and thereafter. No trip tickets were used at the beginning. Later they were (R. 388). Trips to accused's house were marked "city", and not DalRaida (R.389). The driving of both station wagons to accused's house continued until 15 August 1944 (R. 389). Private Franklin carried packages and food about once a week from the mess hall to accused's house under instructions of Sergeant Rosenbaum. A station wagon was also used to carry grocery items for accused from the post exchange, commissary and other stores (R. 393). The International station wagon was used to get accused's Lincoln Zephyr out of a ditch at DalRaida (R. 394). Mess employees, Elvina Hubbard, Maggie Lee Washington, Walter Mason were brought to accused's house at DalRaida from

mess hall in station wagons (R. 395). On 12 August 1944, the driver was instructed by Sergeant Rosenbaum to carry clothing, a small kettle and a box that smelled liked meat to accused's home at DalRaida in a station wagon (R. 395). The packages were delivered directly to accused who was at home at that time (R. 396). This trip was marked city (R. 396). On 15 August 1944 accused directed driver Franklin to bring a radio to accused's home in the International station wagon (R. 397).

Private Coy R. Stuart, a driver for Mess Hall #1, testified that he carried Walter Mason, Elvina Hubbard, Roosevelt Braxton, Mamie Maxie and Fred Sims to the home of accused at DalRaida under instructions of Sergeant Rosenbaum and carried personal laundry to Christine Reese's home (R. 269) every other day, alternating with driver Franklin. The laundry was personal laundry of Margie Bramblett, Sergeant Rosenbaum and accused. He carried five chairs in the Ford station wagon to the house of accused in DalRaida. Accused, who was at home at the time told him to carry back to the mess five folding chairs that were in the yard (R. 407, 408). All trips to DalRaida and to the home of Christine Reese were marked city (R. 408).

Samuel V. Flowers, a civilian driver employed by the mess, testified that he drove the International station wagon to the home of accused to bring three shelves from the carpenter's shop, and on another occasion brought over a negro maid under instructions of Sergeant Rosenbaum (R.415, 416).

For the defense:

Accused admitted on the witness stand that he may have used the station wagons as often as once a month to go to DalRaida. He used official transportation to DalRaida when he had difficulty with his own car. Bus transportation was not available during the hours that he needed to be on duty. He used the wagons frequently to his quarters in the field, but he considered such transportation as official trips (R.576). He never did authorize any transportation to carry laundry to the home of Christine Reese (R. 576).

Accused admitted also sending a car to DalRaida on 15 August 1944 to deliver a radio to his quarters. The radio was too large for his car (R. 579). He denied giving any orders or instructions about using the station wagons of the mess. On 12 August 1944, a car came to his quarters, but it was sent without his prior knowledge (R. 541).

IV. UNAUTHORIZED USE OF PERSONNEL

(a) Civilians.

For the Prosecution:

Sometime in 1944, accused requested Sergeant Rosenbaum to have a lawn table made for him. It was built by Mr. Cheney, a civilian carpenter working for the cadet mess (R. 71). Shelves were also made for accused (R. 72). Cheney worked at the mess from 8:00 a.m. to 4:30 p.m. Accused did not give him the order to build the table, the order came from Rosenbaum. Pros. Ex. 39 is the table built by Cheney. He saw it the last time on the lawn at the house of accused. The carpenter worked on it off and on and took about two weeks to build it (R. 337-338). The table was built with leftover material (R. 340). Elvina Hubbard, another employee of the mess hall was instructed by Sergeant Rosenbaum to go to accused's home to work a couple of days each week and for those days she was carried as present in the mess payroll (R. 76). She worked every day at the mess except Sunday, her day off, and Tuesday when she worked at accused's house (R. 319). Although she worked at accused's house on Tuesdays in January and February 1944, she received full pay at the mess (R. 320). She also received $1.20 every time she worked at accused's house (R. 322). Christine Reese was asked by Rosenbaum in June 1944 to do his and accused's laundry (R. 80). She washed the laundry at home and came to the mess only to sign the payroll every two weeks (R. 265, 266, 267) and get her pay. She worked one or two nights a week (R. 274) for a while and she complained that she could not work at the mess and have the uniforms ready so was relieved from any work at the mess, and had been laundering accused's and Sergeant Rosenbaum's uniforms until the investigation started on 15 August 1944 (R. 271-276). Accused had one uniform washed a day (R. 80). Walter Mason, an employee of the mess for over two years (R. 283) was also sent to the house of accused and worked cutting grass in the yard. There he received a dollar and fifty cents occasionally. Accused himself once brought him to DalRaida one afternoon, taking him from his work at the mess. At other times he went there in a station wagon. He worked there about every two weeks (R. 283, 284).

Abraham Williams testified that, since the winter of 1944, he had washed the De Soto coupe three or four times a week (R. 261); a Lincoln Zephyr car once a week. The De Soto car was simonized about once every two weeks. Accused saw witness working on his cars and once commented that some places "don't look so good" (R. 261).

Roosevelt Braxton, who had been an employee of the mess since December 1943, and Walter Mason were sent from the mess on a Tuesday at

about nine in the morning to accused's house to rake off the yard (R.255). About twice a week Braxton washed accused's cars (De Soto and Lincoln Zephyr) and simonized the car about every other week (R. 256). Braxton did not receive any pay from accused, but continued receiving his regular pay at the mess. Accused saw Braxton working on his cars (R. 256). Braxton did not work at any other time at the mess to make up for the time he went to accused's house (R. 257). He received the same pay from the mess when he worked at accused's house as he received every other week (R. 257). Charlie Coleman was also sent to cut grass at accused's house and was carried on the payroll in the same manner (R.78).

Drivers Franklin and Stuart both testified that they carried in station wagons, from the mess to the house of accused at DalRaida, employees of the mess, Elvina Hubbard, Walter Mason and others, and carried laundry to the home of Christine Reese (R. 395, 406).

For the Defense:

Accused admitted on the witness stand that occasionally Elvina Hubbard performed personal services for him. She was paid for her service by accused and he did not know that she also received pay at the mess (R. 582). Accused did not recollect ever giving any instructions relative to his laundry being washed by an employee of the mess (R. 576) except that Sergeant Rosenbaum had informed him that a sister of one of the employees was doing his laundry on a flat rate basis, and that volume was not considered, so accused availed himself of that laundry work (R. 577). Accused had about 30 uniforms laundered at no cost to himself (R. 577). Accused admits he may have given instructions to wash his cars (R. 586) but he did not see any washing of cars done except when employees had no other work to do (R. 585, 640) and before 7:30 a.m. Accused had occasionally seen Roosevelt Braxton and Abraham Williams washing the automobiles (R. 584). Accused never gave an order to Mr. Cheney nor instructions to have a lawn table or a "what not" built (R. 580) that he had no knowledge that civilian employees performed service for him for which they were not paid (R. 582, 583, 584, 585).

(b) Military.

For the Prosecution:

Sergeant Rosenbaum was instructed by accused to install a horse racing machine in the noncommissioned officers' club (R. 82) and made collections from the machine in the afternoon about twice a month (R. 83, 84). Later, the machine was installed in the student officers' mess (R. 84). The same type of machine was installed in the officers' club and required servicing about 3 or 4 times a week when the machine

was not working. Collections were made by Rosenbaum about twice a month (R. 82, 361, 362). The money collected by Sergeant Rosenbaum from the machine was turned over to accused. Two antiaircraft machines were installed in the Narrow Lane Inn and were maintained by Sergeant Rosenbaum. Proceeds from the machine were also delivered to accused (R. 86). Rosenbaum was paid for his services by accused (R. 87, 586). Sergeant Rosenbaum made arrangements with the Noncommissioned Officers' Club to have horse racing machine placed there, the club to get 60% of the proceeds and a female civilian 40%. Sergeant Rosenbaum and four enlisted men brought over the machine to the club in a station wagon. Rosenbaum had a key to the machine and serviced it (R. 359, 360). The sergeant serviced the machine about 12 times.

For the Defense:

Sergeant Rosenbaum had expressed a desire to familiarize himself with the operation of slot machines, as he might be able, when released from the service, to accept employment in that direction. Accused asked the owner of the machines if it would be all right and received approval.

Sergeant Rosenbaum did this work at his own request, of his own free will and on his own time and was paid for it (R. 586). Accused had no interest in the slot machines (R. 587).

Accused admitted that money collected by Sergeant Rosenbaum from the operation of the slot machines was delivered to him and that in turn he delivered it to the owner of the machines (R. 609).

V. MAKING AND WRONGFULLY CAUSING FALSE OFFICIAL REPORTS TO BE MADE.

For the Prosecution:

The attendance of employees at the mess was noted in a form containing columns for each day. The column next to the name of employee was marked with an X if employee was present, with an O for days off, and a dash for any day of absence. Instructions were received from Sergeant Rosenbaum to mark employees working at officers quarters as present even though they were not at the mess (R. 242). This arrangement was made about the Spring of 1944 (R. 243). Annie Ruth Jackson, who worked in the morning at Major Zimmerman's, was marked present. She reported for duty at the mess at 1:30 p.m. instead of 6:30 a.m. and worked until 3:30 p.m. (R. 243, 244). On a Sunday, Sergeant Rosenbaum phoned in for a girl to be sent to accused's house. An employee working

in Wing B was sent to DalRaida in the Ford station wagon (R. 245, 246). When Jackson was sent to work to Major Zimmerman's house, to take the place of Katie Holston who was fired, Sergeant Rosenbaum told her to look to the mess hall for her pay (R. 75). Sergeant Rosenbaum instructed Private First Class Lester to mark a girl present if she was working at the officers quarters. Rosenbaum told witness who the girls were. Accused never gave Lester a direct order on that except in the case of Elvina Hubbard (R. 242, 333-334). Private Shambaugh, night shift supervisor, testified that one evening about June 1944 he called Christine Reese to the office of Sergeant Rosenbaum. Instructions were then given to Reese to launder accused's and Sergeant Rosenbaum's uniforms (R. 271) and that her pay would be "same as usual" (R. 273). Reese was carried on the payroll as present although she actually was not present for duty (R. 272). One morning accused came in the kitchen where Sergeant Rosenbaum, Christine Reese and witness were standing and he asked the sergeant if the laundry deal had been straightened out to which the sergeant said yes. Accused answered "That is one good thing" (R. 271).

On 17 January 1944, instructions were issued to accused in connection with the use of trip tickets on trips made by the station wagons under his control (Pros. Ex. #91). On 28 March 1944 a memorandum was addressed by Major Doss in connection with a discrepancy in driver's ticket on station wagon #1287 (Ford) for 18 March. The driver's ticket was marked in on that day with speedometer reading 50.248, and marked out the following working day with a speedometer reading 50.230 (R. 371; Pros. Exs. 94, 95, 96). Obviously one of the reports was wrong. Accused instructed Lieutenant Gemma, assistant mess officer, to correct them. Lieutenant Gemma made up one ticket and changed the other to make up the missing mileage (18 miles) (R. 379). Three entries were added to the trip ticket (Pros. Ex. 95) to make up the mileage from 50.230 to 50.248. These last three items were entered in ink. The rest of the ticket was written in pencil. Both trip tickets (Pros. Exs. 94 and 95) as changed were shown and given to accused. After that date Lieutenant Gemma was told not to have anything to do with trip tickets and let Mrs. Bramblett in the office handle them (R. 382). Accused did not suggest any way to correct the discrepancy shown in the two trip tickets, just said to correct them and make sure they were right (R. 386). Driver Franklin had been driving accused to his home at DalRaida, in the Ford station wagon 3881 from the beginning of 1943 and after the trip tickets were instituted, the trips to the house of accused were marked "city". Accused told driver to make trips to his home as trips to city. This was kept up until 15 August 1944. Once or twice during this period trip tickets were examined by accused (R. 389). He also instructed the driver not to write the mileage in the entry "in" when he turned in the trip ticket at night, but to leave it open and next day to put in the mileage that was

found on speedometer (R. 393). In June or July, there was a discrepancy of 40 miles from the time driver turned in the station wagon at night and the reading of the speedometer next morning. Driver refused to change figures, and stated to accused that he did not know about the forty additional miles and he was not making up any trips for that. Accused told Lieutenant Gemma to stay with driver until he filled out the tickets to account for the 40 miles. Driver finally had to change trip tickets for the week to add additional miles each day to make up for the 40 miles (R. 392). Packages, groceries, ice kettle, lawn chairs, table, and a screen door were carried to the house of accused at DalRaida and marked "city" in the trip ticket (R. 393, 394). Colored employees Hubbard, Mason and others were brought there to work, and these trips were also marked "city". A small kettle and a box (it smelled like meat) were delivered on 12 August 1944 while accused was in the house, and the same marking of the trip ticket occurred. On 15 August 1944, a radio was brought in the International station wagon to accused's home. Trip was marked the same way (R. 397).

Driver Stuart testified that trips to bring laundry to Christine Reese were also marked "city" (R. 395-408). Civilian driver Flower drove International station wagon twice to accused's home at DalRaida. He stated that he had marked his trip tickets "Garrett's house". Witness identified trip tickets (Pros. Exs. 92, 93) as trip tickets partly written in his own handwriting and partly in somebody else's handwriting. There was no notation of trip to "Garrett's house" on them. They showed erasures and somebody else's handwriting on them. On trip ticket dated 2 August 1944, the line which read "Brewbaker Motor Company" was the only line that was not in his handwriting. He did not erase the reference to Captain Garrett's house from the tickets (R. 417). Trips to accused's home were taken at the direction of Sergeant Rosenbaum. At the end of each day he deposited tickets in the file in the office (R. 418). Private P. T. Bosnak, a driver from July 1943 to February 1944, drove accused home and was told by him not to enter the trip on the trip ticket and not to enter the final mileage at night, but to wait until the following morning. Trips to accused's home were made as trips to places in the post. Sergeant Rosenbaum gave him the same instructions as accused (R. 420-425), and said the instructions came from accused (R. 421). Sometimes vehicles would show next morning more mileage on the speedometer than when Private Bosnak left at night and he had to fill the ticket to make it up (R. 427). Accused gave him the above orders only once.

For the defense:

Accused, on the witness stand, admitted certifying to the correctness of payrolls introduced in evidence (R. 596) and stated that he was signing the payrolls without checking for their correctness (R. 548).

Accused admitted that on one occasion he had instructed the payroll checker to mark Elvina Hubbard present, although she did not do a full day of work, it was his understanding that she would work on her next day off (R. 582).

Accused remembers to have said to drivers that trips to the city of Montgomery should be shown (R. 542), but he has no other recollection of telling anyone how to mark trip tickets (R. 544). In connection with a difference of 40 miles in trip tickets he had told Lieutenant Gemma to make an investigation and submit a report. After the investigation was made, he had been led to believe that the error had been a mathematical error. Therefore, at that time Mrs. Bramblett was instructed to check the trip tickets each day for accuracy (R. 545); that he did not know the employees were being marked present when they were, in fact, absent (R. 547); that he gave no instructions to carry employees as present when they were absent (R. 555); that he did not knowingly certify falsely to payrolls on which certain civilian employees were paid when no services were rendered (R. 545).

VI. UNLAWFULLY CAUSING DISCHARGE OF CIVILIAN EMPLOYEES

For the Prosecution:

Joe Ross was employed in the mess as a helper (R. 125). On or about the first week in August 1944 he was discharged for reasons not connected with the performance of his work (R. 123). He was one of the borrowers of money from E. Davis, the head K.P., who was in charge of a loan racket operated by Sergeant Rosenbaum (R. 115, 116, 117). Davis had considerable trouble in collecting the money loaned to Ross (R. 119). On a loan of $5.00 the borrower returned $6.25 on the following pay day (two weeks). This rate was changed from $6.25 to $7.00 (R. 119, 122) and Joe Ross refused to pay (R. 70, 119, 122). Sergeant Rosenbaum under orders of accused discharged Ross (R. 70), took his pass and had him escorted out of the gate (R. 124). Joe Ross denied having any altercations with Rosenbaum prior to his being discharged (R. 124).

Katie Holston was fired by Sergeant Rosenbaum at the direction of accused on 5 December 1943 (R. 75; Pros. Ex. 42). The sergeant testified that she was doing part time work at the home of Major Zimmerman. The major complained to accused that Holston had asked him for money. Katie Holston worked at the mess for about three hours per day instead of the usual hours for which she was paid.

For the defense:

Accused stated that it was his recollection that Katie Holston was fired on account of her laziness (R. 627), that Joe Ross was discharged because he had cursed the mess sergeant and caused trouble (R. 569).

VII. NEGLECT OF DUTY

(a) A loan business at usurious rates

Sergeant Rosenbaum on or about Christmas 1943 gave $50 to E. Davis, Jr., head K.P. of Mess #1, and told him to loan money out, 25¢ on the dollar, for a two-weeks loan. Records were kept for the first two months by Davis, then by Sergeant Rosenbaum. Money was loaned to civilian employees and repaid every pay day (R. 116). Davis collected from the employees on the 5th and 20th of each month. Money was lent to as many as 100 employees. The largest amount ever loaned was about $300, and the largest amount ever collected about $500 (R. 117). The money collected was turned over to Sergeant Rosenbaum and kept in the drawer of his desk (R. 118). Davis had trouble only once, in collecting a loan from Joe Ross (R. 119).

(b) Unlawful sale of cigarettes

Cigarettes which had been obtained from the commissary for free distribution to the cadets (R. 233) were diverted to private use and were sold every pay day to civilian employees. Every fifteen days from 25 to 40 cartons were sold by Corporal Bernard and Private Shambaugh in the kitchen (R. 230, 232, 235). Sergeant Rosenbaum was, at the beginning, selling the cigarettes himself, but later he let Corporal Bernard handle the entire matter (R. 232). The selling of cigarettes took place in the months of June, July and August (R. 233). The cigarettes were kept in Sergeant Rosenbaum's office (R. 236), who, since June 1944 (R. 42), shared the same office of accused (R. 42). From four to five hundred dollars was taken in (R. 234). The proceeds from the sale of cigarettes were given to Sergeant Rosenbaum. Rosenbaum, however, testified that he did not know anything about the sale of cigarettes (R. 486).

For the defense:

Accused on the witness stand testified that he had no knowledge of cigarettes being sold at the mess (R. 590) nor did he know of a loan business being conducted there (R. 591).

5. The evidence shows that many of the illegal acts charged against accused were done pursuant to instructions given by Sergeant Rosenbaum, the mess sergeant. In some instances the sergeant benefited, while in a number of instances the accused himself benefited by the misappropriation and misuse of property of the mess. The sergeant was a mere agent for the accused and the evidence leads inevitably to the conclusion that he knowingly aided and abetted the accused, through devious means, in the misuse of the aviation cadet fund. The evidence establishes a conspiracy between them to steal food, to misuse and misappropriate property and services of the mess for their own personal benefit. The overt acts are numerous, and have been enumerated in the statement of the evidence. Proof of a formal agreement to accomplish their unlawful purpose was not necessary. A tacit understanding was sufficient.

Alaska S.S. Co. v. International Longshoremen's Assn of Puget Sound, 236 F. 964;
O'Neil v. State, 237 Wisc. 391, 296 N.W. 96.

A conspiracy having been established acts and declarations of any conspirators in execution and furtherance of the common purpose are deemed to have been said and done by everyone of them and may be proved against each.

Wharton's Criminal Evidence, sec. 699;
Agnello v. U.S., 269 U.S. 20; 46 S.Ct. 4;
Hitchman Coal & Lake Co. v. Mitchell, 245 US 229; 38 S.Ct.65;
Logan v. U.S., 144 U.S. 263; 12 S. Ct. 617.

It is immaterial whether or not the declarations were made in the presence of the party against whom the evidence is offered or that he had any knowledge of the statements.

Wharton's Criminal Evidence, sec. 709;
Nudd v. Burrows, 91 U.S. 426;
Lincoln v. Chaflin, 7 Wall. (U.S.) 132;
Francis v. U.S., 152 F. 155;
Samara v. U.S., 263 F. 12

It is also unnecessary that a conspiracy be charged or a co-conspirator be named in the charges and specifications to make his acts and declarations binding upon accused, where as here it is clear that the substantive offenses charged are shown by the evidence to have been committed pursuant to a conspiracy, and the acts and declarations actually were in furtherance of the commission of unlawfulacts charged.

Wharton's Criminal Evidence, sec. 701;
Slaughter v. State, 113 Ga. 284; 38 SE 854;

Boutwell v. Marr, 71 Vt. 1; 42 A. 607;
Heard v. State, 9 Tex. App. 1;
Rex v. Stone, 6 T.R. 527; 101 Eng. Reprint 684.

6. Defense counsel argues in his brief that an error in law was committed by the court, after Rosenbaum had been impeached, in allowing confirmatory proof of previous statements. It cites as authority for the proposition that such ruling was erroneous the decision in Ellicott v. Pearl, 10 Pet. (U.S.) 412; 9 L.Ed. 475.

The court held in that case that as a general proposition evidence is not admissible to confirm a witness' testimony, that at other times, he had given the same version of the facts as that made under oath, since the fact that his testimony was a repetition of statements made before the trial would not establish the credibility of the witness. To this general rule, however, there are exceptions of a peculiar nature, as where the testimony is assailed as "a fabrication of recent date, or as a complaint recently made", when in order to repel such imputation, proof of the antecedent declaration of the party may be admitted. The rule is clearly stated in 140 ALR 93 and reads as follows:

> "The principal exception to the general rule of evidence that the statements of a witness out of court, consistent with his testimony, are inadmissible, is the one mentioned by Justice Story in Ellicott v. Pearl (1836) 10 Pet (US) 412, 9 L ed 475, that where the testimony of the witness is assailed as a fabrication of recent date, or as a complaint recently made, proof of the antecedent declarations of the witness consistent with his testimony may be received, in order to repel such imputation."

This rule seems to be of general acceptance

U.S. v. Potash, 118 F. (2d) 54;
Townsend v. U.S., 106 F. (2d) 273;
Malone v. U.S., 94 F. (2d) 281;
Tompkins v. Erie R. Co., 90 F. (2d) 603;
Gelbin v. N.Y., N.H. & H.R. Co., 62 F. (2d) 500;
Dowdy v. U.S., 46 F. (2d) 417.
American Agri. Chemical Co. v. Hogan, 213 F. 416;
Yarbrough v. State, 105 Ala. 43; 16 So. 758;
People v. Nobles, 44 Cal. App. (2d) 422; 112 P.(2d) 651;
Lance v. State, 166 Ga. 15; 142 SE 105;
Kelley v. Boston, 296 Mass. 463; 6 NE (2d) 371;

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

State v. Palmer, 206 Minn. 185; 288 NW 160;
State v. Neiman, 124 NJL 562; 12 a(2d) 860;
Connolly v. Culver, 150 SW (2d) 126.

Under the circumstances admission of testimony of prior statements by the witness consistent with his testimony was proper (MCM 1928, par. 124a).

7. It appears that Lieutenant Duke, a member of the court, was absent because of illness when the court reconvened on the morning of the second day of the trial at hours 0906 (R. 137). The court sat from the mentioned hour until about noon when it recessed. Upon its reconvening at hours 1330, Lieutenant Duke was again present (R. 206) and sat throughout the trial. He obviously took part in the deliberations and voting by the court on the findings and sentence.

The record does not state that the proceedings of the court during his absence were read to him. During that absence, the evidence was taken of a number of witnesses for the prosecution, all of whom gave testimony concerning the unlawful taking of food by the accused; the unauthorized use of Government transportation for private purposes, and concerning the specific charge of taking food under Specification 2 of Additional Charge II. There was other evidence in the record of trial on these points.

We are now faced with the question of whether the return of an absent member of the court affects the legality of the proceedings, and if so, to what extent.

The old rule, prior to the adoption of the 1928 Manual for Courts-Martial, seemed clear. In the trial of Brigadier General Hull it was held that an absent member of the court could properly return and resume his functions provided the proceedings had and evidence taken during his absence were read to him as recorded (Winthrop - Military Law & Prec., Reprint p. 175). Winthrop quotes several cases in which a member of a court returned after an absence of a day or more and the interim proceedings were read to him, "with the express understanding concurred in by the accused", or "without objection from the accused" or "with the assent of the accused".

> "In our present practice members who have absented themselves during the hearing of testimony retake their places in general without objection; and their action does not affect

03472

the validity of proceedings or sentence — is believed not now to be questioned. Such action however — is irregular and certainly not to be encouraged." (Winthrop, p. 176).

In the light of the context following this quotation, it would appear that the intervening testimony must be read to such returning member. Winthrop goes on to say, in the same paragraph, that where material disadvantage has resulted to the accused as a result of such action, the fact will induce a disapproval or mitigation of the sentence. In repeated cases of trials during the civil war, in which members who had been absent during the hearing of material evidence, were readmitted, and it did not appear that the accused had assented to such readmission, the proceedings were disapproved by the reviewing authority (see Winthrop Mil. Law & Prec., footnote to p. 176). This statement of the law in Winthrop (supra) appears in toto in the 1912-40 Digest of the Opinions of The Judge Advocate General.

By 1917, the rule had crystallized as reflected in the 1917 Manual which provides (par. 93):

"* * * The rule is that no member who has been absent during the taking of evidence shall thereafter take part in the trial; but the nonobservance of this rule shall not be construed as invalidating the proceedings of courts-martial if no objection is made, and the court permits the member to sit. * * *"

However, the paragraph further goes on to state that:

"* * * Where a member who has been absent is permitted to resume his seat, or a new member is added after the trial of the case has begun, all proceedings and evidence during his absence should be read over to him in open court before the case proceeds further and the record should show this fact; * * *" (Underscoring supplied).

The 1921 Manual for Courts-Martial adopted paragraph 93 merely adding that the rule is particularly true as regards the law member of a general court.

The present Manual for Courts-Martial states (pars. 38b and c) that when a member of a court misses part of the proceedings, because of absence "the substance of all the proceedings had and evidence taken will be made known to him in open court before the trial proceeds".

The change is obvious. Previously, the proceedings and testimony were required to be read to the member of the court who had missed the proceedings. But under the present rule, it is only necessary to make known the substance of what transpired. While it is still provided that this be done in open court, and before the trial proceeds, the requirement that the record affirmatively show this, has been dropped.

The only case on the question since the adoption of the 1928 Manual which we have been able to find is the Thesevitz case (CM 201781) which is not quite in point. In that case a member of the court was present for the first time at its second session, and the record of previous proceedings was not read to him as required by Manual for Courts-Martial, 38b. It was held not fatal error when all that occurred at first session was assembly of the court, passing on challenges, and the arraignment and plea.

Did the failure of the record to affirmatively show that the substance of what transpired was made known to Lieutenant Duke before the trial proceeded, result in fatal error in the present case? Obviously this question is merely procedural and not jurisdictional. In matters of procedure, regularity of proceedings is presumed unless the contrary is shown (CM CBI 71, Dunn; Dig. Ops. J.A.G. 1912, Discipline XV C, p. 570).

This being true, we may assume that Lieutenant Duke did have made known to him the substance of what transpired during his absence. Since there was no objection by the accused either at the trial or in the counsel's brief, the error was cured by the reviewing authority's action under Article of War 37. The better practice, however, is for the record to affirmatively show that requirements of paragraph 38 of the Manual for Courts-Martial were complied with.

8. It is noted from a study of the Specifications that some of them could have been consolidated and some repetitious specifications could have been eliminated. Such procedure might have simplified the trial of the case and enabled the court more easily to have dealt with complex factual issues. It does not appear, however, that the substantial rights of accused were injuriously affected, since the rule against multiplicity of charges is neither jurisdictional nor substantive, but is merely procedural as far as the findings are concerned. In such instances where the court was faced with a multiplicity of charges (MCM, 1928, p. 17) as in the case of the Specification of Charge II, Specification 6 and Specification 7 of Additional Charge II; Specification 1 and Specifications 2, 3, 4 of Additional Charge II; Specification 2 and Specifications 3, 4, 6, 7 of Additional Charge I, the findings of guilty of any of the Specifications would sustain the sentence awarded.

9. All the property of Aviation Cadet Student Mess #1 was under the supervision of its mess officer, the accused. The records were modeled after the accountable records used by the Air Corps Supply and by the Quartermaster. The question arises therefore (Specs. 1, 2, 3, Charge I) whether in law the charge of larceny can be sustained. The vital question is whether accused as mess officer had mere custody of the property or actual possession. Accused had charge of the property acquired by the Mess Fund but his powers as mess officer were limited generally to the custody of the property, particularly of the food acquired, and to see that it was properly prepared and served to the student cadets. In this capacity he was acting for the Aviation Student Cadet Fund and for the benefit of the cadets. Further, his control of the property was subject to the control of his superior officer, Major Zimmerman, Base Mess officer. In law he was a servant and a mere custodian (CM 211810, Houston) of the property stolen, as possession, which means the "present right and power absolutely to control" the property remained in the Aviation Cadet Student Fund (CM 220398, Yeager). The applicable rule is concisely stated in paragraph 149g, Manual for Courts-Martial:

> "* * * Where a servant receives goods or property from his master to use, care for, or employ for a specific purpose in his service, the master retains possession, and the servant has the custody only and may commit larceny of them. A person, then, has the 'custody' of property, as distinguished from the 'possession', where, as in the case of a servant's custody of his employer's property, he merely has the care and charge of it for one who still retains the right to control it, and who, therefore, is in possession (i.e., constructive possession as distinguished from actual possession) of the property."

10. At the inception of the trial, accused made a motion in the nature of a plea in bar on the ground that at an investigation conducted under AR 420-5, about five weeks before charges were preferred against accused, his rights were violated. Defense, in its argument on the motion, stated that the Board appointed by the commanding officer of Maxwell Field at that time failed to inform accused, orally or in writing, that his conduct had become an issue of the investigation, nor was he informed of the precise nature of the prejudicial charges, nor was he afforded the opportunity to defend himself by calling witness in his behalf. This motion was properly denied by the court. If any errors are committed by any board appointed by a commanding officer to apprise himself of certain facts on the basis of which charges are subsequently preferred the proceedings of such board are beyond the province of the court which subsequently tries the case, provided a fair and impartial investigation of

the Specifications and Charges are conducted as provided in Article of War 70. Not only is there no attack in the record on the validity of the investigation under Article of War 70 but we find a statement by defense counsel that his motion was not an attack on the validity of that investigation. If the Board appointed on 15 August 1944 under AR 420-5 failed to inform accused of the nature of the prejudicial allegations and failed to give him an opportunity to call witnesses, accused certainly had an opportunity to cure these defects and these omissions were cured at the investigation of the charges on 5 October 1944 and at the trial of the case on 27 December 1944.

11. Sergeant Rosenbaum, as a witness for the defense, testified that while in the stockade awaiting trial on Thursday, 9 November 1944, Captain Park and Lieutenant Maher, the duly appointed defense counsel and assistant defense counsel in his case, had stated to him that they had talked to the trial judge advocate and that witness had two alternatives: (1) to testify against all the officers to the fullest extent and in that case he would be tried last and very few charges placed against him and that he would be sent to a rehabilitation center; (2) that if he did not testify against the officers that he would be tried to the fullest extent for everything that could possibly be charged against him, and that he would not be sent to a rehabilitation center (R. 472, 474). The witness after receiving this information reported the matter. A new defense counsel was appointed (R. 475). Since then no further threats or promises were made to him. He stated that he had told the truth in his own case and in this case (R. 478). He had already been tried, convicted and sentenced to eight years to a rehabilitation center (R. 485). Captain Park was called for the defense to the witness stand to testify concerning the statement made by Sergeant Rosenbaum. The prosecution objected. The objection was sustained by the law member. Sergeant Rosenbaum had already been on the stand for the prosecution and on cross-examination (R. 109), had been asked to testify as to the alleged promises and threats. The prosecution objected on the ground that the defense could not go beyond the testimony given on direct examination. The law member sustained the objection. Obviously both rulings were incorrect, as prejudice, bias, and the like may be shown to diminish the credibility of a witness, either by testimony of other witnesses, or by cross-examination of the witness himself. Such matters are never regarded as collateral (MCM, 1928, par. 124b). However, since the court was fully informed on this point by Sergeant Rosenbaum when he was called to the witness stand by the defense (R. 474), the rights of the accused were not prejudiced by these erroneous rulings of the law member. It bears against a witness' credibility that he is an accomplice. This rule is well expressed in Manual for Courts-Martial, 1928, par. 124a.

"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 general rule is that an accomplice induced to testify by a promise of lighter punishment or pardon is nevertheless a competent witness.

Tonge's Trial, 6 How. St. Tr. 226;
Bush v. People, 66 Col. 75; 187 Pac. 528;
State v. Reed, 50 La. Ann. 990; 24 So. 131;
State v. Riney, 137 Mo. 102; 38 S.W. 718;
State v. Magone, 32 Or. 206; 51 Pac. 452;
U. S. v. Gilbert, 10 Ann. St. Tr. 699.

Therefore, even if we accept as true the contention of the defense that the testimony of Sergeant Rosenbaum was induced by promises of a lighter sentence and fewer charges to be preferred against him, we are of the opinion that this is a circumstance which affected the weight but not the admissibility of his testimony. He was a competent witness, and the credibility of his testimony was for the court to evaluate.

12. The records of the War Department show that accused is 39-7/12 years of age. He was born in Boston, Massachusetts, 19 August 1905, is a high school graduate and attended Massachusetts State College for one year, and is married. In civilian life, he was farm manager and director in a hospital in Massachusetts from 24 February 1927 to 28 September 1931; a business and financial manager in a hospital in Massachusetts from 30 September 1931 to 17 May 1935; and a coordinator of food supervision in a hospital in Massachusetts from 19 May 1935 to 1942. He was appointed a temporary first lieutenant in the Army of the United States (AC) on 25 May 1942 and promoted to captain on 20 January 1943.

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. Dismissal is authorized upon conviction of a violation of Articles of War 93 and 96 and is mandatory upon conviction of a violation of Article of War 95.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

SPJGV-CM 275547 1st Ind
Hq ASF, JAGO, Washington 25, D.C. 4 JUN 1945
TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 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 Wallace F. Garrett (0-905159), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of appropriating to his own use and benefit property and services belonging to the Aviation Cadet Mess Fund of Maxwell Field, Alabama, in violation of the 93rd and 96th Articles of War, of making and causing others to make false official statements, and abuse of authority, in violation of the 95th Article of War, and neglect of duty in violation of the 96th Article of War. He was sentenced to dismissal, forfeiture of all pay and allowances due or to become due and to be confined at hard labor for ten years. The reviewing authority approved the sentence but remitted five years of the confinement imposed 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 and sentence as approved by the reviewing authority and to warrant confirmation of the sentence.

During the period between April 1943 and August 1944 accused was mess officer of the Aviation Cadet Student Mess, Maxwell Field, Alabama, one of the largest Army messes in this country, serving between 3000 and 5000 cadets at each meal and employing in various capacities about 400 persons.

The larceny of which accused was found guilty, consisted of pilfering, for his own and the benefit of other officers, steaks, hams, chickens, turkeys, pickles and bread, during a period of 18 months beginning April 1, 1943 and ending August 15, 1944, during which time accused was mess officer.

Although accused had living quarters assigned to him at Maxwell Field he maintained a private residence at DalRaida, Alabama, about eight miles from the field. He repeatedly used official cars to go to and from this residence, and twice daily used official transportation to and from the mess to his quarters on the field. On average of once a week, from April 1943 to August 15, 1944, he used official transportation to carry employees of the mess to perform personal services for him at his private residence as house maids and gardeners. The two station wagons belonging to and operated by the mess were used by accused every day alternatively

to bring accused's uniforms and other clothing to be laundered at the private home of one of the employees.

Accused was found guilty of unauthorized use of civilian personnel. The carpenter, employed by the mess, built for accused's private use a table and some shelves during mess working hours. A maid employed by the mess went weekly to accused's residence off the post to do house work for a period of time. Employees of the mess were sent about once a week to tend accused's private garden. His privately owned cars were washed and simonized weekly by employees of the mess on mess time. A female civilian employee of the mess, carried as present on the pay roll of the mess during the summer months of 1944, washed accused's uniforms and personal laundry. She appeared at the mess every fourteen days but then only to collect her pay.

The false official statements consisted, in part, of certificates to the correctness of pay rolls in cases where accused knew, or should have known, that mess employees listed as present were in part or, in one case, totally, engaged in working not for the mess but for himself and performing personal services for other officers. These certifications of pay rolls, covering a period from January 1944 to July 31, 1944, included the maid employed by accused once a week and another used by Major Zimmerman for half a day each day. Also included was the employee who during the summer months of 1944 devoted her entire time to laundering accused's uniforms and clothing and came to the mess only to collect her pay. The pay rolls included other employees who washed, simonized his car, and attended to accused's personal garden.

Accused also permitted driver's trip tickets to be altered to make up for mileage officially unaccounted for. For example, on March 28, 1944, three additional fictitious entries were made on a driver's ticket to make up for a discrepancy of 18 miles appearing on the speedometer. Private trips to accused's residence at DalRaida were marked as trips to some official destination. Trips to deliver accused's laundry were marked in the same way.

The clerks in the mess whose duty it was to make up the daily attendance records of mess employees were directed by the mess sergeant to mark employees working at officers quarters as "present" even though they were not in fact present and working at the mess. The station wagon drivers were instructed by the mess sergeant and by accused personally to record in their official reports trips to his residence as trips to other places.

Accused also was found guilty of neglect of duty in suffering a private loan business to be operated at the mess. Money was loaned to

civilian mess employees by Sergeant Rosenbaum, the mess sergeant and others, which was required to be repaid on pay day, two weeks later. For each $5 loaned $6.25 was collected. Cigarettes were withdrawn by two soldiers employed at the mess from the commissary for free distribution to the aviation student cadets, which were not in fact distributed to the cadets at all, but instead were sold to civilian employees of the mess at $1.20 per carton. Between four and five hundred dollars was collected from the sale of cigarettes, thus withdrawn and was retained by Sergeant Rosenbaum.

Although accused was found guilty of 31 offenses, it should be noted that the larceny and appropriation, in each instance, involved property of little value, and such acts were in the nature of pilfering, for himself and other officers on the post. The evidence in support of the more serious charges of making false official statements, in the main establishes omissions, in failing to properly check pay rolls, rather than a deliberate intent to falsify. The accused, however, knew that some mess employees were being used to wash private cars, to launder privately owned clothing, and that other mess employees were being used by himself and Major Zimmerman as part-time maids. Accused also directed the drivers of Government owned cars to report in writing trips made by accused to his home at DalRaida as official trips to the City of Montgomery.

Sergeant Francis J. Rosenbaum, the mess sergeant, involved with Captain Garrett in the appropriation from this same mess of food on a larger scale and also in other violations, was tried separately on November 29, 1944 by a general court-martial and sentenced to be dishonorably discharged the service and to be confined at hard labor for eight years. The sentence was approved but the dishonorable discharge has been suspended. Sergeant Rosenbaum was promised by the trial judge advocate that if he would furnish incriminating evidence against accused that a rehabilitation center would be designated as a place of confinement. There is no evidence in the record whether the trial judge advocate had authority to make such a promise. However, in fact, a rehabilitation center was so designated in his case. It is possible that such joint offender, by good behavior may achieve restoration to duty within a lesser period of time. Major Edward E. Zimmerman, Base Mess officer, Maxwell Field, Alabama, under whose general supervision Captain Garrett operated the mess and who was involved in some of accused's transactions noted above, which gave rise to the charges against accused, has been allowed to resign for the good of the service. Lieutenant Joseph V. Gemma, a minor figure in the same transaction, was also allowed to resign for the good of the service. The commanding officer of Maxwell Field testified that from the time that accused took over the mess in April 1943 he improved

its operations and the quality of food served and that in his opinion he considered the conduct of the mess as "most efficient".

In view of these circumstances, I recommend that the sentence as approved by the reviewing authority be confirmed but that the period of confinement be reduced to two years, that the sentence as thus modified be ordered executed, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

4. Consideration has been given to the brief submitted to the trial court by Major John Devereux, defense counsel for accused and also submitted by him to the reviewing authority and to the Board of Review; likewise to the oral argument presented by Major Devereux at a special hearing before the Board, held at his request on 9 April 1945. Separate and special consideration has been given to the oral inquiries made concerning the case by Honorable John W. McCormack, Congressman from Massachusetts and to a letter from Honorable Leverett Saltonstall, Senator from Massachusetts, which is attached to the record. Consideration has also been given to letters written to The Adjutant General by Honorable David I. Walsh, Senator from Massachusetts.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

4 Incls
1 Rec of trial
2 Form of Action
3 Brief by Maj John Devereux
4 Ltr fr Hon Saltonstall
dated Apr 3/45

(Sentence confirmed but confinement reduced to two years.
G.C.M.O. 217, 13 Jun 1945)

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

SPJGH CM 275645

2 MAR 1945

UNITED STATES v. Second Lieutenant GLENN J. GRIFFITH (0-1318632), Infantry.	INFANTRY REPLACEMENT TRAINING CENTER Trial by G.C.M., convened at Camp Joseph T. Robinson, Arkansas, 10 February 1945. Dismissal, total forfeitures and confinement for five (5) years.

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

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

2. The accused was tried upon a Charge and single Specification as follows:

CHARGE: Violation of the 61st Article of War

Specification: In that Second Lieutenant Glenn J. Griffith, Company D, 129th Infantry Training Battalion, 81st Infantry Training Regiment, Infantry Replacement Training Center, Camp Joseph T. Robinson, Arkansas, did, without proper leave, absent himself from his command at Camp Joseph T. Robinson, Arkansas, from about 18 January 1945 to about 28 January 1945.

He pleaded guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by general court-martial on 11 November 1944 for AWOL for four days (2 Specifications) was introduced at the trial. For these offenses accused was sentenced to forfeit $25 of his pay and to be restricted to his regimental area for one month. For the instant offense he was sentenced to dismissal, total forfeitures and confinement for ten years. The reviewing authority approved the sentence, reduced the period of confinement to five years and forwarded the record of trial for action under Article of War 48.

3. The evidence adduced by the prosecution shows that following a period of hospitalization in the Regional Hospital at Camp Joseph T. Robinson, Arkansas, accused was released therefrom and returned to his

organization for duty, at the same station, the afternoon of 16 January 1945. The following day, 17 January 1945, accused's company was engaged in field exercises and firing on the range, but accused was left in the company area to assist the executive officer check huts and to familiarize himself with the new training memorandum which had been published during the time he was absent in the hospital. That afternoon at about four o'clock, accused's commanding officer, Captain Wendell L. Garrison, returned from the field to the company area and accused expressed a desire to talk with him. Captain Garrison and accused went into the company day room for the interview. While there accused asked for "two or three days off from duty to get his feet on the ground." "He said he was having personal trouble and he wanted to get it straightened up." "He stated his wife [had] left him and he couldn't find her; he wanted time off to find his wife and get his personal affairs straightened up and also he wasn't feeling well and wanted a little change to rest before he went to duty" (R. 11).

The next morning, 18 January 1945, accused reported for duty at 6:40 and was told by Captain Garrison to put on his leggings and take command of the first platoon of his company, which was scheduled to move out of the company area for the range at 7:30. Accused put on his leggings and took his position at the head of the first platoon. As the company moved out Captain Garrison took his place at the head of the column and accused stepped from in front of the first platoon to the side and stood there while the company marched by. Upon arriving at the range, Captain Garrison did not observe accused's presence, and as it was early in the morning and still quite dark, he waited until it was light enough to make a search for him. A search was made later, but accused was not present with the company, whereupon Captain Garrison called his executive officer, who had remained in the company area, and ordered a search of the area to be made (R. 7-8). The company executive officer, Second Lieutenant John R. Vadilka, made a search of the company area as directed and also of accused's hut, but did not find accused. He did find a pair of shoes and leggings lying in the center of the floor of accused's hut. This search took place about ten o'clock on the morning of 18 January (R. 12-13).

Accused was not seen by anyone of his company and was not present with his company at any time between the morning of 18 January 1945 and 28 January 1945. He had not been given permission by his company commander or anyone else to leave the company area or his station. He was absent without leave from 18 January 1945 until 28 January 1945 (R. 9; Pros. Exs. 1, 2).

4. After being duly informed of his rights, accused elected to be sworn and testified in his own behalf substantially as follows: He had trained with his company until 21 November 1944 at which time he had entered the Regional Hospital at Camp Joseph T. Robinson to be treated for arthritis and a neck and back injury previously incurred at Fort Benning, Georgia. He had been hospitalized six times before for the

same trouble. He was released from the hospital 16 January 1945, and reported to his company for duty in the afternoon of that date, but was apprehensive about his health and his domestic relations. His wife was staying in Little Rock, Arkansas, and was dissatisfied and wanted to leave. He telephoned his wife from camp on 16 January 1945 and she informed him that she was leaving. Accused thereupon talked to his company commander about his domestic troubles, as well as his physical well being and asked for some time off, but his company commander (Captain Garrison) "just said he was sorry to hear I was having trouble and it would probably affect my work until I got it straightened out" (R. 17-18). His company commander did not tell him the leave requested would be granted nor did accused consult his regimental commander or other superior with respect to the leave desired. On the morning of 18 January 1945 accused was still worried about his health and his family troubles. When asked if he could explain why he absented himself without leave as of 7 o'clock, 18 January, as shown on the morning report, Prosecution's Exhibit 1, accused said, "I don't know, I just cracked up, I don't remember what happened." When he left on 18 January he went to Little Rock, Arkansas, and remained there throughout the entire period of his absence. He came back to Camp Robinson around midnight 27 January 1945, and reported to the Regional Hospital instead of to his company because his nerves were completely gone and for treatment to get straightened up. He requested the hospital authorities to advise his company commander that he had turned in at midnight of 27 January 1945. He did not enter any hospital or receive any medical attention during his unauthorized absence (R. 18-20).

5. The uncontradicted evidence of the prosecution and the testimony of accused each demonstrates that accused absented himself without leave from his organization at Camp Joseph T. Robinson, Arksansa, from 18 January 1945 to 28 January 1945. Accused's testimony further demonstrates that his plea of guilty was not entered inprovidently or through lack of understanding of its meaning and effect. The record of trial fully sustains the court's findings of guilty.

6. Accused is 41 years of age and married. He is a high school graduate and prior to entering the military service he was employed at Kingsbury Ordnance plant, La Porte, Indiana, as Senior Material Checker at a salary of $200 per month. He enlisted in the Army 4 January 1922, was honorably discharged 18 October 1924 by reason of purchase, and reenlisted 23 July 1942. He was commissioned a second lieutenant, Army of the United States, 23 April 1943, following his graduation from OCS, The Infantry School, Fort Benning, Georgia, and was ordered to active duty the same date.

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

authority, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

Thomas N. Tappy, Judge Advocate

William H. Saunders, Judge Advocate

Robert C. Trevethan, Judge Advocate

SPJGH-CM 275645 1st Ind 29 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 Glenn J. Griffith (0-1318632), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed but that the confinement be reduced to two years, and that the sentence as thus modified be carried into execution. I also 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 as approved by reviewing authority confirmed but confinement reduced to two years. G.C.M.O. 186, 9 Jun 1945)

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

SPJGQ-CM 275648

9 APR 1945

UNITED STATES	)	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND
v.	)	
Second Lieutenant HAROLD G. CREIGHTON (0546683), Air Corps.	)	Trial by G.C.M., convened at Smyrna Army Air Field, Smyrna, Tennessee, 19 January and 8 February 1945. Dismissal, total forfeitures and confinement for five (5) years.

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

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

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

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

Specification: In that Second Lieutenant Harold G. Creighton, Section H, 2140th AAF Base Unit (Pilot School, Specialized 4 Engine and Instructors School), Smyrna Army Air Field, Smyrna, Tennessee, did, without proper leave, absent himself from his organization at Smyrna Army Air Field, Smyrna, Tennessee, from about 0001 o'clock, 22 October 1944 to about 1400 o'clock, 23 December 1944.

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

Specification 1: In that Second Lieutenant Harold G. Creighton, Section H, 2140th AAF Base Unit (Pilot School, Specialized 4 Engine and Instructors School), Smyrna Army Air Field, Smyrna, Tennessee, did, at Houston, Texas, on or about 14 December 1944, wilfully and wrongfully wear Captain's bars on his uniform.

Specification 2: In that Second Lieutenant Harold G. Creighton, Section H, 2140th AAF Base Unit (Pilot School, Specialized 4 Engine and Instructors School), Smyrna Army Air Field, Smyrna, Tennessee, did, at Chicago, Illinois, on or about 14 November 1944, wilfully and wrongfully wear Captain's bars on his uniform.

Specification 3: In that Second Lieutenant Harold G. Creighton, Section H, 2140th AAF Base Unit (Pilot School, Specialized 4 Engine and Instructors School), Smyrna Army Air Field, Smyrna, Tennessee, did, at Nashville, Tennessee, on or about 23 September 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Broadway Liquor Store, Nashville, Tennessee, a certain check in words and figures, as follows, to wit:

Greenville, Miss. Sept 23 1944 No._____

GREENVILLE BANK & TRUST CO.

Pay to the order of _____ Cash _____ $25 00/100
Twenty five & 00/100 _____ DOLLARS

Box 182: SAAF (Signed) H. G. Creighton
Smyrna, Tenn. 2nd Lt. O-546683

and by means thereof did fraudulently obtain from the said Broadway Liquor Store, Nashville, Tennessee, twenty five dollars ($25.00), lawful money of the United States, in payment of said check, he the said Second Lieutenant Harold G. Creighton then well knowing that he did not have, and not intending that he should have sufficient funds in the Greenville Bank and Trust Company for the payment of said check.

The remaining 23 Specifications under this charge allege offenses substantially identical with that set forth in Specification 3, except as to the date, place, amount, and firm to which presented, which facts are alleged respectively as follows:

Specification	Date	To Whom Presented	Amount
4	26 Sep. 1944	Commerce Union Bank, Nashville, Tennessee	$20.00
5	29 Sep. 1944	The American National Bank, Nashville, Tennessee	$25.00
6	30 Sep. 1944	Broadway National Bank, Nashville, Tennessee	$20.00
7	3 Oct. 1944	The First National Bank of Montgomery, Alabama	$20.00

8	11 Oct. 1944	State National Bank of Decatur, Decatur, Alabama	$20.00
9	26 Oct. 1944	Hotel Claridge, Memphis, Tennessee	$25.00
10	27 Oct. 1944	Hotel Thomas Jefferson, Birmingham, Alabama	$25.00
11	29 Oct. 1944	Hotel Thomas Jefferson, Birmingham, Alabama	$25.00
12	30 Oct. 1944	Birmingham Trust and Savings Company, Birmingham, Alabama	$25.00
13	6 Nov. 1944	Emigrant Industrial Savings Bank, New York, New York	$25.00
14	8 Nov. 1944	Hotel Lincoln, New York, New York	$35.00
15	10 Nov. 1944	Southern Hotel, Baltimore, Maryland	$25.00
16	11 Nov. 1944	Southern Hotel, Baltimore, Maryland	$25.00
17	13 Nov. 1944	Southern Hotel, Baltimore, Maryland	$25.00
18	14 Nov. 1944	City National Bank and Trust Company of Chicago, Chicago, Illinois	$20.00
19	14 Dec. 1944	Rice Hotel, Houston, Texas	$25.00
20	15 Dec. 1944	Rice Hotel, Houston, Texas	$25.00
21	17 Dec. 1944	Ship's Service Department, U.S. Naval Air Station, New Orleans, Louisiana	$50.00
22	20 Dec. 1944	Ship's Service Department, U.S. Naval Air Station, New Orleans, Louisiana	$30.00
23	15 Nov. 1944	United States National Bank of Omaha, Omaha, Nebraska	$25.[illegible]

24	10 Dec. 1944	Officers' Mess, Pecos Army Air Field, Pecos, Texas	$40.00
25	2 Nov. 1944	Ambassador Hotel, Washington, D. C.	$20.00
26	3 Nov. 1944	Ambassador Hotel, Washington, D. C.	$25.00

CHARGE III: (Finding of not guilty).

Specification: (Finding of not guilty).

ADDITIONAL CHARGE:

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

The three specifications under this Charge allege offenses identical with those stated in Specifications 3 through 26 of Charge II, except as to the respective particular facts, following:

Specification	Date	To Whom Presented	Amount
1	15 Nov. 1944	First National Bank of Omaha, Omaha, Nebraska	$20.00
2	22 Nov. 1944	J. C. Penney Company, San Francisco, California	$25.00
3	7 Dec. 1944	Ciro's, Hollywood, California	$25.00

Following arraignment, upon motion by the defense counsel, concurred in by the trial judge advocate, the court inquired into the mental condition of accused (R. 6), receiving evidence on the issue (R. 8-47). The court found, a majority of the members concurring, that accused was sane at the time of the commission of the alleged offenses and at the time of trial (R. 49). The law member denied the special plea of insanity (R. 49). Further reference is hereinafter made to the issue of insanity thus raised and acted upon. Upon announcement by the court of its action upon the special issue, accused 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. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that accused was granted a leave of ten days effective 11 October 1944, and failed to return to

duty on 22 October as required (R. 50). An extract copy of the morning report of his organization for 23 October 1944 shows accused "fr ord lv of absence to AWOL 0001 22 Oct 1944" (R. 51; Pros. Ex. B). His commanding officer made a search for him after he failed to report back to the organization, and was unable to find accused. Prior to absenting himself without leave accused had missed a "great number of formations" and had told his commanding officer that one of his reasons for missing them was "because of a dairy farm in his home town, Pensacola" (R. 52). Accused surrendered to military authorities at Brookley Field, Mobile, Alabama, on 23 December 1944. On 26 December 1944 he was flown from Brookley Field to his station and confined (R. 50-54; Pros. Ex. C, D).

A stipulation was voluntarily entered into between the trial judge advocate, accused and his defense counsel, and accepted by the court, the relevant parts of which are as follows:

> "1. That accused, Harold G. Creighton, was absent without proper leave from his organization at Smyrna Army Air Field, Smyrna, Tennessee, from about 0001 o'clock, 22 October 1944, to about 1400 o'clock, 23 December 1944.
>
> "2. That the accused did at Houston, Texas, on or about 14 December 1944, wrongfully wear Captain's bars on his uniform.
>
> "3. That the accused did, at Chicago, Illinois, on or about 14 November 1944, wrongfully wear Captain's bars on his uniform.
>
> "4. That the accused did make and utter each of the instruments described in Specifications 3 to 26 under Charge II, and did receive for each of the said instruments the amount of cash set forth in each from the corporations and individuals as set forth in each of the said specifications.
>
> "* * * 6. That the accused did make and utter each of the instruments set forth in Specifications 1 to 3, inclusive, under additional Charge, Charge I, and did obtain from each of the persons or corporations named in said specifications the amount in cash as called for in said instruments.
>
> "7. That the accused did not have sufficient funds in the Bank upon which said instruments were drawn to meet or pay said instruments and that the statement of account by the Greenville Bank & Trust Company, Greenville, Mississippi to accused marked "Duplicate Statement" covering period from August 1, 1944 to December 31, 1944, is correct" (R. 56-58).

Photostatic copies of each of the checks described in Specifications 3 to 26 inclusive, Charge II, and in Specifications 1 to 3 inclusive,

Additional Charge, Charge I, were introduced into evidence without objection (R. 59-63; Pros. Ex. 1-27).

A duplicate statement of accused's account with the Greenville Bank and Trust Company, Greenville, Mississippi, covering the period from 1 August 1944 to 31 December 1944, accepted as correct in the above stipulation, was introduced in evidence without objection (R. 58-59; Pros. Ex. E). This statement shows a balance in accused's account on 23 September 1944 of $64.80. On 26 September 1944 a balance of $44.80 appears. From 27 September 1944 to 31 December 1944 the account at no time shows a sufficient balance to pay any of the checks issued between such dates, the smallest check issued being for $20.00. Between 23 September and 31 December only two deposits were made to the account. The first, on 29 September, was in the amount of $9.90, and the second, on 5 October, was in the amount of $164.50. Checks in the total amount of $150 were paid from the account on 5 October, the date the last deposit was made (Pros. Ex. E).

4. The accused, after having his rights duly explained to him by the president, elected to remain silent (R. 65).

The Courts and Boards Officer, a witness for the defense, testified that all of the checks described in the Specifications had been paid by money orders mailed from the office of the witness on the day preceding the trial (R. 63-65).

5. The evidence introduced as to the absence without leave alleged in the Specification, Charge I, aside from the stipulation, is clearly sufficient to establish accused's guilt of that offense.

As to Specifications 1 and 2, Charge II, the stipulation voluntarily entered into by accused admits the wrongful wearing of Captain's bars at the times and places alleged. Such offense is a violation of Article of War 96 (CM 233393, Colburn, 19 BR 377).

The stipulation also admits the making and uttering of each of the checks described in the remaining Specifications, the receipt of cash therefor as alleged in the Specifications, and "that the accused did not have sufficient funds in the Bank upon which said instruments were drawn to meet or pay said instruments." Although not as comprehensive as it might have been, this stipulation fairly admits the elements of the offenses charged except that of fraudulent intent by accused in making and uttering the checks. The stipulation and evidence show that accused passed twenty-seven checks in the total amount of $695.00 over a period of less than three months, during which period his account with the drawee bank was insufficient in amount for the payment of the checks upon presentment. Such repeated acts clearly justified the court in assuming that accused knew of the condition of his account and in concluding that he made and uttered the checks with the fraudulent intent alleged (CM 236509, Veal, 23 BR 31).

It is true that the duplicate statement of accused's account shows a balance on the dates of 23 and 26 September of slightly more than the amounts of the respective checks issued on such dates; but in view of the stipulation as to the insufficiency of the account, and the actual insufficiency shown by the statement on 27 September, it seems apparent that accused, at the time he gave the checks, had already issued other checks in amounts which he knew would deplete the account before the checks dated 23 and 26 September would clear the bank in the ordinary course of business. Under such circumstances the court was justified in finding him guilty as to such checks (22 Am. Jur. 479).

The fact that reimbursement was made as to all of the checks prior to the trial is clearly not a defense (CM 233722, Growdon, 20 BR 77).

The Manual for Courts-Martial states that a stipulation "which practically amounts to a confession" should not ordinarily be accepted by the court where the accused has pleaded not guilty (MCM, 1928, par. 126b). "However, the language of the Manual leaves the acceptance or rejection of the stipulation to the discretion of the court" (CM 248408, Young, 31 BR 249). Since the original checks and a duplicate statement of accused's account with the bank were introduced in evidence, and the theory of the defense was not to deny the commission of the offenses but to excuse them by proving lack of mental responsibility, it cannot be said that the court abused its discretion in receiving the stipulation.

6. Upon arraignment, as noted above, an issue as to the sanity of accused was raised and the court granted a continuance of the case in order that an inquiry might be made in the premises (R. 6). A board of two officers, each with experience in psychiatry, was convened at Smyrna Army Air Field for the purpose of determining whether accused was sane and responsible for his acts. The report of the board was received in evidence (R. 9; Pros. Ex. A). Both members of the board testified at length (R. 8-11; 12-15).

The report of the board, the testimony of its members, and other evidence introduced by the defense discloses a history of accused in substantial particulars as follows: Accused is 23 years of age, is unmarried, and has seven living brothers and sisters. Two sisters are inclined to be nervous, and his father suffered a "nervous breakdown" in 1928. A first cousin and a paternal grandfather were each sent to hospitals for the insane for a year and six months, respectively (Pros. Ex. A; R. 24). A great uncle also had a nervous disorder necessitating a rest cure (R. 39). From an early age accused worked diligently, before and after school, in a large dairy operated by his father near Pensacola, Florida. He developed a lack of admiration for his father because of the father's inclination to be irritable and lose his temper readily. Accused was unhappy at school as a child because he was short and fat and was teased by other children. He suffered difficulty in one high school because of poor grades and truancies, which he attributed to long working hours in the dairy. At one time he went to Texas and worked two months in the oil

fields, but returned and graduated from another high school with average grades. Upon graduation in 1939 he managed his father's dairy. He enlisted in the Air Corps in January 1942 (Pros. Ex. A; R. 8-10). His W.D.A.G.O. Form 66-2 reveals that he acted as gunner on a medium bomber prior to 10 July 1942, at which time he became an aviation cadet (R. 16). On 28 April 1943 he received an honorable discharge as an enlisted man, with character rating of excellent (R. 17). On 29 April 1943 he was appointed a flight officer in the Army of the United States, and thereafter served for thirteen months at Greenville, Mississippi, as a basic flying instructor (R. 16). While there he became indebted as a result of gambling and gave some worthless checks, which he later made good (Pros. Ex. A). From 1 May 1943 to 30 June 1943 he received a rating of very satisfactory. Between 1 July 1943 and 26 May 1944 he received four separate ratings of excellent (R. 16-17). He received a certificate showing honorable service as a flight officer from 29 April 1943 to 4 March 1944 (R. 18). He was commissioned a second lieutenant on 5 March 1944. He compiled a total record of over 1000 flying hours. A transition course in the B-24 plane, begun 26 May 1944, at Smyrna Army Air Field, was not completed (R. 16-17). The pilot of a B-24 plane is responsible for its crew of ten men as well as the plane, valued at approximately $250,000, and powered with a total of 4800 horsepower in its four engines, as compared with 400 and 450 horsepower in the single-engine BT-13 and BT-15 training planes used in instruction at Greenville, Mississippi (R. 35-36). Accused became "jittery" and apprehensive about flying the heavier plane, and was "on the carpet" several times for missing formations (Pros. Ex. A). His flight surgeon did not suggest a change of duty assignment "because it is not uncommon for a man coming in to show some tension and apprehension" (R. 11). Forms from the Flight Surgeon's office indicate he was placed on "duty not involving flying" on four occasions between 23 June and 19 September 1944. No reason is indicated for the actions (R. 33-35; Def. Ex. I-IV). He was given a ten-day leave on 10 October 1944 and went home. On the way back to his base he was unable to make up his mind to return to the field because he was afraid to fly the B-24 plane. Instead he went to Washington, New York, San Francisco, Hollywood, Houston, New Orleans, and other cities in the United States, where he visited friends, went sightseeing and toured night clubs. He then went to Mobile, Alabama, where he turned himself over to military authorities. No reason was given for his wanderings (Pros. Ex. A).

The findings of the board respecting accused are as follows:

"1. Lt Creighton is sane at the present and capable of distinguishing right from wrong.

"2. It is the opinion of the board that, failing any undisclosed information, Lt Creighton was sane and responsible for his acts on or about 18 October 1944 and was capable of distinguishing right from wrong.

"3. Althought (sic) Lt Creighton is sane in the legal sense, he exhibits traits showing a definite faulty personality development" (Pros. Ex. A).

The report of the board indicates that accused is neat, polite, cooperative, "rather well poised," and "strikingly calm and unperturbed considering his predicament." He has a good memory and intelligence, but his judgment is faulty (Pros. Ex. A). Each member of the board testified that accused is neither psychotic nor psychopathic. He was capable of distinguishing right and wrong and capable of adhering to the right from September 1944 until the date of the examination, 23 January 1945 (R. 9-10; 12-14).

Major Charles C. Adams, Medical Corps, an expert in the field of psychiatry, testified that accused described to him a fear of flying a four-motored plane, especially during the take-off and in landing the ship, and an inability to explain his feelings to his commanding officer. Accused also described a feeling of futility and sickness which came over him while returning to his base at the end of his leave, and a feeling of relief upon finally giving himself up at Mobile after his wanderings over the country. Accused admitted giving the checks and said he knew what he was doing. The witness noticed a "tick" or twitch of the right side of accused's face, which "sometimes does go with psychoneurosis." The witness also testified that accused,

> "has a good mind, - no mental disease there at all. There was nothing during the entire thing that I could see that would indicate to me an indication of psychosis. * * * My final diagnosis is that this was a form of, - that his condition at that time was to be labeled as anxiety neurosis, a form of psychosis. By that I don't mean that he was psychotic, but that he had a nervous condition, an abnormal mental condition and presumably still has it. * * * Anxiety neurosis is a symptom complex not associated with a mental disease, wherein the individual worries abnormally either because of himself or of a situation or of other things. That worrying is abnormal and, one might say pathological. It is not a mental disease, though."

Major Adams stated that the existence of anxiety neurosis would interfere with proper performance of duties. There is a difference between lack of will power and anxiety neurosis. Accused does know right from wrong and is legally sane, but the actions with which he is charged are not those of a person with a healthy and normal mind (R. 18-23).

Captain Hawley S. Sanford, Medical Corps, also an expert in the field of psychiatry, read at length from a report prepared by him following a three-day examination of accused, who described to the witness his feeling of fear and anxiety over flying the four-motored plane, and a consequent inability to sleep coupled with nightmares and spells of crying at night. In describing his wanderings, accused said that his previous symptoms of anxiety, depression and feeling of unreality increased when he learned

from a friend in Wilmington, Delaware, that inquiry was being made as to his whereabouts. Later, in Corpus Christi, Texas, he experienced a definite feeling of unreality and realized that he must give himself up when he learned that he had been reported missing. His feeling of tenseness and depression diminished upon returning to his base. He had frequent headaches which grew progressively worse during October, November and December 1944. His ability to smell has been reduced during the past year. "It is his feeling that something definite happened to him, that he changed into another type of person for a while and that now he has come back to being himself again." The witness' diagnostic impression was,

> "psychoneurosis, anxiety-depression moderately severe. * * * The patient is sane and therefore can distinguish right from wrong. * * * He is not psychotic at this time and I do not believe he ever has been, but his psychiatric disease was just as incapacitating as if he were. * * * One of the differences in this case from that of a psychosis is that his escape was in fact rather than in phantasy. The feelings of confusion and unreality were probably on a psychoneurotic basis, although they do suggest a somewhat malignant mental illness" (R. 23-33).

Accused's mother, Mrs. Mary Louise Creighton, testified that on his leave in October 1944, accused was moody, stayed to himself, and "seemed all on edge for some reason," in contrast to his pleasant and friendly disposition on previous leaves. Accused also at that time expressed displeasure over flying the B-24 plane (R. 37-40).

While visiting the witness, Mrs. Davis Hodges, at her home in Decatur, Alabama, while on his way home on leave, accused seemed "rather despondent, rather blue, and he had very little to say." On previous visits to her home, accused was friendly and sociable. He was regarded very highly by the witness and others (R. 40-41).

Second Lieutenant Lon Earnest Willis testified that persons who knew accused held him in very high regard. "He seems to be a very conscientious man as far as I know" (R. 35).

On this issue, the accused, after having his rights explained to him, elected to make a sworn statement (R. 42). He described his early life and intensive work in his father's dairy. During his thirteen months at Greenville, Mississippi, he flew the BT-13 and BT-15 training planes in giving basic flying instruction, and during part of the time he handled backward students. As a result of visits to the hospital or dispensary he was "grounded" six to eight times between 5 June and 11 October at Smyrna Army Air Field. In describing why he made the visits he stated:

> "Sometimes, once or twice, for a cold sir, one time I was just nervous. There were times that I was just jittery, wasn't

sleeping, having bad dreams, had a tooth pulled, a wisdom tooth, and a sisk (sic) out out of my face. These were usually the nature of my visits."

He had no close friends in the BOQ. During periods of loss of sleep and bad dreams, he sometimes found himself crying. He started to discuss his problems with his commanding officer once or twice, "but never could get to it." After his leave, he intended to return to his base, and got as far as Nashville. He bought a ticket to come to the field, and did not know why he did not come back or why he ran "around the country." He passed the checks because he had to have money. "I just felt that I had to keep going, had to live somehow." He did not know whether he was afraid of the B-24 plane. He volunteered for every service in his army career except "this four engine training" (R. 41-46).

Following the taking of evidence on the special plea of insanity, the court was closed, and upon being opened the president announced,

> "* * * upon secret written ballot, a majority of the members present at the time the vote was taken concurring in the finding, finds that you are in a proper mental condition to undergo trial under the charges and specifications and (2) * * * that at the time of the commission of each of the alleged offenses you were so far free from mental defect, mental disease, or mental derangement as to be able, concerning the particular acts charged, both (a) to distinguish right from wrong and (b) to adhere to the right."

The law member thereupon ruled on the plea before the court by stating: "The plea is denied" (R. 49).

Issues relating to sanity may be properly determined as interlocutory questions by the law member, subject to objection by any member of the court (AW 31; MCM, 1928, par. 51, 75a). It was unnecessary, therefore, in ruling on the special plea, for the court to determine the issue of insanity by majority vote on secret written ballot. This action, however, clearly afforded accused a greater measure of protection than he was entitled to, and at the same time rendered harmless the failure of the law member to make his ruling subject to objection by any member of the court.

The type and extent of mental disease which will relieve one of criminal accountability is stated in 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" (MCM, 1928, par. 78).

Since none of the witnesses for the defense or prosecution testified

that accused was at any time insane, unable to distinguish right from wrong, or unable to adhere to the right, but all affirmatively testified that he was sane and did know right from wrong, it is doubtful if any real issue of insanity was injected into the case by the testimony (See CM 231963, Hatteberg, 18 BR 349). Assuming the issue was raised, it is fair to conclude from the testimony that accused became obsessed with an abnormal worry, anxiety, fear or apprehension by reason of flying the four-motored plane, and that he entered upon the course of conduct shown by the evidence in an attempt to cast off the obsession. That he exhibited such faulty judgment is unfortunate, but it falls short of showing such lack of mental responsibility as will relieve him in any court of law. It is true that the testimony shows that his actions were not those of a person with a healthy and normal mind. However, the evidence shows that he had previously given worthless checks during a period when he was also instructing flying students in an excellent manner at another field. By his own statements he knew what he was doing while absent without leave, and was capable of rationalizing as to the precarious predicament into which he had entangled himself. The court could consider the facts in evidence in the light of its own knowledge of human motives and behavior (CM NATO 2047, Bull. JAG, June 1944, p. 228). Viewed in such light the actions of accused are no more those of a mentally irresponsible person than the acts of a person purposely and consciously intending to breach fundamental rules of society and military discipline in gratification of selfish desires possessed but restrained by men of better judgment and stronger will power. For the purpose of criminal responsibility there is no twilight zone between normality and insanity. The accused is either wholly sane or wholly insane. Criminal law allows for no gradations of responsibility based upon the partial impairment of the will to resist temptation. From a careful consideration of the record, the Board of Review concludes that the court was fully warranted in denying the special plea of insanity.

7. War Department records reveal that accused is 23 years of age and is unmarried. For a number of years prior to and subsequent to completing high school in 1940 he managed his father's dairy business near Pensacola, Florida. He enlisted in the Army Air Corps in January 1942, and became an aviation cadet in July 1942. On 29 April 1943 he was appointed flight officer in the Army of the United States upon graduation from the Army Air Forces Advanced Flying School, at Marianna, Florida. On 5 March 1944 he was commissioned a second lieutenant in the Army of the United States.

8. 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 61 or Article of War 96.

Fletcher R. Anderson, Judge Advocate

Herbert B. Frederick, Judge Advocate

[illegible], Judge Advocate

SPJGQ - CM 275648 1st Ind

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

TO: The Secretary of War 5 JUN 1945

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Harold G. Creighton (0546683), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave for 62 days in violation of Article of War 61; of wrongfully wearing captain's bars on his uniform at Houston, Texas, and Chicago, Illinois, in violation of Article of War 96; and of wrongfully making and uttering, with intent to defraud, twenty-seven checks in the total amount of $695.00, knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for their payment. 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 your action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board 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. I concur in that opinion.

On 22 October 1944 the accused absented himself without leave by failing to return after a ten-day leave to his organization at Smyrna Army Air Field, Smyrna, Tennessee, where he was in training as a pilot for the B-24 type of plane. He remained absent without leave from 22 October 1944 until 23 December 1944, at which time he surrendered himself to military authorities. During this period of unauthorized absence he visited Washington, New York City, San Francisco, Hollywood, Corpus Christi, New Orleans and other cities. Although he was in fact a second lieutenant, while in Houston, Texas, and Chicago, Illinois, he wrongfully wore captain's bars on his uniform. Between 26 September and 20 December 1944, accused issued for value 27 checks totaling $695.00, all of which were returned by the drawee bank because of insufficient funds in his account to meet them. No deposits were made to his account after 5 October, but accused wrote 22 of the worthless checks after that date. The evidence clearly warrants the conclusion that accused knew that he did not have, and did not intend that he should have, sufficient funds in the bank to meet these checks. Reimbursement for all of the worthless checks was made the day before the trial. Upon motion by the defense counsel, prior to pleading to the general issue, the court inquired into the mental condition of accused. Evidence received on that issue showed that accused became

obsessed with an abnormal apprehension, anxiety or worry by reason of being required to fly the four-motored type of plane after previously having flown a single-engine training plane for thirteen months as a basic flying instructor. His condition was diagnosed by defense witnesses as anxiety neurosis or psychoneurosis, anxiety-depression, moderately severe. However, there is no evidence that accused was at any time insane, incapable of distinguishing right from wrong, or incapable of adhering to the right. All of the witnesses agreed that accused was sane and knew right from wrong. Accused admitted to medical witnesses that he knew what he was doing at all times. He testified at the trial that he did not know why he "ran around the country". The court and also a board of medical officers found accused sane both at the time of the alleged offenses and at the time of the trial.

In my opinion confinement for three years will be adequate punishment. I recommend that the sentence be confirmed but that the forfeitures be remitted and the period of confinement reduced to three years, that the sentence as thus modified be carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

4. Consideration has been given to attached letters from the Honorable Charles O. Andrews and the Honorable Claude Pepper, United States Senate, the Honorable Bob Sikes, Member of Congress, Mrs. Mary Creighton, mother of the accused, addressed to Senator Andrews and to the President, to a letter from Mr. Webb C. Jernigan, Pensacola, Florida, addressed to Senator Andrews, and to a letter from J. W. Malone, addressed to the President, all on behalf of the accused.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

10 Incls
1 - Record of trial
2.- Form of action
3 - Ltrs fr Sen. Andrews dated 13 Jan. & 20 Mar. 1945 with incl.
4 - Ltrs fr Cong. Bob Sikes dated 26 Feb. & 5 Mar. 1945
5 - Ltr fr Mrs. Mary Creighton dated 16 Mar. 1945
6 - Ltr from Sen. Pepper dated 10 Mar. 1945
7 - Ltr fr Mr. Jernigan to Sen. Andrews dated 11 Jan. 1945
8 - Ltr fr Mrs. E. B. Creighton addressed to the President, dated 27 Apr. 1945
9 - Ltr fr Mrs. E. B. Creighton addressed to the President, dated 22 Mar. 1945
10 - Ltr fr J. W. Malone, addressed to the President, dated 24 Mar. 1945

(Sentence confirmed but forfeitures remitted and confinement reduced to three years. G.C.M.O. 258, 20 Jun 1945)

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

SPJGQ - CM 275699

30 MAR 1945

UNITED STATES v. Private PAUL A. SARAPOCHILO (42187378), Company "A", 17th Infantry Training Battalion, Camp Wheeler, Georgia.	INFANTRY REPLACEMENT TRAINING CENTER Camp Wheeler, Georgia Trial by G.C.M., convened at IRTC, Camp Wheeler, Georgia, 6 February 1945. Dishonorable discharge and confinement for ten (10) years. Southeastern Branch, Disciplinary Barracks.

- - - - - - - - - - -

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

- - - - - - - - - - -

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Paul A. Sarapochilo, Company "A", 17th Infantry Training Battalion, Camp Wheeler, Georgia, did, at Camp Wheeler, Georgia, on or about 2 January 1945, willfully maim himself in the left foot by shooting himself with a U. S. Army .30 Caliber M-1 Rifle, thereby unfitting himself for the full performance of military service.

Specification 2: (Finding of not guilty).

He pleaded not guilty to the Charge and its Specifications and was found not guilty of Specification 2 of the Charge and guilty of the Charge and Specification 1 thereof. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten (10) years. The reviewing authority approved the sentence, designated the Southeastern Branch, United States Disciplinary Barracks, Camp Gordon, Georgia, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence is legally sufficient to support the finding of guilty. The only question requiring consideration is the legality of the sentence imposing ten years' confinement. The evidence shows that while acting as a range guard accused shot himself in the left foot with a .30 caliber rifle, the bullet entering at the base of the great toe and emerging at a point between the fourth and fifth toes (R. 19, 21, 25, 31-34, 43-46). There will be some temporary disability, but it is too early to determine whether any permanent disability will result from the injury (R. 25-26).

The operative facts of this case are similar to those in the recent case of CM 272944, Wilburn, wherein it appeared that the accused shot off a part of the great toe of his left foot with a .30 caliber rifle, suffering some temporary disability from which the medical officer thought there was a good chance of recovery. The Specification of which the accused was found guilty in the Wilburn case is identical in form with that in the present case. The Board of Review in the Wilburn case concluded that the maximum punishment of seven years "should serve as a guide where the self-inflicted wounds are not of such an extent and nature as to constitute mayhem, and there are no additional elements which may render the offense, as charged and established, a more serious one than that contemplated by the form of specification used in the present case". The Board held that seven years was the maximum legal period of confinement. In view of that holding it is clear that in the present case that portion of the sentence adjudging confinement in excess of seven years is illegal.

4. For the reason stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for seven years.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ
CM 275699

1st Ind
31 MAR 1945

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

TO: Commanding General
Infantry Replacement Training Center
Camp Wheeler, Georgia

1. In the case of Private Paul A. Sarapochilo (42187378), Company "A", 17th Infantry Training Battalion, Camp Wheeler, Georgia, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for seven years. Upon compliance with this recommendation, under the provisions of Article of War 50½ you will have authority to order the execution of the sentence.

2. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, should be designated as the place of confinement instead of the Southeastern Branch, United States Disciplinary Barracks, Camp Gordon, Georgia.

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 275699).

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

SPJGH-CM 275715

16 MAR 1945

UNITED STATES	SIXTH AIR FORCE
v.	Trial by G.C.M., convened at Albrook Field, Canal Zone, 31 January 1945. Dismissal.
Major DAVID P. BURLEIGH (0-384597), Quartermaster Corps.	

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

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

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

CHARGE I: Violation of the 95th Article of War

Specification: In that Major David P. Burleigh, Quartermaster Corps (Aviation) unassigned and attached 10th Replacement Control Depot, Howard Field, Canal Zone, did, at the Officers' Club, Albrook Field, Canal Zone, on or about 31 December 1944, wrongfully strike Miss Dorothy Manucy on the face with his hand.

CHARGE II: Violation of the 96th Article of War

Specification: In that Major David P. Burleigh, Quartermaster Corps (Aviation) unassigned and attached 10th Replacement Control Depot, Howard Field, Canal Zone, was, at Albrook Field, Canal Zone, on or about 31 December 1944, drunk in uniform in a public place, to wit: the Officers' Club, Albrook Field, Canal Zone.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I, as a violation of Article of War 95, but guilty

of the Specification thereof in violation of Article of War 96, and guilty of Charge II and its Specification. No evidence of any previous conviction was introduced at the trial. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

On the evening of 31 December 1944 accused, in company with his date, Miss Dorothy Manucy, attended a New Year's Eve party at the Officers' Club, Albrook Field, Canal Zone. They arrived at the club at about 8:30 p.m. and accepted an invitation to join a party at a table occupied by Lieutenant Colonel Dean H. Eshelman and several other officers (R. 70; Pros. Ex. A). At about 10 p.m. Colonel Eshelman and Miss Manucy, upon concluding a dance, strolled into the Guatemalan Room of the club, took seats at a table and ordered drinks (Pros. Ex. A). The Guatemalan Room was about half filled with people at this time (R. 18, Pros. Ex. A). Nearby tables were occupied by several officers (R. 12, 22, 27, 32; Pros. Ex. A). After Colonel Eshelman and Miss Manucy had been seated about 15 minutes, accused entered the room, carrying a champagne bottle in one hand, and sat down with them, crowding the lady between the two men on a seat that was designed for two people (R. 13, 21-22, 30-33; Pros. Ex. A). Accused at this time had the appearance of being drunk. His uniform was badly wrinkled, his collar was unbuttoned, his tie was pulled part way down, his hair was down over his face and part of his shirttail was out (R. 14, 22, 28, 33, 40; Pros. Ex. A).

For a period of approximately 5 minutes accused and Miss Manucy engaged in a heated conversation, Colonel Eshelman turning aside and paying little attention to it (R. 13, 22, 57; Pros. Ex. A). Accused then slapped Miss Manucy on the mouth with the back of his left hand. Major Arthur L. Cushing, who was 20 feet away but looking directly at accused, was an eyewitness to the blow (R. 13, 17). Captain Walter K. Morgan, who was ten feet away, heard the slap and saw accused's hand falling away from Miss Manucy's person (R. 28-29, 31). Colonel Eshelman did not see the slap but he heard it and is "morally certain" it was a blow struck by accused upon Miss Manucy (Pros. Ex. A).

Immediately after the slapping episode, Colonel Eshelman and accused simultaneously leaped to their feet and Miss Manucy fell over on the settee, covered her face with her hands and commenced crying (R. 13, 19, 22, 28). Colonel Eshelman and accused assumed a belligerent attitude, raising their hands "as if fisticuffs were about to ensue" (R. 13, 19, 22, 32-33). Accused turned to Miss Manucy and placed his hand on her. She said sharply "Don't you touch me. Don't you lay your hand on me" (R. 22, 29). Colonel Eshelman stepped over to a nearby table occupied by Major Cushing, Captain Morgan, Captain George K. Hutchings, Major James A. Castner and Major Quinn and inquired whether any of them had seen

accused strike the lady. Someone made a negative response and he turned and went back to his table (R. 14, 16a, 23; Pros. Ex. A). After accused stood up he bolstered himself by holding to the drapes on the wall (R. 22, 26, 29). Following the slapping incident Miss Manucy's face bore no evidence of having been slapped (R. 38, 39; Pros. Ex. A). About 20 minutes later she and accused walked away together and they did not at that time appear to be unfriendly (R. 39).

Accused's commanding officer, Lieutenant Colonel Robert W. Thomas, talked with accused at the club at about 10:30 p.m. In the opinion of Colonel Thomas, accused was at that time drunk. He was "bedraggled", drinks were spilled on his uniform, his hair was down over his face, he was "slovenly" and "disheveled", his eyes were "glassy and half closed" and "he had the typical appearance of a drunk" (R. 40). Also, in the opinion of Major Cushing, Major Castner and Captain Morgan, accused was drunk (R. 15, 21, 23, 31).

Captain Albert M. Thayer testified that he took Miss Manucy to her quarters in a staff car at the close of the party (R. 71). Colonel Eshelman testified that he believed that Captain Thayer took Miss Manucy home, and he denied that he accompanied them (Pros. Ex. A). This statement was contradicted by Miss Manucy, who, when asked on cross-examination the name of "the gentleman who escorted" her to her quarters on the night in question, replied: "Did you say 'gentleman'? It was Colonel Eshelman" (R. 68).

Captain Hutchings testified that he talked with accused at San Juan race track on Sunday afternoon, 7 January 1945. Accused apparently thought that Hutchings had testified favorably to accused in an investigation which had taken place Sunday morning and he told Hutchings that he wanted Hutchings to know what had actually occurred at the party on New Year's Eve. He thereupon told Hutchings "that he and Miss Manucy had slapped each other innumerable times, and that on 31 December he had slapped her" (R. 34, 35).

4. Evidence for the defense:

Miss Manucy testified that about 20 or 25 minutes after she and Colonel Eshelman entered the Guatemalan Room accused entered the room and approached the table at which she and Colonel Eshelman were seated. He "seemed provoked" because she "had left the table." Upon her insistence he sat down with them. She "tried to make excuses for staying in there so long." He said the thing for him to do was "to go home" and he arose to leave. Colonel Eshelman arose almost simultaneously and she started crying. Accused did not strike her. She "was perfectly sober" and would have known if accused had struck her. Her feelings were hurt and she cried simply because accused stated he did not want to see her any more (R. 64-65). No blow was struck and she was not marked (R. 65).

Lieutenant Colonel Francis J. Fitzpatrick (Aide to Lieutenant General Brett) was called as a witness for the defense. He was present, with a lady, in the Guatemalan Room at approximately 10:45 p.m. and observed no disturbance. He did not recall seeing accused (R. 45).

Accused, after having his rights as a witness explained to him, elected to be sworn and to testify in his own behalf. He is attached to the 10th Replacement Control Depot, Howard Field, Canal Zone, awaiting reassignment. He and Miss Manucy arrived at the Officers' Club on 31 December 1944 at approximately 8:30 p.m. They were invited to join a party at a table occupied by Colonel Eshelman and other officers. It had been originally planned to have the New Year's Eve party at Colonel Frost's quarters, but because of an alert it had been switched to the club, and as a result none of the other officers had dates. The party at this table talked and danced and drank champagne for about two hours. There were "quite a few bottles of champagne on the table." During this time no one left their group. Then Colonel Eshelman, upon finishing a dance with Miss Manucy, failed to return. At first accused was not concerned, "but as time went on and they didn't return" he became worried and started to search for them. Not finding them, he returned to the table and had "a drink or two." Someone knocked a glass over and spilled champagne on his shirt (R. 47-48). He then went in a staff car to Miss Manucy's quarters, but still did not find her. Returning to the club he went to the Guatemalan Room, taking a bottle of champagne with him. He had become angry by this time and wanted to know "what the score was." When he entered the Guatemalan Room Miss Manucy called to him, and upon turning around he saw her seated with Colonel Eshelman. They asked him to sit down, but he said "No, you are doing very well as you are." When they insisted, he sat down saying to Colonel Eshelman that "perhaps he was more interested in my date than I had supposed, and perhaps I was intruding" (R. 49). He then got into an argument with Miss Manucy, and told her that possibly it would be a good idea if she stayed with Colonel Eshelman. She said "Don't be silly. You can't walk out on New Year's Eve." He replied that she had walked out on him and that she should continue to enjoy New Year's Eve but she should not call him. She became quite excited and said "You can't do this to me." He said "I'm leaving" and jumped up. He did not slap anyone, nor did he hear a slap. Colonel Eshelman leaped to his feet and said "What's the idea" to which accused replied "None of your business." Colonel Eshelman walked over to the nearest table and spoke a few words. He then returned and said "Let's get out of here." He said "What did you slap her for?" and accused said "For God's sake let's not start this, it's trouble enough as it is" (R. 50). Later accused talked to Colonel Thomas and then walked home from the club (R. 51). He did not make any admission to Captain Hutchings when he met him at the race track that he had slapped Miss Manucy. He and Miss Manucy are still good friends (R. 53). He has been in the Army since November 1940 (R. 54). On cross-examination

he testified that he started drinking rye whiskey at 3 o'clock in the afternoon on 31 December. He had six or seven glasses of champagne at the club and was feeling "pretty high" when he went into the Guatemalan Room (R. 54-55). Questioned closely about the incident in the Guatemalan Room, he was asked why Miss Manucy had said to him "Don't you touch me" and he replied "she was naturally furious, I suppose." "Q What led you to believe she was furious?" "A Her actions. No one had been killed; I hadn't shot anybody, but everybody was getting wild about this incident" (R. 59).

5. Upon arraignment, but before accused pleaded to the Charges and Specifications, defense counsel made a motion for a continuance for "a week or ten days" on the ground that "one of the chief witnesses, Lt. Colonel Eshelman" was in the hospital and that another witness, a waiter believed to have been on duty in the Guatemalan Room at the time of the alleged incident, could not be located. Defense counsel argued that Colonel Eshelman's deposition (Pros. Ex. A) failed to give the defense a full opportunity to make an adequate cross-examination. This motion was properly denied. The record discloses that at the taking of the deposition defense counsel's cross-examination was extensive and complete. There was no claim of surprise by the defense and, in view of the extensive testimony of several witnesses who were near the scene of the incident when it occurred, it is reasonable to assume that any testimony that might have been obtained from the absent witness would have been corroborative and cumulative only. Defense counsel did not go so far as to assert that the waiter had actually been present when the alleged incident occurred, nor is that fact shown by the testimony of any of the witnesses who testified. Under the circumstances, it was not an abuse of the court's discretion to deny defense's motion for a continuance and no substantial right of accused was adversely affected thereby.

6. The Specification of Charge I alleges that the accused "did, at the Officers' Club, Albrook Field, Canal Zone, on or about 31 December 1944, wrongfully strike Miss Dorothy Manucy on the face with his hand." The evidence on the question as to whether a blow was struck is squarely contradictory. For the prosecution, Major Cushing testified that he saw accused strike a blow on Miss Manucy's mouth with the back of his left hand, Colonel Eshelman testified that he heard a blow and was "morally certain" that accused did strike a blow upon Miss Manucy, Captain Morgan testified that he heard a blow and saw accused's hand falling away from Miss Manucy's person, Major Castner testified that shortly after the incident accused placed his left hand on Miss Manucy whereupon she exclaimed "Don't you touch me. Don't you lay your hand on me", and Captain Hutchings testified that on 7 January 1945 accused admitted to him that he (accused) and Miss Manucy had frequently slapped each other and that he struck her on 31 December 1944. Also, several witnesses testified to the fact that immediately following the incident both Colonel Eshelman

and accused sprang to their feet and assumed belligerent attitudes and that Miss Manucy covered her face with her hands and commenced crying. In contradiction of the prosecution's evidence, both the accused and Miss Manucy denied flatly that any blow was struck.

In the face of such contradictory testimony, it was the function and duty of the court to determine which of the witnesses should be believed and which should be disbelieved (CM 126252, Heppberger; MCM, 1928, par. 124). It is evident from the finding of guilty that the court chose to accept the testimony of the disinterested witnesses called by the prosecution and to reject the testimony of the accused and his female friend. This it had a right to do. In the opinion of the Board of Review the evidence of accused's guilt is compelling. Not only does all of the disinterested testimony point to guilt but all of the surrounding circumstances point to the same conclusion. The accused admits that there was "quite a scene", and, in a burst of frankness on cross-examination, he stated "No one had been killed; I hadn't shot anybody, but everybody was getting wild about this incident."

While the evidence was abundantly sufficient to have sustained a finding of guilty of the wrongful striking of Miss Manucy in violation of the 95th Article of War, as charged, the court saw fit to make a finding of guilty under the 96th Article of War, at the same time sentencing accused to dismissal. The conduct of the accused on this occasion, under the circumstances shown by the evidence, was not only prejudicial to good order and military discipline and of a nature to bring discredit upon the military service, but was reprehensible, disgraceful and dishonorable. The court's finding of guilty is amply supported by the record of trial.

7. The Specification of Charge II alleges that accused "was, at Albrook Field, Canal Zone, on or about 31 December 1944, drunk in uniform in a public place, to wit: the Officers' Club, Albrook Field, Canal Zone." The Specification is laid under the 96th Article of War. The evidence of accused's guilt of this offense is clear and overwhelming. It is undisputed that he was present at the club, in uniform, at the time alleged. His commanding officer and several other officers who had close observation of him testified unequivocally that accused was drunk. The accused himself admitted drinking large quantities of alcoholic drinks and that he was feeling "pretty high." The court could not reasonably have made any other finding than that of guilty. That such conduct on the part of the accused was a violation of the 96th Article of War is too clear to require discussion.

8. The records of the War Department show that accused is 38 years of age and married. He attended Dartmouth College one year and Newark Technological School one year. In civilian life he was employed

in a clerical capacity by Western Electric Company for 11 years, was proprietor of a night club in Passaic, New Jersey for 2½ years and sold life insurance for 1½ years. He was commissioned a second lieutenant, Quartermaster Corps, Reserve, on 11 September 1939 and was called to active duty 9 November 1940. He was promoted to first lieutenant on 30 June 1942, to captain on 12 December 1942 and to major on 8 July 1943.

9. In accordance with accused's request, he was represented at the trial by First Lieutenant Arthur J. Sleppin, as special counsel. The regularly appointed defense counsel and assistant defense counsel acted as associate counsel.

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

(On Leave), Judge Advocate

William H. Bamberger, Judge Advocate

Robert E. Trevethan, Judge Advocate

(144)

SPJGH-CM 275715 1st Ind

MAR 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 Major David P. Burleigh (0-384597), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. There appear to be no mitigating or extenuating circumstances. The review of the Acting Staff Judge Advocate of the Sixth Air Force, attached to the record of trial, contains the following statement with respect to previous punishments imposed upon this officer (page 5):

> "* * * This officer was returned to the United States 14 December 1943 for reassignment from this command and recalled to this command as a witness in a court-martial case 27 September 1944, involving the conduct of his office while stationed at Guatemala City, Guatemala. After reassignment to the United States his conduct became the subject matter of an investigation by the Inspector General, Second Air Force, report of which was forwarded to this headquarters following his return to this command. The nature of the offenses investigated included drunkenness at several air bases and the use of insulting and abusive language toward a civilian woman driver employed at Biggs Field, Texas. Major Burleigh was given an Administrative Reprimand for this offense by the Commanding General, Sixth Air Force. The accused has been further disciplined since 8 September 1944 by one reprimand under the 104th Article of War and one written admonition, the offenses being failure to properly supervise the accounting system of his office by permitting subsistence stores to be charged to enlisted men's messes and paid for by the United States, when such stores were not, in fact, consumed by these enlisted mens' messes, and dereliction of duty as mess supervisor and Police and Prison Officer at Casper, Wyoming, while stationed there in August 1944."

I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

8

(Sentence confirmed. G.C.M.O. 179, 9 Jun 1945)

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

SPJGN-CM 275738

17 APR 1945

UNITED STATES	)	SECOND AIR FORCE
v.	)	Trial by G.C.M., convened at Lincoln Army Air Field, Lincoln, Nebraska, 17 January 1945. Dishonorable discharge (suspended) and confinement for two (2) years. Seventh Service Command Rehabilitation Center, Jefferson Barracks, Missouri.
Private CHARLEY C. KIDDER (17130691), 273rd Army Air Forces Base Unit (SB), Section A.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Charley C. Kidder, 273rd Army Air Forces Base Unit, Section A, did at Lincoln Army Air Field, Lincoln, Nebraska, on or about 12 December 1944 wrongfully take and use without the consent of the owner, a certain automobile: to wit, a 1940 Plymouth sedan, of a value of more than Fifty Dollars ($50.00), property of First Lieutenant Jerry T. Segura, Second Air Force Classification and Routing Pool, Provisional Squadron B.

The accused pleaded not guilty to, and was found guilty of, the Charge and Specification. He was sentenced to be dishonorably discharged the service,

to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for two years. The reviewing authority approved the sentence, ordered its execution but suspended the dishonorable discharge, and designated the Seventh Service Command Rehabilitation Center, Jefferson Barracks, Missouri, as the place of confinement. The result of the trial was published in General Court-Martial Order 59, Headquarters Second Air Force, 9 February 1945. The record of trial was forwarded to The Judge Advocate General pursuant to Article of War 50½.

3. The evidence shows that, when the prosecution offered a confession of the accused in evidence, the defense objected on the ground that the confession had not been voluntarily given. After the prosecution had introduced evidence tending to show that the confession, contrary to the defense's contention, had been voluntarily made and properly secured, the defense offered the accused as a witness "in rebuttal" (R. 12-14). This offer to present rebuttal testimony was denied by the court and the confession was admitted into evidence and marked "Prosecution's Exhibit 2" (R. 14).

Later in the trial, when the prosecution had rested, the accused sought "to make a sworn statement insofar as a confession [was] concerned", the defense contending that, if the accused limited his testimony to the "validity and voluntariness" of the confession, he would "not be subject to cross-examination on the whole offense" (R. 17-18). The law member ruled, however, that, if the accused took the stand and made a sworn statement, he "would be subject to cross-examination on the whole matter and not merely to his confession" (R. 19). In view of this ruling the accused elected to remain silent (R. 19).

4. Since the confession was essential to the findings of guilty the correctness of the above ruling presents the only question requiring discussion. The Manual for Courts-Martial, in explaining the right of the accused to testify in his own behalf and the correlative right of the prosecution to examine him, states that:

> "An accused person taking the stand as a witness becomes subject to cross-examination like any other witness. So far as the latitude of the cross-examination is discretionary with the court, a greater latitude may properly be allowed in his cross-examination than in that of other witnesses. When the accused testifies in denial or explanation of any offense, the cross-examination may cover the whole subject of his guilt or innocence of that offense. Any fact relevant to the issue of his guilt of such offense or relevant to his credibility as a witness is properly the subject of cross-examination. The accused can not avail himself of his privilege against self-incrimination to escape proper cross-examination. Where an accused is on trial

for a number of offenses and on direct examination has testified about only a part of them, his cross-examination must be confined to questions of credibility and matters having a bearing upon the offense about which he has testified" (MCM, 1928, par. 121b).

Wigmore in his treatise on evidence, in justifying the rule permitting a liberal examination of an accused by the prosecution, makes the following explanation:

"The case of an accused in a criminal trial, who voluntarily takes the stand, is different /from the case of the ordinary witness/. Here his privilege has protected him from being asked even a single question, for the reason that no relevant fact could be inquired about that would not tend to criminate him (ante, sec. 2260, 2268). On this very hypothesis, then, his voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all. His situation is distinct from that of the ordinary witness, with reference to the point of time when a waiver can be predicated, because the ordinary witness is compelled to take the stand in the first instance, and his opportunity for choice does not come till later, when some part of the criminating fact is asked for; while the accused has the choice at the outset" (Wigmore on Evidence, 3rd Ed., Sec. 2276; a part of the above statement is quoted with approval by the Supreme Court in Johnson v. United States, 318 U.S. 189; see also Brown v. Walker, 161 U.S. 591).

The fairness of the above rule is considered in Grantello v. United States, 3 F. 2d 117 (C.C.A., 8th, 1924), wherein the court, quoting an earlier Federal decision, states that:

"* * * the defendant, having taken the stand and offered his testimony upon the merits of his case, and having entered into it in part, rendered himself amenable to cross-examination as to the whole. * * * A defendant cannot tell a half story touching his defense, which is a half story from his standpoint of the merits of the case, then abruptly stop in his course and decline to answer further, and expect to reap the benefit for himself to be derived therefrom, without incurring the discredit that is, by the rules of evidence and legal inference, visited upon the ordinary witness pursuing a like course."

The court was of the opinion that the case under its consideration did not fall within the reason of the above rule because the defendant did not testify regarding the merits of the case or as to any of the issues relating

to his guilt or innocence but "only testified that his name was Frank Grantello". The court concluded that:

> "It is a fundamental principle of our government, repeatedly emphasized and applied by the Supreme Court, that the provisions of its Constitution and statutes for the protection of the rights and privileges of its citizens accused of crimes shall not be limited, qualified, or frittered away, but shall be fairly and broadly construed and enforced for their protection."

This decision clearly recognizes the right of an accused to testify for a limited purpose provided he does not testify concerning facts relative to his guilt or innocence. Similarly the Board of Review has recognized the right of the accused to testify for the limited purpose of attacking the alleged voluntary character of his confession. In the court-martial case of Marquez, ETO 3931, the Board of Review stated that:

> "On the preliminary question of the admissibility of the confession the testimony of accused to show undue influence was properly offered and received (Id, sec. 594, p. 986). Since accused became a witness on his own behalf for an expressly limited purpose which excluded inquiry into the issue of his guilt or innocence of the offense charged, the prosecution's question - 'Was the statement you made true?' - was highly improper. The question and the affirmative answer by accused, in view of the fact that the statement was subsequently received in evidence, were substantially a confession of his guilt in open court and constituted an invasion of his privilege to remain silent on the issue of his guilt, which privilege he significantly elected to assert both at the time he appeared as a witness for the limited purpose and later when his rights were explained to him. * * * The admission of the confession was therefore an error and the sufficiency of the evidence to support the finding of guilty by the court independently of the evidence illegally received must be determined in accordance with principles applied in the Pheil and Allen cases, supra."

The right of an accused soldier against self-incrimination is specifically protected by the provisions of Article of War 24 which are as follows:

> "No witness before a military court, * * * shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him."

This same right is safeguarded by the provisions of the fifth amendment of the United States Constitution which are in part, as follows: "No person * * * shall be compelled in any criminal case to be a witness against himself * * *".

So obnoxious to the law is the use of a forced confession that the Supreme Court of the United States has stated that:

> "The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy; governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions, by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government." (Ashcraft v. Tennessee, 88 Law Ed. 858).

This constitutional guarantee can be most effectively enforced by excluding from the record all evidence obtained in violation of an accused's right against self-incrimination. Closely correllated to this prohibition against self-incrimination is the right of an accused to testify freely concerning the manner in which his confession was procured without being at the same time required to testify against himself. Any ruling of a court-martial which would circumvent the accused's right to limit his testimony to statements relative to the procuring of his confession would jeopardize the constitutional guarantee against self-incrimination, a right which the courts are under an obligation to guard. Unless this right of an accused is respected and protected, law-enforcing officers will be tempted to resort to unlawful practices. The court is under a duty, therefore, not only to guard itself from the possible consequences of an involuntary and untrustworthy confession, but to shield all persons accused of crime from maltreatment by overzealous officers. In the present case it would be vain to speculate as to the probable result of the accused's proferred testimony. Since the ruling of the law member denied to the accused the right to limit his testimony to facts showing the manner in which his confession was procured, and since the confession was essential to the findings of guilty, potential evidence in which the court is vitally interested was suppressed and the fundamental rights of the accused were prejudiced.

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

Abner E. Lipscomb, Judge Advocate.

Robert J. Glenn, Judge Advocate.

Samuel T. Morgan, Judge Advocate.

SPJGN-CM 275738

1st Ind
23 APR 1945

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

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) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Charley C. Kidder (17130691), 273rd Army Air Forces Base Unit (SB), Section A.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and, for the reasons stated therein, 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 designed to carry into effect these recommendations, should such action meet with your approval.

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings of guilty and sentence vacated. G.C.M.O. 259, 20 Jun 1945)

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

SPJGQ - CM 275792

2 APR 1945

UNITED STATES v. Private HOWARD R. BLAIR (39302013), and Private CHESTER M. CARVER (11039475), both of Headquarters Battery; Private J. W. CLINE (35690243), Headquarters Battery (attached to Battery B) and Private First Class PAUL F. McCONNELL (37426885), Battery B (attached to Headquarters Battery); all of 748th Antiaircraft Artillery Gun Battalion.	ICELAND BASE COMMAND Trial by G.C.M., convened at Camp Tripoli, Iceland, 10 February 1945. Sentence as to each accused: Dishonorable discharge (suspended) and confinement for eighteen (18) months. Disciplinary Barracks, Eastern Branch.

- - - - - - - - - - -

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

- - - - - - - - - - -

1. The record of trial in the case of the soldiers named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence as to Private First Class Paul F. McConnell. The record has been examined by the Board of Review, and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Howard R. Blair, Headquarters Battery, 748th Antiaircraft Artillery Gun Battalion, Private Chester M. Carver, Headquarters Battery, 748th Antiaircraft Artillery Gun Battalion, Private J. W. Cline, Headquarters Battery, 748th Antiaircraft Artillery Gun Battalion (attached to Battery B, 748th Antiaircraft Artillery Gun Battalion) and Private First Class Paul F. McConnell, Battery B, 748th Antiaircraft Artillery Gun Battalion (attached to Headquarters Battery, 748th Antiaircraft Artillery Gun Battalion), acting jointly and in pursuance of a

common intent, did at Reykjavik, Iceland, on or about 14 January 1945, wrongfully take and use without consent of the owner, a Studebaker automobile, license number R-1273, property of Sveinn Jonsson, Fogrubrekku, Seltjarnarnes, Iceland, of a value of more than Fifty ($50.00) Dollars.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced as to the accused McConnell. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might "indicate" for eighteen (18) months. The reviewing authority approved the sentences, but suspended the execution of the dishonorable discharge as to each accused until his release from confinement, and designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 1, Headquarters Iceland Base Command, APO 860, c/o Postmaster, New York, New York, 15 February 1945.

3. The evidence for the prosecution shows that on the night of 14 January 1945, at about 11:00 p.m., Gardar Jonsson, pursuant to a previous agreement with the owner, parked a 1935 model Studebaker automobile, license number R-1273, belonging to Sveinn Jonsson, at a street intersection in Reykjavik, Iceland (R. 7-10, 12-13). It was stipulated that the car was of a value of more than $50.00 (R. 36).

The witness Magnus Kristinnsson, while driving from Reykjavik to Keflavik at about 2:30 a.m. on the same night, stopped his car near the place where a Studebaker car, later identified as that belonging to Sveinn Jonsson, had gone off the road (R. 16-19, 8, 13-14). The accused McConnell got out of the rear seat of the car and the witness saw two other American soldiers in the front of the car. McConnell told the witness "that the driver had gone back to Reykjavik. Then he asked for a lift to Keflavik." Kristinnsson drove McConnell "for sometime between camps but he was unable to get in or at the least any place we came to he said that this was not the right place" (R. 17-18). At about 3:30 a.m. McConnell came to the main gate of Camp Finley looking for Private Cline, but he did not enter the gate (R. 37-38). Kristinnsson testified that McConnell was very drunk, and that the witness could not understand what he was trying to say in answer to questions about paying his fare. The witness left McConnell at the "Icelandic police station, where American policemen received him in custody" (R. 21-22). At about 6:10 a.m. McConnell told a member of the military police that he had been to Keflavik "to see some of his

friends" and "was late getting back to camp." McConnell was booked "for failing to pay a cab bill and for being AWOL" (R. 39-42).

At about 1:00 p.m. the same day, 15 January, Sveinn Jonsson went to the intersection to get his car, but found that it was not there. He notified the Icelandic Police who already had a report on the car. He did not know any of the accused (R. 10).

Thereafter, the accused Carver, Cline and Blair made voluntary signed statements, which were received in evidence, in which they admitted going over the fence at Camp Grotta, with accused McConnell, shortly before midnight on 14 January, and going to Reykjavik where the four, all of whom were drinking, took an Icelandic car which they saw parked on the streets. They also admitted they later ran the car off the road between Keflavik and Reykjavik (R. 26-36; Pros. Ex. B, C, D). None of the statements was limited by the court in so far as it applied to accused McConnell, who made no statement.

4. Each accused, after having his rights explained by the president and law member, elected to remain silent (R. 50-51). The sole witness for the defense gave no testimony relating to the accused McConnell (R. 48-49).

5. It is clear that each of the statements or confessions made by Blair, Carver and Cline was admissible only against the accused making the statement or confession, and should not have been admitted or considered against the accused McConnell (MCM 1928, par. 114c, 76; Dig. Op. JAG, 1912-40, sec. 395(4)). Aside from these statements or confessions, the only evidence linking McConnell with the offense charged is that he got out of the rear seat of the car while it was parked near a highway some miles from the place where it was taken and some time after it was taken, the front seat being then occupied by other soldiers. It also appears, for whatever it is worth, that McConnell was looking for the accused Cline later during the same night. McConnell at no time made any statement which admitted any connection with the offense charged.

It is not necessary to decide whether such evidence sufficiently shows McConnell's guilt of the offense since there were errors which necessitate a holding that the record is legally insufficient to support the findings and sentence as to him. In opening argument the prosecution made a number of statements of fact aimed at showing the joint guilt of McConnell and his fellow accused, which facts were obviously taken from the confessions of the three accused, Carver, Blair, and Cline. At no point during the trial was any warning or instruction given that each confession must be considered solely

against the accused making it. This improper argument by the prosecution, and failure to limit the effect to be given such extrajudicial statements, clearly were infringements of the substantial rights of McConnell such as have, in previous cases, impelled the Board of Review to set aside convictions (See CM 210985, Bonner et al, 9 BR 383; CM 202225, Leach et al, 6 BR 11). It does appear that the prosecution prefaced a sentence of its argument to the court with the statement,

> "Granted, that the law says we can't use those confessions regarding a joint act of persons against another party allegedly in the same joint act who has not confessed, * * * (R. 53).

This statement reflects merely an assumption on the part of the prosecution that the court understood the principles announced in paragraph 114c of the Manual for Courts-Martial. It obviously could not have served the purpose of a proper warning or limitation by the law member, and does not warrant a conclusion that the references to McConnell contained in the statements made by his fellow accused were not considered by the court (See CM 214637, Bullington, et al, 10 BR 371). Indeed, there was little else to consider. It is significant that the prosecution read to the court from the Manual for Courts-Martial (1928), paragraphs 114a and 114b, relating to confessions and admissions, but did not read the relevant rules contained in paragraph 114c as to acts and statements of conspirators and accomplices (R. 6).

In addition to the statements referred to above, the prosecution during its opening argument referred to the accused McConnell in the following language:

> "He has remained silent on the point. Granted, that the law says that the silence can not be taken to be an inference of guilt or innocence, but it does not say that the court can fail to reasonably infer it either inferentially or circumstantially. * * * It is too bad in one way that we haven't got one of the men to take the stand. Justice certainly wouldn't take a right turn if three men were honest enough to confess a crime and one man remained silent and was left out of the crime for that * * *" (R. 53).

Such argument constituted a clear violation of the rule that during argument "the failure of an accused to take the stand must not be commented upon" (MCM 1928, par. 77). Unless competent evidence of guilt is compelling, such improper argument is prejudicial to the substantial rights of the accused (See CM ETO 2885, Nuttman; Dig. Op. JAG, 1912-40, sec. 395(55)).

Since the competent evidence clearly is not compelling as to the guilt of McConnell, the Board of Review concludes that the errors above pointed out were prejudicial to the substantial rights of this accused.

6. The accused McConnell is 29 years of age and was inducted on 13 August 1942 at Camp Dodge, Iowa.

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

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ - CM 275792 1st Ind

APR 4 1945

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

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) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private First Class Paul F. McConnell (37426885), Battery B (attached to Headquarters Battery), 748th Antiaircraft Artillery Gun Battalion, together with the foregoing opinion of the Board of Review.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence as to McConnell, and, for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which this 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 these recommendations, should such action meet with your approval.

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings of guilty and sentence as to McConnell vacated. G.C.M.O. 160, 30 Apr 1945)

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

SPJGH-CM 275842

13 MAR 1945

UNITED STATES v. Second Lieutenant ROBERT E. HART (0-1183874), Field Artillery.	7TH HEADQUARTERS AND HEADQUARTERS DETACHMENT SPECIAL TROOPS, FOURTH ARMY Trial by G.C.M., convened at Camp Bowie, Texas, 16 January 1945. Dismissal, total forfeitures and confinement for one (1) year.

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 Robert E. Hart, Service Battery, 426th Armored Field Artillery Battalion, did, at Camp Bowie, Texas, on or about 25 December 1944, fail to repair at the fixed time to the properly appointed place, to wit: 426th Armored Field Artillery Battalion, Camp Bowie, Texas, for guard duty as Officer of the Day.

CHARGE II: Violation of the 95th Article of War

Specification 1: (Finding of not guilty).

Specification 2: In that Second Lieutenant Robert E. Hart, * * *, did, at Camp Bowie, Texas, on or about 24 December 1944, appear in a public place, namely,

Camp Bowie Officers' Club, wearing unauthorized Service Ribbons, to wit: Purple Heart, Silver Star, and Distinguished Service Cross.

The accused pleaded not guilty to all Specifications and Charges but during the course of the trial changed his plea of not guilty to Specification 2 of Charge II to guilty, without changing his plea to Charge II. He was found not guilty of Specification 1 of Charge II, and guilty of all other Charges and Specifications. No evidence of any previous conviction was introduced. He was sentenced to dismissal, total forfeitures and confinement for five years. The reviewing authority approved only so much of the sentence as provides for dismissal, total forfeitures and confinement for one year and forwarded the record of trial for action under Article of War 48.

3. About a week prior to 24 December 1944 accused was notified by the adjutant of his battalion that he was to be Officer of the Day on that date (R. 7, 11). On 19 December 1944 there was posted on the bulletin board of accused's organization a duty roster to the same effect (R. 10; Pros. Ex. A). It was the obligation of each officer of the organization to read the roster daily and to certify that he had read it by initialing it (R. 7, 11). Accused's tour of duty on 24 December would begin at 1750 hours and continue until 1830 hours the next day. Accused did not report for duty as Officer of the Day on 24 December 1944 at 1750 hours nor did he report to the Battalion Commander or Battalion Adjutant at the conclusion of guard mount on that day as was required by a general order of his battalion (R. 12, 13, 26; Pros. Exs. C, G). The old Officer of the Day continued to act until relieved by the Battalion Adjutant at 1830 (R. 12, 13, 18, 27; Pros. Ex. G).

On the evening of 24 December 1944 accused was seen at the Officers' Club on the post wearing two rows of "service ribbons", one of them being the service ribbon for the Purple Heart (R. 23). At 2330 of the same evening accused reported to the adjutant at battalion headquarters for duty as Officer of the Day. He had no cap, his blouse was unbuttoned and unclean, his hair was unkempt, and his hands and face were dirty. His speech was "thick", "he didn't have control of his walking," he staggered slightly, was hiccoughing and his breath "reeked" of liquor. He was wearing the service ribbon for the Purple Heart, the Silver Star and the Distinguished Service Cross in one row, together with three campaign ribbons in another row (R. 13, 14). The adjutant told him that he had assumed accused's duties as Officer of the Day and directed him to go to his "hut" and remain there. The next morning the adjutant at the direction of accused's commanding officer searched accused's "hut". His blouse had no "bars" on it but two bars of ribbons were found in his footlocker. One of these bars consisted

of the service ribbons for the Purple Heart, the Silver Star and the Distinguished Service Cross (R. 15, 16; Pros. Exs. D, E). The accused's W.D., A.G.O. Form No. 66-1 and his 201 file did not show that he was authorized to wear these ribbons (R. 16, 17, 22; Pros. Ex. F).

Accused's commanding officer talked with him about 0745 on the morning of December 26 in his "hut". When asked why he had not reported at the proper time as Officer of the Day accused replied he was in no fit condition to do so.

4. Accused, after being warned of his rights, elected to be sworn and testify. He stated that on the morning of 24 December he was visiting his brother in San Angelo, Texas, with the permission of his commanding officer. He was driving an automobile which used butane instead of gasoline and was delayed because he had difficulty in finding a place where he could buy it. Consequently he had his brother telephone the headquarters of his battalion and inform them he would be late. On the way from the "club" to the "battalion" a spare tire fell out of the trunk and in putting it back his hands became soiled and his blouse disarranged. He reported to the Battalion Adjutant at 2330 for duty as Officer of the Day. He has been in the Army four years and one month and has never been in any "difficulty" before this (R. 37-39).

On cross-examination, accused testified that he had expected to return from his visit to San Angelo about 1600 or 1630 because he was Officer of the Day and his tour of duty as such began at 1730 (R. 39, 40).

Accused's company commander, First Lieutenant Bankhead T. Davies, testified that he saw accused at the Officers' Club at Camp Bowie on 24 December about 2300 and that he was sober although he had been drinking. While there, accused sat at the lieutenant's table for about twenty minutes (R. 29-31).

Over the objection of the prosecution the defense introduced the record of a "neuropsychiatric consultation" dated 3 January 1945 signed by a captain of the Medical Corps attached to the Neuropsychiatric Section of the station hospital. Under the heading of "Opinion of consultant" this report indicated that accused had suffered a fracture of the skull in August 1938 with consequent dizzy spells at the rate of about once a month for the period of a year. These spells recurred in July 1943 when accused trained for liaison pilot and resulted in his being grounded. When he became battery commander in September 1944 "headaches, dizzy spells and poor memory" became worse and he became "very flustered and nervous." These symptoms are not the result of

"post traumatic cerebral syndrome, but due to nervousness following the injury." The report concluded with the doctor's "impression" that accused was suffering from "psychoneurosis, anxiety, moderate", with a statement that he did not believe accused was qualified for combat duty, and with a recommendation that he be placed under observation with a view toward reclassification (R. 33, 34; Def. Ex. 1).

5. Without objection the prosecution introduced in evidence a "certificate" from the same doctor which stated that accused at the time of the alleged offenses was, as to the particular acts charged, able to distinguish right from wrong and adhere to the right, and that he was sufficiently sane to conduct and cooperate intelligently in his defense (R. 35; Pros. Ex. I).

The accused's commanding officer was called as a rebuttal witness and stated that accused did not have permission to visit San Angelo, Texas, on 23 December. Over the objection of the defense there was introduced in evidence an affidavit made by the witness on 26 December in which accused is quoted as admitting that he was in San Angelo on 25 (sic) December without authority.

6. The evidence clearly establishes and accused admits that he was scheduled to be Officer of the Day on 24 December 1944 and that his tour of duty began at 1750 hours. It is likewise undisputed that he did not report for this duty until 2330 hours on that day. The court was clearly warranted in disbelieving his uncorroborated testimony that he was unavoidably prevented from reporting at the proper time. While the Specification alleged that the accused failed to report as Officer of the Day "on or about 25 December 1944" the evidence showed that he was supposed to report at 1750 hours on 24 December 1944. However, the accused was fully apprised of the offense with which he was charged and the variance was immaterial. The record amply supports the findings of guilty of Charge I and its Specification.

Specification 2 of Charge II alleged that accused wore the service ribbons for the Purple Heart, Silver Star and Distinguished Service Cross at the Camp Bowie Officers' Club without being authorized to do so. After the prosecution rested the accused changed his plea to this Specification from not guilty to guilty. Apparently through an oversight the accused did not alter his plea of not guilty to Charge II, which alleged a violation of Article of War 95. The prosecution's evidence, however - which was uncontradicted - fully sustained the finding of guilty of the Specification. Although accused testified, he did not seek to excuse his wearing of these ribbons as an alcoholic prank. This excuse, it may be said, would not have been persuasive unless he also explained his possession of the ribbons. In view of these facts the finding of guilty of a violation of Article of War 95 was warranted (CM 261810, Kitchel, 3 Bull. JAG 422) and it is unnecessary to consider the effect of accused's inconsistent pleas.

7. The prosecution introduced without objection a "certificate" of a medical officer (Pros. Ex. I) which in effect stated that accused was sane at the time of the commission of the offenses charged and at the time of the trial. This was error but accused was not prejudiced thereby. The evidence as to accused's mental condition introduced by defense - in itself hearsay - did not begin to raise a legal issue as to the sanity of accused or his responsibility for the acts charged, and such defense was at no time a factor in the case. Likewise, the introduction of the affidavit of accused's commanding officer (Pros. Ex. J) was not prejudicial error. At most it contradicted accused on a collateral point which had no real bearing on the main issue.

8. War Department records show that accused is single and 29 years of age. He is a college graduate and after graduation worked as a supervisor of district managers for a chain grocery store. He enlisted in the National Guard in December 1940 and entered on active duty in the Federal service in February 1941. Following his graduation from Field Artillery Officer Candidate School, Fort Sill, Oklahoma, he was commissioned a second lieutenant, Army of the United States, on 15 July 1943.

9. 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, as approved by the reviewing authority, and to warrant confirmation of the sentence. The sentence imposed is authorized upon conviction of a violation of Article of War 61. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Thomas N. Tappy, Judge Advocate.

William H. Gambrell, Judge Advocate.

Robert E. Truethau, Judge Advocate.

SPJGH-CM 275842 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 Robert E. Hart (0-1183874), 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 of guilty and the sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures and confinement be remitted and that as thus modified the sentence 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 as approved by reviewing authority confirmed but forfeitures and confinement remitted. G.C.M.O. 188, 9 Jun 1945)

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

SPJGK - CM 275928

14 MAR 1945

UNITED STATES v. First Lieutenant JOHN W. HAGLER (O-1113722), Corps of Engineers.	7TH HEADQUARTERS AND HEADQUARTERS DETACHMENT SPECIAL TROOPS, FOURTH ARMY Trial by G.C.M., convened at Camp Bowie, Texas, 18 January 1945. Dismissal.

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

---

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that First Lieutenant John W. Hagler, attached unassigned Headquarters 1162d Engineer Combat Group, then of 1475th Engineer Maintenance Company, did, at Camp Bowie, Texas, on or about 1 September 1944, while on duty, drink intoxicating liquor with enlisted men.

Specification 3: In that First Lieutenant John W. Hagler, * * *, did, at Camp Bowie, Texas, on or about 20 September 1944, while on duty, drink intoxicating liquor with an enlisted man.

Specification 4: (Finding of not guilty).

Specification 5: (Finding of not guilty).

He pleaded not guilty to the Charge and the Specifications. He was found not guilty of Specifications 1, 4 and 5, but guilty of the Charge and Specifications 2 and 3 except the words in Specification 2 "with enlisted men," of the excepted words not guilty. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution in support of those specifications of which the accused was found guilty in whole or in part may be

summarized as follows:

Sergeant Craven H. Crump testified that he had signed and sworn to a statement before the investigating officer, Major De Noya, which among other things set forth that -

> "On or about 1 September 1944 at approximately 1400 hours, I saw Lt Hagler take a drink of whiskey from a whiskey bottle in the orderly room. There were enlisted men present but I did not see them drinking with Lt Hagler."
>
> "On or about 20 September 1944 at approximately 1430 hours, I saw Sergeant Wasa pour whiskey in a coke bottle and Lt Hagler drink from the coke bottle. This incident occurred in the Company Supply Room."

and that these statements were true as he actually saw the incidents described (R. 10). On cross-examination the witness stated that the incident with the "coke" bottle in the supply room took place in July or August - he did not know the exact date (R. 12). The incident in the orderly room took place in September (R. 13) when the witness went there to sign out for a pass. The accused had a bottle in his left hand while seated at a desk about 15 to 20 feet from the witness (R. 16). When asked if he knew what was in the bottle, he answered, "No, sir, I don't. * * * I couldn't say it was whiskey but I don't think he would be drinking coke out of a whiskey bottle tho." The witness was in the orderly room three or four minutes. When the accused took the drink he turned to his right and faced the wall and then turned back again. There was a "coke" bottle on accused's desk at the time and he also took a drink out of it (R. 17).

Sergeant James Huntley testified that he served as company runner under the accused who was his company commander from the latter part of August through September 1944, and that his duties required his presence in the company orderly room. On a few occasions he saw the accused drinking during duty hours in the orderly room (R. 27). Once he saw the accused take a drink from a "coke" bottle after mixing its contents with the contents of a whiskey bottle. When this occurred there were present about five other enlisted men of whom one or two were also drinking similar mixtures. The witness stated that he saw the bottle and on several occasions smelled it (R. 28).

4. In defense Private Marpel C. Johnson testified that he served as first sergeant under the accused as commanding officer during August, September and October 1944 and his duties kept him in the orderly room most of the time; that he recalled the occasion described by Sergeant Crump in early September, but he did not remember seeing Sergeant Crump in the room; and that the accused never drank with enlisted men to his knowledge (R. 39-40).

The accused elected to testify in his own behalf. His ratings for performance of military duties have been four "excellents" and one "superior" preceding 1 December 1944. He has always conducted himself as an officer and gentleman in the performance of his duties and had no blemish on his record until this trial (R. 46). He denied that he ever drank during duty hours in the orderly room with enlisted men (R. 47). On cross-examination he was asked if he ever drank with enlisted men in the supply room. He replied that he had given the Inspector General a statement that he had had one drink in the supply room with an enlisted man. On re-direct examination in explanation of this testimony concerning the one drink in the supply room, the accused stated that on this particular occasion Sergeant Wassa had made a remark that some liquor he had tasted "funny" or had a peculiar odd taste. Sergeant Wassa poured some of it in a coke bottle and asked the accused to taste it in order to give his opinion on what it tasted like. Accused sipped the liquor. It had a metallic taste. After he sipped the liquor he handed the coke bottle back to the Sergeant who poured the contents back into the original bottle (R. 51-52).

5. Specification 1 of the Charge, of which the accused was acquitted, charged him with gambling with enlisted men on 1 September 1944. The major portion of the testimony of record dealt with that offense. The testimony pertaining to the Specifications of which he was convicted was meager and disjointed. Specification 2 alleges that the accused did on or about 1 September 1944 drink intoxicating liquor while on duty with enlisted men. The words "with enlisted men" were excepted from the findings. He was found not guilty of them. There were two witnesses called to prove this charge. It is impossible to ascertain from the record whether the two witnesses were testifying concerning the same episode. Crump was originally led into saying that it occurred at 1400 hours on 1 September 1944 (R. 10). Later, he could not fix the date other than it was in September (R. 13). He named no one else as present. He could not say what the liquid was that he saw the accused drink. He described how the accused drank from the bottle with his back turned. Whatever it was that he drank came out of a bottle which he thought was a whiskey bottle. Huntley's testimony was to the effect that at some time during September he saw the accused in the orderly room during duty hours take a drink out of a "coke" bottle after he had just mixed the previous contents of the "coke" bottle with the contents of a whiskey bottle. He referred to the contents of the latter as whiskey. He based this opinion on the type of the bottle and upon the fact that on "several occasions he smelled it." Such testimony as proof that the bottle's contents was whiskey on the particular occasion he described is very unsatisfactory. He said that at the time there were five other enlisted men in the room of whom one or two were also drinking a mixture of "coke" and whiskey. He did not name Crump as being present. None of these enlisted men were called as a witness to corroborate him - a circumstance which might indicate that they could not corroborate him.

There was therefore no similarity in the stories of the two witnesses from which one could reasonably infer that they were telling about the same incident. The specification fixed the time as on or about 1 September 1944. Specification 1 (of which the accused was found not guilty) fixed the time of the alleged gambling as on or about 1 September 1944. Crump was the chief witness for the prosecution in support of that specification. Huntley's name does not appear as a witness on the Charge Sheet. It appears therefore that Specification 2 was directed at the alleged conduct of the accused as described by Crump. This conclusion is further strengthened by the finding of the court. By excepting the words "with enlisted men" the court indicated that its finding of guilty was based upon Crump's testimony and not upon Huntley's, whose story included five other enlisted men as present. If such is the case, and so it would appear, then Huntley's testimony as proof of an occurrence that took place upon a different occasion was not properly admissible. It would have no probative value to prove that the accused took a drink or that the liquid that the accused drank in the presence of Crump was intoxicating liquor upon that different occasion.

Crump's testimony could not sustain a conviction of the specification as he could not say what the liquid was that he saw the accused drink. Huntley's testimony of what took place upon other occasions did not add anything of a probative value on that point. As against this testimony the accused flatly denied that he ever drank any intoxicating liquor during duty hours with enlisted men.

It should always be borne in mind that the burden of proof is on the prosecution. Among the elements of the offense charged required to be proved beyond any reasonable doubt was that the liquid which the accused drank was intoxicating. The prosecution has failed to discharge this burden. The finding of guilty of Specification 2 cannot therefore be legally sustained.

The only evidence introduced by the prosecution in support of Specification 3 of Charge I was the testimony of Sergeant Craven H. Crump. Without showing any reason or justification for impeaching his own witness, the trial judge advocate proceeded to interrogate the witness about a statement made by him to an investigating officer at a date prior to the trial, asking witness whether, among other things, he did not tell the investigating officer that on or about 20 September 1944 at approximately 1430 in the supply room he saw the accused drink from a "coke" bottle after an enlisted man had poured some whiskey into it. The witness replied in the affirmative. The witness likewise gave affirmative responses to two further questions then submitted to him by the trial judge advocate, who asked him whether the "three statements" read to the witness were true and whether the witness actually saw the "incidents, as described in the statements, occur." This concluded the prosecution's case in support of Specification 3.

Such a method of attempting to prove the commission of an offense is highly objectionable. The trial judge advocate, without legal justification, was in effect permitted to formulate the witness' testimony through the reading of a statement previously made by the witness, followed by an inquiry as to whether the statement was true and whether the witness actually saw the incidents therein described occur. Since, however, defense counsel failed to object to this method of leading the witness, the testimony thus given will have to be treated as properly admitted evidence. It will be noted that on cross-examination this witness testified that while he could not fix the exact date, the incident, made the basis of this specification, occurred in the "summer, July or August."

Neither the prosecution nor the defense questioned the witness as to the source of his knowledge that the liquid he alleged Sergeant Wasa poured into the "coke" bottle was whiskey, nor did the prosecution endeavor to prove that the resulting mixture in the "coke" bottle was intoxicating. Advancing the argument that there was a very definite doubt in his mind that anything had been proved by the testimony of the enlisted men who had been placed on the stand, when the prosecution rested defense counsel moved for a finding of not guilty of all specifications and charges. This motion was denied by the court. When the accused subsequently took the stand as a witness in his own behalf, he was asked no questions concerning this specification. Despite this fact, on cross-examination he was asked whether he ever drank with enlisted men in the supply room. No objection to this improper question was raised by defense counsel. In reply accused declared that he had already stated in his statement to the Inspector General that he had taken one drink in the supply room, and explained the circumstances, as fully set forth in the summary of his testimony, under which he took this single drink. Even if it may be assumed that the occasion described by the accused is the same as that described by the prosecution's witness, Crump, it will be observed that the accused in no place stated or admitted that the liquor which he drank was intoxicating. As a matter of fact he did not state the nature of the liquor at all. Consequently the record is devoid of any evidence that the liquor or liquid which accused drank or sipped in the supply room was intoxicating. This is an essential element of the charge, and in view of the failure of the prosecution to prove it, the finding of guilty should not be sustained. It is not necessary, under this view, to consider the variance between the date alleged in the specification and the date testified to by prosecution's witness on cross-examination, but it should be noted that while the Manual for Courts-Martial (pp. 237 and 238) permits considerable latitude in the use of the term "on or about," a reasonable degree of definiteness should be required where time is so important an element as in a case of this type. It places an extraordinary burden on an accused to require him to account for his actions on every day from 1 July 1944, under the charge that he drank intoxicating liquor with an enlisted man on or about 20 September 1944, not at any

designated place in Camp Bowie but at Camp Bowie.

6. War Department records show the accused to be 28 years and 5 months of age and single (divorced). His mother and a son 5 years of age appear to be dependents. He graduated from high school and for 1-1/2 years attended a college for accountants. He was employed for three years as a junior accountant and four years as branch manager of a sales and service branch of a manufacturer of industrial engines. He entered active service from the Enlisted Reserve on 6 March 1941 and served until 26 October 1941 as a general mechanic in the Engineers. He again entered active service on 2 November 1942 and served as an enlisted man until commissioned at Fort Belvoir, Virginia, as second lieutenant, Corps of Engineers, Army of the United States, on 12 May 1943. On 28 March 1944 he was promoted to first lieutenant.

7. The court was legally constituted and had jurisdiction over the accused and the offenses. In the opinion of the Board of Review the record of trial is not legally sufficient to support the findings of guilty of any of the charges or specifications of which he was found guilty and not legally sufficient to support the sentence.

Percy E. Fox, Judge Advocate.

Charles Stern, Judge Advocate.

Norman Moore, Judge Advocate.

SPJGK - CM 275928 1st Ind.
18 MAR 1945

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

TO: CG, 7th Hq and Hq Det Sp Tr, Fourth Army, Camp Bowie, Texas

1. In the case of First Lieutenant John W. Hagler (O-1113722), Corps of Engineers, 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 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 275928).

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 275993

16 MAR 1945

UNITED STATES	)	FOURTH AIR FORCE
v.	)	Trial by G. C. M., convened at Hamilton Field, California, 24 January 1945. Dismissal, total forfeitures and confinement for five (5) years.
First Lieutenant GLENN A. MITCHELL (0-572686), 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 First Lieutenant Glenn A. Mitchell, AC, Army Air Forces District Traffic Office No. 9, San Francisco, California, did without proper leave absent himself from his proper station at San Francisco, California, from about 10 November 1944, to about 12 November 1944.

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

Specification: In that First Lieutenant Glenn A. Mitchell, AC, Army Air Forces District Traffic Office No. 9, San Francisco, California, did, at San Francisco, California, on or about 10 November 1944, without authority, wrongfully make and use a Government Request For Transportation, thereby wrongfully procuring transportation from

San Francisco, California, to Portland, Oregon, and return at the expense of the United States of America.

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

Specification 1: In that First Lieutenant Glenn A. Mitchell, AC, Army Air Forces District Traffic Office No. 9, San Francisco, California, did, at San Francisco, California, on or about 9 November 1944, wrongfully deceive Lieutenant Colonel William B. Freer by officially reporting to the said Lieutenant Colonel William B. Freer that he was to be admitted as a patient to the Oakland Regional Hospital, Oakland, California, on 9 November 1944, and would by reason thereof be absent from his official duties, which representation was then known by said First Lieutenant Glenn A. Mitchell to be false and untrue in that he then and there intended to proceed without authority to Portland, Oregon.

Specification 2: In that First Lieutenant Glenn A. Mitchell, AC, Army Air Forces District Traffic Office No. 9, San Francisco, California, having on 10 November 1944 wrongfully used transportation from San Francisco, California, to Portland, Oregon, and return, furnished at the expense of the United States of America, did, at San Francisco, California, on or about 13 November 1944, with intent to deceive Lieutenant Colonel William B. Freer, officially state to the said Lieutenant Colonel William B. Freer that he had on or about 10 November 1944 provided said transportation at his own expense from San Francisco, California, to Portland, Oregon, and return, which statement was then known by the said First Lieutenant Glenn A. Mitchell to be false and untrue.

Accused pleaded not guilty to, and was found guilty of, all Charges and Specifications except the words "without authority" in the Specification of 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 five (5) years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: Accused was serving as Adjutant of Office No. 9, Traffic Division, Army Air Forces, San Francisco, California, in November, 1944. The function of this office was "to give technical advice to the various Air Forces" in an area consisting of most of California, Utah and Nevada (R. 31-32).

Several officers on duty at this installation, including accused, had been authorized, when traveling on official duty within the district

covered by the office, to request the issuance of their temporary duty travel orders from Headquarters, Fourth Air Force, San Francisco. When traveling outside the district, it was necessary to procure orders from Washington. Portland, Oregon, was outside the district (R. 10-12, 32, 38; Pros. Ex. 1). About 8 November 1944, Corporal Robert S. Pollack, special orders clerk with the Fourth Air Force, received a telephone call from accused asking that orders be issued placing him on temporary duty at Portland, Oregon, on or about 9 November 1944 (R. 9, 11-12). Pursuant to the request Pollack cut the stencil, had it signed by the Adjutant General, made out a request form for mimeograph work by the Publication Section noting on the form that the orders were to be returned to his section for delivery, and had the orders "run off" (R. 12). He did not remember "for sure" when the orders were returned to him but "would say" it was between one and two o'clock in the afternoon. Accused picked up the orders at about five o'clock that afternoon (R. 13, 20). The orders read in part as follows:

* * * * * * * * *

"Subject: TDY travel orders HQ FOURTH AF
San Francisco, Calif
To: 1 LT GLENN A MITCHELL 0572686 AC 8 Nov 44

* * *

You will proceed o/a 9 Nov 44 fr San Francisco, Calif to Portland, Oregon on TDY, in connection with AAF Traffic activities, and upon compl will ret to your proper sta.

Travel is directed by commercial ap and/or mil ap, * * *

* * * * * * * * *"
(Pros. Ex. 2).

Corporal Pollack testified he "couldn't swear right now that it was on the 8th of November" that accused requested the orders but based upon an examination of the work request forms for similar orders "it would be [his] own conclusion" that the request was made on 8 November (R. 11, 16). He could find only one work request form dated 9 November 1944, on which it was noted that the completed orders were to be returned to his section for delivery, and that form related to orders requested by "Colonel Freer". He found two such work request forms dated 8 November (R. 14-15). Corporal Pollack admitted making a pre-trial statement to the effect that accused had requested the orders on the 9th but asserted this statement was made before he had checked the work request forms (R. 16). Although the orders issued to accused were dated 8 November 1944, this was not necessarily the date they were issued because "we have a habit in the office, if they call in for the orders a day in advance we date them the same day, but if it is the same day, we

will back date them". In other words "if the request came in on the 9th and he was going to proceed on the 9th, we would date the order the 8th and have him proceed on the 9th" (R. 13, 21; Ex. 2).

Accused had talked to his commanding officer, Lieutenant Colonel William B. Freer, previously on 3 November 1944, concerning hospitalization for some minor operations which accused needed. Shortly before noon on 9 November 1944, Colonel Freer signed a letter, which accused prepared and presented, authorizing the accused to enter the Oakland Regional Hospital (R. 32-33; Ex. 4). Accused left the office around one o'clock and between two-thirty and three o'clock secured reservations at the United Air Lines Office for a round-trip flight to Portland, Oregon, scheduled to depart at two forty-five o'clock on the morning of 10 November and to return on 12 November. Accused was given a Class "3" priority on the basis of his orders (R. 22-23, 27, 34). He paid for the round-trip ticket, which cost $53.20, by presenting a Government Transportation Request (R. 23, 30; Pros. Ex. 3). He had been issued a book of "Transportation Requests" at a previous station and was authorized to sign and issue his own requests when traveling under official orders (R. 38, 41; Pros. Ex. 6). Accused had no official business at Portland and his trip there was unauthorized (R. 38).

Information concerning accused's unauthorized jaunt having come to Colonel Freer's attention he wired accused at his Portland home on 11 November as follows:

"WHAT ORDERS COVER PORTLAND TRIP? YOU ARE NOT REGISTERED

OAKLAND HOSPITAL. REPORT BACK IMMEDIATELY. FREER." (R. 34-35; Pros.Ex.5).

Accused got in touch with Colonel Freer by telephone on 12 November and was ordered to report in the office on the following morning. When accused came in on the morning of 13 November Colonel Freer said to him, "Lieutenant, I am afraid you are in a hell of a mess", and asked him for an explanation (R. 36, 41). Accused stated that several things of great importance to him had happened in quick succession and that he had felt it necessary to make the trip. He admitted making the trip by plane on the basis of the orders he had the Fourth Air Force cut for him. Colonel Freer asked him if he had made the trip at his own expense and accused replied that he had paid cash in both directions (R. 36-37).

Accused gave a signed statement to the investigating officer on 6 January 1945, after having been advised of his rights under the 24th Article of War (R. 50; Pros. Ex. 7). In this statement accused related that he was assigned to Colonel Freer's office on 6 November 1944 and was shortly thereafter advised that he would probably be transferred to another command. Believing that overseas service would ensue, he requested permission to enter the Oakland Hospital to obtain treatment for a

severe case of hemorrhoids from which he was suffering. Permission was granted by Colonel Freer in a letter dated 9 November. Accused called the hospital between three and four o'clock that afternoon and it was suggested to him by the party answering the telephone that he withhold his entrance until Monday as most of the doctors would be away over the weekend. Accused asserted he then conceived the idea of visiting his parents over the weekend. Since it was after banking hours and he did not have sufficient cash to buy a ticket, he decided to use a Government Transportation Request and remit the cost of the trip to the Finance Office upon his return. He called the Order Section of the Fourth Air Force and requested orders be issued immediately authorizing travel to Portland and return. Shortly after five o'clock he picked up the orders and went to the United Air Lines' office where he obtained plane reservations paying for his ticket with a transportation request which he filled out. He left San Francisco at ten o'clock on the morning of 10 November, spent two days with his parents in Portland, and returned about nine o'clock on the evening of 11 November. He did not arise until noon on 12 November and it was almost four o'clock before he was able to get in touch with Colonel Freer who told him to report at the office the following morning. Accused told Colonel Freer in the conversation the next morning that the trip to Portland was made at accused's own expense. He knew it would be found out that he had used government transportation but he wanted to enter the Regional Hospital first and have his operation. He intended to reimburse the government as soon as he was released from the hospital. He entered the hospital and spent about three weeks there. Colonel Freer visited him during that time and told him court-martial charges would be filed against him and therefore accused did not reimburse the government (Pros. Ex. 7).

4. Evidence for the defense: Accused, cognizant of his rights, made an unsworn statement in writing to the court (R. 59-63; Def. Ex. 1). He asserted that he was making an unsworn statement because he had already given a sworn statement to the investigating officer and because his physical condition would not permit his cross-examination as a witness. He stated that he was 25 years old, had enlisted in the Army 30 January 1942, spent one year as a noncommissioned officer, and was commissioned 20 January 1943. This was the first time he had been charged with an offense (R. 60, 62). He reiterated his previous statement that he had no intention of going to Portland at the time he secured the letter of admission to the Oakland Regional Hospital from Colonel Freer. However, after calling up the hospital and ascertaining from "Captain Kohlstrom" that it would be more convenient for the hospital if he [accused] would enter on the following Monday morning he decided to go home to Portland, because he previously had received word that his parents, after thirty-four years of married life, were contemplating divorce. This news had left him very much upset. He had around $200 in the bank (Def. Ex. B) and was well able to pay his fare to Portland but because it was after banking hours he used a government travel request intending to reimburse the government later. It was his understanding that he was

obligated "to account to the Finance Officer for the TR's or for money in like amount" (R. 61). When talking to Colonel Freer on his return from Portland, accused intended to convey the idea that he would reimburse the government for the cost of the trip (R. 62). Accused had no intention of defrauding the government and on 23 January 1945 sent his check to the Finance Office to cover the transportation costs (R. 61-63; Def. Ex. C).

Captain Karl E. Kohlstrom of the Oakland Regional Hospital testified that his records showed that on 2 November 1944 he made a diagnosis of accused's condition and advised a hemorrhoidectomy (R. 57). Captain Kohlstrom had no recollection of any telephone conversation with accused on 9 November 1944 regarding his admission to the hospital (R. 58).

Miss Desda Hammond, "secretary to the Transportation Officer at the Sheldon Building", where accused's office was located, testified she had dinner with accused around six o'clock on the evening of 9 November 1944 (R. 52). He showed her a letter authorizing his entrance into the Oakland Regional Hospital and told her that he had called the hospital but was requested to defer his entry until Monday (R. 52-54). After dinner she accompanied accused to his office, where he made out a travel request, and then to the Palace Hotel where he picked up his plane tickets (R. 54).

5. The accused is charged with the commission of several offenses which are so closely connected from the standpoint of the applicable evidence that they will be considered together. The Specification of Charge I alleges that accused was absent without leave from his station at San Francisco, California, from 10 November to 12 November 1944, in violation of Article of War 61. The Specification of Charge II alleges that he wrongfully made and used a Government Request for Transportation at San Francisco, 10 November 1944, thereby wrongfully procuring transportation from San Francisco to Portland, Oregon, and return, at government expense, in violation of Article of War 96. Finally, Specifications 1 and 2 of Charge III allege that accused made two false official statements to Lieutenant Colonel William B. Freer, in violation of Article of War 95.

It is not disputed that accused left his station at San Francisco on 10 November 1944 without authority and went to visit his parents at Portland, Oregon. He had no official business there and the trip was made without the knowledge or consent of his superiors. His commanding officer next heard from him on the afternoon of 12 November when accused, back in San Francisco, reported to him by telephone. Although accused contended that his absence was prompted by a personal problem of most compelling urgency, namely, that his parents after 34 years of marriage had become estranged and were contemplating divorce, such a reason constitutes, of course, no legal defense to the offense of absence without leave. The Specification, Charge I, is accordingly sustained.

It is likewise undisputed that, on 9 November 1944, in buying a round-trip ticket for transportation by plane between San Francisco and Portland, at a cost of $53.20, accused made out and gave a Government Transportation Request in payment. The use of such a Transportation Request, according to the testimony, was authorized only for travel under official orders. Although, in order to facilitate his unauthorized trip, accused had procured the issuance of travel orders purporting to place him on temporary duty at Portland, such orders were necessarily invalid and clothed accused with no authority which might render legal the use of a Government Transportation Request. The use of the Transportation Request was, under the circumstances, wrongful and no intent on the part of accused, if any he had, to repay the Government the amount he illegally obtained by its use, exonerates him of his offense. It may be seriously questioned, however, that accused intended, at the time he used the Transportation Request, to repay the Government the amount thereby obtained. In discussing the trip with his commanding officer on 13 November 1944, accused made no statement that he intended to reimburse the Government, but on the contrary concealed the fact that he had used a Transportation Request and asserted that he had traveled at his own expense. Furthermore, accused never did repay the Government until 23 January 1945, just the day before trial. Such actions on his part do not induce belief in his sincerity. The evidence is legally sufficient to sustain findings of guilty of wrongfully making and using a Government Transportation Request, in violation of Article of War 96.

The evidence is conflicting on the question whether accused, at the time he represented to Colonel Freer on 9 November 1944 that he intended to enter the Oakland Regional Hospital, in fact intended to go to Portland, Oregon, and intentionally deceived Colonel Freer. Accused insists that the idea of visiting Portland did not enter his mind until subsequent to his conversation with Colonel Freer when he called Captain Karl E. Kohlstrom of the hospital staff, who advised accused to defer his entrance into the hospital for a few days. The evidence for the prosecution, on the other hand, tends to establish that on 8 November accused made a request of Headquarters, Fourth Air Force, for temporary orders placing him on duty in Portland, thereby showing that he intended to visit Portland at the time he talked to Colonel Freer. The orders subsequently published were dated 8 November which, as the testimony showed, was indicative but not necessarily determinative of the date of issuance because of the practice of predating orders one day in some instances. However, the prosecution contends that the records of the Publication Section of that organization satisfactorily establish the issue date. It appears that only one request for orders of this character dated 9 November could be found and that request was shown to have been made by Colonel Freer personally. It is argued that accused's request not having been made on 9 November, it necessarily was made the day preceding and confirming this is the fact that the records of the Publication Section showed two such requests on 8 November. Although this contention is not without its persuasive effect, it is believed that it is insufficient to establish the date of issuance beyond a reasonable doubt

and consequently Specification 1, Charge III, which alleges the making of a false official statement by accused on 9 November 1944 to Colonel Freer is not sustained.

Accused admits stating to Colonel Freer on 13 November 1944, that he had made the trip to Portland at his own expense. Such statement was manifestly false because accused had used a Government Transportation Request. Accused at the trial attempted to explain away the clear import of his language by asserting that, at the time he made the statement, he intended to reimburse the government and that when he said he made the trip at his own expense he was considering that ultimately the trip would be at his own expense. His explanation is ingenious but not convincing. Moreover, it is at variance with the explanation he gave the investigating officer earlier on 6 January 1945 to the effect that he had made the false statement because he was afraid that Colonel Freer would not allow him to enter the hospital if he knew that accused had used a Government Transportation Request. The falsity of this statement, which was of an official character, and the intent to deceive are clearly established. The Manual for Courts-Martial (par. 151) instances as a violation of Article of War 95: "Knowingly making a false official statement".

6. Accused is about 25 years and 8 months of age, having been born 10 July 1919. War Department records disclose that he is a native of Wisconsin but has resided principally in Washington and Oregon. After being graduated from the Grants Pass, Oregon, High School in 1936, he attended the Oregon State College from 1936 to 1938 and the University of Oregon from 1940 to 1941. His employment record discloses that he worked for a transportation company from 1939 to 1942 as an accountant and rate clerk and terminated his employment to enter the Army as an enlisted man on 7 Feb. 1942. He was promoted to the grade of sergeant on 4 April 1942 and, after being graduated from officer candidate school, was commissioned a second lieutenant in the Army of the United States on 20 January 1943. His promotion to first lieutenant, Army of the United States, was announced on 29 July 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 insufficient to support the findings of guilty of Specification 1, Charge III, but legally sufficient to support the other findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61 and 96, and is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

Robert J. Kennor, Judge Advocate.

Samuel P. Morgan, Judge Advocate.

SPJGN-CM 275993 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 First Lieutenant Glenn A. Mitchell (0-572686), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specification 1, Charge III, but legally sufficient to support the other findings of guilty and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted and the confinement at hard labor 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. Consideration has been given to letters and their inclosures in behalf of the accused from his parents, Mr. and Mrs. G. E. Mitchell, 2612 N.E. 23rd Street, Portland 8, Oregon; from Mrs. Genevieve Beaman; from Lyle F. Watts, Chief, Forest Service, Department of Agriculture; from Honorable Homer D. Angell, James W. Mott and Harris Ellsworth, Members of Congress; and Honorable Guy Cordon and Wayne Morse, 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 into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

11 Incls
Incl 1 - Record of trial
Incl 2 - Dft. ltr. for sig. S/War
Incl 3 - Form of Executive action
Incl 4 - 3 Ltrs. fr. Hon. Guy Cordon w/incls.
Incl 5 - Ltr. fr. Hon. Wayne Morse
Incl 6 - 2 Ltrs. fr. Hon. Harris Ellsworth
Incl 7 - Ltr. fr. Hon. Homer D. Angell
Incl 8 - Ltr. fr. Hon. James W. Mott w/incls.
Incl 9 - Ltr. fr. G.E. Mitchell & Emma Mitchell, parents of accused.
Incl 10- Ltr. fr. G. E. Mitchell, father of accused.
Incl 11- Ltr. fr. Lyle F. Watts

(Finding of guilty of Specification 1, Charge III, disapproved. Sentence confirmed but forfeitures remitted and confinement reduced to one year. G.C.M.O. 206, 11 Jun 1945)

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

SPJGQ - CM 276025

17 APR 1945

UNITED STATES	HAMPTON ROADS PORT OF EMBARKATION ARMY SERVICE FORCES
v.	Trial by G.C.M., convened at Hampton Roads Port of Embarkation, Newport News, Virginia, 26, 27, 28 January 1945. Dismissal.
Major FRANK FARELLA (O-477814), Army Exchange Service.	

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: Violation of the 96th Article of War.

Specification 1: In that Major Frank Farella, Post Exchange Officer, Hampton Roads Port of Embarkation, Newport News, Virginia, did, at Newport News, Virginia, on or about 22 August 1944, wrongfully sell to E. L. Tarr for the sum of approximately $2100.65, the following property of the Hampton Roads Port of Embarkation Exchange, well known by the said Major Frank Farella to be of the value of about $3465.65: about 5 bronze exit lights; about 1 dozen flood lamps; about 1 dozen 250-watt lightpost lamps; about 1 dozen vapor-proof fixtures; about 12,000 Gem paper cups, No. 85; about 19,000 No. 24 paper milk-shake cups; about 25,000 ten-ounce Lily paper cups, No. 1057; about 122,000 eight-ounce paper hot cups; about 33,000 No. 6 rolled ream paper plates; about 7,000 No. 7076 cone soda paper cups; about 30,000 Tulip paper souffle cups, No. 55; about 10,000 paper souffle cups, No. 45; about 9,000 paper souffle cups, No. 50; about 150,000 three and five-eighths (3-5/8)

inch flat wood spoons; about 20,000 fibre paper soup spoons; about 65,000 fibre paper T spoons; about 140,000 paper salad forks; about 95,000 wood salad forks; about 41,500 ten and a quarter (10-¼) inch paper blue plates; about 60 rolls of 6-inch paper plates; about 10 cases of toilet tissue; about 140,000 wax bags; about 32,500 twelve (12) ounce paper cups; about 40,000 fibre coffee spoons; about 40,000 No. 66 Vortex dishes; about 10,000 No. 65 Lily dishes; about 12,500 No. 67 Dixie cups; about 36 Vortex holders with handles; about 276 Vortex dish holders, and about 132 six (6) ounce Vortex holders.

Specification 2: (Finding of not guilty)

Specification 3: (Finding of not guilty)

The accused pleaded not guilty to the Charge and all Specifications and was found guilty of Specification 1 of the Charge and of the Charge, not guilty of Specifications 2 and 3 of the Charge. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial pursuant to the provisions of the 48th Article of War.

3. The evidence for the prosecution was substantially as follows:

The accused was Post Exchange Officer in charge of the Hampton Roads Port of Embarkation Exchange, Newport News, Virginia, from 27 June 1944 (Ex. 32; R. 112) to 9 November 1944 (Ex. 33; R. 112).

Frank G. Ennis, Manager of the Frank G. Ennis Paper Company, of Norfolk, Virginia, wholesale commercial dealer in paper products, testified that he received a telephone call from the accused about 14 August 1944 (R. 38), asking for information on cost prices of certain merchandise. Mr. Ennis quoted the prices on various items called for by the accused. A day or two later, the accused again telephoned and asked Ennis what Ennis would pay for the merchandise. Ennis stated cost prices on such items as he could price in that manner. On the following Monday, 21 August 1944 (R. 38, 41), or possibly Tuesday, 22 August (R. 49, 53), the accused called again and asked Ennis to come over to the Post Exchange warehouse in Newport News (R. 38, 47). On the first telephone call, the accused did not propose either purchase or sale. On the

second call, he proposed sale to Ennis (R. 38). In these two conversations, there was no mention of Mr. Tarr, and Ennis believed that he was dealing "with the Government altogether" (R. 54). In the third telephone conversation, on the day Ennis was asked to go to Newport News, he was told that he "was to pay Mr. Tarr" (R. 54). Ennis had never met the accused nor Tarr in person (R. 38, 39). He met them both at the Post Exchange warehouse, upon going there in response to the accused's request on or about 21 August. It was there proposed that Ennis buy, for cash, a lot of paper goods in the warehouse. He was told that Tarr had bought the merchandise and that he would pay Tarr (R. 38). They went into the warehouse and picked out the items which Ennis was to buy. This did not cover all the items there (R. 38, 39). Ennis made a list in pencil of the items and quantities which he offered to buy (Ex. 12; R. 39), and stated the prices he would pay, which were manufacturer's cost prices (R. 39). A duplicate list was made in pencil upon which the prices offered by Ennis were shown, totaled by Ennis at $3404.65 (Ex. 13; R. 41), and Ennis then and there told the accused that he would pay those prices for the goods listed, cash on delivery at Ennis' place, and that Ennis would have it hauled. The accused wanted it out of the warehouse that day, and would not agree to wait for Ennis' trucks (R. 41), so Ennis called the Old Dominion Freight Line, who promised to move the merchandise the next day, and did pick it up on Wednesday, 23 August. The accused and Tarr agreed to this arrangement, and Tarr agreed to come to Norfolk, where Ennis was to pay him for the goods on delivery (R. 42). Ennis was in the warehouse about three hours, in the section where the goods were stored from two to two and a half hours, and made an accurate count of what he was to buy. The price figures were agreed between Ennis and Tarr. The items listed were those which the accused said were for sale (R. 49). Tarr was the seller, but the accused was not "just a bystander". The accused asked Ennis why he could not pay more for one or two items (R. 50). Both the accused and Tarr were there, and Ennis dealt with both (R. 51), but Ennis testified: "I believe I was talking at least seventy-five percent of the time to Major Farella." (R. 54)

(The merchandise selected by Ennis, as listed in Exhibits 12 and 13, corresponds in items and quantities to the paper, wood and fibre goods listed in Specification 1 of the Charge.)

Ennis further testified that on 23 August he received a telephone call from the accused, advising that the Old Dominion Freight Line had started out with an open trailer and, upon being told that it was sprinkling in Norfolk, the accused proposed to send a canvas cover after the truck, but missed it. The truck arrived with its load of paper goods

watersoaked and damaged. Ennis refused to accept the goods, and they were taken to the freight line's warehouse, later to be sorted and salvage reclaimed. An hour or two later, a covered truck, Army olive drab color, brought another load, which was in good condition and which Ennis accepted. Tarr accompanied the latter truck (R. 42). Exhibit 14 (R. 43) is a list of the goods on the second truck, which constituted a part of the paper goods purchased by Ennis at the Exchange warehouse. The next day Ennis went with Tarr to the freight line's warehouse and picked out and accepted the undamaged portion of the first load, listed in Exhibit 15 (R. 45). Ennis mailed Tarr a check for $1338.77 for the goods accepted from both loads (Ex. 16; R. 46). The remainder of the goods purchased by Ennis, not shipped on either of the two trucks on 23 August, listed in Exhibit 17 (R. 47) was brought from the Exchange warehouse in Ennis' truck, for which goods Ennis mailed Tarr a check for $286.23, dated 31 August 1944 (Ex. 18; R. 47). It was impossible to count what was shipped on the freight line truck, due to water damage and breakage of cartons. No one knows what actually was shipped, but the figures on goods which were to be shipped were agreed upon at the Exchange warehouse by Tarr and Ennis of goods that the accused said were for sale (R. 49).

Frank Logan (R. 55), manager of the electrical department of Noland Company, Newport News, Virginia (R. 56), testified that he received a telephone call from the accused, or someone who said that he was Major Farella at the Exchange warehouse, proposing to sell some electrical goods. Logan went to the warehouse, where Tarr met him and introduced him to Major Farella. The accused said that Tarr would show him the goods for sale (R. 56). Tarr did so, and Logan bought five or six bronze highway lights, about a dozen flood lamps, about a dozen vapor-proof fixtures and some 250-watt bi-post lamps. Logan offered Tarr $50 for the lot. Tarr said that was satisfactory and the accused said to make the check to E. L. Tarr. Logan brought a truck to get the goods on 19 September and received them from the warehouseman, Loper, leaving a check for $50 with Loper, payable to Tarr, as agreed (R. 58; Ex. 19). Logan's transaction was with Tarr, but at the instance of the person on the telephone who said he was Major Farella (R. 59). At the warehouse, Tarr introduced Major Farella to Logan, in his presence, as the person who had called Logan about the electrical goods (R. 60).

Second Lieutenant Jack Smith, accounting officer for the Post Exchange (R. 31), identified Exhibit 20 (R. 60) as the voucher covering the paper goods received by the Exchange from Fort Eustis Exchange.

Exhibit 20 consisted of the purchase order, dated 24 August 1944, initialed by the accused, the receiving report of Hampton Roads Port of Embarkation Exchange for the same merchandise, dated 24 August 1944, the itemized bill from Fort Eustis Exchange, dated 19 August 1944, and the voucher summarizing the merchandise in one item at $2521.35 net payable to Fort Eustis Exchange, approved for payment by the accused, and the check voucher for payment, dated 23 August 1944 (R. 61). Ordinarily, a purchase order issued after the goods purchased had been paid for would be marked "Confirmation Order", which was not done in this case (R. 62). The receiving report, dated 24 August after payment 23 August, was further unusual in that it was typed, whereas such reports ordinarily were prepared in pencil upon actual check of the goods as they were received. The witness did not know whether or not the receiving report in Exhibit 20 was based upon actual check of the merchandise (R. 63). Exhibit 21 (R. 61-62) was an original warehouse invoice of Hampton Roads Port of Embarkation Exchange to E. Tarr, Buyer, dated 23 August 1944, for paper goods listed therein, delivered from the Exchange warehouse, billed at a net total of $2100.65. E. Tarr paid that amount in cash to the accused in the presence of the witness and Mr. Hudson, Post Exchange office manager, on a date as to which the witness was not positive, but which he believed was Monday or Tuesday (R. 63, 65). Exhibit 22 (R. 64), a Manager's Consolidated Report, prepared by the cashier, approved by the signatures of the accused and Hudson, showed Tarr's payment of $2100.65 as received by the Exchange on 20 August. It was not in fact received on 20 August, which was Sunday (R. 65).

Thad A. Loper (R. 69) was manager of the Exchange warehouse. He testified that about the middle of August, 1944, a large lot of paper goods and some electrical fixtures and furnishings were received at the warehouse from Fort Eustis. At the direction of the accused, the whole shipment was set aside, pending the arrival of shipping papers, upon receipt of which receiving reports were made. No shipping papers were received on the electrical goods (R. 70). Most of this shipment was listed in the warehouse receiving report (Ex. 20; R. 60) which, however, did not show the electrical goods (R. 69) and did not show some broken cartons of paper goods possibly received in the shipment (R. 77). The omitted items were regarded as "free goods", included in the lump purchase from Fort Eustis, but not invoiced nor inventoried (R. 74, 75). The entire shipment was placed in the rear room of the warehouse (R. 74), segregated from the paper goods already in the warehouse (R. 77). They were separated as to kinds on the floor (R. 74). Shortly thereafter, the accused went through the stock with Mr. Quinn, the Food Supervisor, and with his advice determined what

articles could be used by the Exchange (R. 74, 79). At the selection of the accused a part of the goods was put in regular stock to be retained by the Exchange, and a part was set aside for sale (R. 74, 79). The stock was put in two piles according to that separation (R. 74). Some cups from the Fort Eustis lot that could be used by the Exchange were put in stock in exchange for some off-size cups taken from stock and put in the sale lot (R. 78-79).

About 21 August, Mr. Ennis came to the warehouse and looked over the paper goods with the accused and Mr. Tarr. Tarr and Ennis made notations (R. 71). The witness, Loper, was informed that the paper goods not retained by the Exchange had been sold to Tarr. Exhibit 21 (R. 62), a warehouse invoice to Tarr, dated 23 August 1944, was prepared by Mrs. McIntyre, a clerk, from a list furnished to her by the accused (R. 72, 73). There was no physical check made, to the witness' knowledge, of the goods received from Fort Eustis (R. 73). The paper goods separately piled as sold to Tarr went out of the warehouse to Ennis Paper Company in three trucks, first an Old Dominion truck, then a Post Exchange truck, both on 23 August, and third, a day or two later, a truck sent by Mr. Ennis to get the balance. The three loads took the entire pile (R. 72, 78). Loper took no inventory of what went on the trucks to Ennis (R. 77). Later, in September, Mr. Tarr talked with somebody on the phone about the electrical goods (R. 75) and Mr. Logan came to the warehouse and bought the electrical goods from Mr. Tarr for Noland Company. The accused and Tarr were there at that time. Logan returned several days later, got the electrical goods and left a check payable to Tarr for $50, which Loper mailed to Tarr, as instructed (R. 70, 76, 77).

Exhibit 24 (R. 80), original bank deposit ticket, identified by the bank cashier, showed a deposit to the credit of the Exchange on 23 August 1944 of $2100.65 in currency, the only item on the ticket. A bank stamp on the ticket indicates that the deposit was made "a little later than noon" (R. 80).

George W. Hudson (R. 86), Post Exchange office manager at the time of the transaction, later employed in the same capacity at a new Post Exchange, testified that although he signed Exhibit 22, the consolidated report for 20 August 1944, the item of $2100.65 from accounts receivable, which represents payment for the paper goods sold to E. Tarr, was not in fact received on that date (R. 86), but was received on 23 August. It was paid by Tarr to the witness, Hudson, in currency, in the presence of the accused and Lieutenant Smith, and handed by Hudson to the office girl, before noon. Later

on the same day, according to his records, Hudson took the money to the bank and deposited it. On the same day, two shipments of paper goods left the Exchange Warehouse by truck. One was on the Exchange truck (R. 87).

On cross-examination, the witness, Hudson, admitted that he had been less positive of the date of the payment in a previous statement, wherein he had indicated that it might have been received on 22 August, but after examining his records and in view of the fact that the Exchange was not permitted by regulations to keep such money overnight without a special guard, which was not procured, he fixes the date as 23 August (R. 87-90). Hudson explained his signing of the consolidated report for 20 August (Ex. 22), showing a payment item which was not received until 23 August, on the ground that the report was for the information of the Exchange Officer and that it was only important to get the items in by the end of the month, and they were too busy to check the report in detail until the end of the month. His signature was not as a certificate, but just to show that he had seen the report (R. 87-88). A notation appearing on Exhibit 21, the warehouse invoice to Tarr, saying "No Invoice necessary as per Mr. Hudson", was placed there at Hudson's direction to show that it would not be necessary to type a billing invoice to Tarr, as he had already paid cash (R. 102). However, the witness thought it was customary to supply an invoice to a civilian buying Government property (R. 103).

Major Horace O. Young, Inspector General's Department (R. 80), had taken a statement (Ex. 25 for identification only) from the accused on 10 November 1944 in the course of an investigation, wherein the accused had testified that there were a lot of free goods in the Fort Eustis transaction not shown on Exhibit 20, including extra paper towels, cups and toilet paper, of which items no receiving report was made; that the electrical goods were turned in with the paper goods in the sale to Tarr; that no records were made of the sale to Ennis because that was a sale by Tarr; that Ennis came and examined the paper goods on Monday, 21 August, at Tarr's request, the accused being present, and that the accused did not know the exact figure that Ennis would pay because he "hadn't gone down to the quantity of it" (R. 81-85). However, the accused had there stated that he worked with Ennis while Ennis made up his list, and checked off his (accused's) sheet the quantities "we were willing to let go", and knew the items and quantities Ennis agreed to purchase and the prices he was willing to pay (R. 85). The accused had denied that he knew that Ennis would pay $3404.65 for the paper goods, and defended the sale to Tarr as profitable to the Exchange,

since Tarr paid $2100.65 for part of the merchandise, the whole of which had cost the Exchange $2521.35 in the purchase from Fort Eustis Exchange, leaving the Exchange remaining goods worth over $900 for its own use at a very low cost. He denied any knowledge of Ennis' list of items, quantities and prices (R. 120).

First Lieutenant Gehrad Snyder (R. 90), Field Representative, Army Exchange Service, Third Service Command, made a routine monthly audit of the Exchange on 15 October 1944. He returned on 26 October and made an examination at the request of the Port Inspector General concerning the receipt and disposition of certain paper products from Fort Eustis (R. 91). He prepared a work sheet (Ex. 26; R. 94), showing in corresponding columns the merchandise billed from Fort Eustis Exchange (Ex. 26, columns 2, 3, 4 and 5), the merchandise invoiced by Hampton Roads Port of Embarkation Exchange as sold to Tarr (Ex. 26, columns 6, 7 and 8), and the merchandise selected by Ennis for purchase (Ex. 26, columns 10, 11 and 12). Columns 9 and 13, appearing upon the face of Exhibit 26, were based upon information received from the Port Inspector General, not in evidence, and these two columns were stricken and not introduced in evidence, the court being instructed to disregard them (R. 95), and the document (Ex. 26) being marked accordingly. Column 1, Exhibit 26, is a list of items on 41 consecutively numbered lines, with no items entered on lines 31 and 34. Columns 2, 3, 4 and 5 extend the listed items as to (Col. 2) number of units packed per case (Col. 3), number of cases sold (Col. 4), Army Exchange Service price per thousand or per case, as listed, and (Col. 5) total values, all based on Exhibit 20, the billing from Fort Eustis Exchange (R. 92). Columns 6, 7 and 8, Exhibit 26, extend by items the number of units sold, unit values and total values, all based on Exhibit 21, the warehouse invoice on the sale to Tarr (R. 92). Columns 10, 11 and 12, Exhibit 26, extend by items the number of units, price per unit, and total values, based on Exhibit 13, the list made by Ennis of goods selected by Ennis for his purchase at the Exchange Warehouse (R. 92). Tabulations showed the total value of goods selected by Ennis at $3404.65, the price paid to Fort Eustis Exchange at $2521.35, and the sale price to Tarr at $2100.65 (R. 94). The computation showed substantial variations among the three lists. Certain items selected by Ennis, not billed from Fort Eustis or to Tarr, totaled $673.29. The witness did not examine to determine whether the transaction showed a profit to the Exchange on the purchase from Fort Eustis and the sale to Tarr plus remaining inventory (R. 96). Certain items and quantities received from Fort Eustis did not go to Tarr, according to Exhibit 26 (R. 100-101).

(Exhibit 26 shows substantial variances in quantities listed by Ennis (per Ex. 13) from those invoiced to Tarr (per Ex. 21) on the items from the Fort Eustis billing (per Ex. 20) which were invoiced to Tarr.)

4. For the defense, Major Walter B. Russell (R. 122), successor to the accused as Exchange Officer at Hampton Roads Port of Embarkation, formerly, and through its liquidation, Exchange Officer at Fort Eustis, Virginia, testified that he was familiar with the circumstances of the sale of paper goods and free goods from Fort Eustis Exchange to Hampton Roads Port of Embarkation Exchange. Fort Eustis Exchange, in course of liquidation, had on hand a large amount of paper goods taken over in July from Special Services. At least half of it was slow merchandise, difficult to sell. The post was practically liquidated, the Exchange was required to take over the paper stock, which it did not want, at stated prices, and it proved to be their "biggest headache" in liquidation (R. 122, 123). Major Baxter, Chief of Liquidation Section, Third Service Command (R. 126), was in charge of the disposal. He made efforts to sell the paper stock elsewhere, to other Exchanges, without success. Buyers would take only the more desirable portion and not the lot. Major Baxter called Headquarters, Third Service Command, to obtain authority to sell the lot to Hampton Roads Port of Embarkation Exchange with authority to dispose of what that Exchange could not use. Major Baxter gave that authority to the accused, who refused to take the lot otherwise, and with persuasion, the accused took the paper goods off their hands. The only way that the accused would take it was with the authority to get rid of it any way he could (R. 123). A Third Service Command directive stated a policy to hold inventories to a 60-day supply (Ex. 35; R. 124). Another directed quick reduction of overstocks by sufficient reduction in prices to effect their liquidation, but required prior approval from Headquarters, Third Service Command, for sales to civilian firms (Ex. 36; R. 124). Witness was informed by accused that such approval was granted ordinarily in writing (R. 126), but Major Baxter granted it orally, saying to go ahead and sell the goods to the accused and he, Major Baxter, would obtain approval for the accused to sell them to anybody he wanted to (R. 126). With authority from the Service Command, they could properly be sold to anyone after Post Exchanges had been contacted (R. 125). This conversation occurred at Fort Eustis about 10 to 15 August. Witness did not know whether it was ever confirmed in writing (R. 126). A letter dated 22 August 1944, to the accused, from Major (then Captain) Baxter, for the Command (Ex. 39; R. 127), authorized resale "to jobber" of such of the products purchased in the sale in question as could not be used by Hampton Roads Port of Embarkation Exchange. A subsequent letter (Ex. 40; R. 128) dated 25 October 1944, from Major Baxter, for the Command, to the Commanding General, Hampton Roads Port of Embarkation, for attention of the Port Inspector General, stated:

"1. During liquidation of Fort Eustis Exchange, Major Farella acquired a large assortment of paper

products and paper fountain supplies, sold per Inclosure No. 1, hereto. These products were sold in one lump sum since Major Farrella represented to undersigned that his Exchange had an acute need for the major items thus acquired. Contact for bids from other Exchanges revealed that they would purchase only the same badly needed critical items, leaving a residue that would be difficult to dispose of. Therefore, and naturally assuming that the transaction was in good faith, undersigned sold Major Farrella all said products, and, acting under competent authority, gave Major Farrella permission to sell residue that his Exchange could not use. It was thoroughly understood by both parties at the time that such residue would be small and nominal in amount."

Exhibit 39 and Exhibit 40 both were admitted upon stipulation and without objection.

Major Russell further testified (R. 123) that the paper goods in solid containers and in good condition were billed to Hampton Roads Port of Embarkation Exchange at Army Exchange Service prices, but that much of the merchandise was in bad condition, obsolete, or unsuitable for Post Exchange use. Some was water-damaged, some roach-infested, some in broken containers. Of undesirable items, the accused would say, "I won't pay you for that", and witness would say "All right, throw it away or give it to salvage". They wound up putting it all on the truck (R. 123).

Lieutenant Smith, Post Exchange Accounting Officer, was recalled for the defense (R. 128). The witness had made analyses from the books and records of the Post Exchange (R. 129). Exhibit 41 (R. 130) shows the stock of paper goods per inventory 23 July 1944, adds the total quantities purchased during August, deducts transfers to branches and the items invoiced to Tarr, and compares the remaining book balance with the monthly inventory of 24 August 1944. The items invoiced to Tarr correspond to Exhibit 21. The result verifies Exhibit 21 as a true showing of the paper goods "sold to Tarr and shipped out of the warehouse for him" (R. 129), as the 24 August inventory corresponds with or exceeds the book balances so obtained, with three minor exceptions otherwise explained (R. 129; Ex. 41). (An inventory shortage of 2500 #85 Gem cups is explained by the observation that that size is used in the office and warehouse for their own consumption (Ex. 41). Quinn gave one case of #38 souffle cups to Branch #25 (Ex. 41). Four cases of 6-inch rolled plates were issued to and used by Lieutenant Taddeo for the Italian Service Unit (Ex. 41; R. 141).)

Exhibit 42 (R. 130), prepared by Lieutenant Smith, shows by items, quantities and prices the goods invoiced from Fort Eustis, lists and deducts the goods invoiced to Tarr, and shows the book balances remaining. This analysis shows net purchase cost of the goods from Fort Eustis at $2521.35; price received from Tarr for the portion invoiced to him, $2100.65; residue in Post Exchange inventory, $921.98. Deducting the $921.98 value remaining from the $2521.35 cost, the cost to the Post Exchange of the goods invoiced to Tarr was $1599.37, so the $2100.65 received from him showed a profit of $501.28 to the Post Exchange on the goods invoiced to Tarr (Ex. 42; R. 130). A billing error from Fort Eustis, later discovered, reduced the remaining inventory value by $6.21 (R. 131).

Lieutenant Smith testified that, according to the records, the invoice to Tarr (Ex. 21, Ex. 41) actually reflected all the invoiced paper goods which could have been transferred to him (R. 130), and that Exhibit 12, the list of goods selected for purchase by Ennis, showed more merchandise than was invoiced to Tarr (R. 131, 140). In several instances, quantities shown on Exhibit 12 as selected by Ennis are substantially in excess of what the books show the Exchange had. Ennis showed 5000 more Gem cups, 5000 more #55 souffle cups, 4000 more #50 souffle cups, 12000 more #24 Gem cups, 20000 more fibre forks, than the records show they had. There are other discrepancies, not clear to the witness by reason of differences in nomenclature of the items (R. 131-134). The Exchange had 225 cases, 1000 units to the case, of 8-ounce hot cups - 74 cases in previous stock and 151 cases billed from Fort Eustis. 16 cases were transferred to branches of the Exchange and 110 cases were invoiced to Tarr, leaving 99 cases book balance. The August inventory showed 99 cases in fact on hand. Ennis' list (Ex. 12) showed 122 cases, which number could not in fact have been shipped to Ennis, or only 87 cases would have remained on hand (R. 132).

On cross-examination, Lieutenant Smith testified that his figures were entirely from the Exchange records, and did not reflect any free goods not carried into those records (R. 136-138). So far as he knew, the goods from Fort Eustis were never physically inventoried as a whole, nor were they tallied in physically on arrival (R. 138, 139). Inventory overages in six items, reflected in Exhibit 41, where the August inventory showed excesses over the book balances, were largely explained by free goods from Fort Eustis (R. 137). Witness did not know whether Exhibit 21 was in fact a complete and accurate invoice of all the goods transferred to Tarr, but if it was not, then "any invoice HRPE Exchange ever sent out"

could be wrong (R. 137). The warehouse invoice (ordinarily) is prepared by checking what actually goes on the trucks (R. 138).

The goods were received from Fort Eustis some time before 24 August. The receiving register shows 22 August (R. 136, 138). For at least four days before the inventory, begun the night of 23 August and completed on 24 August, the witness, Lieutenant Smith, was worried that the invoice would not be received from Fort Eustis before time for the inventory (R. 138).

E. L. Tarr testified for the defense (R. 142). He is a traveling wholesale shoe salesman by occupation (R. 142), but his business is seasonal, and in off times he buys and sells merchandise to retailers (R. 151). He has no warehouse, but has storage space in his home and garage, or can rent storage (R. 156). He has known the accused for two or three years. On Sunday, 20 August 1944, the wife of the accused was staying in Tarr's home, in Richmond, and the accused was visiting there. Tarr overheard the accused telephoning paper goods agents, trying to sell the paper goods, and a conversation ensued wherein Tarr proposed to buy the lot for himself as an investment (R. 151). The witness had never been in the paper goods business and knew little about it, but has learned a lot since (R. 146, 151). Tarr had made phone calls to various drug stores and found an interested market (R. 151). His thought was to bring the goods to Richmond, store them at his home or rent storage, and sell them to drug stores and fountains (R. 156). The accused had figured that he had to get about $2100 for the lot and the quantities and amounts. Tarr and the accused agreed that Tarr would buy the lot at about $2100, subject to his inspection the next day to determine that the goods were as represented (R. 146, 147, 151). The next day, Monday, Tarr went to the Post Exchange warehouse, where the accused had the Army Exchange price lists, and accepted the goods at the agreed price (R. 146, 151). Tarr saw that the bulk was greater than he had supposed and the condition of the packages not good enough for much transportation. The accused had no objection to Tarr selling the lot from the warehouse (R. 154). Tarr, not the accused, called Ennis and invited him to come to the warehouse and look over the goods. The accused's secretary put the call through from the accused's office. The accused had no interest other than to accommodate Tarr, permitting him to dispose of the goods without shipping them to Richmond (R. 146, 151, 155). Tarr did not use the name of the accused except perhaps to say that he was calling from the accused's office (R. 157). Tarr was not present at any time when the accused called Ennis (R. 145). Ennis came to the warehouse and made his count, which appeared to be

an exact count, at which he spent from 3½ to 4½ hours (R. 146). The only record made there was Ennis' pencil memorandum. Ennis went too fast for Tarr to keep up. Tarr's deal with Ennis was to be completed at Ennis' warehouse on complete inventory to follow the check made at the Exchange warehouse. Ennis called the Old Dominion Freight Line (R. 147). The greater portion of the goods left the warehouse on an Old Dominion open truck, and was damaged by rain, so Ennis would not take it. Some more of the goods went on a Post Exchange truck, and Ennis was to send his truck for the rest (R. 147, 152). As it turned out, about half the goods were damaged and rejected. Ennis paid for the rest (R. 152). On Ennis' original count, he was to pay something like $3400 for the lot, and Tarr would have made about $1300 on the deal if the goods had checked in to Ennis according to that count. Tarr did realize between $2800 and $2900 from the goods, including what Ennis paid him and what he, Tarr, recovered from the freight company. Tarr was quite pleased with his profit (R. 153).

Tarr paid the Post Exchange $2100.65 in cash, not by check, on a date as towhich he was not certain (R. 153). He had no reason for paying it in cash. He does not usually carry $2100 in cash (R. 154). He had a checking account, but not for that amount of money (R. 157).

Tarr first heard of Ennis from the accused, when, in the office of the accused, he asked if the accused knew any paper companies or anyone else who might buy the lot of paper goods there, so that Tarr would not have to ship it to Richmond (R. 153).

Tarr further testified that the electric goods were odds and ends thrown in on his deal with the accused to help satisfy Tarr on the price that the accused demanded for the lot of paper goods, as much of the paper goods was damaged. Tarr thought that the electric goods might be salable, and called Logan, whom he had never met, to come and look at them. It was agreed that the Post Exchange would retain any of the lot that it could use (R. 149). Logan came to the Post Exchange warehouse and Tarr went through the lot of electric goods with him. Logan said he would pay $50 and Tarr said "Sold". Logan was to pick up the goods and leave a check for Tarr. Tarr later received the check by mail (R. 150).

James Quinn, Food Supervisor of the Post Exchange since 5 August 1944, at the request of the accused, went with the accused through the lot of paper goods from Fort Eustis to see what the Exchange could use. At the time, about 15 to 18 August, they kept enough

supplies for two or three months normal use. The witness, Quinn, advised the accused on what to keep and what the Post Exchange had no use for. This inspection was first on a Saturday and then on Monday or Tuesday (R. 158, 159). Though some paper cups were priority merchandise (R. 124; Ex. 35), the accused and the witness did not question priorities at the time, as witness had found from previous experience with Service Clubs, whose use was comparable to that of the Post Exchange, that supplies were obtainable on lower priority than that exercised by the Exchange (R. 161-163). The entire lot of merchandise was still on the floor. Items were not pointed out to Quinn. He looked over the entire stock (R. 162).

Mr. Dinsmore (R. 163), a buyer for a confectioner company, was asked by the accused whether he would buy some paper cups and other surplus items from the Exchange, but did not buy, as the accused wanted to sell the entire lot and the witness did not want all of it. Witness had bought paper goods from the Exchange under a previous Exchange Officer (R. 163-164).

Ida M. Smith (R. 165), Major Russell's secretary at Fort Eustis, called several telephone numbers for the accused about the middle of August in connection with liquidation of the paper goods (R. 166). One call was to Frank Ennis (R. 166, 167). The calls were to find out current prices on goods where inventory prices differed from list book prices (R. 166). Major Baxter said that if any concern bought the merchandise, they would have to take the good with the bad (R. 167).

The accused testified (R. 174). After one and a half years of college, he has engaged in the retail mercantile business since he was nineteen years old, with department stores, five years in Seattle and twelve years in Portland. He was commissioned in the Army of the United States 12 June 1942. He served eighteen months at Camp Lee, Virginia, as clothing specialist, and four months at Indiantown Gap, Pennsylvania, on special duty. At his present station since May 1944, he was Assistant Exchange Officer to 27 June 1944, then Exchange Officer to 9 November 1944, after which he was again Assistant Exchange Officer until relieved 22 November 1944 (R. 175, 176; Exs. 31, 32, 33). As Exchange Officer, he brought the Post Exchange operation from losing money to making profit of $5000 to $15,000 a month (R. 175).

After a lot of telephoning and conversation, the accused agreed with Major Baxter to take the Fort Eustis paper goods stock in perfect

condition at Army Exchange Service list prices less 10% lump sum discount and 2% cash discount, and the accused and Major Russell checked it on to a truck (R. 179). "A lot" of it was in bad condition, and that was thrown on the truck without checking. The accused told them he would not take that without permission to resell it, and had that permission from Major Baxter. Exhibit 20 shows the goods that were in good condition. The tally-out made by the accused and Major Russell was shown to Major Baxter, and the accused told Major Baxter that the broken lots, wet cartons, etc., were not tallied but were put on the truck, and that the accused would not pay for them, and made sure that Major Baxter understood it. The electric goods were thrown in without charge. The accused could use the Christmas tree lights in December, and Major Russell said that if the accused did not take it they would have to throw it out to salvage. All of the goods acquired from Fort Eustis were put in a back room in a new section of the warehouse at the (Hampton Roads Port of Embarkation) Exchange, and the accused told Mr. Loper to segregate the different kinds as much as possible (R. 180).

The accused and Loper went through the goods and checked those that were paid for to the accused's tally, and saw that all were there, including those not paid for. It was all in the warehouse by Saturday, 19 August. The accused and Quinn went over it at length on Saturday afternoon, and then continued to go over it on Monday (R. 181). On Saturday afternoon, the accused worked with Quinn "laying things aside and jotting down quantities, approximate quantities as close as I (could) get them" (R. 203). Quinn made his recommendations on what the Exchange could use, and the accused followed them generally. Accused wanted to use all they could of the goods, and he went through the entire stock with Quinn, pointing out each item (R. 181). Not more than sixty days supply is kept, as they cannot make a profit with large sums tied up in supplies. For that reason, the accused wanted the lot disposed of before inventory (R. 181).

The accused had called Ennis, along with other vendors of paper goods, from Fort Eustis during the middle of August, to find out prices on items not listed in the Army Exchange Service book - obsolete items, etc., - when the accused contemplated buying from Fort Eustis Exchange. Major Baxter told him to verify the AES prices. Accused did not call Ennis after the goods were brought to the Hampton Roads warehouse. Tarr called Ennis, which displeased the accused, because his deal with Tarr contemplated Tarr taking the goods to Richmond immediately and selling it to drug stores. Accused wanted

it out before inventory, to show a profit for August. He later found that was unnecessary, as the Exchange made $15000 that month (R. 182).

The accused had talked with Dinsmore three times trying to sell the paper goods. The Exchange bought its candy from Dinsmore's company and did a lot of business with them. They had bought paper cups from the Exchange before, under the accused's predecessor. He had not considered selling to Ennis, though he did not know why he did not. Accused took his file home with him over Sunday, thinking to contact the larger jobbers in Richmond and vicinity, and there called them but could not reach the necessary men. Tarr asked what he was trying to do and expressed an interest in buying the paper goods. The accused went over his inventory with Tarr; the list of items purchased and a notation with reference to the free goods. The free goods were not over 10% to 20% of the list, in quantity (R. 183). On Sunday, 20 August, it was agreed that Tarr would buy the paper goods, subject to his own inspection Monday morning, if they were as the accused said they were. Tarr was not busy at the time (R. 184).

The accused's recollection was that Tarr paid for the goods on 22 August, not 23 August, in which he might be wrong. The accused first saw Ennis at the warehouse on Tuesday, 22 August, the day before the paper goods were shipped out. The accused told Tarr definitely that the goods had to be out of there before inventory 23 August. They got it out. Ennis tried to locate his truck and then called the Old Dominion Freight Line, over the accused's phone (R. 184). Ennis told the accused in Tarr's presence that he would get the goods out at ten the next day, the 23rd. Accused told him that must be done; that they had to be out before inventory if he had to put them out on the platform (R. 185).

The accused sold to Tarr for $2100.65, and had nearly $1000 worth of paper cups, etc., left that the Exchange could use. The Exchange made a profit on the deal, which the accused had figured at about $449, but which turned out to be a little more. The electric goods were thrown in to Tarr after withdrawal of everything that the Post Exchange could use. Tarr expressed dissatisfaction with the condition of the paper goods and wanted the price cut to $2000. Accused refused to cut the lot price, but threw in the electrical goods instead. Accused saw Logan there talking with Tarr, and was surprised that he got in without the accused's knowledge. Logan's testimony that the accused called him is false; accused did not know Logan and had no interest in what Tarr did with the electrical goods (R. 185-186).

A lot of the quantities charged are in excess of what the accused sold to Tarr (R. 189). Accused "would have no way of knowing what the value of those paper goods were", and the charge that he knew them to be of the value of $3465.65 is false (R. 188). There was no conspiracy between the accused and Tarr, and no division of profits. "Never. That is definite." The accused acted with an honest purpose, and not in collusion with Tarr (R. 189).

Cross-examination elicited generally a repetition of the accused's account of the transaction (R. 189-208). The accused called Ennis and other vendors about 14 or 15 August to find out prices on goods not listed in his book. After these discussions, he knew the values of the various items (R. 190, 191, 196), but not the amount nor approximate amount that Ennis would pay. He first learned that at this trial, and he was "faced with those charges" by the Investigating Officer (R. 205). He had no conversation with Ennis about what Ennis would or would not do. "You would have to talk to Mr. Tarr about that." Accused was present in his office part of the day Ennis was there, and was in the warehouse two or three times when Ennis and Tarr were going over the goods. They asked him about quantities, not prices, of some items (R. 193). Ennis' testimony that 75% of his conversation was with the accused is false. "I don't think Mr. Ennis could determine how much of the conversation he had with me there or I to him." That accused wanted higher prices on some items than Ennis indicated he would pay is also false (R. 194). If the accused said anything about prices, it was in response to some question Tarr asked concerning the price list. Accused did not discuss prices with Ennis and Tarr, and was not then interested, as his deal was closed and he was getting ready for inventory (R. 197).

Tarr might have got Ennis' name from accused's "over-all conversation", or he could have got it in the phone book. When Tarr asked about dealers, accused gave him Harper's name, and Tarr mentioned calling Weger, other dealers. Accused had no reason to tell Tarr he had called Ennis when asking about prices, and did not do so (R. 198).

The accused's deal with Tarr was made on Sunday, 20 August, using the yellow sheet lists that the accused had made of the goods, based on the price the Exchange had paid to Fort Eustis Exchange, without the discounts, subject to confirmation on inspection (R. 192, 197, 203). Not all the Fort Eustis goods went to Tarr; considerable was left over (R. 192). The electric and free goods were thrown in to close the deal,

after the Exchange had withdrawn all that had value to it. They cost the Exchange "not a nickel" (R. 194, 195, 204). The free goods were 10% to 20% of the total (R. 205). The amount Tarr was to pay was agreed on Sunday. Accused returned to the Port Sunday night or Monday morning in his car. Tarr followed him by train and got there about noon "on or about" Monday. The accused was not positive that Tarr came on Monday, but "would state" it was Monday (R. 204). Positively, Ennis came on Tuesday (R. 197, 204), and the goods were shipped Wednesday (R. 204). Ennis' testimony that he came on Monday is an error: He came over the day before he ordered his truck (R. 197). Accused contacted Ennis about 15 August, first talked with Tarr about the deal 20 August, Ennis came to the warehouse 22 August and the goods were shipped 23 August. Accused "still thinks" Tarr paid on 22 August, in the morning (R. 196). It was definitely around 11:00 or 11:30 when Tarr paid for the goods, and accused thinks it was on Tuesday, the 22d, before Ennis arrived. It was paid to Mr. Hudson. Lieutenant Smith was there. Accused questioned whether the written authority to sell had come from Major Baxter. Mrs. Keeler, his secretary, said the mail had not come, so accused phoned Major Baxter and verified his authority to sell. Although Hudson testified that the money was paid on 23 August, the date of the bank deposit slip, Hudson had worked for the accused for a while and was asked to resign the service. Accused did not handle the money and was not certain of the date, which could have been Tuesday or Wednesday, but he thought it was Tuesday, before Ennis came over, and if it is proved otherwise, he is mistaken (R. 205).

It is a mystery to accused how Tarr got between $2800 and $2900 out of the goods sold to him. Accused does not know how that was arrived at. Ennis was the shipper and his figures were used to collect "that claim" (from the freight carrier) (R. 205). Accused had no idea what profit Tarr made except as Tarr stated in court that he got "some $2800, or whatever it was", for the goods (R. 199). The warehouse records, checked by Lieutenant Smith, came out exactly right or showing overages - no shortage of stock - and goods can get out of the warehouse only on those tally sheets (R. 205-206). The free goods that went to Tarr had no value to the Exchange (R. 206).

Accused was under no obligation to Tarr, financial or otherwise (R. 206). He had known Tarr in social relations for two or three years, and his wife had stayed in Tarr's home during confinement (R. 194), but the expense of her keep, from May through August, was paid to Tarr by the accused by check early in September, when the accused and his wife moved to an apartment in Newport News. Accused received none of Tarr's profits (R. 206, 207).

The deal with Tarr was hurried, to make inventory, but the accused thinks he made a good transaction, profitable to the Exchange, and that his responsibility was fulfilled even though Tarr made an additional profit (R. 206). Accused would have made the sale to anybody who offered $2100.65 for a quick sale. He "probably wishes now (he) had done a lot of things different, but that was August and this is January ... unfortunately for (the accused), Tarr made a quick turnover at a profit probably above what (the accused) thought he could make." (R. 197, 198). Accused acted in good faith, in a hard job, "doing three things" with insufficient help. The Exchange is now doing half as much business, with five officers, where accused had only two, "and they have since been disposed of for more capable men".

5. A substantial portion of the record is composed of testimony and exhibits relating to the two Specifications of the Charge whereof the accused was acquitted. Discussion of that evidence is not pertinent here, and reference to it is omitted, except to say, for better understanding of the case, that upon conflicting evidence the court found the accused not guilty of alleged wrongful dealings in two other transactions on behalf of the Post Exchange with Tarr, in one of which the Exchange paid Tarr $3015 for a stock of military clothing for which Tarr had paid a clothing store $2541 in currency, with evidence of circumstances indicating that the purchase from the clothing store was initiated by the accused, and that the clothing merchant thought he was selling to the Post Exchange in the first instance. However, it appeared that Tarr himself may have been instrumental in the purchase. Both transactions involved in the two Specifications mentioned occurred in September, 1944, after the transaction here concerned.

6. The evidence clearly establishes that the accused, as Post Exchange Officer, did, at about the time and at the place specified, sell to E. L. Tarr for $2100.65 substantially the lot of paper goods specified, property of the Post Exchange; that Frank G. Ennis was then ready, willing and able to pay $3404.65 for the same property, and that the accused included in the sale to Tarr, for no additional consideration, substantially the lot of electrical goods specified, which were of the value of $50; a total value of $3454.65.

The term "paper goods" was used at the trial to refer to the lot of merchandise in question, other than the electrical items, and to include the wood and fibre forks and spoons as well as the paper cups, plates, dishes, etc., and will be so used in this discussion.

Whether the sale to Tarr was wrongful, as specified, depends upon considerations of good or bad faith, which must be deduced from the

circumstances. Primarily, it depends upon the knowledge by the accused that he could make an expeditious sale of the merchandise in question at a higher price than that received from Tarr. If he had only the ready and obvious means of knowledge, which he did not exercise, it was neglect of duty. If he had that knowledge, it was fraud. The court was convinced that he acted knowingly, and the record fully sustains that conclusion.

At the invitation of the accused, as Ennis testified, or of Tarr calling from the office of the accused, as the accused and Tarr testified, Ennis came to the Post Exchange warehouse either on Monday, 21 August, or on Tuesday, 22 August 1944, for the purpose of buying the lot of paper goods which was there for sale, and concerning which he had had such previous conversations with the accused as to fix in his mind the impression that he was dealing with the Post Exchange. There he first heard of Tarr, and met Tarr and the accused, and was told that Tarr was the proposed seller. There, in the presence of Tarr and more or less in the presence of the accused, Ennis inspected and listed the lot of paper goods laid out for his inspection, which the accused said was for sale. The items and quantities counted by Ennis were listed with his offered prices, and the total price computed therefrom at $3404.65. This was done upon actual inspection of the lot offered for sale, and not with reference to any other or previous list or billing. The lot consisted principally of a single lump shipment of goods purchased about 15 August by the accused, as Post Exchange Officer, from the Fort Eustis Exchange in liquidation, whereof delivery had been made to the Hampton Roads Port of Embarkation Exchange warehouse on or just before Saturday, 19 August, but that shipment from Fort Eustis had been worked over on Saturday and Monday at the direction of the accused: portions thereof had been withdrawn from the lot and put in the warehouse stock for Exchange use, and some items from the previous Exchange stock had been put into the lot for sale. The lot offered for sale to Ennis was the result of that selection and distribution. It is fairly clear from all the evidence that the lot was segregated from the retained stock and shown to Ennis as ready for shipment to the purchaser. Ennis agreed to buy it, Tarr to sell it. Efforts were made to get it shipped out that day, but, trucks being then unavailable, it was shipped out to Ennis on Wednesday, 23 August. The lot was shipped to Ennis in three trucks, which collectively took all the goods which had been segregated in the warehouse for that purpose. These circumstances are sufficient to identify the lot shipped to Ennis with the lot listed by him for his purchase, which the accused said was for sale by Tarr to Ennis and which Tarr agreed to sell and Ennis agreed to buy.

The extent to which the accused participated in the negotiations at the warehouse between Tarr and Ennis was disputed, but that he did participate enough to have full knowledge of what was going on, and that the agreement of sale was reached with his full approbation, is clearly established. According to Ennis, the accused was not only active, but took the leading part, in the negotiations, despite his assertion that Tarr was the owner of the goods.

The lot of goods listed by Ennis exceeded substantially the list of goods billed from Fort Eustis, less withdrawals for Exchange stock as shown by other dispositions and by the subsequent warehouse inventory, and it exceeded substantially the list of goods invoiced by the Exchange to Tarr, which generally reflected the Fort Eustis billing less withdrawals for stock. The ready, obvious and admitted explanation of that discrepancy is that the shipment from Fort Eustis included "free goods", thrown in without charge and without listing in the liquidation sale by the Fort Eustis Exchange, consisting of undetermined quantities and items which, the accused testified, constituted 10% to 20% of the total shipment from Fort Eustis. A further explanation is that some items from former stock went into the lot for the sale, in exchange for some of the Fort Eustis goods or otherwise, when the old stock and the new shipment were worked over and segregated into lots for retention and for sale.

The lot shipped to Ennis was the lot sold to Tarr. It was handled throughout the Ennis-Tarr negotiations, at the direction of the accused, as a segregated mass, and disposed of as such at Tarr's direction, authorized by the accused.

In transit to Ennis, the lot of goods sold was so damaged by exposure to the rain that the total of its component items became impossible of proof except by evidence of observations prior to the destruction of the part destroyed. That evidence, therefore, must determine what the accused sold to Tarr.

The records of the Post Exchange were patently inadequate to identify the lot of goods sold to Tarr or to Ennis. They identified only the goods for which the Post Exchange was to pay the Fort Eustis Exchange, not the "free goods" included with the shipment. It does not appear when the shipping list and invoice to the Post Exchange were received from Fort Eustis. They did not arrive with the goods, as Loper was instructed by the accused to hold the shipment segregated until their arrival. Lieutenant Smith was apprehensive for some days that the list would not arrive before inventory, to begin on 23 August. The goods were there on 19 August. The tally-out made at Fort Eustis is dated 19 August and attached to the invoice dated 23 August.

Admittedly and demonstrably, it did not list and was not intended to list the "free goods", which as clearly were in fact in the shipment. The "receiving report" and the "purchase order" made at the Exchange, both dated 24 August, were mere typed reproductions, line for line, of the Fort Eustis bill, so far as the list of goods was concerned. On 24 August, the goods already were gone from the Exchange warehouse, and partly destroyed. The "warehouse invoice" to Tarr, dated 23 August, was prepared by a clerk, Mrs. McIntyre, who did not testify, from a list furnished by the accused, who did not testify about that. On all the testimony except that of the accused (who said he checked it in with Loper, which Loper contradicted), the shipment from Fort Eustis was never tallied into the Exchange warehouse by any physical count or inventory. Admittedly, the free goods never got on to Post Exchange stock records in any form, except insofar as what was left of them showed up thereafter as overages on the 24 August monthly inventory. On all the testimony, the shipment from the Post Exchange warehouse was never tallied out. The tally-out, which was ordinary practice on loading the trucks for shipment out of the warehouse, and which would have been made on shipment of goods sold by the Exchange, was not made on the shipment of these goods, sold by Tarr.

It is significant that no lists purporting to be prepared by the accused, whether made on tally at Fort Eustis, check of the goods on arrival at Hampton Roads, survey with Quinn, or otherwise, ever found their way into the evidence. Lists of Post Exchange property made by the Exchange Officer should have been Post Exchange records. If the accused had lists of the property, as certainly he should have had and as he says he had when he made his deal with Tarr, they would have been informative in a case where the items and quantities sold were hotly at issue, and in which the accused, testifying at length, challenged the accuracy of the only other lists made of the entire property sold - those made by Ennis at the warehouse, Exhibits 12 and 13.

The Ennis lists, which the defense sought to discredit as listing more merchandise than was there, were made by Ennis as an experienced dealer in the commodities in question for the purpose of determining what goods were there, as a basis for his own purchase of the lot. Certainly no rational motive is suggested for him to compute his offer to buy on more than he was to receive. These lists were, by the accused's own testimony, accepted as the basis upon which the carrier's liability was settled and discharged for that portion of the goods which was damaged or destroyed in transit. The accuracy of the Ennis lists is in part corroborated by the lists which Ennis made of the undamaged portion of the shipment, which he

accepted and paid for by checks to Tarr. Exhibit 14 shows that Ennis received and paid for ten cases of toilet paper, though only two were billed from Fort Eustis (Ex. 20), and none invoiced to Tarr (Ex. 21). He got and paid for 41,500 blue plates, the number which he had listed at the warehouse, though only 40,000 were billed by Fort Eustis and invoiced to Tarr (Line 25, Ex. 26). He got one case of 12-ounce, No. 127 cups, not billed from Fort Eustis, of which six cases were invoiced to Tarr and 13 cases listed by Ennis at the warehouse (Line 33, Ex. 26). He got one case of No. 76 cups, not billed from Fort Eustis nor invoiced to Tarr, out of 12,500 cups of that number listed by him at the warehouse (Line 38, Ex. 26). He got 10,000 No. 65 dishes, which he had listed at the warehouse, but which were not billed from Fort Eustis nor invoiced to Tarr (Line 37, Ex. 26). For all of these, he paid Tarr. Thus, while the damage in transit destroyed the means of identification of the shipment to Ennis as a whole, and prevented full corroboration of quantities, enough was left to justify credence in the Ennis lists as against the admittedly incomplete Post Exchange lists and "warehouse invoice" to Tarr. Like Tennyson's Ulysses and his band, "though much is taken, much abides", and that which does abide tends to authenticate the Ennis record of that which is gone. The court was justified in finding that the paper goods sold to Tarr by the accused were those listed by Ennis at the warehouse, which were those stated in Specification 1 of the Charge.

The contention of the defense was that the sale to Tarr occurred on Sunday, 20 August 1944. Prior to that, the accused had discussed prices with Ennis by telephone. The accused contended that he was merely getting information for his guidance in the matter of his purchase of the paper goods stock from Fort Eustis Exchange, but Ennis testified that the accused, on a second call, had proposed to sell the goods to Ennis, and that Ennis quoted prices at which he would buy. The accused knew Ennis' prices. He had only to apply them to quantities to know what Ennis would pay for the goods he had to sell. On Sunday, 20 August, on the accused's own testimony, he had his tally sheets made at Fort Eustis, which showed the goods billed from there, though not the free goods. The accused was an experienced merchant. He says that he and Loper went through the Fort Eustis goods on arrival, by Saturday 19 August, and checked those listed for payment and saw that they all were there, though Loper says no such check was made to his knowledge. The accused began his examination of the goods with Quinn on Saturday afternoon, separating them into a lot to sell and the remainder to keep, and he says that he "went through

the entire stock with Mr. Quinn, pointing out each item", "laying things aside and jotting down quantities", and that they went over the stock "at length on Saturday", though they "continued to go over it on Monday" (R. 181, 203). On his own testimony, he knew enough about quantities on Sunday, 20 August, to consider himself in position to sell the lot to Tarr for $2100.65, and he had his "file" with him, which he and Tarr used to determine quantities and agree upon that fixed price. The accused knew that his examination and separation of the stock with Quinn was not yet completed, so, if anything substantial remained for them to do, it was not yet determined how much of the stock was to be retained for use and how much would be for sale. Men engaged in a business transaction do not fix a definite price for an indefinite quantity of merchandise intended for resale, unless the buyer, at least, has some assurance that the quantity, though indefinite, is sufficient to show a profit, at expected prices, over the price he is to pay. The only source of information to Tarr on Sunday, 20 August, concerning quantities in the stock of paper goods in question, was the accused. Therefore, the accused then knew that the quantities he had for sale were enough to make Tarr an attractive proposition at $2100.65. Knowing that, and knowing Ennis' prices, he knew that the lot was worth more than $2100.65, and he either knew that Ennis would pay more or he knew how to find out and did not care. His testimony that he never thought of selling to Ennis, after getting Ennis' prices, when he tried and failed to contact or to sell to other buyers, is thoroughly unworthy of belief. Somebody thought of Ennis promptly enough the next day, when Tarr was ready to sell the same goods from the same place. The legitimate inference is that the accused and Tarr, on Sunday, 20 August, hatched their deal intending to sell to Ennis and knowing that the quantity of goods for sale, at Ennis' prices, would net a substantial sum over the $2100.65 which Tarr was to pay to the Post Exchange. The accused then knew that the quantity of merchantable "free goods" obtained in the Fort Eustis purchase, not appearing on any records unless in memoranda of his own, was substantial, whether or not he knew their full extent. If, contrary to expectations, Ennis would not buy, there was then nothing to bind Tarr to his purchase, and there never was until Tarr made his payment of $2100.65, after Ennis had agreed to buy the lot of goods and they were shipped or ready to ship.

The destruction of a portion of the goods by rain and water damage in transit was, of course, not contemplated. However, when Tarr made his payments to the Post Exchange, Ennis had agreed to buy the entire lot of goods and arranged for their shipment. The carrier was responsible. The situation must have appeared safe for Tarr to pay the Exchange and show a completed sale to him. That sale had to look complete to justify

payment of the expected $3404.65 by Ennis to Tarr instead of to the Exchange, and the best way to accomplish that appearance was to complete the sale by payment. The choice of currency as the medium for payment of $2100.65, rather than the more customary medium of a bank check, was an unusual and peculiar choice to business minds, but not to fraudulent minds. It is, in human experience, a common badge of fraud, because fraudulent minds work that way.

The fictitious entry of receipt of $2100.65 on the daily consolidated report for Sunday, 20 August 1944, was unexcused and unextenuated. Nobody had the effrontery to attempt to support it as true. Admittedly, no such payment was made to the Exchange before 22 August, after Ennis had agreed to buy the goods at $3404.65, and on the more convincing evidence it was not made until 23 August, when the goods were being shipped to Ennis. Then it was hustled to the bank in one single, separate-item deposit—not with any general lot of bank items in the ordinary day's business. The only purpose for entering a false record of payment on 20 August would be to create the false appearance that it was made at that time. The only purpose for creating that illusion would be to fortify the appearance of a sale at that time. The need for such fortification would occur only to a mind conscious of impropriety, or at least vulnerability, in the transaction involved. The inference is unescapable that no sale to Tarr intended by Tarr or the accused to be binding and conclusive was made on Sunday, 20 August, though the two probably did plan at that time the profitable enterprise which ensued. The sale to Tarr was concluded after the agreement of sale from Tarr to Ennis, and was fictitious until then. It would not have been concluded unless the agreement of sale from Tarr to Ennis had proceeded as planned, and had reached a point of apparent security.

That the acts of the accused and Tarr were collusive is apparent from the circumstances. The two were in close personal relations. The wife of the accused was living at the Tarr home, and did so from May through August. Tarr was a shoe salesman, never connected with the paper goods business, wholly without facilities or connections to justify any reasonable faith in the success of a speculation in such goods for sale on the open market. The prospect of gain in the transaction lay in special information assuring a particular market at a safe and attractive margin of profit. The accused was the person in position to have that information, so it is fair to conclude that he supplied it. His knowledge belonged to the Post Exchange.

No evidence, apart from suggestions reasonably arising from the circumstances, indicates that the accused derived personal profit from the transaction, nor is that alleged, nor is it necessary. The intentional diversion, by collusive and surreptitious dealings, on the part of a Post Exchange Officer, of a part of the profit realized or inherent in a Post Exchange transaction to the private profit of an individual is fraudulent and wrongful, whether the person so enriched is the officer himself, by direct participation, or some friend or confederate from whose gain benefit to the officer may redound or may be hoped for in any of the countless forms known to human interrelations. In either event the Post Exchange was entitled to that profit, and was fraudulently deprived of it.

The electrical goods came to the Post Exchange and went to Tarr as a minor adjunct to the principal lot of merchandise, merely adding their relatively small value to the bonanza otherwise passed to Tarr. The accused knew they were there, and either knew that they had value or, bent primarily on accomplishing profit to Tarr, did not care, and sold to Tarr without any effort to realize their value for the Exchange. Their sale to Tarr was imbued with the vice of the general transaction, and was wrongful. Their identity with the electrical goods specified is established, and their value was established, under the circumstances, by their sale to Logan for $50.

The views above expressed dispose of the contentions made by the defense that the Specification in question failed to state an offense, and also that there was no affirmative evidence of collusion by the accused with Tarr. That the fraudulent diversion by a Post Exchange Officer of property of the Exchange in his custody and under his management (Par. 20, AR 210-65, 1 June 1944) to the private benefit of an individual is an offense under Article of War 96 is too plain for discussion (CM 240018, Abele, 25 BR 331).

For exactness, variances are noted between the value of $3465.65 specified and that of $3454.65 proved, and between one dozen "light-post" lamps specified and one dozen "bi-post" lamps proved, which would be proper subjects for exceptions and substitutions, but are trivial, unsubstantial, and immaterial to the proper disposition of the case.

7. The accused officer is 37 years of age, married. War Department records show that, at the time of his entry upon active duty, he had one son 12 years old. His testimony indicates that he may now have another infant child. He was born in New York, New York, of naturalized

Italian-born parentage, and christened Francisco Farella. He was graduated from high school at Chehalis, Washington, in 1926, and thereafter had three years of college education at St. Martin's College, according to War Department records, but one and a half years college according to his testimony at the trial. He was employed by Rhodes Department Store, at Seattle, Washington, from 15 June 1925, according to one statement in War Department records, and from May 1926, according to another, to January 1931, where he became a buyer and manager of the luggage department. From January 1931 to May 1942 he was employed by Lipman Wolfe & Co., a department store at Portland, Oregon, where he became merchandise manager and buyer for several departments, advancing in salary from $2300 annually to $8500 plus bonus. He entered the service 12 June 1942 upon temporary appointment as Captain, Army of the United States, assigned to the Army Exchange Service. He was promoted to the grade of Major 6 July 1943. He served, apparently very capably, as Assistant Exchange Officer at Camp Lee, Virginia, and in the same capacity and as Exchange Officer at Hampton Roads Port of Embarkation. At the age of 15, he enlisted in the Army in 1922 and served about five months, when he was discharged upon the discovery that he was under age and lacked parental consent for enlistment.

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

Fletcher R. Andrews, Judge Advocate.

Herbert R. Frederick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ-CM 276025 1st Ind

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

TO: The Secretary of War 4 JUN 1945

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Major Frank Farella (0-477814), Army Exchange Service.

2. Upon trial by general court-martial this officer was found guilty of wrongfully selling, as Post Exchange Officer, certain described merchandise, property of the Post Exchange, for $2100.65, knowing the property to be of the value of about $3465.65, in violation of Article of War 96. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board 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. I concur in that opinion.

As Post Exchange Officer in charge of the Hampton Roads Port of Embarkation Exchange, Newport News, Virginia, about 14 August 1944, the accused purchased for his Post Exchange a stock of paper goods, consisting of paper cups, dishes, forks, spoons and other items, from the Fort Eustis, Virginia, Post Exchange, in liquidation, for the lump sum of $2521.35. This figure was reached as the total of agreed prices according to Army Exchange Service lists, where applicable, and commercial information on wholesale costs otherwise, less discounts, for the items listed and billed by the Fort Eustis Exchange. A substantial amount of "free goods", of the same character but regarded as less merchantable, was included in the purchase at no additional charge and without listing or billing, together with a small lot of electrical goods similarly treated. The goods purchased were delivered on or before August 19, 1944 at the warehouse of the accused's Exchange. There, at the direction of the accused and under his supervision, the stock of similar type goods previously on hand in accused's Exchange and the newly acquired stock were divided, one lot to be retained for the use of the Exchange and the other lot to be sold as surplus stock. The accused had obtained authorization to sell to civilian jobbers such surplus portion of the stock as could not be used by his Exchange. He first obtained information by telephone from one Frank G. Ennis, a commercial dealer in paper products, that Ennis would buy the stock which was to be for sale, at certain prices per unit which would yield a substantial profit over their cost. The accused then made a fraudulent

and collusive sale of the whole lot of these surplus goods to one E. L. Tarr, a personal friend, not engaged in any business of the nature here involved, and turned this lot of surplus goods for sale over to Tarr's disposition, where they stood in the warehouse, for $2100.65. This price was paid in currency by Tarr to the Post Exchange on August 23, 1944, after he and Ennis, together with the accused, had inspected the lot at the warehouse, and Ennis had agreed to buy it any pay for it at prices aggregating $3404.65, on which basis Tarr sold it to Ennis where it stood. Tarr contributed no service of value to the transaction. The surplus electrical goods were included in the lump sale to Tarr, who sold them to a dealer for an additional $50. The retention in stock by the Exchange of a portion of the goods bought in the Fort Eustis liquidation enabled the Exchange to show some profit on the transaction. Nevertheless, the circumstances in evidence establish beyond reasonable doubt that the sale to Tarr was made for the purpose, and with the effect, of diverting a substantial portion of the profit realized in the Fort Eustis transaction from the accused's Exchange to private individual enrichment. Whether or not the accused personally shared in the plunder, the Post Exchange was entitled to that profit and was fraudulently deprived of it. The accused thus appears to be unworthy of trust and of no further value to the service.

I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

2 Incls
Record of trial
Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed. G.C.M.O. 216, 13 Jun 1945)

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

SPJGQ CM 276032

12 MAR 1945

UNITED STATES)	FORT LEWIS, WASHINGTON
)	
v.)	Trial by G.C.M., convened at Fort Lewis, Washington, 2 February 1945. Confinement at hard labor for one (1) month, and forfeiture of $18.00 per month for a like period.
)	
Private ROY C. HOWELL)	
(37406241), Prisoner of)	
War Detachment, Service)	
Command Unit 1907.)	

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

1. The record of trial in the case of the soldier named above, having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and 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 86th Article of War.

Specification: In that Pvt. Roy C. Howell, PW detachment, SCU 1907, being on guard and posted as a sentinel at Fort Lewis, Washington, on or about 19 January 1945, was found asleep upon his post.

He pleaded not guilty to the Charge and Specification. He was found not guilty of the Charge, but guilty of a violation of the 96th Article of War, and guilty of the Specification, except the word "sleeping", (sic) substituting therefor the word "loitering"; of the excepted word not guilty, of the substituted word guilty. Evidence of one previous conviction by special court-martial for absence without leave for 13 days in violation of Article of War 61 was introduced at the trial. He was sentenced to confinement at hard labor for one month and forfeiture of $18 per month for a like period. The reviewing authority approved the sentence and ordered it into execution, but suspended the execution of that portion thereof relating to confinement. The proceedings were published in General Court-Martial Orders No. 45, Headquarters Fort Lewis, Fort Lewis, Washington, 12 February 1945.

3. The evidence for the prosecution shows that accused, while on duty as a guard on 19 January 1945, in a guard tower outside the main gate of the stockade at the Prisoner of War Camp, Fort Lewis, Washington,

was discovered by the Officer of the Day, at about 2:20 a.m., sitting on a table in a stooped position. His head was hanging low and he was snoring. The Officer of the Day called his driver, who also climbed the tower and observed accused. Accused awoke about a minute later, and admitted he was asleep. His carbine was lying on the table about six inches from his body (R. 10-26).

The accused testified that a few minutes before the Officer of the Day came to the tower, he sat down on the table to rest because of a swollen testicle which pained him when he stood for long periods of time. The next thing he knew, the Officer of the Day came up into the tower, walked toward accused and said "I have got you". Accused replied, "Yes, you have". Accused's rifle was across his lap when the Officer of the Day came in. He had permission from the Corporal of the Guard to sit down, and there were no orders which required him to stand while on guard (R. 26-42).

4. No useful purpose would be served in discussing the evidence, since the action of the court upon the findings necessitates a holding that the record is legally insufficient to support the findings and sentence. After the court had found the accused not guilty of the offense of sleeping on post in violation of Article of War 86, a finding of guilty of the offense of loitering on post in violation of Article of War 96 was clearly unauthorized. Under the Manual for Courts-Martial, in order for the court by exceptions and substitutions legally to find accused guilty of loitering on post, such offense must be "necessarily included" in the offense of sleeping on post, as charged. The court is not authorized to make substitutions in a specification when the nature or identity of the offense charged is thereby changed (MCM, 1928, par. 78c). The offense of loitering on post is not included within that of sleeping on post, but is a separate and distinct offense (CM 126321 (1919); Dig. Op. JAG, 1912-40, sec. 444(2).)

5. The accused is 22 years of age and was inducted 23 December 1942 at Jefferson Barracks, Missouri.

6. For the reason stated the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty or the sentence.

Fletcher R. Anderson, Judge Advocate

Herbert B. Frederick, Judge Advocate

[illegible], Judge Advocate

SPJGQ - CM 276032 1st Ind

MAR 13 1945

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

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) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Roy C. Howell (37406241), Prisoner of War Detachment, Service Command Unit 1907, Fort Lewis, Washington, together with the foregoing opinion of the Board of Review.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and, for the reasons stated therein, 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 these recommendations, should such action meet with your approval.

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings of guilty and sentence vacated. G.C.M.O. 104, 26 Mar 1945)

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

SPJGH-CM 276203

5 APR 1945

UNITED STATES v. Second Lieutenant STANLEY D. WALKER (0-775212), Air Corps.	FOURTH AIR FORCE Trial by G.C.M., convened at Walla Walla Army Air Field, Washington, 3 February 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 95th Article of War

Specification: In that Second Lieutenant STANLEY D. WALKER, Squadron T, 423rd Army Air Forces Base Unit, was, on or about 15 December 1944, in a public place, to wit, on the streets of Walla Walla, Washington, drunk and disorderly while in uniform.

CHARGE II: Violation of the 68th Article of War

Specification: In that Second Lieutenant STANLEY D. WALKER, * * *, being engaged in a disorder among persons subject to military law, and having been ordered into arrest by Military Policeman Corporal Fred W. Cooke, did, at Walla Walla, Washington, on or about 15 December 1944, do violence to the said Corporal Fred W. Cooke, by fighting and kicking the said Corporal Fred W. Cooke.

CHARGE III: Violation of the 96th Article of War

Specification: In that Second Lieutenant STANLEY D. WALKER * * *, did, at Walla Walla, Washington, on or about 15 December 1944, strike Corporal George H. Park, a non-commissioned officer of the Military Police who was then in the execution of his office by hitting him in the face and mouth with his fist.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. Evidence of one previous conviction on 3 October 1944 for absence without leave for four days, for which accused was sentenced to forfeit $75 per month for 10 months, was considered by the court. He was sentenced in the instant case to dismissal and total forfeitures. The reviewing authority approved the sentence, remitted the forfeitures and forwarded the record of trial for action under Article of War 48.

3. Around 11:55 p.m. on 15 December 1944 Technical Sergeant Charles E. Wolfe, Sergeant Fred W. Cooke, then a corporal, and Corporal George H. Park were on duty as military policemen in the "Shangra-La", a public drinking place, in the City of Walla Walla, Washington. A lieutenant directed the attention of Sergeant Cooke and Corporal Park to the condition of the accused, who was sitting at a table drinking beer. He was "reeling" and "weaving" in his chair, and when he tried to take a drink of beer he spilled it (R. 9, 10, 14, 15). After the lieutenant had spoken to the accused, at the suggestion of Sergeant Cooke and Corporal Park, the latter asked accused to leave with them and he readily consented to do so. He promised to go home and not to return to the "Shangra-La", and with that Sergeant Cooke and Corporal Park, joined by Sergeant Wolfe, left him. They had gone only a short distance when they noticed that the accused had entered the "Wishing Well", apparently a restaurant or saloon. Sergeant Cooke and Corporal Park followed him and conducted him outside, while Technical Sergeant Wolfe went in search of the lieutenant who had talked to the accused in the "Shangra-La." The two military policemen told accused to accompany them to the police station and they would take him home. When the accused refused to accompany them Sergeant Cooke said, "Sir, I will have to place you under arrest", whereupon accused replied, "Arrest, hell. I want your name" (R. 7, 12). Sergeant Cooke told the accused his name and showed him his driver's license and after accused had examined it he started to walk away. When they insisted he was under arrest and must go with them, accused said, "You are chicken shit sons-of-bitches" (R. 12). Each of them took him by the arm and started for the police station. They had gone only twenty feet when the accused commenced kicking and trying to trip them. He finally succeeded in tripping Corporal Park and when the latter started to get up accused hit him in the mouth with his fist. They managed to throw accused to the ground where he continued to struggle until Sergeant Wolfe, who had failed to find the officer, came up and put handcuffs on him and took him to the police station (R. 7, 12, 14).

Sergeant Cooke testified that accused was "very drunk", his eyes were "blurred and red", he was staggering and his speech was not clear, although he did appear to understand what was said to him and was able to make an intelligent response thereto (R. 10). Corporal Park stated that accused was under the influence of liquor and "appeared to be drunk" (R. 13). Technical Sergeant Wolfe "couldn't say" he was "very" drunk, but his speech was incoherent. Lieutenant Colonel Patrick W. Hayes, who talked to the accused at the police station shortly after he was arrested, testified that accused was under the influence of liquor but that he was coherent and had control of his faculties (R. 16).

On cross-examination, it was Sergeant Cooke's "guess" that prior to the arrest, the accused was not creating a "disturbance" although he was "reeling around in his chair" and "wasn't able to take care of himself" (R. 9).

4. Captain Horatio C. Wood III, the Station Hospital Psychiatrist, whose qualifications as an expert were conceded by the prosecution, testified for the defense and identified a transcript of accused's hospital record which was introduced in evidence. This record shows that accused was admitted to the Station Hospital for "Neuro-psychiatric evaluation precedent to Court-Martial" on 16 December 1944, and returned to duty 20 January 1945. Captain Wood's diagnosis as contained in this record was read to the court, and is as follows:

> "Psychopathic personality, with emotational [sic] instability, paranoid personality and excessive misuse of alcohol; cause undetermined but existing previous to induction; manifested by behavior problems in childhood, excessive sexual indulgence in adolescence, and difficulties from drunkenness in both civilian and army life, in an individual with emotional instability and abnormal depressive, hypochondriacal, and paranoid personality trends."

This diagnosis was based on accused's case history as compiled from interviews with accused, a "Social History" of accused furnished by the American Red Cross, and observation and tests of accused made by the witness. The American Red Cross report states that in the second and third generations prior to the accused there was insanity among his maternal relatives. One great aunt is still in an insane asylum, having been there for twelve years. There are also five confirmed alcoholics in these generations. Accused suffered from malnutrition as a child and was physically retarded until he reached puberty when he developed a "fine physique." He sucked two fingers of his right hand until he was six years of age and as a result of this became left handed. When playing outdoors he ate dirt. As a young man he had considerable athletic

ability, but he had no ambition to excel. About this time he became addicted to the excessive use of alcohol. "He has always been excessively high-strung, and nervous, restless, strongly sexual and inclined to self-pity." In addition, interviews with the accused revealed that he was a poor student in school. He attended college for one year, and thereafter he had three jobs in as many years. He has been heterosexually active since the age of 14. During his career in the Army he did not drink until his wife, who was separated from him in 1942, refused to return to him. During the course of the interview, the accused spontaneously stated, "I have been the black sheep of my family all my life" (R. 27; Def. Ex. 1).

Amplifying his diagnosis the witness testified that the mind of an individual with a psychopathic personality has a "defect or flaw" in it to the extent that while he has been able to "intellectually comprehend the difference between right and wrong, he has no emotional understanding of it and no actual complete knowledge of it" (R. 26). Such an individual is in constant conflict with whomever is in a position of authority over him.

On cross-examination and examination by the court the witness stated that a person afflicted with such a personality has a "lack of comprehension and understanding of right and wrong - a lack of inhibitions, which offers no barrier to an ordinary impulse. He just has an ordinary impulse to go in and get drunk - he has none of the feeling of ethics about what is right or wrong that the average person has" (R. 29). He stressed the distinction between an intellectual comprehension of the difference between right and wrong as opposed to the emotional comprehension of this difference, and stated that it was the latter that the psychopathic personality lacked (R. 29). There was no way of evaluating how much of his conduct on the night in question was due to drinking and how much of it was due to his psychopathic personality. "There can be no positive answer as to how much his psychopathic personality led to this particular difficulty" (R. 30). However, on redirect examination, the witness stated that a drunken individual who possessed a psychopathic personality was more likely to be troublesome than a normal person who was drunk. In short, accused does not have the same ability to restrain himself that a normal person has (R. 31).

Lieutenant Colonel Clarence G. Potter, Base Surgeon, testified that he made a "superficial examination" of accused and assigned him to Captain Wood for observation and diagnosis. At the time, accused had been grounded, and the witness would not reinstate him as a flyer because accused had a psychopathic personality, and under the provisions of paragraph 50d (1), AR 40-110, 12 December 1944, such individuals are not eligible to hold a flying status (R. 18, 19). The witness testified much to the same effect as Captain Wood on the nature of a person of a psychopathic personality, but stressed the fact that the difficulty they

encountered in life was the result of their inability to profit by experience (R. 20). He, too, was unable to say to what extent, if at all, accused's mental condition was responsible for the offenses charged (R. 23). The accused elected to remain silent (R. 35).

5. The Specification of Charge II and the Specification of Charge III:

The first of these Specifications alleges that accused in violation of Article of War 68 "did violence" to a noncommissioned officer who ordered him into arrest as a result of his being engaged in a disorder. The second Specification alleges that accused committed an assault and battery on a noncommissioned officer who was in the execution of his office, in violation of Article of War 96. His assault on Sergeant Cooke is the subject of the Specification of Charge II and the assault on Corporal Park is the subject of the Specification of Charge III. Article of War 68 grants any noncommissioned officer authority to "part and quell all quarrels, frays, and disorders" among persons subject to military law and to order officers who take part in them into arrest and other persons who take part in them into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith. It is a violation of this Article for any officer or enlisted man so ordered to do violence to a noncommissioned officer acting pursuant to the authority granted him therein. The evidence establishes that there was occasion for the exercise of that authority. Accused was engaged in a disorder within the meaning of Article of War 68. He was so patently drunk that his removal from a public drinking place was necessary. He promised the military police that he would go home and then at the first opportunity went into what apparently was another saloon. When they removed him from there he refused to allow them to accompany him home. Obviously they could not permit him to continue his revelry, a course which he apparently intended to follow, and, when he refused to accede to their suggestion that he go home, they were authorized to take appropriate action under Article of War 68 (CM 253660, Brown, 35 B.R. 31; CM 253661, Stevens, 25 B.R. 45).

The action that these noncommissioned officers did take was to seize accused, handcuff him when he resisted, and remove him to the police station which apparently was the Military Police Headquarters for that area. The question presented is whether this action was a permissible exercise of the authority granted by Article of War 68 so that accused was bound to submit to it or whether it was so illegal as to justify the resistance he offered. As has been said, the Article grants authority to the persons described therein to "order" officers "into arrest" and other persons subject to military law into "arrest or confinement." The meaning of these terms as used in Article of War 69 is defined in paragraph 139, Manual for Courts-Martial, 1928, which states:

"The distinction between arrest and confinement lies in the difference between the kinds of restraint imposed.

> In arrest the restraint is moral restraint imposed by the orders fixing the limits of arrest or by the terms of the article. Confinement imports some physical restraint."

On first impression it would seem that this distinction has been maintained in Article of War 68 and that so far as restraining an officer who participates in a disorder, moral restraint is the most that can be imposed. In the opinion of the Board of Review, however, such a construction is not warranted by a reading of the entire Article of War. The purpose of this Article can be gathered from its opening grant of power to "part and quell all quarrels, frays, and disorders" among persons subject to military law and the authority to order into arrest is auxiliary to this power. Plainly, then, the authority to arrest should be construed in a manner that will enable those acting under this Article to achieve its purpose. It seems clear that a non-commissioned officer, for instance, in seeking to stop an affray between two officers would be authorized to impose some physical restraint on the participants. The power to "part and quell" a fray certainly includes the power to separate the combatants, using physical force if necessary. This is the view taken by Winthrop in Military Law and Precedents (2nd ed.), page 589:

> "To part affrayers and quell a fray or disorder, the officer may employ such means as may be requisite, resorting even to the use of a deadly weapon if other means fail or are inadequate."

Once this fray or disorder is quelled admittedly the imposition of arrest in the sense of moral restraint may follow. If, however, that would be inadequate and futile there seems to be no reason why the physical force initially used to quell the disturbance cannot be used to remove the offenders to a place where competent authority can deal with the situation adequately. In such a case the power to arrest includes the power to enforce protective custody, temporary in nature, as a necessary means of ensuring that the disorder or fray will not re-occur.

This construction of Article of War 68 receives support from Winthrop, <u>supra</u>, page 115:

> "* * * Thus a sergeant or corporal, in exerting himself to quell an affray or riot, would be authorized to arrest a commissioned officer engaged in it, and a lieutenant would be authorized to arrest a captain, or field officer, &c. There is nothing in this power to excite apprehension; the inferior, in employing it, simply exercises an authority, analogous to that with which every citizen is invested, to put a stop to a breach of the peace and arrest an affrayer; and a military superior, arrested by an inferior under the

circumstances, instead of protesting, would in general rather have occasion to congratulate himself that he had been taken in hand by one of his own class rather than by a strange policemen or other civilian."

Applying those principles to the instant case it seems clear that to order accused to return to his quarters and remain there would not have attained the desired result. He had already broken the promise he made that he would go home. He had rejected their offer to escort him there. In these circumstances the only means by which these non-commissioned officers could make certain that accused would not continue to be disorderly was to take him into custody. From the readiness with which accused grasped the fact that they were taking him into custody and from the other evidence as to his ability to understand what was transpiring, the court was warranted in finding, as it must have found, that the persons who were arresting him were known to him to be non-commissioned officers. In resisting by kicking and struggling with Sergeant Cooke accused violated the prohibitions of Article of War 68, and the findings of guilty of the Specification and the Charge were warranted. Likewise, in striking Corporal Park, who was assisting in the arrest, the accused was guilty of assault and battery on a non-commissioned officer in the execution of his office and the finding of guilty of the Specification of Charge III was justified.

6. <u>The Specification of Charge I</u>:

This Specification charges accused with being "drunk and disorderly while in uniform" on the streets of Walla Walla, Washington, a public place, in violation of Article of War 95. The uncontradicted evidence shows that the accused was so intoxicated while sitting in a saloon that he attracted the attention of a lieutenant and of two military policemen, Sergeant Cooke and Corporal Park. He was "reeling and weaving" in his chair, and was unable to raise a glass of beer from the table to his mouth without spilling it. He was not creating any public disturbance, but his condition was such as to require the military policemen in the performance of their duties to request him to leave, a request with which he readily complied. After he had failed to keep his promise to go home alone, and refused to permit the military policemen to accompany him to his home, they placed him under arrest. He cursed them, and tried to break away from them, but was subdued after a short struggle, not until, however, he had kicked Sergeant Cooke in the shins and punched Corporal Park in the face. Sergeant Cooke, one of the military policemen, testified that the accused's eyes were "red and blurred", that he staggered, and that his speech was not clear. He was of the opinion that accused was "very drunk." The other two military policemen were less positive in their characterization of his condition, one saying he "appeared to be drunk",

and the other being unable to say whether he was "very drunk", but in general they corroborated Sergeant Cooke, in his description of accused's lack of muscular control. On this evidence the court was warranted in its findings that accused was "drunk and disorderly." In view of the character of accused's conduct and the place where it occurred the Board of Review is of the opinion that it constituted a violation of Article of War 95 and, accordingly, the record is legally sufficient to support the findings of guilty of the Specification of Charge I and Charge I.

7. While no special plea of insanity was entered, all of the defense's evidence concerned itself with the mental condition of the accused. Paragraph 78, Manual for Courts-Martial, 1928, provides that:

> "* * * A person is not mentally responsible for an offense unless he was <u>at the time</u> so far free from mental defect, disease, or derangement as to be able <u>concerning the particular acts</u> charged both to distinguish right from wrong and to adhere to the right." (Underlining supplied)

In substance, the medical witnesses for the defense testified that the accused was affected with a "psychopathic personality" and that this was a "defect or flaw" in his "mind" which rendered accused incapable of intellectually comprehending the difference between right and wrong except in a "limited way", and that he had no emotional comprehension of this difference. Neither witness, however, testified that accused's psychopathic personality was the specific cause of his committing the offenses for which he was tried. Both of them admitted that they could not ascribe his conduct on the night in question to his mental condition, and they went no further than to say it might have been a result of it. It is clear, however, that the mental deficiency which absolves a man from criminal responsibility for his acts must actually impair the exercise of his judgment and the operation of his will. Mental deficiency in a state of suspension is not enough; it must be an operative factor in preventing accused "at the time" from distinguishing between right and wrong and adhering to the right "as to the particular acts charged." No suggestion was made that the accused could not conduct his own defense, nor cooperate intelligently therein. In the opinion of the Board of Review, considering the entire evidence, the court was justified in finding that the accused was mentally responsible for the offenses charged, a finding necessarily implied in its findings of guilty of all Specifications and Charges.

8. The records of the War Department show that the accused is divorced and 28 years of age. He attended college for one year and thereafter he worked as a truck driver and a munitions handler. He

entered the Army as an aviation cadet on 8 February 1943, and on completing his training as a pilot, was commissioned a second lieutenant, Army of the United States, on 15 April 1944, entering on active duty the same day.

9. 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, as approved by the reviewing authority, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of either Article of War 68 or 96 and is mandatory upon conviction of a violation of Article of War 95.

Thomas N. Jaffy, Judge Advocate

William H. Gambrell, Judge Advocate

Robert C. [illegible], Judge Advocate

(224)

SPJGH-CM 276203 1st Ind APR 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 Second Lieutenant Stanley D. Walker (0-775212), Air Corps.

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

3. 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 as approved by reviewing authority confirmed. G.C.M.O. 203, 9 Jun 1945)

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

SPJGH-CM 276208

30 MAR 1945

UNITED STATES v. Private FLOYD W. CAMPBELL, JR. (37402132), Company A, 380th Engineer Combat Battalion.	12TH HQ & HQ DETACHMENT SPECIAL TROOPS, SECOND ARMY Trial by G.C.M., convened at Fort Jackson, South Carolina, 16 February 1945. Dishonorable discharge and confinement for fifteen (15) years. Disciplinary Barracks.

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

---

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

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

CHARGE I: Violation of the 58th Article of War

Specification: In that Private Floyd W. Campbell Jr, Company A, 380th Engineer Combat Battalion, did, at Camp Pickett, Virginia on or about 14 November 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at St. Louis, Missouri on or about 17 December 1944.

CHARGE II: Violation of the 61st Article of War
(Finding of not guilty)

Specification: (Finding of not guilty)

CHARGE III: Violation of the 96th Article of War

Specification 1: In that Private Floyd W. Campbell Jr, * * *, did, at Cincinnati, Ohio, on or about 12 November 1944, wrongfully and with fraudulent

intent have in his possession a Military Pass, W.D.,A.G.O. Form Number 7, purporting to have been issued to himself under authority of the United States by one William F. Bills, Captain CE, in contravention of Section 132 Title 18 Criminal Code of the United States.

Specification 2: In that Private Floyd W. Campbell Jr, * * *, did, at St. Louis, Missouri, on or about 17 December 1944, wrongfully have in his possession with intent to utter as true a certain public writing to wit: A Registration Certificate DDS Form #2 in words and figures as follows: "This is to certify that in accordance with the Selective Service Proclamation of the President of the United States Alfred M. Nickols, 808 West Bland St., Adrain Co., Vandalla, Mo. has been duly registered this 14 day of December 1944, /s/ Miss Ruth E. Grantil, Registrar for 6 Precinct St. Louis City, Mo." for the purpose of defrauding the United States of his immediate service, as a soldier, knowing the same to be false, in contravention of Section 72 Title 18 Criminal Code of the United States.

Accused pleaded not guilty to all Charges and Specifications, was found not guilty of Charge II and its Specification upon motion for such a finding made by the defense (R. 26) and was found guilty of all other Charges and Specifications. Evidence of one prior conviction for absence without leave from 12 April 1943 to 22 November 1943 was introduced. He was sentenced in the present case to dishonorable discharge, total forfeitures and confinement for 25 years. The reviewing authority approved only so much of the finding of guilty of Specification 2 of Charge III as involves a finding that accused

"did, at St. Louis, Missouri on or about 17 December 1944 wrongfully have in his possession with intent to utter as true a certain public writing to wit. A Registration Certificate DDS Form #2 in words and figures as follows: 'This is to certify that in accordance with the Selective Service Proclamation of the President of the United States Alfred M. Nickols, 808 West Bland St, Adrain Co, Vandalla, Mo. has been duly registered this 14 day of December 1944, /s/ Miss Ruth Grantil, Registrar for 6 Precinct St. Louis City, Mo.' for the purpose of defrauding the United States of his immediate service, as a soldier, knowing the same to be false",

in violation of Article of War 96, approved the sentence, reduced the period of confinement to fifteen (15) years, 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 support the findings of guilty of Charge I and its Specification, and of Charge III and Specification 1 of Charge III and legally sufficient to support the sentence as approved by the reviewing authority. The only question requiring consideration here is whether or not the record of trial is legally sufficient to sustain the finding of guilty under Specification 2 of Charge III. Only the evidence relating to the offense alleged under that Specification will be hereinafter summarized.

4. The prosecution introduced evidence to show that when accused was apprehended by military police in St. Louis, Missouri, on 17 December 1944, he was asked for his draft registration certificate and he produced a certificate which certified that Alfred M. Nickols, 808 West Bland Street, Adrain Co., Vandalla, Missouri, had been duly registered under the Selective Service Proclamation on 14 December 1944 by Miss Ruth E. Grantil, registrar for the 6th Precinct, St. Louis, Missouri. In the blank for the registrant's signature appeared the name "Alfred M. Nickols" written in ink. When asked by the military police if his name was Floyd Campbell he denied that it was and insisted that he was Alfred M. Nickols. However, en route to military police headquarters he admitted his true identity (R. 20, 21, 23; Pros. Exs. 10, 11, 13).

5. After his rights had been explained to him accused elected to remain silent and the defense presented no evidence.

6. As approved by the reviewing authority accused was found guilty under Specification 2 of Charge III of wrongfully having possession of the above described draft registration certificate with intent to utter it as true, knowing it to be false, in order to deprive the United States of his services as a soldier, in violation of Article of War 96. The proof does not establish, however, that the registration was false. There is no proof that it was a forgery in any respect. For all that appears in the record it may have been an authentic registration card properly issued by the appropriate registrar and signed by the registrant to whom it was issued.

What the proof does establish is that accused displayed to military authority a draft registration certificate which had not been issued to him and falsely represented himself to be the individual named thereon. Undoubtedly his conduct constituted a violation of Section 11 of The Selective Training and Service Act, (which provides among other things that whoever "otherwise evades registration or service in the land or naval forces" is guilty of an offense under the Act) for which accused could have been tried by court-martial as expressly provided by that section of the Act (54 Stat. 894, 50 U.S.C. App. 311, M.L. 1939, Sup. I, sec. 2225-11). Be that as it may, accused was not charged with such an offense. Furthermore, the offense established by the proof is not a

lesser included offense of the one alleged. A lesser included offense is one the elements of which necessarily are proved in proving the offense originally alleged (CM 254312, Buchanan, 35 B.R. 205, JAGS Text No. 1, par. 33b). An essential element of the offense here proved is that accused falsely represented himself to be the individual named on a particular draft registration certificate when in fact he was not the individual so named. That element is not an element which necessarily is proved in proving the offense alleged (i.e. possession of a false registration certificate intending to utter it as true) inasmuch as the alleged offense could have been established by proof that accused possessed a forged registration certificate bearing his own name as that of the registrant. Accordingly, the evidence does not sustain the finding of guilty of Specification 2 of Charge III.

7. 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 Charge III but legally sufficient to support the findings of guilty of all other Specifications and of all Charges and legally sufficient to support the sentence as approved by the reviewing authority.

Thomas N. Jaffey, Judge Advocate

William A. Brambrell, Judge Advocate

Robert E. Trevethan, Judge Advocate

SPJGH-CM 276208

1st Ind
MAR 31 1945

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

TO: The Commanding Officer, 12th Headquarters and Headquarters Detachment, Special Troops, Second Army, Fort Jackson, South Carolina.

1. In the case of Private Floyd W. Campbell, Jr. (37402132), Company A, 380th Engineer Combat Battalion, 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 Charge III but legally sufficient to support the findings of guilty of all other Specifications and of all Charges and legally sufficient to support the sentence as approved by the reviewing authority, which holding is hereby approved. Upon vacation of the finding of guilty of Specification 2 of Charge III you will have authority to order the execution of the sentence.

2. In view of the findings of guilty that are sustained by the record of trial and considering the policy announced in the letter dated 5 March 1943 (AG 250.4 (2-12-43)), from The Adjutant General to all officers exercising general court-martial jurisdiction within the continental limits of the United States, Subject: "Uniformity of sentences adjudged by general courts-martial", it is recommended that the period of confinement be reduced to ten years.

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

(CM 276208).

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 276248

12 APR 1945

UNITED STATES	INFANTRY REPLACEMENT TRAINING CENTER
v.	Trial by G.C.M., convened at Camp Fannin, Texas, 14 February 1945. Dismissal.
First Lieutenant WOODROW H. STROUD (0-1298951), Infantry.	

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 63rd Article of War.

Specification: In that First Lieutenant Woodrow H Stroud, Infantry, did, at Waco, Texas, on or about 20 January 1945, behave himself with disrespect toward Captain Joseph B Marsh, his superior officer, by saying to him, "You are a first class son of a bitch; I hope to be a Captain and meet you on equal basis and I have intention of some day meeting you", or words to that effect.

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

Specification 1: In that First Lieutenant Woodrow H Stroud, Infantry, was, at Waco, Texas, on or about 27 December 1944, in a public place, to-wit: the public streets of Waco, Texas, drunk and disorderly while in uniform.

Specification 2: In that First Lieutenant Woodrow H Stroud, Infantry, did, at Waco, Texas, on or about 27 December 1944, publicly associate with a notorious prostitute, to-wit: one Toni Jo Benham.

Specification 3: (Disapproved by Reviewing Authority).

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

Specification 1: (Finding of Not Guilty).

Specification 2: In that First Lieutenant Woodrow H Stroud, Infantry, was, at 1901 Cleveland Street, Waco, Texas, on or about 20 January 1945, drunk and disorderly while in uniform.

Specification 3: In that First Lieutenant Woodrow H Stroud, Infantry, did, at Waco, Texas, on or about 20 January 1945, publicly make derogatory and defamatory remarks regarding officers of the Army of the United States, to-wit: "The God-damned officers of the United States Army are first class son of a bitches", or words to that effect.

The accused pleaded not guilty to all of the Charges and Specifications and was found not guilty of Specification 1 of Charge III; guilty of the Specification of Charge I except the words "a first class son of a bitch", substituting therefor the words "one of the first class"; guilty of Specification 3 of Charge II except the word "disorderly"; and guilty of all of the Charges and all other Specifications thereunder. He was sentenced to be dismissed the service. The reviewing authority disapproved the finding of guilty of Specification 3 of Charge II, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that "around midnight" on 27 December 1944 the accused was seated in a car parked in the 700 Block of Bankers Alley, Waco, Texas, and was "necking" with Toni Jo Benham, who, according to a police officer named Albert B. Leonard, was described in the police files of the city as a "known prostitute" (R. 14-15, 18-20). Leonard and "Phillips", another police officer, who happened to be riding by in a police car number 26 "on another call", observed the accused in the act of embracing and kissing his companion, and ordered him "to move" because his automobile was "right in the middle" of the thoroughfare (R. 15-16, 18). Leonard and Phillips proceeded upon their mission and, upon completing it, reported the accused's conduct to "Wohlwend" the Chief of the Vice Squad. Wohlwend immediately directed that the "girl" be arrested (R. 16).

Later that same morning, while driving up Austin Avenue, the main street of Waco, Leonard and Phillips observed a Plymouth coupe parked in front of a business driveway (R. 16, 19). They investigated and found the accused lying drunk on the seat of the car and Toni Jo Benham "in the act of stealing his jacket, insignia from his cap, [and] about six bottles of beer". Although Toni Jo Benham protested that the accused had authorized her to take these items, she was placed in the back seat of the police car number 26. At this moment "Captain Gunterman" and Wohlwend came by in another automobile. At their suggestion Toni Jo Benham was transferred to their custody (R. 16-17). Leonard entered the accused's car and drove to military police headquarters. Shortly after the accused was taken inside, "it dawned on" him that one of his two billfolds was missing. A search of police car number 26 in which Toni Jo Benham had been conveyed resulted in the finding of the missing item. It contained some sixty-five dollars (R. 17-18).

On the night of 20 January 1945 the accused, while in an intoxicated condition, became involved in an argument with his wife at 1901 Cleveland Street where her sister, Mrs. Alma Brownlow Whitlock, resided. The accused had demanded money and had been supplied with some by his wife but he insisted that she also give him a watch and a ring. Convinced that "we couldn't cope with him", Mrs. Whitlock summoned the police (R. 21, 24-25, 28-29). Upon responding to the call Police Officer R. B. Mackie observed that she had a hammer in her hand. She explained that the accused had been beating and "choking his wife" and that the tool was necessary "to make him turn loose". The left eye of the accused's wife was "between a black and purple [and] getting dark". In Mackie's opinion the discoloration was of recent origin (R. 29-31).

The accused was carried to the City Hall and brought before Captain Joseph B. Marsh, the Provost Marshal of Waco, Texas (R. 6, 8, 29). After admonishing the accused to conduct himself like an officer, Captain Marsh decided to accompany him back to Mrs. Whitlock's residence. The purpose of the trip, according to Captain Marsh, was to obtain information concerning the accused's behavior and "to get his automobile and let him go to Connor Courts if he would promise to stay there all night". Because of the accused's severe intoxication the vehicle was not to be entrusted to his care but was to be parked at the City Hall for the night (R. 7-8, 11-12).

He and Captain Marsh entered the police car driven by Mackie and were conveyed toward their destination. As they rode along, Captain Marsh remarked that he was not interested in the accused's personal affairs but that, if the civilian police found it necessary to arrest him, disciplinary action would be taken against him by the military authorities. The accused replied in a sarcastic tone of voice that he "didn't give a damn, he was going to get his ring and watch from his wife even if he had

to break her arm off". Having delivered this threat, he remarked that "all officers were first class sons of bitches". Mackie "turned around and asked him what officers he meant". The accused replied, "Army" (R. 8-9, 30, 37).

Upon reaching Mrs. Whitlock's house, Captain Marsh went inside and learned from those there present that the accused's return was not then desired. Rejoining the accused, Captain Marsh requested him to stay at Connor Courts "the rest of the night". Since the accused was too intoxicated to drive, he was informed that his car would be removed to the City Hall. To this proposed arrangement he strenuously objected proclaiming that "he was going wherever his car went". Up to this point Captain Marsh had not intended "to lock him up". The recalcitrance displayed, however, left Captain Marsh no choice. He ordered that the accused be taken back and put in jail for the night (R. 9, 11-12, 30-31). The return ride to Military Headquarters was apparently uneventful. Upon arriving there the accused's personal effects were taken from him, and a report was prepared. As he was being led to a cell, he turned to Captain Marsh and said, "You are one of the first class". When Captain Marsh requested elucidation of this remark, the accused declared that, "You can use your own damned imagination" (R. 8, 13, 36). Captain Marsh understood the words addressed to him to mean that he was being referred to as a "first class son of a bitch" (R. 36). At the elevator door the accused again gave oral vent to his feelings toward Captain Marsh by stating that, "Some day I hope to be a captain on an equal basis with you".(R. 13, 37). The accused was then drunk (R. 9-10, 12-14, 30, 32, 37-38).

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

5. Specification 1 of Charge II alleges that the accused was "on or about 27 December 1944, in a public place * * * drunk and disorderly while in uniform". //Specification 2 alleges that he on the same day did "publicly associate with a notorious prostitute, to-wit: one Toni Jo Benham". These acts were set forth as violations of Article of War 95.

One of the examples of "conduct unbecoming an officer and a gentleman" enumerated by Winthrop in his Military Law and Precedents, Second Edition, page 718, and adopted in paragraph 151 of the Manual for Courts-Martial, 1928, is "public association or gross conduct with notorious prostitutes". Although Toni Jo Benham's standing as a prostitute was not established to be "notorious", it was repeatedly described as "known". This distinction would ordinarily be without a difference, for "notorious" is defined in Webster's New International Dictionary, Second Edition, as "Generally known and talked of; widely or commonly known". In this particular instance, however, the testimony to the effect that Toni Jo Benham was a "known prostitute" was based entirely upon a cursory examination of a police file. This was plainly hearsay evidence and should have been excluded. Since Toni Jo Benham has accordingly not been shown

to be a "notorious prostitute", Specification 2 of Charge II must fall for want of proof.

The accused at the time of his association with Toni Jo Benham was drunk. When finally taken into custody, his senses had been so overpowered by intoxicants that he had completely lost consciousness. On both of the occasions on which he was seen with his allegedly nefarious companion he was shamelessly consorting with her on the public streets of Waco, Texas, one of them being the principal thoroughfare of that city. Being a married man, his "necking" there with a woman not his wife was repugnant to all accepted standards of morals and decency. Similarly his subsequent stupified condition was obnoxious and revolting to all respectable members of the community who might have witnessed the scene. This was plainly disorderly conduct within the established meaning of that term. Specification 1 of Charge II has been proved beyond a reasonable doubt.

6. The Specification of Charge I alleges that the accused did "on or about 20 January 1945, behave himself with disrespect toward Captain Joseph B. Marsh, his superior officer". This offense was laid under Article of War 63. Specification 2 of Charge III alleges that the accused was on the same day "drunk and disorderly while in uniform". Specification 3 of Charge III alleges that he did on the same day "publicly make derogatory and defamatory remarks regarding officers of the Army of the United States * * *". These latter acts were represented to be in contravention of Article of War 96.

It is perfectly obvious that the accused's slanderous reference to "all officers" as "first class sons of bitches" was prejudicial to good order and military discipline. One of the basic requirements for any effective fighting organization is the mutual respect of the men who compose it. Any remark such as the one quoted tends to undermine morale and is plainly violative of Article of War 96.

In refusing to spend the night at "Connor Courts" and in insisting upon staying with his automobile, the accused spurned the kindness displayed toward him by both the civilian and military police and manifested his contempt for authority. His unruly and defiant behavior was per se disorderly. Its explanation was, of course, intoxication.

His subsequent denunciation of Captain Marsh as "one of the first class" was not inherently disrespectful, but it contained a patent innuendo which was calculated to detract "from the respect due to the authority and person of a superior officer" within the meaning of paragraph 133 of the Manual for Courts-Martial 1928. The words were uttered in the light of the accused's previous slanderous description of all Army officers as "first class sons of bitches". This was the sense intended to be conveyed and it was the one understood by Captain Marsh. Under Article of War 63

disrespect may be shown to a superior officer by "opprobrious or denunciatory language" (MCM, 1928, par. 133). Certainly no more cogent example could be conceived than the reference to a superior officer as a "son of a bitch". When to this contumacious remark the accused added a threat only partly disguised in the words, "Some day I hope to be a Captain on an equal basis with you", a most aggravated contravention of Article of War 63 was committed. The Specification of Charge I and Specifications 2 and 3 of Charge III have been proved beyond a reasonable doubt.

7. The accused, who is married and the father of one child, is about 30 years old. After attending high school for one year, he was employed as a truck driver from 1932 to 1936 and as a shipping clerk from 1936 to 1940. He had enlisted service from 25 November 1940 to 4 November 1942 and was commissioned a second lieutenant on 5 November 1942. While serving overseas at Bougainville in the Solomon Islands, in March of 1944, he was seriously wounded in action. He was subsequently awarded the Purple Heart and the Bronze Star Medal.

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 insufficient to sustain the findings of guilty of Specification 2 of Charge II and legally sufficient to sustain all of the other findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of either Article of War 63 or Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Robert J. Hanner, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 276248 1st Ind
Hq ASF, JAGO, Washington 25, D. C.

4 JUN 1945

TO: 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 First Lieutenant Woodrow H. Stroud (0-1298951), Infantry.

2. Upon trial by general court-martial this officer was found guilty of behaving himself with disrespect toward a superior officer, in violation of Article of War 63 (Spec., Chg. I); of being drunk and disorderly while in uniform in a public place (Spec. 1, Chg. II), of publicly associating with a notorious prostitute (Spec. 2, Chg. II), and of being drunk while in uniform in a public place (Spec. 3, Chg. II), all in violation of Article of War 95; of being drunk and disorderly while in uniform (Spec. 2, Chg. III), and of publicly making derogatory and defamatory remarks regarding officers of the Army of the United States (Spec. 3, Chg. III), all in violation of Article of War 96. He was sentenced to be dismissed the service. The reviewing authority disapproved the finding of guilty of being drunk while in uniform in a public place (Spec. 3, Chg. II), 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 of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 2 of Charge II, but legally sufficient to support all of the other findings and the sentence and to warrant confirmation thereof.

Shortly after midnight on 27 December 1944 the accused, a married man, was seen in a parked automobile in the act of embracing and kissing a woman not his wife, who was allegedly a prostitute. Later the same morning he was found slumped on the seat of his car, so completely overcome by drink that he had lost consciousness. His companion of questionable character was still with him, but was about to depart after having stripped him of his jacket, certain insignia, several bottles of beer, and a wallet containing some $65. About three weeks after this incident the accused again became intoxicated and, while under the influence of liquor, involved himself in a violent altercation with his wife which was terminated only by the intervention of the civilian police. A short time thereafter, upon returning to his wife's place of residence, he remarked to the Provost Marshal of Waco, Texas, who had accompanied him, that "all officers [of the Army] were first class sons of bitches". Upon arriving at their destination, the Provost Marshal learned from the accused's sister-in-law that the accused's return was not then desired. The Provost Marshal accordingly re-

quested the accused to spend the night at "Connor Courts" and offered to remove the accused's car for safekeeping to the City Hall. To this proposal the accused belligerently replied that "he was going wherever his car went". Having thus displayed a contempt for authority, he was forthwith removed to the City Hall for incarceration. As he was being led to a cell, he turned to the Provost Marshal and said, "You are one of the first class". A few steps further on the accused added, "Some day I hope to be a captain on an equal basis with you". Although these derelictions were of a serious nature, the accused's valiant overseas service during which he earned the Purple Heart and the Bronze Star Medal strongly indicate that, if given another opportunity, he may redeem himself by his conduct in the future.

I accordingly recommend that the sentence be confirmed but that its execution be suspended during good behavior.

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

Myron C. Cramer.

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Finding of guilty of Specification 2, Charge II, disapproved. Sentence confirmed but execution suspended. G.C.M.O. 252, 19 Jun 1945)

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

SPJGK - CM 276250 9 MAY 1945

UNITED STATES	)	FAIRFIELD AIR TECHNICAL SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Wright Field, Dayton, Ohio, 3 February 1945. Dismissal.
Major RICHARD R. HARVEY (0-247679), Air Corps.	)	

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

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

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

CHARGE I: Violation of the 95 Article of War.

Specification: In that Major Richard R. Harvey, Air Corps, then Captain Richard R. Harvey, Air Corps, 4020th Army Air Forces Base Unit, a married man, did, at Dayton, Ohio, between 1 July 1944 and 1 September 1944, on five separate occasions, engage in sexual intercourse with one Helen Brady, the wife of an enlisted man on active duty in a theater of operations, which the said Major Richard R. Harvey, then and there well knew.

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

Specification 1: (Finding of not guilty.)

Specification 2: In that Major Richard R. Harvey, Air Corps, then Captain Richard R. Harvey, Air Corps, 4020th Army Air Forces Base Unit, being indebted to the Dayton Biltmore Hotel, Dayton, Ohio, in the sum of Three Hundred Dollars ($300.00) for hotel services, which amount was due and payable on or about 27 February 1944, did, at Dayton, Ohio, from about 27 February 1944 to about 17 October 1944, wrongfully fail and neglect to pay said debt.

Specification 3: In that Major Richard R. Harvey, Air Corps, then Captain Richard R. Harvey, Air Corps, 4020th Army Air Forces Base Unit, being indebted to the Del Paso Country Club, Sacramento, California, in the sum of One Hundred Fifty-Eight Dollars and Seventy Cents ($158.79) for membership dues and club services, which amount became due and payable on or about 1 October 1943, did at Dayton, Ohio, from about 1 October 1943 to about 25 July 1944, wrongfully fail and neglect to pay said debt.

CHARGE III: Violation of the 93rd Article of War (Finding of not guilty).

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

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

Specification 1: In that Major Richard R. Harvey, Air Corps, 4020th Army Air Forces Base Unit, did, from about 21 January 1944 to about 13 November 1944, dishonorably draw upon The Winters National Bank and Trust Company and cause to be presented to the aforesaid bank for payment, about sixty (60) checks, individually varying in amount from about Seven Dollars and Eighty Cents ($7.80) to about Three Hundred Dollars ($300.00) each, and aggregating in total amount about One Thousand Nine Hundred Twenty-Seven Dollars and Sixty-One Cents ($1,927.61), without maintaining on deposit with said bank funds sufficient for the honoring of each such check upon its presentation to the said bank for payment.

Specification 2: (Finding of not guilty.)

Specification 3: (Finding of not guilty.)

3. Defense counsel moved the court to strike Specifications 1, 2 and 3 of Charge II for the reason that the Specifications did not set forth any offense as there was no allegation of deceit, fraud, or dishonor in connection with the alleged debts, and Specification 1 of the Additional Charge for the reasons (1) that there was no allegation of fraud or deceit, (2) the Specification groups a number of alleged offenses which are separate and distinct from each other, (3) it fails to set forth sufficient details concerning the 60 checks so that the accused could be apprised of what he was required to meet in order to defend himself in court, and (4) the Specification is unknown as to form in military law. The law member overruled the motion of the defense counsel, whereupon the accused pleaded not guilty to all of the Charges and Specifications. He was found not guilty

of Specification 1 of Charge II, Charge III and its Specifications, and Specifications 2 and 3 of the Additional Charge. He was found guilty of the remaining Charges and Specifications except (1) the words "on five separate occasions" in the Specification of Charge I, (2) the words and figures "$158.70" in Specification 3 of Charge II, substituting therefor the words and figures "$58.70", and (3) with reference to the Additional Charge, not guilty of a violation of the 95th Article of War but guilty of a violation of the 96th Article of War. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

4. The evidence for the prosecution pertinent to the Charges and Specifications of which the accused was found guilty may be summarized as follows:

It was stipulated and agreed that the accused was in the military service of the United States at all times material to the Charges and Specifications pending against him (Pros.Ex.7).

Charge I and its Specification (Sexual relations with Helen Brady).

Helen Brady, a resident of Dayton, Ohio, 24 years of age, testified that she had been married for five years to Sergeant James F. Brady, who was serving overseas in the North African Theater of Operations, and that she was the mother of two children. She met the accused in June 1944, at her own house-warming party to which he came as the guest of a Mrs. Hardin. Mrs. Brady was "paired off" with him in a card game. About a week later, at his invitation, she had dinner and danced with accused at the Van Cleve Hotel, in Dayton, Ohio. This was repeated the following week. Upon the latter occasion she drank too much and did not remember what occurred between that time and the time when she awakened the next morning in bed in one of the hotel's rooms. (Note: The record of trial is silent as to presence or absence of accused at this time.) She dressed and went home. She had "dates" with the accused on the average of once or twice a week thereafter until the end of August when her husband returned to this country. During that time she took a trip to Indianapolis where she met the accused, spent the night with him in a hotel and had sexual intercourse with him. The two traveled to Chicago the next day and repeated the performance at the Drake Hotel. On the train the following night they occupied the same roomette and engaged in sexual intercourse. She also had similar relations with him three or four times in Dayton, Ohio, about three times in one of the local hotels, and once in her own home (R. 18-19,33). When she first met the accused she told him that her husband was in the service (R. 17). Her husband was injured and returned to this country and eventually to Dayton in October, 1944. He discovered and read a letter which the accused had written to her in August. When her husband turned the letter over to her after reading it she destroyed it. In the letter the accused among other things wrote

that he "wouldn't forget the night that we had spent together" (R. 22). The accused himself was a married man and had two children living in Niagara Falls, New York (R. 23).

Mrs. Brady's full name was Helen Louise Morgan Brady. At the age of 16 she was employed as a maid in the home of a Mrs. J. C. Kochler. She was employed as a waitress in different restaurants and bars in Dayton and married her present husband in 1940 (R. 26-29).

Sergeant James F. Brady testified that he entered the military service of the United States on 9 January 1943 and was overseas from August 1943 to 2 October 1944. His left foot was injured in Yugoslavia by the fall of a building which was struck by a shell. He was returned for hospitalization (R. 47-48). Upon his return home he discovered the letter written by the accused in which the writer stated that he would never forget the wonderful night that he had spent with the witness' wife (R. 48). As a result his wife attempted suicide in November by slashing her wrist with a razor blade. Sergeant Brady's private income from August 1943 to August 1944 was $7,000 (R. 50).

Specification 2 of Charge II (Debt to Biltmore Hotel).

Mr. J. G. Tourkow, credit manager of the Biltmore Hotel, Dayton, Ohio, testified that the accused was a guest at the hotel from 16 September 1943 until 1 May 1944. The accused was billed on the first of each month for charges incurred during the preceding month. Bills were supposed to be paid on the 10th of the month, but military personnel were not requested to make payment until the end of the second month. The accused was not delinquent until that time. The accused's account reached its peak on 27 February 1944, at which time he owed the hotel $753.41 (R. 51-52). He gradually reduced this obligation so that when he checked out on 1 May 1944 he paid this account in full. On 20 March 1944, accused made a payment on the account of $300.00, which was by a check. The check was deposited by the hotel in the usual course of business but was returned marked "insufficient funds". Notwithstanding the return of this check the accused's account continued to be credited for the payment that it represented. The check was carried by the hotel in a separate account which was not paid off by the accused in full until 17 October 1944 (R. 52-53, 58). After the receipt of the worthless check the hotel continued to extend credit to the accused. This credit amounted altogether to about $250, but the hotel would not cash any of his checks (R. 58-59). The accused voluntarily checked out of the hotel. He was not asked to leave (R. 59). The hotel account except for the $300 check was satisfied in May 1944 (R. 60).

Specification 3 of Charge II (Failure to pay debt to Country Club).

By stipulation (Pros. Ex. 4) admitted in evidence (R. 66) it was agreed that if John Titus, Manager of the Del Paso Country Club, Sacramento, California, were present in court he would testify that the accused became indebted to the Club in the sum of $158.70 for dues and services. Such was the balance due to the Club on 1 October 1943. On 22 September 1943, the accused wrote Mr. Titus from Dayton telling him of his change of military station and requesting his bill. After receiving the bill and a formal demand for payment the accused on 22 November 1943 wrote that he would forward payment on December 1st. On 25 February 1944 he made a payment by check on account of $50. On 5 April 1944 the witness threatened to notify the Adjutant General if the accused did not pay the balance of the account by return mail. On 7 May 1944 he received a check from the accused dated 28 May 1944 for $25.00. When presented for payment the check was returned for insufficient funds. On 19 June 1944 he received a money order for $50, and on 25 July 1944 one for $58.70, which completed the payment of the account.

Specification 1 of Additional Charge (Drawing 60 checks on his bank account without sufficient funds).

Mr. Douglas E. Lawson, cashier of the Winters National Bank and Trust Company, Dayton, Ohio, testified that the records of that bank show that the accused maintained a checking account with that bank from 29 December 1943 until 14 November 1944. During the period of time from 21 January 1944 until 13 November 1944, 61 checks were presented to the bank in amounts which at the time each was presented exceeded the funds of the accused on deposit. These checks ranged in amount from $7.80 to $300 and totaled $1927.61. The account was charged $1.00 for each check thus presented as an expense charge and the checks were returned to those who presented them. The witness produced a Memorandum Charge Ticket of the bank as to each check thus presented showing the amount of the check, its date, and the name of the payee (Pros. Ex. 5). They were admitted in evidence over the objection of defense counsel (R. 70).

Without objection the monthly statement of the accused's account with the bank, showing his daily balance, was admitted in evidence (Pros.Ex.6).

5. In defense the accused showed by numerous witnesses, including prominent citizens of Niagara Falls, New York, that he (the accused) enjoyed an excellent reputation in that community for truth and veracity, and as a moral, well-behaved and law-abiding citizen (R. 86, Def. Ex. C).

In 1941 he was chosen as the outstanding young man of Niagara Falls (R. 85) and was President of the Junior Chamber of Commerce (R. 90).

Many other witnesses, civil and military, testified that the duties performed by the accused in the Army were numerous, difficult and vital to the needs of Air Corps; that he was responsible for obtaining delivery of spare parts for Wright engines used in the B-29's; that this required considerable travel to various industrial plants; and that he performed his duties in an excellent manner and had a good reputation for efficiency and fidelity to duty (R. 93, 98-99, 100, 102; Def. Ex. G).

Having been advised concerning his rights, accused elected to testify under oath in his own defense (R. 115). He is 38 years of age. After graduating from high school he attended the University of Minnesota for six years, majoring in chemical engineering and business administration. He received a "BS" degree. He was employed as a chemist by various dye and paper companies until 1933 when he moved to Niagara Falls, New York, where he was employed by the International Paper Company and worked his way up to Assistant Manager in 1942 and later to Personnel Manager, and then entered military service on 23 June 1942. He married on 4 March 1933 and has two children. While living in Niagara Falls he was also very active in civic affairs and became president of the Junior Chamber of Commerce (R. 116-117). For ten years he held a reserve commission but let it lapse in 1938. Upon entering active service he was commissioned first lieutenant and was promoted to captain in 1943 and to major on 26 October 1944 (R. 118). His chief duty at Wright Field was the procurement of engine parts and their distribution to the overhaul agencies both domestic and overseas. He was required for these purposes to travel considerably - he made 26 to 30 trips within the year necessitating his absence from Wright Field 100 days out of 300. In making these trips he had to use his own money and then put in a voucher for reimbursement (R. 119-120). As a result he was often short of funds. $125 was taken out of his pay each month as an allotment to his family (R. 156). He previously enjoyed an individual income of $100 per month outside of his Army pay from some bonds, but the bonds defaulted and the income ceased in the latter part of 1943 (R. 126, 156). His pay as a captain was $230 per month (R. 158).

With reference to <u>Charge I and its Specification</u>, three witnesses testified that Mrs. Brady's reputation for truth and veracity was not good (R. 94, Def. Ex. E and Ex. F).

The accused, testifying on his own behalf, denied generally that he ever had sexual intercourse with Helen Brady and denied particularaly that he had had sexual intercourse with her at the times and places averred by Mrs. Brady (R. 135-136). He admitted that he knew her and that he had spent

the night with her in a hotel room in Indianapolis about 30 June 1944, in Chicago the following night, and in the roomette on the train when returning to Dayton. He denied that he had intercourse with her on those occasions (R. 139-140). He denied that he was alone in any hotel room in Dayton with Mrs. Brady except for short periods of time. Other people were present most of the time (R. 141). He could not recall how they were registered in the various hotels. He shared the same room but not the same bed with her in Cincinnati (R. 142). He admitted that he wrote the letter referred to by Mrs. Brady sometime in July (R. 147).

With reference to Specification 2 of Charge II, the accused admitted that he gave the hotel his check for $300 on account of his indebtedness to the hotel in March 1944. He showed that on 29 Feburary 1944 he deposited in his account in the bank on which the check was drawn $320 (Def. Ex. I). The $300 check was given to cover a similar check for $100 given to the hotel on 29 February 1944, but which was returned by the bank unpaid because it was presented before his deposit reached the bank, and $200 on account of his hotel bill (R. 127-128, 136). After the $300 check was returned unpaid he paid the Hotel $300 in two payments of $200 on 26 March and $140 on 1 April 1944. The hotel applied these payments to his hotel bill instead of to the check. He finally paid the check in October 1944 (R. 128). He voluntarily checked out of the hotel on 1 May 1944 and paid the balance then due on the hotel bill. He had no intention of depriving the hotel of the $300 (R. 129).

With reference to Specification 3 of Charge II, the accused admitted that when he left Sacramento he owed the Club $152.42. On 24 February 1944 he paid the Club $50 and thereafter made the remaining payments of $50 on 19 June 1944 and $58.70 on 25 July 1944. The reasons for his inability to pay sooner were that he was traveling in the performance of his duties and used up his ready cash and that his source of independent income amounting to $100 per month had suddenly ceased. He stated that he had no intention of avoiding or evading payment (R. 126).

With reference to the Additional Charge and its Specification, the accused, testifying in his own behalf, admitted that he maintained the account with the bank and that he personally drew the 61 checks which were dishonored (R. 130). He related the circumstances surrounding the issuance of 30 of the checks and their subsequent prompt payment by him after the checks had been dishonored by the bank. He stated that these checks were given by him to various persons, hotels, clubs, and business establishments as payment for services and merchandise, and, in some few instances, as loans, and that he promptly made the checks good when they were returned (R. 132-134). He stated that he promptly redeemed the remaining 31 checks. Concerning the issuance or redemption of the checks the following testimony is pertinent:

"Q. At the time you gave these checks, Major, did you have any intention of depriving any of these people of their money?

A. No, in most instances I approached the people and picked up the checks before they had gotten back from the bank; generally the reason for that was the bank was very prompt on sending out this notification that he introduced a while ago, as soon as I received that and find that out and I was back from a trip I would pick them up or call them and have them redeposited.

Q. Now state to the court why you gave this series of checks which were returned for insufficient funds, how did you happen to do that?

A. Well, there were, chief reason is that I am careless about the handling of money, I have had a penchant for doing that prior to the time I came to Dayton; I always had a joint account so that with a savings account and checking account in the same bank the bank would not return the checks because they know the checks would be honored from the savings account.

Q. Did you have any intention of escaping the obligations involved in these checks?

A. No, at no time." (R. 134,135)

6. Discussion

Charge I and its Specification.

The accused, a married officer having a wife and two children, has been found guilty of engaging in habitual sexual intercourse in Dayton, Ohio, over a period of two months, with the wife of an enlisted man then engaged in active service in a theater of operations overseas, well knowing those facts.

The woman, Mrs. Brady, wife of Sergeant Brady, and the mother of their two children, testified that she met the accused at her home where he learned of her marital status and that her husband was an enlisted man serving overseas. For about two months following this meeting the accused entertained her by "wining and dining" her at the local hotels on an average of twice a week. He took her to hotel bedrooms in Dayton where they engaged in sexual intercourse. She accompanied or met him on trips to Indianapolis, Chicago, and Cincinnatti where they spent the night together in the same room and engaged in sexual intercourse. Mrs. Brady's testimony presented a clear picture of adulterous cohabitation.

When her husband returned to this country as a result of an injury received in line of duty, he discovered the illicit relationship that had, up to that time, existed between his wife and the accused. In consequence thereof, marital troubles immediately followed which resulted in an attempt on the part of Mrs. Brady to commit suicide. The accused's conduct had a material effect upon the life and domestic affairs of the injured enlisted man.

In the light of the Bradys' testimony the accused's conduct was manifestly, under the circumstances, dishonorable and, as such, was grossly unbecoming an officer and a gentleman and therefore constituted a violation of the 95th Article of War.

The accused has denied that he ever had any sexual relations with Mrs. Brady. He admitted that he knew her and that he had numerous engagements with her during the time complained of, that he occupied the same room with her at the times and places described in her testimony, but that, despite the continuous intimate relationship thus indicated, he did not have sexual intercourse with her. He admitted that he knew during this time that she was a married woman and the mother of two children. Although he testified in his own defense, he did not deny that he also knew that Mrs. Brady's husband was an enlisted man serving overseas. Notwithstanding the evidence introduced by the defense attacking Mrs. Brady's reputation for truth and veracity, the court resolved the issue of fact thus raised in her favor and rejected the accused's testimony that he did not have sexual relations with Mrs. Brady during any of the times that he and she occupied the same bedroom. The accused has either admitted under oath, or failed to deny, all of the allegations contained in the Specification, except that of the sexual intercourse. His protestations of innocence in this respect are not worthy of belief. It would be contrary to human behavior for a man to engage a hotel bedroom and spend the night therein with a woman, under the circumstances shown in this case, and not to engage in sexual intercourse with her. No other reason was advanced or suggested for engaging the rooms and occupying them. We find no difficulty in sustaining the finding of guilty of this Specification and of the Charge. The accused's conduct, apart from its military aspect, with regard to its effect upon the enlisted man and his family, constituted habitual adultery in violation of the laws of the State of Ohio (Section 13024 of Page's Ohio General Code). The Board of Review has consistently held that a married officer who engages in habitual sexual intercourse with a woman who is not his wife is guilty of conduct unbecoming an officer and a gentleman in violation of the 95th Article of War (CM 202212, 5 BR 373; CM 203719, 7 BR 279; CM 208296, 9 BR 1).

Charge II, Specifications 2 and 3

It was clearly established by the evidence for the prosecution and admitted by the accused that he was indebted to the Dayton Biltmore Hotel in the sum of $300 from at least 27 February 1944 until 17 October 1944. It is of no great importance whether this indebtedness was for hotel services, as alleged in the Specification, or arose upon the check in that amount which accused had given to the hotel on account of his hotel bill and which had been dishonored. This variance between the proof and the allegation is not a material one. The evidence clearly showed that the hotel extended credit to the accused over a long period of time to an amount that at one time reached $753.41. Even after accused gave the hotel the worthless check for $300, the hotel continued to extend credit. There was no evidence of any demand being made upon the accused for payment. When he voluntarily removed from the hotel he paid his hotel bill in full, leaving unpaid the $300 evidenced by the check, which, according to the hotel manager, constituted a separate account. Again he continued thereafter to use the hotel facilities and to incur further indebtedness until October when he paid all of his obligations to the hotel, including the $300 item. There was no evidence of any attempt on the accused's part to evade payment. There was no fraud involved in the creation of the debt, nor in its non-payment during the time alleged. The Specification and the proof merely show a failure to pay a running account. It has been consistently held by the Board of Review that the failure or neglect on the part of an officer to pay his debts promptly is not of itself sufficient grounds for charges against him under the Articles of War. There must be an allegation and proof of some dishonorable conduct with reference to the debt either in its inception or in connection with a protracted delay in payment. The record does not disclose any false representations, fraud, deceit or evasion on the part of the accused with reference to the hotel account and therefore discloses no offense. There was therefore nothing dishonorable in his conduct toward the debt or toward the creditor.

No doubt the lack of proof of dishonorable conduct, with reference to the hotel account, on the part of the accused prompted the omission from the Specification of the word "dishonorably". Except for this word, the Specification is otherwise copied from Form 117 of the Specifications contained in Manual for Courts-Martial, 1928, page 253. The omission of this word destroys the validity of the Specification. It no longer sets forth an offense. For the reasons enumerated, the finding of guilty of this Specification should not be sustained (See CM 220760, 13 BR 61; CM 228894, 16 BR 365; CM 254704, 35 BR 329; and CM 254722, 35 BR 341). A different conclusion might have been reached had the accused been properly charged with bringing discredit upon the service by wrongfully issuing the worthless $300 check to the hotel, well knowing that he did not have and not intending to have sufficient funds in the bank upon which the check was drawn for its payment.

With reference to Specification 3 the same omission appears. The word "dishonorably" has again been omitted. No offense is charged. The evidence in support of this Specification might have supported a charge of dishonorable conduct in connection with this debt. The accused made false promises of payment and he gave one worthless check on account. It is impossible to say, however, whether the court would have found the accused guilty of dishonorably failing or neglecting to pay the debt if that word had appeared in the Specification. We cannot speculate on that conclusion. The finding of guilty should not be sustained.

In CM 254722, 35 BR 341,355, the accused was charged with "dishonorably" failing and neglecting to pay a debt in violation of the 95th Article of War. The court found the accused guilty of the Specification except the word "dishonorably", substituting for it the word "wrongfully", not guilty of the excepted word and of the Charge, but guilty of the substituted word and a violation of the 96th Article of War.

The Specification thus amended was identical with the Specification used in the case under discussion. The Board of Review refused to sustain the conviction and held:

> "It is the opinion of the Board that the evidence was sufficient to have justified a finding of guilty as charged, in that accused's conduct was characterized by deceit and protracted evasion, and that while in receipt of ample funds, he preferred to satisfy his own desires rather than to discharge a standing obligation. It has repeatedly been held, however, that mere failure to pay a debt is not an offense under either Article of War 95 or 96". CM 221833, 13 BR 239; CM 220760, 13 BR 61; and CM 207212, 8 BR 319 were cited.

Specification 1 of Additional Charge

This Specification was originally laid under the 95th Article of War. In substance it alleges that the accused was guilty of conduct unbecoming an officer and a gentleman, by drawing and causing to be presented to his own bank about 60 checks over a period of 10 months when his deposits in that bank were insufficient for the payment of the checks. Defense counsel moved to strike this Specification because (1) it failed to aver fraud, (2) it was duplicitous, and (3) it is so indefinite and vague in its terms that the accused could not be apprised from it of what he is required to defend. In view of this timely objection it cannot be said that the defects complained of, if they, or any of them, exist, were waived by the accused. It should be noted that the court found the accused not guilty of a violation of the 95th Article of War, but guilty of the

Specification as a violation of the 96th Article of War. This may have been prompted by the fact that no fraud was alleged or proved and that therefore the accused was not personally dishonored and disgraced as an officer and gentleman. In any event whatever tests are applied to the validity of the Specification should be applied to it as a violation of the 96th Article of War. Defense counsel's first objection was therefore eliminated by the court in shifting to the 96th Article of War under which, in worthless check cases, it is not necessary to allege, nor to prove, fraud (CM 249006, Vergara, 32 BR 5). We are constrained to conclude, however, that the Specification is either duplicitous, too indefinite and vague in its terms for proper defense and also for acting as a bar for further prosecution, or that it fails to set forth any offense under Article of War 96.

The subject of duplicitous Specifications was ably discussed in CM 268259, Stevens. The following excerpts therefrom are worthy of repetition:

> "In general, one Specification should not allege more than one offense (MCM 1928, par. 29b) and if it does so, it is 'bad' for duplicity (Winthrop, op. cit. P. 143; 31 C.J. 758) a vice against which we are warned as 'a not uncommon fault in our service, and has been repeatedly condemned in Orders' (Winthrop, op. cit., page 144)."

> "However, there are recognized limitations upon that rule. These are offenses having the quality of duration, where ordinary rules do not apply as to specific designation of time. Such may be the continued nonpayment of a debt, charged as dishonorable conduct under Article of War 95 (Winthrop, op. cit., page 139), unlawful cohabitation (CM 211260, Grochowick, 10 BR 43), or the neglect or malfeasance of a continuing duty (CM 238266, Campbell, 24 BR 215). Such cases do not raise the question of duplicity, as there is a single offense, 'continuing' in a true and absolute sense."

> "How much unity of purpose, singleness of transaction, or adherence to scheme, plan or design must be established to justify the collective specification of a series of wrongful acts must depend upon the facts and circumstances of the case."

The same rule appears in Winthrop's Military Law and Precedents, 1920, p. 143:

> "This rule (against duplicity) does not apply to the stating together, in the same count, of several distinct criminal acts, provided the same all form parts of the same transaction, and substantially complete a single occasion of offense.* * * So it is held not double pleading to allege in the same count the larceny of several distinct articles appropriated at the same time and place."

If it was the intention of the court in finding the accused guilty of the Specification under Article of War 96 to find that he brought discredit upon the service in the thoughts of the recipients of the checks issued by the accused which proved upon presentation for payment to be worthless, then, undoubtedly, in the light of the principles quoted above, the Specification is duplicitous. It is also too indefinite and uncertain in its terms. The issuance of each check might or might not be an offense under Article of War 96 depending upon the circumstances surrounding its issuance and acceptance. Sixty possible offenses are involved which make the Specification duplicitous. No details are furnished concerning the dates, amounts, and the name of the persons to whom the checks were issued or negotiated which make the Specification too indefinite and uncertain for proper defense. The failure to supply such details makes it impossible for the accused to plead any conviction as a bar to further prosecution for issuing some, if not all, of the 60 checks referred to in the Specification. When viewed in this light the conviction should not be upheld. The Board of Review so held with regard to a similar specification in CM 257469 (1944), which was reported in the August 1944 Bulletin of Dig. of Op., Page 338, 339, as follows:

> "Accused was found guilty of wrongfully ordering and causing to be used, 'on numerous occasions' from about 12 July to 5 October, motor vehicles of the United States, furnished and intended for the military service thereof, for his personal gain and benefit in hauling persons and materials from Army installations and business establishments to accused's home, in violation of Article of War 96. The Specification was defective in that it (1) alleged a number of distinct and separate offenses, (2) did not describe the various Government vehicles alleged to have been used, (3) did not specify the dates of commission of the alleged offenses, and (4) did not describe the persons or materials hauled or the points between which they were hauled. Defense counsel's motion to strike the Specification was denied; and his motion to strike all evidence applicable to it, made at the close of the prosecution's case, was also denied. Over objection by the defense counsel, the court admitted at the trial an instrument termed a 'bill of particulars", offered by the prosecution 'as a part of the pleading", which set out details respecting thirty separate instances of alleged improper use of Government transportation. Held: The record is not legally sufficient to support the finding. The Specification was fatally defective and the court erred in not granting defense counsel's motion to strike the Specification and all the evidence applicable to it. The admission of the prosecution's 'bill of particulars' was error, there being no authority to use it in court-martial procedure as a means of curing a fatally defective specification. CM 257469 (1944)."

If, on the other hand, it was the intention of the findings that the accused acted dishonorably and thereby brought discredit upon the service in violation of the 96th Article of War by a continuing course of conduct over a period of 10 months in causing to be presented to his own bank about 60 checks when he did not have sufficient funds on deposit for the payment of each check when presented, then, in our opinion, the duplicitous nature of the Specification falls within the exception for the reason that the offense charged is a course of conduct which must be made up of a series of acts. But, when viewed in that light, the Specification does not set forth an offense. The bank under such circumstances is in an entirely different position from a person to whom a bad check has been given in payment of some obligation, or for some other purpose. The bank is a financial institution upon which any one is at liberty to draw for funds. It is a part of its business to determine whether or not it will honor such drafts. In the accused's case it refused to honor his drafts whenever they exceeded the amount of his deposit on hand. The bank may have been inconvenienced but it did not suffer any loss. It had fixed a charge of $1.00 for the service thus rendered the accused. It is a recognized custom among banks to make a service charge. The bank was apparently satisfied with its relationship with the accused as his account was not closed by the bank over the long period of time under discussion. We therefore fail to perceive how the Army of the United States could have been brought into disrepute by the business transaction shown. It did not even appear that the bank or any of its representatives knew that the accused was an officer in the Army of the United States. We are therefore compelled to conclude that neither the Specification nor the evidence discloses the commission of any offense under the 96th Article of War.

7. War Department records and the record of trial show the accused to be 38 9/12 years of age, married, and the father of two children. He graduated from high school, the University of Minnesota, and R.O.T.C. He was employed as a chemist by various dye and paper manufacturing concerns for seven years when he moved to Niagara Falls, New York, where he was employed by the International Paper Company as a technical salesman, then as an assistant manager, and finally as Personnel Manager. He was active in civic affairs and was a national director of the United States Junior Chamber of Commerce.

On 14 June 1926 he was appointed 2nd Lieutenant C.A.C. Reserve. On 9 July 1942 he was appointed 1st Lieutenant, AUS, Air Corps, and attended the Officers Training School for the AAF Technical Training Command. He was promoted to Captain on 21 August 1943 and to Major on 26 October 1944. For a period of 14 months previous to his trial he was stationed at Patterson Field, Ohio, and during that time his manner of performance of his duties was rated as "superior". His last assignment was Chief, Wright Aeronautical Corporation Group, Engine Branch, Aircraft Section, Supply Division.

8. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted, 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 not legally sufficient to support the findings of guilty of Charge II and its Specifications, and the Additional Charge and its Specification, but is legally sufficient to support the findings of guilty of Charge I and its Specification, and the sentence, and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Judge Advocate

Judge Advocate

Judge Advocate

SPJGK - CM 276250 1st Ind.

Hq ASF, JAGO, Washington 25, D. C. 21 JUN 1945

TO: The Secretary of War.

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Major Richard R. Harvey (O-247679), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of acts of adultery with the wife of an enlisted man then on active duty in a theater of operations, in violation of Article of War 95 (Charge I); of the wrongful failure and neglect to pay two debts in violation of Article of War 96 (Charge II and its Specifications); and of dishonorably drawing and causing to be presented to a bank about 60 checks without maintaining on deposit with the bank sufficient funds for honoring each check upon its presentation, in violation of Article of War 96 (Additional Charge). He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Charge II and its Specifications (wrongful failure to pay two debts) or the Additional Charge and its Specification (dishonorably drawing and causing to be presented 60 worthless checks), but is legally sufficient to support the findings of guilty of Charge I and its Specification and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

The accused, a married officer, having a wife and two children, on numerous occasions extending over a period of two months engaged in sexual intercourse here in the United States with the wife of an enlisted man who was then serving overseas in a theater of operations, with full knowledge of her marital status and of her husband's military grade and location. Such conduct was unbecoming an officer and gentleman and contrary to the high standards expected of an officer of the Army of the United States and warrants dismissal. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

Findings of guilty of Charge II and its Specifications and of the Additional Charge and its Specifications disapproved. Sentence confirmed. G.C.M.O. 269, 3 Jul 1945)

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

SPJGQ
CM 276272

5 APR 1945

UNITED STATES v. Second Lieutenant JOHN E. MYRICK (0-818296), Air Corps.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Maxwell Field, Alabama, 20 February 1945. Dismissal.

- - - - - - - - - -

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

- - - - - - - - - -

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

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

CHARGE I: Violation of the 95th Article of War.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

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

Specification 1: (Finding of not guilty.)

Specification 2: In that Second Lieutenant John E. Myrick, Air Corps, Squadron H, 2132d AAF Base Unit, Maxwell Field, Alabama, having received a lawful order from First Lieutenant Harwell H. Jones, Air Corps, Assistant Provost Marshal to remain in the Station Hospital until released, the said First Lieutenant Harwell H. Jones, Air Corps, being in the execution of his office, did, at the Station Hospital, Maxwell Field, Alabama, on or about 28 January 1945, fail to obey the same.

SECOND (sic) ADDITIONAL CHARGE: Violation of the 69th Article of War.

Specification: In that 2nd Lieutenant John E. Myrick, Air Corps, Squadron H, 2132nd AAF Base Unit, Maxwell Field, Alabama, having been duly placed in arrest in quarters,

Building 11, Room 3, Maxwell Field, Alabama, on or about 5 February 1945, did, at Maxwell Field, Alabama, on or about 17 February 1945 break his said arrest before he was set at liberty by proper authority.

The accused pleaded guilty to the Second Additional Charge and its Specification, and not guilty to all other Charges and Specifications. He was found not guilty of Charge I and its Specification and of Specification 1 of Charge II, and guilty of all other Charges and Specifications. Evidence was introduced of one previous conviction for a violation of Article of War 96 (offense not shown in the record of trial), for which he was sentenced to be reprimanded, to be restricted to the limits of the post for 3 months, and to forfeit $100 per month for 6 months. He was sentenced in the instant case to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence, remitted the forfeitures and forwarded the record of trial for action under Article of War 48.

3. Inasmuch as the accused was acquitted of the offense alleged in Specification 1 of Charge II, it is unnecessary to set forth any of the evidence relating to it. The same is equally true with regard to the Specification and Charge I, of which he was likewise acquitted, except that the facts and circumstances shown in support of it are deemed pertinent in the consideration of the findings as to Specification 2 of Charge II. Therefore, so much of the evidence as is considered material is set forth, substantially, as follows:

Specification and Charge I; Specification 2, Charge II.

For the prosecution:

At 2:30 a.m., 28 January 1945, First Lieutenant Harwell H. Jones, Assistant Provost Marshal, 2132d Army Air Forces Base Unit, then on duty with the town patrol in Montgomery, Alabama, received a report from a sergeant of military police that there was a drunken lieutenant in the Manhattan Cafe (R. 21, 22). He thereupon entered the cafe and observed the accused standing near the center in company with civilians and holding a civilian hat in his hand (R. 23). The accused's cap was behind him (R. 27). There were about five or six persons present, including the accused and his three companions (R. 26). Lieutenant Jones inquired of the accused whether he had lost his hat and asked to see his AGO card. Whether the accused refused to produce it was not shown, but he stated that he was not required to show his "pass" and, when informed that Lieutenant Jones was a military police officer on duty, made disparaging remarks about his being a boy scout and not a real soldier (R. 23), and used the words "God damn it" and "God damn" (R. 26). The accused was unusually loud at the time and Lieutenant

Jones noted that he needed a haircut and that his uniform was in only fair condition (R. 23). The only thing "out of the way" however, was the matter of the accused's hat (R. 25). Witness did smell whiskey on the accused's breath and his face was flushed. The accused admitted that he had been drinking, but said he could take care of himself and asked to be released. Lieutenant Jones advised him that, since the accused was a flying officer, he could not release him (R. 23), it being his understanding that, under Army Air Forces Regulations, flying officers picked up for drunkenness were to be taken to the flight surgeon's office for examination (R. 26). However, the accused was taken to military police headquarters (R. 23) in a patrol wagon (R. 29), and he went along without resistance but staggered as he walked to the car (R. 25).

The only disorder in the cafe, according to Lieutenant Jones, was the accused's statement, in conversation, that the matter was none of Lieutenant Jones' "damned business" (R. 28).

The accused was held at police headquarters until about 5:00 a.m. when he was taken to the hospital (R. 24, 25). While at the former place, the accused said "something about MPs all being boy scouts" and called Lieutenant Jones "a chicken shit boy scout" (R. 23, 26).

At the hospital, where the accused was "on the point of sobering up" (R. 24), Lieutenant Jones delivered him, as a patient, into the hands of First Lieutenant Girard J. Craft, Medical Corps, outpatient officer of the day, and other than sending in a delinquency report later, Lieutenant Jones felt that his responsibility for the accused was then ended (R. 26, 27, 31). At no time had he attempted to place the accused under arrest but had merely been "holding him under restraint" (R. 27). When asked by the court: "If he hadn't talked to you like that, would you have let him go?" Lieutenant Jones answered: "I would have advised him to go on to his quarters", and to the further statement, "In other words, he did get you kinda riled up", he replied, "Yes sir" (R. 29).

Lieutenant Craft admitted the accused as a patient (R. 31, 33) and Lieutenant Jones then left (R. 24, 31). However, before leaving, according to his version, Lieutenant Jones told the accused he was being held in the hospital under restraint because he was intoxicated (R. 24). The accused again asked to be released but was told by Lieutenant Jones that he had no authority to release him and that he would have to stay (R. 24) until properly released (R. 25). According to Lieutenant Craft, the police officer ordered the accused to stay in the hospital "as a patient" (R. 32). Lieutenant Craft gave no orders to the accused, being in doubt as to his authority under the circumstances; nor did he release him (R. 31, 32, 34). He did engage in conversation with the accused during which the accused

stated that he could go home by himself if allowed to do so, but Lieutenant Craft "encouraged him to stay in the hospital" advising him that he would be "leaving in violation of orders". The accused said he knew that and was going anyway, whereupon he left (R. 32, 33). As to the accused's condition when he arrived at the hospital, Lieutenant Craft thought he was "somewhat irresponsible so far as driving an automobile or walking a white line" was concerned (R. 31).

For the defense:

Mrs. Leland Davis, housewife (R. 56), Miss Sara Nail (R. 52) and R. L. Davis, a display manager (R. 54), all residents of Montgomery, Alabama, testified that they had been with the accused since 8 o'clock p.m., on 27 January 1945, until the military police entered the Manhattan Cafe, accosted the accused and took him away. Mr. and Mrs. Davis stated that a noncommissioned officer first asked the accused: "Lieutenant, where is your hat?" (R. 55, 57). The accused had laid his hat on the table where the ladies were seated and, at the request of Mr. Davis, was also about to place Davis' hat, which he was then holding, on the table (R. 53, 56, 57). An officer came up later and told the accused that his actions were unbecoming an officer (R. 55). The accused was not disorderly in any manner (R. 53, 55-57) but, though the tone of his voice was not loud or boisterous, "it might have been just a bit sarcastic" (R. 54). The accused was walking all right when he entered the cafe and when he went out (R. 57). The party of four had consumed about 2/3 of a quart of liquor during the evening (R. 54, 55). In the opinion of Miss Nail the attitude of the military police "wasn't too good" (R. 53).

The accused, having been informed of his rights, testified as follows regarding the episode in the cafe:

> "Well, sir, I didn't talk out of the ordinary. I used the same tone I am using now. When the MP sergeant came up, Lieutenant Jones was behind him. He asked where my hat was. I pointed to it on the table and told him so. Lieutenant Jones asked for my AGO card. I showed it to him. He said, 'You will have to go with us. You have been drinking.' So I went with them to city hall...Actually I wondered why they approached me. It was a normal evening. I had had a few drinks before we stopped in a friend's house for a bite to eat. I didn't know why I was being approached by MPs...I held a conversation with the Medical OD and asked him if he thought I was drunk. He said 'No...You look all right to me...You have been drinking...If you would comb your hair I don't think anyone could tell you had been drinking.' I believe he said he thought I should go upstairs to bed. I told him I didn't like a hospital and didn't want to stay there...After talking with him a few minutes, I left" (R. 59, 60, 63).

For the court:

Colonel George F. Baier, Medical Corps, Regional Hospital, Maxwell Field, Alabama, called as a witness by the court, testified that he knew of no written regulations pertaining to the hospitalization of drunken officers and that military police have no authority to hospitalize anybody. Any individual delivered to a hospital on a charge of intoxication would be confined to the hospital only when, in the opinion of a medical officer, he is drunk (R. 49, 50).

Additional Charge and Specification.

For the prosecution:

On 5 February 1945, the accused was placed in arrest in quarters by the commanding officer of Maxwell Field, Alabama (R. 9, 11). The order was in writing, prescribed the limits and conditions of the arrest in terms, and the accused acknowledged receipt of it in writing (R. 11, 12; Pros. Ex. A). Although authorized to do so, neither Lieutenant Colonel High nor Major Bell released the accused on 17 February 1945 or gave him special permission to be absent from his quarters (R. 9, 10, 12), yet he was found absent from them at sometime between 3 and 4 p.m. (R. 17, 18), and again at 6 p.m. on that date (R. 14). At about 12:30 a.m. that night, the officer of the day, and at 1:30 a.m., military police, made a search of the accused's quarters and the latrine, and the accused could not be found (R. 20).

For the defense:

The accused, in his testimony, stated that being alone in his room, never having been confined before, worked a hardship on him especially because he was not allowed "to take PT" and was limited to 30 minutes for his meals. He was nervous and under mental strain. He had left his quarters but did not stay out long and returned of his own accord (R. 60, 61).

4. The accused's plea of guilty to the Additional Charge and Specification is amply supported by evidence for the prosecution and the admissions of the accused in the trial. There is, therefore, no question about the propriety of the findings as to this offense.

It has been suggested that, although the findings as to the Specification of Charge I and Specification 2 of Charge II are inconsistent, they are legal. No such question is presented. The latter bears no relation whatever to the former nor are any of the essential elements of either offense embraced within the other.

The accused was charged with having been drunk and disorderly in a public place but, in the light of the most favorable view which can be taken of the evidence for the prosecution, was properly acquitted thereof. The record fails to disclose any evidence of

public disorder on the part of the accused at the time and place alleged and leaves a very substantial doubt of his intoxication, testimony as to which is weak and shallow.

The evidence shows that the Assistant Provost Marshal, accompanied by a sergeant of military police, accosted the accused while in the company of civilian friends consisting of a husband and wife and another woman, and thereafter, presumably because of a suspected intoxication, removed him, by patrol-wagon, to military police headquarters. There he was detained for 2½ hours during which time it is undoubted that there was acrimonious conversation and the use, by the accused, of uncomplimentary and opprobrious remarks about the military police. The accused was not, however, charged with any offense arising out of this episode and it is only mentioned because of what followed.

As the accused was, according to the testimony of the police officer, "on the point of sobering up" and notwithstanding repeated requests to be released, he was taken to the hospital and committed "as a patient" by the Assistant Provost Marshal. This, according to a colonel of the Medical Corps, called as a witness by the court, was not within the province and authority of any military policeman and could only be done by order of a medical officer when the circumstances require it. In this case it appears that the medical officer did execute admission papers for the accused, but the record is silent as to the reason and the medical officer's testimony as to the accused's condition does not indicate that hospitalization was either requested by anyone or required under the circumstances presented.

The Field Manual for "Military Police" promulgated on 14 June 1944, provides that "protective custody" is assumed over military personnel by military police,

"a. When a member of the Armed Forces is found on the street without funds"; or,

"b. .....has suffered illness or injury"; or,

"c. To prevent a member of the Armed Forces from bringing discredit upon the service"; or,

"d. To protect a member of the Armed Forces from violence or injury" (Par. 15, FM 19-5).

All of the testimony indicates that it was such protective custody which the Assistant Provost Marshal had assumed over the accused in this case. He did not immediately take the accused to the flight surgeon or a medical officer as he said it was his duty to do with intoxicated flying personnel but, instead, took him to the police headquarters and held him there for a substantial period of time which was much longer than necessary to make any preliminary determination, whether the accused's actions and condition indicated

intoxication. The situation raises a strong inference that the subsequent commitment to the hospital was the consequence of pique created by the accused's insolent attitude at the police station and not because of his physical condition.

However that may be, the police officer voluntarily divested himself of his custody and control of the accused when he delivered him at the hospital. That this is all that was intended is apparent from the testimony of the police officer, who said he had no thought of arresting the accused but had merely held him "under restraint". Such terms are ambiguous when used, as they frequently are, without regard to the niceties of legal distinction; but it is clear that by "restraint" the police officer meant "custody" in contrast with the term "arrest" which he said he understood could only be effected by "the Commanding Officer".

Nevertheless, after turning the accused over to the medical officer at the hospital, and just as he was about to go away, he ordered the accused not to leave the hospital until properly released and this was an attempt to restrict the accused to specified limits for an indefinite time which, if legal, constituted an actual arresting of the accused's liberty beyond the period and outside of the scope of any previous lawful detention.

It is unnecessary to speculate upon whether the actions of the Assistant Provost Marshal were well intentioned, or whether being so, they were tactless and injudicious. It is sufficiently evident that he transcended his power and authority when he attempted to place the accused under restriction in the hospital and that the order intended to accomplish it was, therefore, not a lawful order which the accused was obliged to obey.

5. Records of the War Department disclose that the accused was born in Roanoke Rapids, North Carolina, is 27 years of age, married and has two children. After graduation from high school he was employed from June 1942 to March 1943 as an electrician by the Newport News Drydock and Shipbuilding Corporation. He became a member of the Air Corps Enlisted Reserve on 19 August 1942 and on 11 March 1943 entered upon active training. After completing the prescribed course of training he was commissioned a second lieutenant, Army of the United States at Army Air Forces Pilot School (Advanced - 2 Engine), Moody Field, Georgia on 5 December 1943 and was detailed to Smyrna Army Air Field, Smyrna, Tennessee on the same date. On 15 August he was punished under Article of War 104 by reprimand and forfeiture of $75.00 pay for being drunk and disorderly at Harlingen Army Air Field, Texas on 5 July 1944 and for breach of restrictions on 18 July 1944. On 18 September 1944 he was convicted by a general court-martial for having been drunk and disorderly in uniform in a public place and for wrongfully striking a civilian youth on 8 September 1944 at

Harlingen Army Air Field in violation of Article of War 96. He was sentenced to be reprimanded, to be restricted to the limits of his post for three months, and to forfeit $100.00 per month for six months.

6. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Specification 2, Charge II and of Charge II, but is legally sufficient to support the findings of guilty of the Second Additional Charge and its Specification and to support the sentence and warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of a violation, by an officer, of Article of War 69.

Esther R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

(sick in quarters), Judge Advocate.

SPJGQ - CM 276272 1st Ind
5 JUN 1945

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant John E. Myrick (0-818296), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of failure to obey the lawful order of a superior officer then in the execution of his office (Specification 2, Charge II) in violation of Article of War 96, and upon his plea of guilty was also found guilty of breach of arrest (Second Additional Charge and Specification) in violation of Article of War 69. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence but remitted the forfeitures and forwarded the record of trial for your action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 2, Charge II, and of Charge II, but is legally sufficient to support the findings of guilty of the Second Additional Charge and its Specification and to support the sentence and warrant confirmation thereof. I concur in that opinion.

This officer, after having been duly placed in arrest in quarters, willfully and deliberately violated the conditions thereof by going beyond the limits of his arrest. Although, of itself, this was a minor military offense, under the circumstances shown, his course of conduct prior thereto demonstrates his failure to comprehend the meaning of good order and military discipline and his continual disregard of the standard of conduct and behavior required of him as an officer. In August 1944 punishment by reprimand and forfeiture of $75.00 was imposed upon him by his commanding general under Article of War 104 for being drunk and disorderly and for breach of restriction. In September 1944 he was convicted by a general court-martial of having been drunk and disorderly in uniform in a public place and of striking a civilian youth, in violation of Article of War 96. He was sentenced to be reprimanded, to be restricted to the limits of his post for three months, and to forfeit $100 per month for six months. Notwithstanding these admonitions he has again been found guilty of a breach of arrest.

I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

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

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings of guilty of Specification 2 of Charge II, and of Charge II, disapproved. Sentence as approved by reviewing authority confirmed. G.C.M.O. 246, 19 Jun 1945)

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

SPJGH-CM 276285

17 MAR 1945

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Gulfport Army Air Field, Gulfport, Mississippi, 14 February 1945. Dismissal, total forfeitures and confinement for three (3) years.
First Lieutenant JOHN S. LUCAS (0-728294), Air Corps.	)	

OPINION of the BOARD OF REVIEW
TAPPY, CAMBRELL 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 1: In that First Lieutenant John S. Lucas, Squadron T, 328th AAF Base Unit CCTS (HB), then Squadron S, 328th AAF Base Unit CCTS (HB), Gulfport Army Air Field, Gulfport, Mississippi, did, without proper leave, absent himself from his station at Gulfport Army Air Field, Gulfport, Mississippi, from about 11 December 1944 to about 13 December 1944.

Specifications 2 and 3: (Findings of not guilty).

CHARGE II: Violation of the 69th Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: In that First Lieutenant John S. Lucas, Squadron T, 328th AAF Base Unit CCTS (HB), then

Squadron S, 328th AAF Base Unit CCTS (HB), Gulfport Army Air Field, Gulfport, Mississippi, did, at New Orleans, Louisiana, on or about 11 December 1944, with intent to defraud, wrongfully and unlawfully make and utter to Thomas J. Bresnahan, doing business as The Old Barn, a check in the words and figures following:

THE LIBERTY NATIONAL BANK AND TRUST COMP.

SAVANNAH, GEORGIA Dec 11th 1944

PAY TO THE ORDER OF Cash $20.00

Twenty and no/100 - - - - - - - - - - - - - - DOLLARS

AAB
No. 37 Gulfport, Miss.

0-728294

/s/ John S. Lucas
1st Lt AC

and by means thereof, did fraudulently obtain from Thomas J. Bresnahan, doing business as The Old Barn, the sum of twenty ($20.00) dollars, he, the said First Lieutenant John S. Lucas, then well knowing that he did not have and not intending that he should have sufficient funds in THE LIBERTY NATIONAL BANK AND TRUST COMPANY, Savannah, Georgia, for the payment of said check.

Specification 2: Same allegations as Specification 1, Charge III, except check in amount of $20.84.

Specification 3: Same allegations as Specification 1, Charge III, except check made and uttered on or about 12 December 1944.

Specification 4: Same allegations as Specification 1, Charge III, except check made and uttered on or about 23 December 1944, to Hancock Bank, Gulfport, Mississippi, in amount of $25.

Specification 5: In that First Lieutenant John S. Lucas, Squadron T, 328th AAF Base Unit CCTS (HB), then Squadron S, 328th AAF Base Unit CCTS (HB), Gulfport Army Air Field, Gulfport, Mississippi, was, at New Orleans, Louisiana, on or about 2 January 1945, drunk in uniform in a public place, to wit, Jung Hotel and Third Precinct Headquarters of 1832nd SCU, Military Police Detachment.

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specifications 2 and 3 of Charge I and not guilty of Charge II and its Specification but guilty of all other Charges and Specifications. Evidence of one previous conviction on 30 May 1944 for uttering six worthless checks totaling approximately $380, committing an aggravated assault and battery upon a woman, wrongfully applying a Government vehicle to his own use and breach of restriction was introduced. He was sentenced in that case to dismissal and total forfeitures. The sentence was commuted to a reprimand and forfeiture of pay of $100 per month for six months. He was sentenced in the present case 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. Charge I, Specification 1:

Accused absented himself without leave at 0800 on 11 December 1944 and remained absent until 0817 on 13 December 1944 (Pros. Ex. 1).

b. Charge III, Specifications 1 to 4 inclusive:

For about 24 hours, from sometime on 11 December 1944 until sometime on 12 December 1944, accused remained in a night club in the city of New Orleans which was known as the Old Barn and was owned by Mrs. Florence L. Bresnahan (R. 40, 41, 43, 44). After purchasing alcoholic drinks for several hours for which he paid cash, accused then made and uttered the following checks to Mrs. Bresnahan for which he received the following consideration, viz (R. 41, 42, 46, 47, 52, 53; Pros. Exs. 3, 4, 5):

Spec.	Date of Check	Payee	Amount	Drawee Bank	Consideration
1	11 Dec 44	Cash	$20	The Liberty National Bank & Trust Co.	$20 in cash
2	11 Dec 44	Cash	$20.84	" "	$20 in cash and one drink
3	12 Dec 44	Cash	$20	" "	$20 in cash

Mrs. Bresnahan's husband who was not employed in or otherwise associated with his wife's business but who happened to be in the establishment during this period approved the check for $20.84 after examining accused's credentials but Mrs. Bresnahan cashed the other

two checks without conferring with her husband (R. 44). In addition to the cash he originally possessed when he entered the establishment, accused spent the further sum of $60 out of the total obtained on his checks for alcoholic drinks at the Old Barn during this 24 hour period, consuming most of the drinks himself. He was drinking there continuously except for the time he spent sleeping at the bar and for a three hour period spent at a nearby tavern or night club called the Three Deuces (R. 48, 50). When he cashed the checks he was, as described by Mrs. Bresnahan, "drunk enough" (R. 49). In the conduct of her business it was her policy to sell a man "as much whiskey as he wants so long as he has the money to pay for it" (R. 48).

About a week after these checks had been deposited by Mrs. Bresnahan for collection they were returned to her marked "insufficient funds" (R. 41, 42). Sometime thereafter she communicated with accused and asked him to redeem his checks. He suggested that she again put them through for collection but she refused so to do. Near the middle of January she received payment of the checks from accused's mother, and at about the same time she received a money order from accused which she returned to him in view of the payment made by his mother (R. 46, 50, 51).

W. B. Stewart, assistant cashier of the Hancock Bank, of Gulfport, Mississippi, was shown Prosecution's Exhibit 7 and when asked to identify it testified that it was "a check drawn on the Liberty National Bank and Trust Company, Savannah, Georgia, written by John S. Lucas, 1st Lieutenant, Air Corps" payable to cash in the amount of $25 (R. 53). When asked if he could tell "from the indorsements on the back of that check what was done with that check", he replied that it "was handled by our bank on or about December 23, was sent through the regular bank channels for collecting out to the bank in Savannah, Georgia, and was returned by that bank to us with the notation 'Insufficient Funds.'" He further testified that he was "reasonably certain" that cash was given to the drawer of the check in exchange therefor and, when asked who would have given accused cash for this check, he replied that it would have been the "teller or whoever handles it in our bank; this particular check was handled by our branch on the field here" (R. 54). On cross-examination he testified that after the check was returned by the drawee bank, his bank communicated with accused and accused "either paid it himself or sent the money in by somebody else to pay it." His bank at no time was concerned about obtaining payment of this check (R. 56).

It was stipulated by the prosecution, defense and the accused that if an officer or employee of The Liberty National Bank and Trust Company were present he would testify that accused had an account in that bank but that the above-mentioned four checks were dishonored by that bank when presented for payment because of insufficient funds (Pros. Ex. 8).

c. Charge III, Specification 5:

About 4 p.m. on 2 January 1945, accused, clothed in proper uniform and in the company of two women, hailed a taxicab at a race track near the city of New Orleans and the three of them were transported to the Jung Hotel in New Orleans (R. 57, 60, 65). The women left the taxi at the hotel but accused refused to do so stating that he wished to go to the Roosevelt Hotel. When the taxi arrived there accused was sound asleep and the driver had an "awful time" awakening him. A crowd of people congregated to observe the driver's efforts to arouse accused. Evidently the driver was then told that accused was registered at the Jung Hotel so he returned to that hostel (R. 58, 64). There accused stated he wished to visit the latrine. Accused had the odor of liquor about him and was unable to walk unassisted. The cab driver assisted him through the lobby of the Jung Hotel to the latrine in the basement where accused folded his arms, rested them on top of the urinal and "practically fell asleep." Thereafter the cab driver enlisted the assistance of another officer and, supporting accused between them, they conducted him to the hotel lobby where accused indicated somewhat incoherently that he wished to return to the cab (R. 59-61). Accused spoke in drunken but not boisterous tones and, in the opinion of the cab driver, did not "really create a real disturbance" at the Jung Hotel (R. 64, 65). The cab driver informed accused he was registered neither at the Jung Hotel nor at the Roosevelt Hotel and inquired exactly where accused wished to go (R. 61, 62). Accused directed the driver to the Monteleone Hotel and during the trip fell sound asleep again in the cab. After inquiring at the Monteleone Hotel and being informed that accused was not registered there, the cab driver proceeded with his fare to the local military police headquarters arriving there about 6 p.m. It was then discovered that accused had drooled in his sleep and splattered the cab seat with expectoration (R. 62). Captain Henry A. Weatherby, the duty officer at the station, and an enlisted man were summoned to the cab by the driver. In the opinion of all three witnesses accused was drunk and had "passed out." He was carried from the cab to a cot in police headquarters. He was found to have in his possession a bottle of whiskey about half full (R. 63, 68, 69; Pros. Ex. 9).

4. The defense introduced as a witness Second Lieutenant John F. Shultz, Jr., the pilot of the plane to which accused had been assigned as bombardier. Although the lieutenant had flown no missions with accused, he testified that to his knowledge accused had performed "his duties properly" (R. 82, 83).

Documentary evidence was introduced to show that accused had been suspended from flying status on 23 December 1944, and that, learning he had been recommended for reclassification, accused submitted his resignation from the Army of the United States in lieu of reclassification on 26 December 1944 (Def. Exs. F, G).

The bank's statement of accused's account with The Liberty National Bank and Trust Company was introduced in evidence and showed that, on 6 December 1944, accused deposited $280 in his account. Withdrawals thereafter reduced the balance on deposit to $104.51 on 8 December 1944 and on 12 December 1944 checks presented against the account on that day reduced it from $104.51 to $43.21. On 13 December 1944, the balance was $39.71; on 14 December 1944 it was $14.71; and on 15 December 1944 it fell to $4.55 above which figure it did not rise for the remainder of that month (R. 95; Def. Ex. C).

After accused had been advised of his rights he elected to make an unsworn statement. He stated that his home was in Savannah, Georgia, and that he had maintained an account with The Liberty National Bank & Trust Company of Savannah for "quite some time", that he made deposits regularly and deposits were made to his account by other individuals from time to time (R. 108). He denied any intent to defraud when he cashed the three checks at the Old Barn on 11 and 12 December 1944 (R. 109). He had about $40 in cash when he first visited the Old Barn on 11 December 1944, and during his stay there he spent approximately $70. When he learned that the checks had been returned because of insufficient funds he advised his mother thereof and thereafter sent money himself to Mrs. Bresnahan to redeem them (R. 110, 111). Accused also admitted writing a check "to the Gulfport Bank"; when notified by the bank about this check, however, he redeemed it (R. 112).

Accused further stated that he had been in military service approximately three years, spending the first 12 months training in the United States and the next 12 months overseas serving first as bombardier with a combat crew and later as squadron bombardier (R. 112). Upon his return to this country he entered upon pilot training but did not complete the course. Thereafter he was assigned to his present station as a bombardier instructor. For his service overseas he was awarded the Distinguished Flying Cross and the Air Medal with three Oak Leaf Clusters (R. 113).

5. Attached to the record of trial is a Psychiatric Report dated 31 January 1945 and made by Captain Harold L. Meyers, Medical Corps, Chief of the Neuropsychiatric Section of the station hospital at Gulfport Army Air Field. The report states among other things that accused "is able to differentiate right from wrong and adhere to the right."

6. The evidence establishes accused's absence without leave from 11 December 1944 to 13 December 1944 and sustains the court's finding of guilty of Specification 1 of Charge I.

Each of Specifications 1 to 3, inclusive, of Charge III alleges that accused made and uttered the three described checks to "Thomas J. Bresnahan, doing business as The Old Barn." The proof demonstrates that the establishment was owned by Mrs. Florence L. Bresnahan and that

she cashed these three checks, consulting with her husband only as to whether or not she should accept one of them, presumably the first one tendered to her by accused. This slight variance between the allegations and the proof was not fatal since the essence of accused's offenses was the making and uttering of three specific checks, identified in full in the Specifications. Accused was fully advised of the offenses with which he was charged (CM 226219, Rickards, 15 B.R. 27; CM 219428, Williams, 12 B.R. 249).

Accused is charged with cashing the three checks described in Specifications 1 to 3 inclusive of Charge III with the intent to defraud, knowing he did not have and not intending to have sufficient funds on deposit to pay them. Two of the checks for $20 and $20.84, respectively, were dated 11 December 1944 and the third check in the amount of $20 was dated 12 December 1944. The prosecution did not establish whether the two checks dated 11 December 1944 were uttered by accused on that day or on the following day. Accordingly, the doubt must be resolved in favor of accused. Under the circumstances, we must assume that each of these three checks was uttered on the date thereof. The prosecution's evidence established only that the balance in accused's account was insufficient to pay these three checks when presented for payment. The defense, however, introduced accused's bank statement which shows that on 11 December 1944, accused had a balance of $104.51 on deposit. On 12 December 1944, when accused cashed the third check, which was in the amount of $20, his balance was $43.21. Furthermore, the prosecution did not establish that the withdrawals which caused the insufficiency in accused's account to pay these three checks resulted from checks issued by accused or under his authority prior to those under consideration. Thus, the proof does not establish beyond a reasonable doubt that in fact accused had insufficient funds on deposit to pay these three checks when he made and uttered them. A fortiori, the proof similarly fails to establish that he had knowledge of any such insufficiency when he made and uttered these checks (CM 258171, Lucas; CM 267843, Bonar). Accused's testimony also indicated he had maintained an active bank account with the drawee bank for some time prior to commission of the instant offenses. The prosecution's evidence did not controvert that testimony. That fact, in the light of all other circumstances here present, does not lend support to an inference of intent to defraud (See CM 271153, Karsanoff).

In view of all of the foregoing it is our opinion that the evidence is sufficient to sustain only so much of the findings of guilty of Specifications 1 to 3 inclusive of Charge III as involves findings of guilty of the lesser included offense of failing to maintain a sufficient bank balance to pay these three checks, in violation of Article of War 96.

Under Specification 4 of Charge III accused is charged with fraudulently issuing a fourth check which was in the amount of $25. This check was admitted in evidence after W. B. Stewart, assistant

cashier of the Hancock Bank, testified with respect thereto. It appears that the cashier was testifying solely from the check itself and that he had no personal knowledge that accused signed it or cashed it. However, a comparison of writing on this check with that on the three earlier checks in evidence, warrants an inference that all four checks were made by the same person. The court was entitled to make that comparison and to reach that conclusion. Accused's authorship of the three earlier checks was firmly established and the court was amply warranted in concluding that he penned the fourth check also. Supplementing this evidence, accused himself admitted he made that check and that he redeemed it from the cashing bank after it had been returned by the drawee bank. This check was dated 23 December 1944 and could not have been negotiated to the cashing bank as a valid obligation prior to that date. As stated above, accused's bank balance was but $4.55 on 15 December 1944 and never rose above that figure during the balance of the month. Thus, at the time this check became a valid, negotiable obligation, the balance in accused's account was insufficient to pay it and so remained at the time it was presented for payment. A person is charged with knowledge of the condition of his bank account particularly when there is no evidence that any other person is authorized to draw upon it (CM 236070, Wanner, 22 B.R. 279). At a time when the balance in his account was woefully insufficient to pay this check, accused was content to make and utter it. There is no evidence to indicate that he was under the influence of intoxicants at the time. Such reckless indifference as to the condition of his bank account brands accused's conduct as fraudulent in uttering this check (CM 270061, Sheridan). The evidence is sufficient to sustain the finding of guilty of Specification 4 of Charge III.

The evidence introduced under Specification 5 of Charge III demonstrates that accused in uniform was so intoxicated at the Jung Hotel that he required physical assistance to walk from the cab to the rest room in the basement of the hotel. He was in a complete alcoholic stupor when delivered to military police headquarters soon thereafter. The evidence amply establishes that accused was guilty of such gross drunkenness in public that his conduct constituted a violation of Article of War 95 (CM 240799, Shapiro, 26 B.R. 131). The evidence sustains the finding of guilty of Specification 5 of Charge III.

7. War Department records show that accused is 27 years of age. He attended Culver Military Academy for three years and the University of Georgia for one year. Thereafter he worked for his father who operated a chain of motion picture theaters in the state of Georgia. He is married and has two children. He enlisted in the service as an aviation cadet in January 1942 and was commissioned a second lieutenant, Air Corps, on 15 August 1942. He was awarded the Air Medal on 10 April 1943 for exceptionally meritorious service performed while participating in five separate bomber combat missions over enemy occupied continental

Europe. He was twice awarded the Oak Leaf Cluster for destroying two enemy airplanes while on two separate bombing missions. On 2 July 1943 he was promoted to first lieutenant. On 30 May 1944, accused was tried by general court-martial and convicted of uttering six worthless checks whereby he obtained a total of $380.76 in cash, of committing an aggravated assault and battery upon a woman, of breaking restriction and of wrongfully and without authority applying a Government vehicle to his own use (See CM 258171). He was sentenced to dismissal and total forfeitures. The sentence was commuted by the confirming authority to a reprimand and forfeiture of pay of $100 per month for six months. On 21 July 1944 he was given five days' restriction to quarters under Article of War 104 for failing to sign a "check out sheet" to indicate his absence from his place of duty. On 24 August 1944, he was given one week's restriction and forfeiture of $83.33 of his pay for one month under Article of War 104 for drinking intoxicating liquor and gambling with enlisted men. On 2 December 1944, he received a reprimand and one week's restriction under Article of War 104 for public drunkenness and for behaving with disrespect toward, and refusing to obey the orders of, a superior officer.

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 except as noted above. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Charge I and Specification 1 thereof and of Charge III and Specifications 4 and 5 thereof, legally sufficient to support only so much of the findings of guilty of Specifications 1 to 3 inclusive of Charge III as involves findings of guilty of the lesser included offense of failing to maintain a sufficient bank balance to pay the three checks described in said Specifications, in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of a violation of Article of War 61 or Article of War 96 and is mandatory upon conviction of a violation of Article of War 95.

On Leave, Judge Advocate.

William H. Gombrell, Judge Advocate.

Robert E. Truethau, Judge Advocate.

SPJGH-CM 276285 1st Ind

APR 4 1945

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

TO: The Secretary of War.

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of First Lieutenant John S. Lucas (0-728294), 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 Specifications 1 to 3, inclusive, of Charge III, as involves findings of guilty of the lesser included offenses of failing to maintain a sufficient bank balance to pay the three checks described in said Specifications, in violation of Article of War 96, legally sufficient to support all other findings of guilty and legally sufficient to support the sentence and to warrant confirmation of the sentence. In view of the accused's outstanding record of combat service, I recommend that the sentence in the present case be confirmed, but that the forfeitures and confinement be remitted and that the sentence as thus modified be carried into execution.

3. Consideration has been given to the attached letter from Honorable Walter F. George, United States Senate dated 22 March 1945.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

4 Incls
1. Rec of trial
2. Drft ltr for sig S/W
3. Form of Action
4. Ltr fr Sen George, dated 22 Mar 1945

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 195, 9 Jun 1945)

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

(275)

SPJGK - 276297

12 APR 1945

UNITED STATES	)	SECOND ARMY
	)	
v.	)	Trial by G.C.M., convened at Memphis, Tennessee, 22 February 1945. Dismissal.
	)	
Captain EARL C. LEWIS (0-386152), Corps of Chaplains.	)	

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 96th Article of War.

Specification 1: In that Chaplain (Captain) Earl C. Lewis, attached unassigned Headquarters and Headquarters Detachment, Special Troops, Second Army, Memphis, Tennessee, formerly with 113th Infantry Regiment, Fort Jackson, South Carolina, did, at New Orleans, Louisiana, on or about 14 September 1944, unlawfully marry, take and have for his wife, one Bertie C. Bass, the said Chaplain (Captain) Earl C. Lewis, then and there having a lawful living wife, to wit: Edith Pearl Lewis.

Specification 2: In that Chaplain (Captain) Earl C. Lewis, * * *, being then and there a married man, having a lawful, living wife, and not being divorced, did, at Miami Beach, Florida, New Orleans, Louisiana, and Blackstone, Virginia, from on or about 17 September 1944, to on or about 30 October 1944, wrongfully, dishonorably and unlawfully live and cohabit with Bertie C. Bass, a woman, not his wife.

Specification 3: In that Chaplain (Captain) Earl C. Lewis, * * *, did, at or near Blackstone, Virginia, from on or about 30 October 1944, to on or about 30 December 1944, wrongfully, dishonorably and unlawfully live and cohabit with Bertie C. Bass, a woman, not his wife.

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

Specification 1: (Finding of not guilty).

Specification 2: In that Chaplain (Captain) Earl C. Lewis, * * *, wrongfully did, at or near Merryville, Louisiana, on or about 6 September 1944, request that the beneficiary of his National Life Insurance be changed to Bertie C. Lewis, his wife, and pursuant thereto said change in beneficiary was made, the said Bertie C. Lewis not then and there being the wife of Chaplain (Captain) Earl C. Lewis, which he well knew.

Specification 3: In that Chaplain (Captain) Earl C. Lewis, * * *, did, at Washington, D. C. on or about 17 November 1944, wrongfully and falsely introduce a woman as his wife to Carroll C. Roberts and Chaplains Welden R. Tuttle, Leighton E. Harrell and Leland Larson, when in truth and in fact the said woman was not the wife of said Chaplain (Captain) Earl C. Lewis as he well knew.

Prior to arraignment of accused, the trial judge advocate made motions that Specification 2 of Charge II be amended by adding the word "Service" after the word "National" (so as to read "National Service Life Insurance," instead of "National Life Insurance") and by striking out the words "and pursuant thereto said change in beneficiary was made," and that Specification 3 of Charge II be amended by striking out the words "Weldon R. Tuttle" and "Leland Larson" and the word "and" following the name "Harrell." Defense counsel stated in each instance that he had no objection, and the motions were granted.

The accused pleaded not guilty to all charges and specifications. He was found not guilty of Specification 1 of Charge II, but guilty of all other charges and specifications, as amended. 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 three 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, relevant to the charges and specifications of which accused was found guilty, is, briefly summarized, as follows:

The accused and Mrs. Edith Pearl Lewis (her name after marriage with accused) were lawfully married in Saint Joseph, Missouri, on 28 February 1925 (R. 7, Ex. 1; R. 9, Ex. 8; R. 23, Ex. 10). This marriage continued until 30 October 1944, at which time it was dissolved by a decree of divorce, awarded in favor of Mrs. Lewis by the Circuit Court of Jackson County, Missouri,

sitting at Independence, Missouri (Exs. 1, 8, 10). Four children, two boys and two girls, were born of this marriage, the oldest of whom was 18 and the youngest 14 years of age at the time the instant case was tried (Ex. 8).

Mrs. Lewis (Edith Pearl) deposed that in April 1943 and at intervals thereafter, sometimes in person and sometimes by letter, the accused had requested that she divorce him in order that he might marry Mrs. Bertie Bass of Merryville, Louisiana (Ex. 8). His requests were refused until in August 1944. Accused visited Mrs. Lewis in their home at Buckner, Missouri, from 1 to 9 August 1944, and during this visit informed her that unless she divorced him, she need not expect any more money from him for the support of their children (Ex. 8). Mrs. Lewis thereupon consented to petition for divorce, and the suit that culminated in the aforementioned decree of divorce appears to have been instituted by her on or about 9 August 1944. On that date the accused signed a waiver of service of process and made a property settlement with Mrs. Lewis (Exs. 8, 10).

On 14 September 1944, at which time Mrs. Edith Pearl Lewis was still living and undivorced, the accused and Mrs. Bertie C. Bass were married to each other in New Orleans, Louisiana, or at least went through a marriage ceremony together which was attended by the circumstances ordinarily attending and effecting a legal marriage (Exs. 1,2,8,10). They immediately began living and cohabiting together as husband and wife and thereafter continued to do so, living at the places alleged in Specifications 2 and 3 of Charge I, viz., Miami Beach, Florida, New Orleans, Louisiana, and Blackstone, Virginia (Exs. 3,4,8,10). They were residing in Blackstone, Virginia, on and after 30 October 1944 (Ex. 4). The ostensible wife of accused's second marriage openly employed the name "Mrs. Bertie C. Lewis" (Ex. 5); and accused consistently held her out to the general public as his wife and so introduced her (Exs. 3,4,10). Being accompanied by her on a trip to Washington on 17 November 1944, the accused introduced her as his wife to various officers and others, among whom were Carroll C. Roberts and Chaplain Leighton E. Harrell, as alleged in Specification 3 of Charge II (Exs. 6,7). Chaplain Harrell was acquainted with accused's first wife, Mrs. Edith Pearl Lewis, and knew that the woman to whom accused introduced him on 17 November was not she (Ex. 7).

Under date of 6 September 1944 (8 days before his second marriage), as alleged in Specification 2 of Charge II, the accused wrote a letter to the Veterans' Administration, in which he requested that "Mrs. Bertie C. Lewis (wife)" be made beneficiary in one of his policies of Government insurance, in lieu of his first wife. This letter was stamped to show receipt by the addressee on 11 September 1944 (Ex. 9). In the same letter, accused requested that two of his children be named beneficiaries in another policy of insurance, in lieu of his first wife.

Under date of 24 August 1944, the accused forwarded by mail to

the Commanding Officer, Army Ground and Service Forces Redistribution Station, Miami Beach, Florida, a request for Government shelter for his wife (whom he did not designate by name) for 14 days, commencing 17 September 1944 (Ex. 3). (Note: This matter was dealt with in Specification 1 of Charge II, of which accused was found not guilty, and is here mentioned only for the purpose of throwing such light as it may on the other issues involved.)

In a voluntary, pre-trial statement, made on 3 February 1945 to an officer of the Inspector's General's Department, which statement was introduced in evidence by the prosecution and has been already hereinabove referred to (Ex. 10), the accused stated, among other things, substantially the following:

On 9 August 1944, after "years of incompatibility," his first wife consented to divorce him. Arrangements for the divorce were concluded in Kansas City, Missouri, while they were both present. He assigned or conveyed to his wife their house and automobile, and agreed to relinquish to her all of their property and to pay her $200 per month as support for her and their children. His wife told him that the divorce would be procured or granted on 3 September 1944. Upon completing arrangements for the divorce on 9 August, he returned to Brooke General Hospital, Fort Sam Houston, Texas, from which he had been temporarily absent on sick leave. He was released from the hospital on 24 August "for a twenty-one day returnee leave;" and, having "no home to go to," he went to Merryville, Louisiana, "to hold a religious meeting." "Then before the end of this meeting I agreed to marry and did marry on the 14th day of September, Bertie Cain Bass by the pastor of the Saint Charles Christian Church, New Orleans, Louisiana." At the time of marrying Mrs. Bass on 14 September, he "thought" that he was divorced from his first wife, but did not know whether the divorce had been granted. In making application for a license to marry Mrs. Bass, he made an affidavit that he and his first wife were divorced on 3 September 1944. The license was issued upon this affidavit and he was not required to exhibit a copy of the decree of divorce. He received a copy of the decree of divorce for the first time sometime in November 1944. It was sent to him by his wife's attorney. Upon receipt of the copy of the decree, he noticed that it showed that it had been entered on 30 October instead of 3 September, and he thereupon made an unsuccessful attempt to see a lawyer for legal advice. Having failed in this initial attempt to secure legal advice, he thereafter neglected the matter.

In readopting most of the foregoing statement before the investigating officer appointed to investigate the charges in the instant case, accused stated that it should be corrected to show that it was his first wife's attorney, rather than his first wife, who told him on 9 August 1944 that the divorce would be obtained or granted on 3 September (R. 12-19).

The following letter, dated 5 October 1944, written by accused

to his first wife, which she stated in her deposition had reference to the divorce and was received by her on 7 October, was also introduced in evidence, to wit (Ex. 8):

"Ch. RP NOPE
New Orleans, La.
5 October 1944.

"Dear Pearl:

I am asking you the courtesy of keeping your word and concluding the agreement. I think that I am entitled to that little bit before again leaving the U.S. I am trying to avoid any more embarrassment to you than possible. A letter from you to Washington would mean a discharge perhaps and then you would go hungry because of no income. I don't care about you and your dirty tricks but I have hesitated on the childrens account. Awaiting your word which must come in a few days.

Hastily

Earl"

Accused stated in his pre-trial statement above referred to that he corresponded with his first wife after 9 August about the payment of bills she had contracted while he was overseas (Ex. 10).

4. For the defense.

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. His testimony was, in effect, largely a reiteration of his pre-trial statement. On direct examination, he stated that at the time of marrying Mrs. Bass he believed the divorce proceedings instituted by his first wife to be complete (R. 25). He based this belief upon "a statement from Mr. Arthur T. Quant (his first wife's attorney) as he had given it to me, assuring me that such would be the case" (R. 26). He knew, of his own knowledge, that the suit for divorce was instituted on 9 August 1944, because he was present in the courthouse in Independence, Missouri, when the petition was filed, and there signed a waiver of service of process. He intended that his marriage with Mrs. Bass should be valid, and thereafter believed that they were lawfully married, otherwise he would not have lived with her (R. 26). He was at Camp Pickett, Virginia, in November when he received the copy of the divorce decree. "It disturbed [him] a little bit." He endeavored to obtain the services of the local legal adviser but was unable to see him, because the legal adviser was too busy with other duties. Business of another nature having required his (accused's) presence in Washington on 17 November, he "went to the Chief of Chaplains' office about this matter and was fully assured there that [he] could rest in peace

and that [he] did not need to resign nor in any way feel embarrassed" (R. 28). At the time of introducing Mrs. Bass as his wife to various people in Washington, he neither knew nor had reason to believe that she was not his wife (R. 29). He made application on 24 August 1944 for reservations for his wife at Miami Beach, Florida, on 17 September because he expected to be married to Mrs. Bass before that time and because he was advised that the reservations would have to be made in advance (R. 28). He wrote the letter to Veterans' Administration on 6 September, before he and Mrs. Bass were married, in the honest belief that he was divorced from his first wife and in the expectation that he and Mrs. Bass would be married before the letter was received and acted upon (R. 29). The "agreement" referred to in his letter of 5 October to his first wife was an agreement she had made in their property settlement to pay the indebtedness against the house. She had failed to pay an installment that had fallen due, and he had been called upon to pay it (R. 27). He and Mrs. Bass were remarried on 7 February 1945, after he learned from The Inspector General's representative on 3 February that their initial marriage was not legal (R. 29).

Upon cross-examination, and upon examination by the court, the accused stated that, in addition to Mr. Quant's representation, made on 9 August, that the divorce would be granted on 3 September, the clerk of the court in which the suit was filed informed him that the "court would be adjourned the last of that month and on the 3d of September would make a final check on cases coming up in that term" (R. 34). Accused also stated that during August he wrote to his wife's attorney several times and received from him "one letter of assurance that everything would go ahead as anticipated" (R. 31). Both telephone and telegraph facilities were available to him, but between 3 and 14 September accused made no effort by the use of either to communicate with his first wife, her attorney, or any other person to determine whether a divorce had been granted (R. 31,32,35). He knew that a court could refuse to grant a divorce and that unless he was divorced from his first wife, he could not legally marry again (R. 32). He received the copy of the divorce decree sometime before going to Washington on 17 November (R. 30). Discovery that the decree was not granted until 30 October raised a "trifle of doubt" in his mind as to the initial legality of his marriage with Mrs. Bass, accounting for his efforts to consult the legal adviser, but it was his belief that when the divorce was granted, his marriage with Mrs. Bass became legal (R. 35).

5. Specification 1 of Charge I - Bigamy. There is no dispute in the evidence that at the time of his initial marriage to Mrs. Bertie Bass, accused's wife of a previous legal marriage was still living, and that this legal marriage had not been terminated by divorce or annulment. Accused's guilt of the offense alleged was therefore prima facie established. The only defensive theory raised by the evidence is that at the time of marrying Mrs. Bass, accused was laboring under an honest, though mistaken, belief that he and his first wife already had been divorced.

By the decision in CM 260611, Wilkinson, it has been heretofore settled in our military jurisprudence that an honest mistaken belief that a spouse of a prior marriage has obtained a divorce, where reasonable diligence has been exercised to ascertain the truth, constitutes a legal defense to a prosecution before courts-martial for the offense of bigamy. Such defense is also recognized by the statutes and courts of Louisiana (State v. Sparacino, 114 So. 601; Louisiana Code of Criminal Law and Procedure, pp. 537,538).

The evidence in the instant case is strongly persuasive that the accused honestly assumed that his first wife obtained a divorce on 3 September 1944, but it wholly fails, in our opinion, to show that he exercised reasonable diligence, or, for that matter, any diligence, to ascertain that he was actually divorced from his first wife before entering into the subsequent marriage with Mrs. Bass on 14 September. In its final analysis, the evidence shows that the only information which accused had upon which to base a belief that he and his first wife were divorced on 3 September was that, at his solicitation, and after repeated requests, his first wife filed suit on 9 August for divorce, and that her attorney informed him then, and perhaps once later, that the divorce would be granted on 3 September. At no time before marrying Mrs. Bass did accused receive information from any source that the divorce actually had been granted, nor did he make inquiry reasonably calculated to apprise him of the true facts. The outcome of a law suit is too uncertain, and trials are too often attended by delay, for the showing made by the defense to constitute reasonable diligence to ascertain the truth or to constitute a basis in law for an honest well founded belief by accused that he was divorced. The record is legally sufficient to support the finding of guilty of this specification.

Specifications 2 and 3 of Charge I both allege that accused "wrongfully, dishonorably and unlawfully" lived and cohabited with Mrs. Bertie C. Bass, a woman not his wife. Specification 2, which covers the period from 17 September until accused and his first wife were divorced on 30 October alleges that accused so lived and cohabited with Mrs. Bass while having a lawful, living wife. Specification 3 covers the period between 30 October and 30 December, after accused and his first wife were divorced. It is undisputed that accused openly lived and cohabited with Mrs. Bass between the respective dates alleged, and that he was not legally married to her at the time. As an abstract proposition, there can be no question but that for one in the military service knowingly and openly to live and cohabit with a woman not his wife is wrongful, unlawful and dishonorable, and constitutes conduct of a nature to bring discredit upon the military service, in violation of Article of War 96. There appears to be no valid legal reason for exempting accused from an application of this rule, except, perhaps, as regards the word "dishonorably" appearing in Specifications 2 and 3 of Charge I. The same defect that, as a matter of law, made unavailabl to him the recognized legal defense of an honest mistake of fact as a defense

to the bigamy charge, i.e., his failure to exercise reasonable diligence to ascertain the true facts with reference to whether he and his first wife were divorced, must likewise be held to render this defensive theory unavailable to relieve him from the legal consequences of his wrongful and unlawful conduct in the respects alleged in the Specifications now under discussion. This rule of law does not, however, in our opinion, necessarily suffice to support those portions of the findings of guilty that involve findings that accused acted "dishonorably," nor does it preclude us from inquiring as to whether such portions of the findings should be sustained. The word "dishonorably," when applied to human behavior, imports a degree of reprehensibility, a personal taint, as it were, beyond mere illegality or mere wrongful and unlawful conduct. Its use was not essential in order properly to charge the offenses actually involved as violations of Article of War 96. Its primary, if not its sole, function is that of heaping opprobrium upon the accused. This being true, we feel that we not only may, but that we should give consideration to such matters as tend to shed light upon the subject, even though such matters might not ordinarily operate as a legal defense. The record clearly discloses that accused desired to contract a valid marriage with Mrs. Bass at the time of going through the initial marriage ceremony with her, and, as already suggested, there is every indication that at that time he honestly assumed that he and his first wife were divorced. While, as already stated, this mental attitude on his part is not legally sufficient to relieve him from the legal consequences of his illegal conduct, we nevertheless feel that it properly should relieve him from the added "personal taint" implied by the allegation that he acted "dishonorably," and that the record is legally insufficient to show that he acted with that degree of reprehensibility implied by that term. It is true that accused continued to live with Mrs. Bass after he unquestionably knew that he had not been divorced from his first wife, but he contended that it was his belief, until he later found out differently, that when the divorce was actually granted, his marriage with Mrs. Bass thereupon became legal. Such a contention could not operate as a defense against the illegal aspects of his offenses, because to so hold would be to hold that ignorance of the law excuses, which it does not, but, granting that he sincerely held this mistaken belief, again we feel that it is sufficient to relieve him from the added personal stigma cast by the allegation and findings that he acted dishonorably. It is therefore our conclusion that the record is legally sufficient to support only so much of the findings of guilty of Specifications 2 and 3 of Charge I, as involve findings of guilty of "wrongfully and unlawfully" living and cohabiting with the woman named, between the dates and under the circumstances alleged.

In holding the record of trial legally sufficient to support the findings of guilty of Charge I and each of its specifications as herein modified, we have not been unmindful of the fact that living and cohabiting with the spouse of a bigamous marriage are natural concomitants of such a marriage, nor of the fact that accused's conduct in living and cohabiting

with Mrs. Bass after 30 October was merely a continuation of what he had already been doing, and that the specifications, upon first impression, may suggest a multiplication of charges growing out of the same or substantially the same transaction such as is contemplated, looked upon with disfavor and discouraged by the Manual for Courts-Martial (par. 27, M.C.M., 1928). However, each of the specifications alleges separate and distinct offenses. The act of living and cohabiting together, while no doubt a common incident of a biagmous marriage, is not an essential element of the offense of bigamy. Furthermore, Specifications 2 and 3 do not arbitrarily and capriciously divide into two periods the time during which accused and Mrs. Bass lived and cohabited together. Specification 2 alleges the offense of adultery, while Specification 3 alleges merely the offense of wrongfully, dishonorably and unlawfully living with a woman who was not his wife. Since the specifications all allege different offenses, occurring at different times and after there had been changes in accused's legal status, we do not feel that the above-mentioned rule against undue multiplicity of charges has been violated; and it may be assumed that the court took into consideration the nature, relation, and sequence of the offenses in fixing punishment.

Specification 2 of Charge II. This specification, as amended, merely alleges that accused wrongfully requested that the beneficiary in one of his policies of insurance be changed to "Bertie C. Lewis, his wife," knowing that the said Bertie C. Lewis was not then his wife. The evidence of record establishes without question that before accused and Mrs. Bass were married, he made application to have her made beneficiary in one of his policies of insurance. He stated that he did this in the belief that he had been divorced by his first wife, the beneficiary originally named in the insurance policy, and in anticipation that he and Mrs. Bass would be legally married by the time his letter was received and acted upon. It was neither alleged nor proved that accused acted with any intent to deceive or to defraud. His letter was not necessarily a representation that he and Mrs. Bass were married at the time he wrote it. The word "wife" was inclosed in parenthesis and it is apparent that accused's real purpose in appending it was in order to supply information as to relationship which he knew was required to be shown in a policy of Government or National Aid Life Insurance in connection with any beneficiary named. We fail to perceive wherein accused's conduct in this particular, under the circumstances shown, was unbecoming either an officer or a gentleman, or wherein it was a disorder or neglect to the prejudice of good order and military discipline, or conduct of a nature to bring discredit upon the military service; nor does it appear to be a crime or offense within the meaning of those terms as used in Article of War 96. We are of the opinion that the facts proved under this specification fail to show any offense cognizable under the Articles of War, and that therefore the finding of guilty should not be sustained.

Specification 3 of Charge II alleges that on 17 November accused wrongfully and falsely introduced Mrs. Bertie C. Lewis to a Chaplain and another as his wife, knowing that she was not his wife. As already stated, accused knew before this incident that he was not divorced from his first wife at the time of his initial marriage with Mrs. Bass and he must therefore be held legally responsible for knowing on 17 November that he and Mrs. Bass were not then legally married. We do not feel, however, that his conduct in this instance in introducing as his wife the lady with whom he had previously gone through a marriage ceremony, with whom he was then living, and whom he subsequently legally married, when viewed in the light of all the attending circumstances evidenced that lack of moral worth or was conduct unbecoming an officer and a gentleman contemplated by Article of War 95. Accused's conduct in this particular was, however, wrongful and of a nature to bring discredit upon the military service. The record is legally sufficient to support the finding of guilty of this specification only as a violation of Article of War 96.

6. War Department records disclose that this officer is 43 years of age, married, and the father of four minor children. He is a graduate of Christian University Academy, holds an A.B. degree from Culver-Stockton College, studied Bible at Drake University for one year, and in civil life was a Protestant minister of the gospel. He was commissioned as a first lieutenant, Chaplain, Army of the United States, on 14 December 1939, was ordered to active duty on 1 September 1940, and was promoted to the grade of captain on 14 October 1942. It is apparent from the record of trial and from papers accompanying it that the accused has served overseas (Italy), but we are unable to determine from available records the extent of such service.

7. The court was legally constituted and had jurisdiction of the person and the offenses. Except as herein noted, 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 insufficient to support the finding of guilty of Specification 2 of Charge II, legally sufficient to support only so much of the findings of guilty of Specifications 2 and 3 of Charge I as involve findings of guilty of "wrongfully and unlawfully" living and cohabiting with the woman named, between the dates and under the circumstances alleged, and to support only so much of the findings of guilty of Specification 3 of Charge II and of Charge II as involve findings of guilty of the offense alleged as a violation of the 96th Article of War, and legally sufficient to support the findings of guilty of Specification 1 of Charge I and of Charge I and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Jerry G. Zorn, Judge Advocate.

Earle Stephens, Judge Advocate.

Norman Mayer, Judge Advocate.

SPJGK-CM 276297 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 4 JUN 1945

TO: The Secretary of War.

1. Pursuant to Executive Order No. 9556 , dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Earl C. Lewis (0-386152), Corps of Chaplains.

2. Upon trial by general court-martial, this officer (a chaplain) was found guilty under Charge I of the offense of bigamy (Specification 1), of having "wrongfully, dishonorably and unlawfully" lived and cohabited with the wife of his bigamous marriage between the time of such marriage and the time he was divorced from his first wife (Specification 2), and of having "wrongfully, dishonorably and unlawfully" lived and cohabited with the wife of his bigamous marriage between the time he and his first wife were divorced and the time he and his second wife were legally remarried (Specification 3), all in violation of Article of War 96, and under Charge II of having wrongfully made application to have his second wife substituted as beneficiary in a policy of National Service Life Insurance which he was carrying, designating her as his wife when he knew her not to be his wife (eight days before his bigamous marriage) (Specification 2) and of having wrongfully and falsely introduced to two individuals as his wife the wife of his bigamous marriage, knowing at the time that she was not his wife (Specification 3), both of these latter offenses in violation of Article of War 95. He was found not guilty of Specification 1 of 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 three 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 2 of Charge II (application for change of beneficiary in insurance policy), legally sufficient to support only so much of the findings of guilty of Specifications 2 and 3 of Charge I as involves findings of guilty of "wrongfully and unlawfully" living and cohabiting with the woman named, between the dates and under the circumstances alleged, and to support only so much of the findings of guilty of Specification 3 of Charge II as involves findings of guilty of the offense alleged as a violation of the 96th Article of War, and legally sufficient to support the findings of guilty of Specification 1 of Charge I and of Charge I, and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

On September 14, 1944, in New Orleans, Louisiana, the accused went through a marriage ceremony with Mrs. Bertie C. Bass, which, except for the fact that accused at the time had a lawful, living wife, would have effected a legal marriage. He and Mrs. Bass thereafter lived and cohabited together as husband and wife. It was the contention of the accused that at the time of marrying Mrs. Bass, he believed that his first wife had obtained a divorce. His first wife, to whom he had been married since February 28, 1925, and by whom he had four children, filed suit in Independence, Missouri, on August 9, 1944, for divorce. She and accused at that time agreed upon a property settlement and accused signed a waiver of service of process. Accused was twice informed by his wife's attorney, once in person and once by letter, that the divorce would be procured on September 3, 1944. Relying upon these statements, but without having been advised from any source between September 3 and September 14 that the divorce had been granted, accused, as already stated, married Mrs. Bass on the latter date. The divorce was not in fact granted until October 30, 1944. Accused received a copy of the decree of divorce on some date previous to November 17, 1944, and noted that it showed on its face that it was not granted until October 30. He nevertheless continued to live and cohabit with Mrs. Bass, and on November 17, 1944, introduced her in Washington as his wife to a Chaplain and another. Accused contended that he believed that his marriage with Mrs. Bass became legal when the divorce decree was actually granted in favor of his wife. After learning on February 3, 1945, that this was not so he and Mrs. Bass were legally remarried on February 7, 1945.

Clemency beyond that already extended by the reviewing authority does not appear to be warranted. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

2 Incls
Record of trial
Form of action

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence as approved by reviewing authority confirmed. G.C.M.O. 260, 22 Jun 1945)

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

SPJGN-CM 276298

16 APR 1945

U N I T E D S T A T E S	)	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND
v.	)	Trial by G.C.M., convened at LaJunta Army Air Field, LaJunta, Colorado, 24, 25, 26, 27, and 28 January 1945. Dismissal, total forfeitures and confinement for five (5) years.
First Lieutenant CHARLES A. McNEIL (0-575489), 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 93rd Article of War.

Specification 1: In that First Lieutenant Charles A. McNeil, AC, 3020th Army Air Forces Base Unit, did at La Junta Army Air Field on or about 1 April 1944 feloniously embezzle by fraudulently converting to his own use, cash in the sum of about $184.00, the property of the Unit Fund of Section F, 3020th Army Air Forces Base Unit, intrusted to him by Private First Class Frank L. Wiley for deposit in said fund.

Specification 2: In that First Lieutenant Charles A. McNeil, AC, 3020th Army Air Forces Base Unit, did at La Junta Army Air Field on or about 30 May 1944, feloniously embezzle by fraudulently converting to his own use, cash in the sum of about $160.00, the property of the Unit Fund of Section F, 3020th Army Air Forces Base Unit, in-

trusted to him by Private First Class Frank L. Wiley for deposit in said fund.

Specification 3: In that First Lieutenant Charles A. McNeil, AC, 3020th Army Air Forces Base Unit, did at La Junta Army Air Field on or about 31 July 1944, feloniously embezzle by fraudulently converting to his own use, cash in the sum of about $200.00, the property of the Unit Fund of Section F, 3020th Army Air Forces Base Unit, intrusted to him by Sergeant Jonas A. Reed for deposit in said fund.

Specification 4: In that First Lieutenant Charles A. McNeil, AC, 3020th Army Air Forces Base Unit, did at La Junta Army Air Field between on or about 1 April 1944 and 27 November 1944, feloniously embezzle by fraudulently converting to his own use, cash in the sum of about $256.00, the property of the Unit Fund, Section F, 3020th Army Air Forces Base Unit, intrusted to him by Technical Sergeant Robert T. Crowder for deposit in said fund.

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

Specification 1: In that First Lieutenant Charles A. McNeil, AC, 3020th Army Air Forces Base Unit, did, on or about 1 October 1944 at La Junta Army Air Field, wrongfully require Private Sam Ingram to pay him the sum of $16.00 in settlement of a loan of $12.00, made by said Lieutenant McNeil to said Private Ingram on or about 15 September 1944.

Specification 2: In that First Lieutenant Charles A. McNeil, AC, 3020th Army Air Forces Base Unit, did, on or about 10 September 1944 at La Junta Army Air Field, wrongfully require Private John W. Woods to pay him the sum of $20.00 in settlement of a loan of $15.00, made by said Lieutenant McNeil to said Private Woods on or about 2 August 1944.

Specification 3: In that First Lieutenant Charles A. McNeil, AC, 3020th Army Air Forces Base Unit, did, on or about 10 May 1944 at La Junta Army Air Field, wrongfully require Private Granville Thompson to pay him the sum of $7.00 in settlement of a loan of $5.00, made by said Lieutenant McNeil to said Private Thompson on or about 15 April 1944.

Specification 4: (Finding of not guilty).

Specification 5: In that First Lieutenant Charles A. McNeil,

AC, 3020th Army Air Forces Base Unit, did, on or about 30 June 1944 at La Junta Army Air Field, wrongfully require Corporal Stephen T. Wyche to pay him the sum of $7.00 in settlement of a loan of $5.00, made by said Lieutenant McNeil to said Corporal Wyche on or about 26 June 1944.

Specification 6: In that First Lieutenant Charles A. McNeil, AC, 3020th Army Air Forces Base Unit, did, on or about 1 September 1944 at La Junta Army Air Field, wrongfully require Private Thomas F. Commodore to pay him the sum of $4.50 in settlement of a loan of $3.00, made by said Lieutenant McNeil to said Private Commodore on or about 15 August 1944.

Specification 7: (Finding of not guilty).

Specification 8: In that First Lieutenant Charles A. McNeil, AC, 3020th Army Air Forces Base Unit, did, between on or about 30 June 1944 and 30 July 1944 at La Junta Army Air Field, wrongfully require Sergeant Joe H. Butler to pay him the sum of $7.50 in settlement of a loan of $5.00, made by said Lieutenant McNeil to said Sergeant Butler approximately ten days previously.

Specification 9: (Finding of not guilty).

Specification 10: In that First Lieutenant Charles A. McNeil, AC, 3020th Army Air Forces Base Unit, did, on or about 29 September 1944 at La Junta Army Air Field wrongfully require Corporal Ulysses Fitzpatrick to pay him the sum of $10.00 and did, on or about 10 November 1944, require him to pay an additional sum of $5.00 in settlement of a loan of $10.00 made by said Lieutenant McNeil to said Corporal Fitzpatrick on or about 15 September 1944.

Specification 11: In that First Lieutenant Charles A. McNeil, AC, 3020th Army Air Forces Base Unit, did, on or about 10 August 1944 at La Junta Army Air Field wrongfully require Sergeant Jonas A. Reed to pay him the sum of $14.00 in settlement of a loan of $10.00 made by said Lieutenant McNeil to said Sergeant Reed on or about 1 August 1944.

Specification 12: In that First Lieutenant Charles A. McNeil, AC, 3020th Army Air Forces Base Unit, did, at or near the Mess Hall of Section F, 3020th Army Air Forces Base Unit, La Junta Army Air Field, on or about 15 July 1944 wrongfully sell a fifth of whiskey to Staff Sergeant Cecil T. Mitchner.

Specification 13: In that First Lieutenant Charles A. McNeil, AC, 3020th Army Air Forces Base Unit, did, at or near the Mess Hall of Section F, 3020th Army Air Forces Base Unit, La Junta Army Air Field, on or about 15 August 1944 wrongfully sell a fifth of whiskey to Staff Sergeant Cecil T. Mitchner.

Specification 14: In that First Lieutenant Charles A. McNeil, AC, 3020th Army Air Forces Base Unit, did, at or near the Mess Hall of Section F, 3020th Army Air Forces Base Unit, La Junta Army Air Field, on or about 15 September 1944 wrongfully sell a fifth of whiskey to Staff Sergeant Cecil T. Mitchner.

Specification 15: (Finding of not guilty).

Specification 16: In that First Lieutenant Charles A. McNeil, AC, 3020th Army Air Forces Base Unit, did, at or near the Orderly Room, Section F, 3020th Army Air Forces Base Unit, La Junta Army Air Field, between the 21st day of June 1944 and the 21st day of September 1944, wrongfully sell a pint of intoxicating liquor to Sergeant Jonas A. Reed.

Specification 17: (Motion for finding of not guilty sustained, R. 230).

Specification 18: In that First Lieutenant Charles A. McNeil, AC, 3020th Army Air Forces Base Unit, did, on or about 20 March 1944, in the Orderly Room of Section F, 3020th Army Air Forces Base Unit, La Junta Army Air Field, wrongfully sell to Staff Sergeant William R. Brown one-half pint of rum.

Specification 19: In that First Lieutenant Charles A. McNeil, AC, 3020th Army Air Forces Base Unit, did, at La Junta Army Air Field on or about 17 November 1944, wrongfully say to Sergeant Jonas A. Reed in words or effect that he should "keep his mouth shut" if called to the Legal Section in connection with an investigation which said Lieutenant McNeil well knew was pending.

Specification 20: In that First Lieutenant Charles A. McNeil, AC, 3020th Army Air Forces Base Unit, did, on or about 1 June 1944, at La Junta Army Air Field, wrongfully require Sergeant Shalma E. Bullock to pay him the sum of $18.50 in settlement of a loan of $15.00 made by said Lieutenant McNeil to said Sergeant Bullock on or about 15 May 1944.

He pleaded not guilty to all Charges and Specifications. He was found

not guilty of Specifications 4, 7, 9, 15, and 17 of Charge II, but guilty of the Charges and all other Specifications except the specific amounts alleged in the Specifications of Charge I for which the court substituted "unknown sums of cash not exceeding" the amounts alleged. 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, which he stated to be "inadequate", and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: Accused was assigned to the 346th Aviation Squadron at La Junta Army Air Field, La Junta, Colorado, on 5 July 1943 and subsequently, on 5 January 1944, assumed command (R. 15; Pros. Exs. 1, 2). The Squadron was apparently reorganized and redesignated as Section F, 3020th Army Air Forces Base Unit about 1 May 1944. Accused remained in command until 15 November 1944, when he was replaced by Major Charles A. Butler (R. 15-16; Pros. Exs. 3, 4, 5).

From time to time on various paydays contributions were solicited in the Squadron to supplement squadron funds used in financing dances (R. 123). Such a collection was taken up on 31 March 1944 to defray part of the expenses of a dance to be given in April (R. 113, 119). Private First Class Frank L. Wiley, chairman of the entertainment committee, turned over the proceeds amounting to approximately $184 ("it could have been less and it could have been a little more") to accused (R. 111, 113, 116, 120). A collection for a similar purpose was taken up on 30 May 1944 and about $160 turned over to accused by Wiley (R. 114). A list of the contributors to each of these collections was made and retained by Wiley until after the dances although it was not given to accused (R. 117, 120-122). A third collection, totalling about $200, was made on 31 July 1944 by Private Wiley and Sergeant Jonas A. Reed (R. 115, 126). The proceeds and a list of the contributors were handed over to Second Lieutenant Hugh J. Anderson, who was the squadron adjutant, and, from 15 June to 2 August 1944, the custodian of the "Council Fund" (R. 126, 136-137). When Lieutenant Anderson relinquished control of the Council Fund, he gave accused the money derived from the July collection and suggested that the accompanying list of contributors be used as a supporting voucher if accused deposited the money (R. 137-138). A list of names and contributions, totalling $176.93, was identified by Sergeant Reed on the witness stand as a list of contributors to the 31 July collection. He insisted that the list was incomplete but was unable to say whose contributions were not listed (R. 127, 129-131; Pros. Ex. 7).

A dance band, known as the "Bombardiers Band", was organized in the Squadron. They played for military and civilian dances both on and off the post and were paid for their services (R. 149-150). The practice had arisen for the band to contribute to the squadron fund from their earnings one dollar per man for each job played (R. 150). Technical Sergeant Robert T. Crowder, manager of the band, testified

that, between April and November 1944, a total of $175 was paid over to accused from dance jobs on the post and "around fifty to seventy-five dollars" from jobs played off the post (R. 156-157).

When Major Butler succeeded accused in command of Section F on 15 November 1944, accused turned over the Council books, vouchers, and check books of the Section and its precedent squadron (R. 183-185; Pros. Exs. 17, 18, 19). The Council books contained no record of the contributions made by the squadron members or the Bombardier Band but it did show expenditures from the squadron funds for squadron dances (R. 190-191; Pros. Ex. 17).

An investigation into accused's activities was commenced about 15 November 1944. Accused was interrogated shortly after the investigation began and, after being warned of his rights, stated that part of what he termed the "slush fund" of the Squadron was in his safety deposit box at the Colorado Savings and Trust Company in La Junta. He accompanied the investigators to the bank and his safety deposit box was found to contain $54.42 and also "a half-dozen bonds". Accused claimed ownership of the bonds but agreed that the money, which he said belonged to the Squadron, would be turned over to Major Butler (R. 187, 191-193). He was asked if $184 was the correct figure for the collection turned over to him by Private Wiley for the April dance and he replied "Yes, that's about right" (R. 197). Accused also made a statement in writing in which he asserted the only active bank account he had was in the La Junta Bank and that the only "funds" of either himself or his wife not in this account or in the safety deposit box were war bonds of the amounts and dates of purchase as follows:

1	$100 War Bond,	June 1944
4	$100 War Bonds,	September 1944
1	$50 War Bond,	September 1944
2	$100 War Bonds,	October 1944
1	$25 War Bond,	October 1944
1	$10 War Bond,	October 1944
1	$25 War Bond,	November 1944 (Pros. Ex. 20).

Accused admitted he had no source of income other than his army pay. He explained that his large bond purchases in September were made from his winnings at dice, totalling $200, and from the payment to him of outstanding loans since he had quit loaning money at that time (R. 196-197, 200-201).

Accused's pay, after deductions, during the period from March 1943 to May 1944 was approximately $225 a month, from June to November 1944 approximately $260 per month, and in December 1944, about $345. From April 1943 on $18.75 had been deducted each month for a war bond (R. 202-206). His bank account during the period he commanded the Squadron increased from about $650 on 5 January 1944 to $1865 on 13

November 1944, a net gain of approximately $1200 (R. 207-208; Pros. Ex. 21).

During the period accused was in command he made a number of small loans to the enlisted men in the Squadron exacting in each case a high return for the use of the money for a short period of time. The following tabulation shows his activities in this connection (all dates in 1944):

Borrower	Amount of Loan	Date of Loan	Amount Repaid	Date of Repayment	
Cpl. Sam Ingram	$15	15 August	$16.00	31 August	(R.9-15, 99-105)
Pvt. John W. Woods	15	1 August	20.00	10 Sept.	(R. 17-23)
Pvt. Granville Thompson	5	15 April	8.00	10 May	(R. 23-28)
Cpl. Stephen T. Wyche	5	26 June	7.00	30 June	(R. 33-37)
Pvt. Thomas F. Commodore	3	15 August	4.50	31 August	(R. 38-40)
Sgt. Joe H. Butler	5	July	7.50	31 July	(R. 48-51)
PFC Ulysses Fitzpatrick	10	September	15.00	2 following paydays	(R.68-73)
Sgt. James A. Reed	10	1 August	14.00	10 Sept.	(R.74-76, 81-83)
S/Sgt. Shalma E. Bullock	15	May	18.50	June	(R. 106-109)
	80		110.50		

Besides his loan business accused also engaged in the sale of intoxicating liquor to men in his organization. Thus Staff Sergeant Cecil T. Mitchner purchased whiskey from accused at squadron dances in April, in June and in September. On each of these three occasions accused sold Mitchner a fifth of a gallon of whiskey at the exorbitant price of $10. Accused had the liquor in his car which was parked back of the mess hall on the field (R. 92-93, 95). Sergeant Jonas A. Reed purchased a pint of whiskey from accused for $7 on 18 June 1944 at a dance following the ball game at which they "entertained the Elks Lodge of Fowler". Accused had several bottles of whiskey in the trunk of his car and parked the car so that the trunk extended into the door of the orderly room which allowed him to remove the whiskey in privacy (R. 76-78). Staff Sergeant William H. Brown paid accused "two or three dollars" for a half pint of rum "approximately nine months ago". At the time accused had two or three bottles of rum on his desk (R. 105-106).

About 15 November 1944, when the investigation into accused's conduct was initiated, accused visited Sergeant Jonas A. Reed at his barracks. Accused asked Reed if he "had been over to the Legal Section yet"? Reed replied in the negative adding that "Lieutenant Haskell" had seen him and wanted him to come over later. Accused requested that in the event Reed was called over he should "keep his mouth shut" (R. 78-79). Accused added that "he had lost command of Section F, they were going to court-martial him, and he didn't want to get five years, and said the only reason he sold whiskey to the boys was so that they could have a good time" (R. 79).

4. Evidence for the defense: Accused, cognizant of his rights, testified in his own behalf (R. 264). He denied that he ever embezzled any funds belonging to the Squadron or Section and asserted that all the monies coming into his hands were expended for the benefit of the organization (R. 287). He admitted receiving from Private Wiley the monies collected for the first two squadron dances but stated that in each instance the money was merely put away in the safe without its being counted (R. 265-267). The money collected for the third dance was in the safe when Lieutenant Anderson turned over the squadron funds to accused and accused did not count it either. Lieutenant Anderson had access to the safe at all times (R. 267-268). Accused also admitted receiving money from time to time from Sergeant Crowder but could not state what the amounts were (R. 268).

There was no arrangement or agreement that these monies would be entered in the Unit Fund (R. 266). They became a part of a "slush fund" which was kept to buy things for the squadron that could not properly be purchased out of the squadron fund (R. 269). Accused had receipts for $318 he had expended out of the "slush fund" (R. 270-281; Def. Exs. J to Y, AA to RA). Some of the larger expenditures follow:

26 June 1944	Martin Music Co.	Music supplies	$25.05
16 Apr. 1944	Sgt. Cecil Mitchner	Extra pay for mess hall personnel	60.00
14 Apr. 1944	Frank L. Wiley	Transportation in connection with party	10.00
26 Apr. 1944	Frank L. Wiley	Purchase of cymbal	10.00
6 May 1944	Sgt. Robert Crowder	Musicians pay	40.00
June 1944	Sgt. Cecil Mitchner	Laundry of mess hall curtains	12.95
19 Aug. 1944	Post Exchange	Cigarettes	21.03
Aug. 1944	Sgt. Cecil Mitchner	Cooks, supplies etc.	75.88

In addition to the foregoing disbursements, covered by receipts, accused testified concerning a number of other expenditures from the "slush fund". He gave Lieutenant Anderson $40 at the time the latter took over the Squadron Fund (15 June 1944) and $10 later to buy barber shop supplies. Lieutenant Anderson subsequently refunded $10 out of the $40 to accused (R. 282). Private Wiley was given $70 as head of the entertainment committee for "trips to Pueblo and Denver for obtaining girls for the parties" (R. 283). Sergeant Mitchner received a total of $120 for expenses in connection with the June and August parties in addition to the $60 he received for the April party for which a receipt was in evidence (R. 283-284). Mitchner also was given approximately $60 over a period of seven or eight months to buy supplies for the squadron mess hall (R. 284). In November $60 was taken from the "slush fund" and deposited in the "Council Fund", as shown by the Council books, for the purpose of buying "pool tickets" (R. 285, 286; Pros. Ex. 17). Between $20 and $25 was also used to make up a shortage in the "ration roll" (R. 286). Finally about 4 November approximately $100 was stolen from accused's

desk. The desk was locked at the time and had not been "jimmied". Someone else may have had a key to the desk. The money stolen included $83 of the "slush fund" and $17 of the barber shop receipts. This $17 shortage was later made up out of the "slush fund" (R. 287-288, 327).

On cross-examination and examination by the court accused admitted that in addition to the funds derived from the collections and the hand contributions the "slush fund" had been augmented by $50 to $60 received from the operation of pin-ball machines at the post exchange (R. 314-315, 323). He asserted that the reason the contributions were not deposited in the Unit Fund was twofold: (1) he had no voucher to support the receipts and (2) the money was to be used for purposes for which Unit Fund expenditures were not authorized. However, he admitted that he had made no effort to obtain a list of contributors for use as a supporting voucher and that most of the "slush fund" expenditures could legitimately have been made from the Unit Fund (R. 301-303). He knew of no Army Regulation which authorized a "slush fund" but such a fund had been maintained in an organization to which he had formerly belonged (R. 289, 325).

Accused stated that the "slush fund" was kept in two boxes, one in the safe and the other in his desk (R. 324). Enlisted men would request money to buy things for the mess hall, their club, or the post exchange, and if he approved the purchase he would give them the money. If they brought back a receipt, it was placed in the box (R. 324-325). Although he did not count the money in the safe, he did count the money in his drawer and knew that $83 had been stolen (R. 330-331). He told Lieutenant Anderson and Sergeant Clayborne Mitchell about the theft on the day on which it occurred and he told "Lieutenant Ellsworth", the "Police and Prison Officer", about it "a week later" but he did not report it to the Provost Marshal until a week after the investigation was commenced (R. 291, 331). The theft of the $17 of barber shop receipts was reported to "Lieutenant Ketchum", the "Administrative Inspector", the day it was discovered (R. 308, 326). Accused admitted that the shortage in the ration amount resulted from his own negligences (R. 294-295).

He testified that his pay was the only source of income of his wife and himself except for his winnings at dice which between January and November 1944 totalled $300 according to his estimate. The war bonds were purchased out of his own winnings (R. 307-308). He gave some of his living expenses in 1944 as follows: house rentals from January to March $28.50 per month, and after March $48.50 per month; club dues $4 per month; and car upkeep $2 per week (R. 310-311).

Partial corroboration of accused's testimony was received from several witnesses. Lieutenant Anderson stated that he had received $50 out of the "slush fund" from accused. He expended $40 and returned $10

to accused (R. 368-369). Private Wiley said accused had given him approximately $80 for trips to Pueblo and Denver to secure various items of equipment for the dance band and to obtain girls for the dances (R. 354, 357). Sergeant Mitchner testified that on the occasion of each of the three dances accused gave him $60 to pay the "cooks, KPs, KP pushers" (R. 369-370). Accused also gave him a total of $60 over a period of several months to buy supplies. Mitchner admitted, however, that this latter amount included the items for which receipts were in evidence at the trial (R. 370-373). He also admitted making a pre-trial statement to the officer that accused had actually given him only $40 to pay the cooks and "KPs" each dance but had required a receipt for $60 (R. 374). This statement, Mitchner testified, was erroneous and he had so informed the investigating officer prior to trial (R. 375). Major Butler identified an entry in the Council books in connection with pool tickets which he said signified a $60 increase in the Unit Fund (R. 341). Verification of accused's testimony concerning his report of the theft of the money from his desk was given by First Lieutenant Harry W. Ellsworth, First Lieutenant Edward N. Ketchum, Lieutenant Anderson, and Sergeant Mitchell. Lieutenant Ellsworth placed the date of accused's report between 13 and 16 November (R. 344-345, 346-347, 348, 350-352). Lieutenant Anderson added that about the same time the sum of $135 was stolen from his own locked desk (R. 348-350).

A number of witnesses testified for the defense that they had borrowed money from accused and had been charged no interest on the loans. These witnesses and the transactions follow:

Borrower	Amount of Loan	Date Borrowed	Date Repaid
Pfc Frank L. Wiley	$30.00	August 1944	Sept. 1944 (R. 231,237)
Pvt. Maceo Ward	27.50	Sept. 1944	10 Oct. 1944 (R. 240-243)
Pvt. Rozell Stewart	20.00	23 July 1944	31 Aug. 1944 (R. 244)
S/Sgt. Timothy Kinzie	30.00	7 Sept. 1944	9 Sept. 1944 (R. 247)
Pfc Ellis Farris	5.00	14 Aug. 1944	31 Aug. 1944 (R. 249)
Pfc William E. Sammons	5.00	15 Sept. 1944	30 Sept. 1944 (R. 251)
S/Sgt. Henry Warfield	30.00	15 Aug. 1944	10 Sept. 1944 (R. 252-255)
Pvt. Edward Hill	5.00	August 1944	Sept. 1944 (R. 257)
Pvt. George Wright	15.00	-	- (R. 335)
Pvt. Henry Belton	5.00	1 Sept. 1944	10 Oct. 1944 (R. 337)
Cpl. Lewis Halloway	5.00	6 Sept. 1944	10 Sept. 1944 (R. 339)
Sgt. Merlin S. Cochran	15.00	-	- - (R. 340)
Sgt. O'Bryant Smith	10.00	15 Aug. 1944	17 Aug. 1944 (R. 344;
Sgt. O'Bryant Smith	20.00	4 Oct. 1944	10 Nov. 1944 Def.Ex. 5A)

Staff Sergeant Mitchner testified that he was at the pay table every time the Section was paid between 30 June and 10 November 1944 and that a number of men repaid loans at such times to accused but the matter of interest on the loans was never discussed (R. 239-240).

5a. The four Specifications under Charge I allege that accused embezzled the sums of $184, $160, $200, and $256, respectively, belonging to the Unit Fund of Section F, 3020th Army Air Forces Base Unit, and entrusted to him on various dates between 1 April 1944 and 27 November 1944, all in violation of Article of War 93.

The evidence shows that sums of money, approximating the amounts alleged in the Specifications, were collected from members of accused's section to defray the expenses of section dances, and entrusted to accused as commanding officer of the Section. The production of a list, or what may have been only a partial list, of contributors to the alleged $200 collection, raises a question whether the correct amount in this instance should not be $175. Further, the testimony concerning the several contributions making up the $256 sum established this fund as something between $225 and $250. With these exceptions the correctness of the amounts set out in the Specifications is established. Although the witnesses whose testimony supported this element of the Specifications apparently relied on their memories and not on written records, there is no reason to doubt the substantial accuracy of their estimates.

Accused failed to deposit the contributions in the Unit Fund account. He contended at the trial that the money was collected to provide a "slush fund" to buy things which could not be legitimately purchased from the Unit Fund. However, in recounting articles or services which he said had been purchased from the "slush fund" he was compelled to admit that the items, with one possible exception, were legitimate Unit Fund expenditures. He also gave as an excuse that he had no vouchers to support entering the receipts in the Unit Fund account but the evidence shows that vouchers could easily have been obtained had accused desired to do so. There appears to be no valid reason why these contributions should not have been credited to the Unit Fund account and handled in the customary manner. The deposit of contributions in Unit Funds is specifically authorized by Army Regulations (par. 18, AR 210-50, 1 June 1944). The failure of accused to care for the funds properly can hardly be construed as anything other than a suspicious and incriminating circumstance. The prosecution further showed, as evidence that accused embezzled the sums entrusted to him, that during the period accused commanded the section his bank account and bond holdings substantially increased. The probative force of this testimony is somewhat weakened by the lack of evidence which would give an accurate picture of accused's living costs and other expenses so that the conclusion cannot be drawn that the accessions were necessarily illegally obtained. There is also the evidence in the record that accused was engaged in a profitable loan and liquor business among the enlisted men which would account for some of his savings.

Accused, although not expressly admitting the accuracy of the estimates of the amounts given him, assumed the burden of accounting for them. He testified that the money was put into a box in the safe just as

it was given him and that he did not count it. When money was needed to purchase things for the Squadron, it was taken out of the box and if a receipt was procured for the expenditure it was placed in the box. Accused produced receipts totalling $318. It was also shown that, when he was removed as section commander, he turned over $54.20 from the "slush fund" to his successor. This sum, for some unexplained reason, was in accused's safety deposit box. In addition to these undisputed expenditures supported by documentary proof, the defense offered the testimony of accused, corroborated in each instance by at least one other witness, as to various other expenditures. This evidence shows that Lieutenant Anderson expended $40 at a time when he was in partial control of the fund, Private Wiley received $70 from the fund for a legitimate expenditure, Sergeant Mitchner received $120 for another legitimate expenditure, and $60 was taken from the "slush fund" and deposited in the Unit Fund to purchase pool tickets on the Squadron, also a legitimate expenditure. The evidence concerning the foregoing disbursements is uncontradicted, credible and, in the opinion of the Board, should be considered a proper accounting for these sums.

According to the further testimony of accused, $83 of the "slush fund" and $17 of receipts from the barber shop intended for deposit in the Unit Fund were taken from his locked desk about 4 November 1944. He asserted that the money was taken by someone with a duplicate key, for the desk exhibited no signs of having been forcibly rifled. This loss of $83 from the "slush fund" rests on accused's own testimony which is not only essentially uncorroborated but also, in the opinion of the Board, incredible when evaluated in the light of the attendant circumstances. There was no valid reason why a portion of the "slush fund" should have been deposited in accused's desk when there was a safe in the same room in which the money could have been securely kept and which contained, according to accused, the major part of the fund. Although accused professed never to have counted the "slush fund" and could not state the amount in the safe, he positively stated that there was $83 in the desk. But most damaging to accused's contention is the fact that, although he reported the loss of $17 to higher authority about 4 November 1944, the alleged loss of the $83 was not reported until about the time the investigation into his activities was inaugurated and he was faced with the necessity of accounting for the funds entrusted to him.

The remaining disbursements claimed by accused in his accounting were the transfer of $17 to the Unit Fund to cover the shortage caused by alleged theft and the transfer of $20 or $25 to the "ration account" to make up a shortage caused by his own negligent handling of that account. Accused was required to account for all the monies he administered belonging to the Unit Fund or the "ration account" unless relieved from liability in the manner provided by Army Regulations. In the absence of such relief he was accountable for the sums in their entirety and whatever the reason for the shortages in these other accounts he was not at liberty to cover up the deficits and relieve himself from personal financial responsibility by covertly diverting money from the "slush fund".

His transfers were wholly illegal and are unacceptable on an accounting.

A tabulation of the sums shown to have been intrusted to accused and the sums for which he has properly accounted follow:

Receipts		Disbursements	
$184		$318.00	Supported by receipts
160		54.20	Paid to successor
175	($200 maximum)	40.00	Disbursed by Lieutenant Anderson
225	($250 maximum)	70.00	Paid to Private Wiley
$744	($795 maximum)	120.00	Paid to Sergeant Mitchner
		60.00	Paid for "pool tickets"
		$662.20	

It appears from this summary and the preceding discussion that accused has failed to account or has improperly accounted for a minimum of $81.80 of the funds described in the Specifications. In addition to these funds accused received and intermingled in the "slush fund" some $50 of pin-ball game receipts and consequently his accounting discloses a minimum shortage of $131.80. The facts and circumstances of the case afford ample basis for the conclusion that this amount was embezzled by the accused.

The Specifications allege that the monies embezzled by accused were "the property of the Unit Fund of Section F, 3020th Army Air Forces Base Unit". The evidence adduced establishes that the collections made to finance the dances of accused's organization should legally have been deposited in and made a part of the Unit Fund and that the enlisted men who contributed them intended to augment that Fund. Although accused did not deposit these monies in the Unit Fund or carry them on the Unit records but instead illegally kept them in a separate "slush fund", nevertheless such monies were in contemplation of law a part of the Unit Fund and, therefore, the allegation of ownership in the Unit Fund was permissible. It has long been the practice to allege ownership of monies belonging to an organization to be in an organization fund. The observations of the Board of Review in CM 202366, Fox, 6 BR 129 (141) are pertinent:

> "The Specification is inartifically drawn, since it places the title to the money embezzled in the 'company fund'. However, whether or not this term be technically accurate, there is no reason to suppose that accused was misled or left in ignorance of the offense with which he was charged, and the inaccuracy mentioned may be passed under the 37th Article of War as harmless".

Even if it be conceded that ownership of the monies should have been laid in the Unit or in the individuals who contributed them rather than in the Unit Fund, there was no error. Thus, in CM 195513, Crose, 2 BR 243, in which the court by exceptions and substitutions found that accused embezzled "moneys of enlisted men of Company E, Tenth Infantry" instead of "money of the company funds, Company E, 10th Infantry" as alleged in the Specification

the Board of Review held:

> "* * * A variance in allegation and proof as to ownership of property alleged to have been stolen or embezzled is normally fatal to the conviction. In the instant case the variance is immaterial. The accused was fully apprised by the language used in the original specification of all of the elements of the offense charged against him and the erroneous legal conclusion of the drafter of the specification that the money pertained to the 'company funds' rather than to individual enlisted men did not deceive the accused, hamper his defense, nor otherwise materially adversely affect him. * * *".

There can be no question in the present case that the language of the Specifications was entirely adequate to apprise the accused of the offense with which he was charged.

The court was confronted with the practical impossibility of determining from which collections the embezzled money was taken. The court accordingly found accused guilty of embezzling "unknown sums of money not exceeding" the amounts alleged in the Specifications. Such findings were proper under the circumstances. Similar findings were approved in CM 123488 (1918), reported in 1912-40 Dig. Ops. JAG, sec. 451 (23), wherein it is stated as follows:

> "Where it was charged in four specifications that accused had embezzled certain sums of money received from four different sources, and on the trial he accounted for part of the whole amount that had been entrusted to him, but there was nothing to show from what particular funds the money accounted for had been drawn, a finding under each specification that accused embezzled 'a part thereof, amount unknown' was proper."

To the same effect see CM 235010 (1943), 21 BR 225, II Bull. JAG. 383.

b. Specifications 1, 2, 3, 5, 6, 8, 10, 11, and 20, of Charge II, allege that accused wrongfully required nine different enlisted men to pay exorbitant interest on loans which accused made to them, in violation of Article of War 96.

The evidence shows that during the period accused was Section Commander he lent to enlisted men under him for short periods of time

sums of money ranging from $3 to $15 at exorbitant rates of interest running as high as 100% per month. This testimony was not directly contradicted by the defense but a number of witnesses were permitted to testify that during the same period accused had loaned them money and had not charged any interest. Assuming the competency of such testimony, it had little probative value on the issues raised by the prosecution's testimony. The large number of witnesses who supported the prosecution's case as to these Specifications precludes any question that accused might be the victim of collusion on the part of men under his command. The Specifications are clearly sustained.

Winthrop (Military Law and Precedents, 2nd Ed., 1920 Reprint, page 716) cites as an example of a violation of Article of War 95:

> "Abuse of authority over soldiers by frauds or exactions practiced upon them, or by requiring or influencing them to do illegal acts" * * * (Foot note) "By exacting from soldiers excessive usurious interest (25 per cent) on loans made to them - G.O. of Dec. 24, 1811: By exacting from soldiers double the amount, at the next pay day, for sums previously loaned - G.O. 4, Dept. of the Gulf, 1866".

The offenses alleged are also violative of Article of War 96.

c. Specifications 12, 13, 14, 16, and 18, of Charge II, allege the sale of intoxicating liquor by accused to enlisted men on an Army post, in violation of Article of War 96.

The evidence establishes that on three separate occasions accused sold a fifth of a gallon of whiskey to a noncommissioned officer in the accused's command at a price of $10. Another time accused sold to one of his men a pint of whiskey for $7 and on a fifth occasion he sold a pint of rum to one of his enlisted men for "two or three" dollars. Each of these sales was made at a squadron dance at La Junta Army Air Field. It appears that accused was present at these dances with his car trunk filled with whiskey which he disposed of to the men at fancy prices.

The sale of intoxicating liquor upon a military post is prohibited by federal statute (Sec. 38, act of Feb. 2, 1901 (31 Stat. 758); 10 U.S.C. 1350; sec. 310 M.L. 1939). Accused's activities in this connection were not only violative of the statute but also patently prejudicial to good order and military discipline (CM 235382, Singletary, 21 BR 389). A clear violation of Article of War 96 is proven.

d. Specification 10 of Charge II alleges that accused wrongfully told Sergeant Jonas A. Reed to "keep his mouth shut" if called to the Legal Section in connection with a pending investigation, in violation of Article of War 96.

After an investigation into accused's conduct had commenced, he

visited one of his noncommissioned officers, Sergeant Reed, at the latter's barrack and, upon ascertaining that Reed had been requested to come to the Legal Section for questioning in connection with the investigation, asked him to "keep his mouth shut". This attempt on the part of accused to impede the progress of the investigation into his activities was wrongful and obviously prejudicial to good order and military discipline, in violation of Article of War 96.

6. Accused is approximately 27 years and 6 months of age, having been born 18 September 1917. He is married and the father of one child. From information contained in the Staff Judge Advocate's Review and from War Department records it appears that accused is a resident of California and was graduated from Fresno State College in 1940 with a Bachelor of Arts degree having majored in Economics and Agriculture. He was subsequently employed as a "herdsman" on his father's dairy farm and also taught at the college a course in the use of agricultural implements. He was a member of the United States Naval Reserve from 20 August 1940 to August 1941 and entered upon duty as an enlisted man in the Army 13 February 1942. During his enlisted service he reached the grade of sergeant and the character of his service was rated "good". Having been graduated from Officers' Candidate School at Miami Beach, Florida, he was commissioned a second lieutenant in the Army of the United States on 3 March 1943 and entered upon active duty as an officer on that date. His promotion to first lieutenant was announced on 26 May 1944. His commissioned service prior to 17 November 1944 was rated "excellent".

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

Abner E. Lipscomb, Judge Advocate.

Robert J. Hannon, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 276298 1st Ind
Hq ASF, JAGO, Washington 25, D. C.

TO: Secretary of War 4 JUN 1945

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 First Lieutenant Charles A. McNeil (0-575489), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of embezzling, between 1 April 1944 and 27 November 1944, unknown sums of money not exceeding a total of $800, the property of the Unit Fund of Section F, 3020th Army Air Forces Base Unit, in violation of Article of War 93; of wrongfully requiring nine different enlisted men to pay exorbitant rates of interest on money which he loaned to them, of selling intoxicating liquor to enlisted men on an Army Post on five separate occasions, and of wrongfully telling a noncommissioned officer under his command to remain silent if questioned during an investigation into accused's activities, all in violation of Article of War 96. 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. 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 and sentence and to warrant confirmation thereof.

The accused was commanding officer of Section F, 3020th Army Air Forces Base Unit, La Junta Army Air Field, La Junta, Colorado. Collections were made among the enlisted men of the Section to augment Unit funds used to finance dances. Four such collections, aggregating around $740, were entrusted to accused who illegally retained the money as a "slush fund" instead of depositing it in the Unit Fund. Some $50 which had accrued to the Unit Fund from a concession at the Post Exchange was also commingled in accused's so-called "slush fund". When called upon for an accounting of the monies inthis fund accused was unable to produce any accurate or complete record of his receipts and disbursements but he finally unearthed and displayed receipts and other evidence tending to show his legitimate disbursement therefrom of about $660 of the $790 in the fund. Concerning the remaining $130 accused claimed that $83 had been lost by theft and the balance of $47 he had transferred to other accounts to make up shortages. The evidence does not support accused's story of an alleged theft. His transfer of some of the fund to other accounts was clearly a wrongful disposition. Accordingly the embezzlement of approximately $130 of Unit

funds by accused is established. Inasmuch as it was impossible to exactly determine from which particular unit fund or collection in his custody the embezzled money was taken, or how much from each fund, the court properly found that accused embezzled unknown sums from each fund or collection within his control not exceeding the amount in it.

During the period he was in command of the Unit the accused loaned money, at rates of interest ranging up to 100% per month, and also sold intoxicating liquor, to the enlisted men under his command. He was convicted of nine different transactions involving loans to enlisted men at usurious rates of interest and of five sales of intoxicating liquor likewise to soldiers. The liquor sales were all made at dances on the post which accused attended where he was well stocked with liquor which he sold to enlisted men of his organization at exorbitant prices. After an investigation into accused's activities was initiated he called upon a noncommissioned officer, who was awaiting summons for questioning by the Intelligence officer investigating accused's activities, and requested that the prospective witness remain silent concerning accused's conduct.

The evidence in this case shows a deliberately dishonest course of conduct on the part of accused. Although the nature of his offenses necessitates appropriate confinement, I believe that the confinement imposed is excessive, and therefore recommend that the sentence be confirmed but that the forfeitures be remitted and the confinement be reduced to two years, that the sentence as thus modified be ordered executed, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

4. Consideration has been given to a letter from Honorable Sheridan Downey, United States Senate, forwarding a communication from Mr. James L. Royle, Fresno, California, in accused's behalf, and to an oral expression of interest in the case by Honorable Bertrand W. Gearhart, Member of Congress.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

3 Incls
Incl 1 - Record of trial
Incl 2 - Form of action
Incl 3 - Ltr. fr. Hon. Downey w/incl.

(Sentence confirmed but forfeitures remitted and confinement reduced to two years. G.C.M.O. 245, 19 Jun 1945)

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

SPJGQ
CM 276363

13 APR 1945

UNITED STATES	)	FOURTH AIR FORCE
v.	)	Trial by G.C.M., convened at March Field, Riverside, California, 9 February 1945. Dismissal, total forfeitures and confinement for one (1) year.
Second Lieutenant EMIL J. KEMPKE (0-2072354), Air Corps.	)	

- - - - - - - - - - -

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

- - - - - - - - - - -

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

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

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

Specification 1: In that Second Lieutenant Emil J. Kempke, Squadron A, 420th Army Air Forces Base Unit, then of Squadron T-3, 420th Army Air Forces Base Unit, did, at March Field, Riverside, California, on or about 30 October 1944, fail to repair at the fixed time to the properly appointed place for a scheduled flight.

Specifications 2, 3 and 4: These are identical with Specification 1 except in the allegations of dates which are "1 November 1944" as to Specification 2, "3 November 1944" as to Specification 3, and "5 November 1944" as to Specification 4, and in Specification 4, the alleged place of duty is "scheduled classes".

Specifications 5, 6 and 7: These are identical with Specification 1 except that the designation of the Squadron is "T-1" in each and the dates alleged are "18 November 1944" as to Specification 5, "19 November 1944" as to Specification 6, and "20 November 1944" as to Specification 7, and in Specification 6, the alleged place of duty is "a scheduled class".

Specification 8: In that Second Lieutenant Emil J. Kempke, Squadron A, 420th Army Air Forces Base Unit, then of Squadron T-1, 420th Army Air Forces Base Unit, did, without proper leave, absent himself from his organization and station at March Field, Riverside, California, from on or about 21 November 1944 to on or about 24 November 1944.

Specification 9: This is identical with Specification 8 except as to the dates, which are "5 December 1944" and "9 December 1944".

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

Specification 1: In that Second Lieutenant Emil J. Kempke, Squadron A, 420th Army Air Forces Base Unit, then of Squadron T-1, 420th Army Air Forces Base Unit, having been duly placed in arrest at March Field, Riverside, California, on or about 26 November 1944, did, at March Field, Riverside, California, on or about 3 December 1944, break his said arrest before he was set at liberty by proper authority.

Specification 2: This is identical with Specification 1 except the date of the alleged breach, which is "5 December 1944".

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

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of guilty disapproved by the reviewing authority.)

Specification 3: In that Second Lieutenant Emil J. Kempke, Squadron A, 420th Army Air Forces Base Unit, then of Squadron T-1, 420th Army Air Forces Base Unit, having received a lawful order from First Lieutenant David W. Foley to report to his squadron commander, the said First Lieutenant David W. Foley, being in the execution of his office, did, at March Field, Riverside, California, on or about 24 November 1944, fail to obey the same.

Specification 4: (Finding of guilty disapproved by the reviewing authority.)

The accused pleaded guilty to Specifications 1, 2, 3, 4, 8 and 9 of Charge I and to Charge I, and to Specifications 1 and 2 of Charge II and to Charge II, but not guilty to Specifications 5, 6 and 7 of Charge I and to all Specifications of Charge III and to Charge III. He was found not guilty of Specification 1 of Charge III but guilty of all other Specifications and the Charges. No evidence of 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, at such place as the reviewing authority may direct, for five years. The reviewing authority disapproved the findings as to Specifications 2 and 4 of Charge III, approved the sentence but reduced the period of confinement to one year, 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 in support of the findings of guilty which were not disapproved by the reviewing authority is, substantially, as follows:

On 6 October 1944 the accused reported for duty at March Field, California and was assigned as a navigator to Crew 33, Flight C, Squadron T, Section III (R. 7, 8, 9; Pros. Exs. 1, 5).

On 30 October 1944 and on 1 and 3 November 1944 the crews comprising Flight C of Squadron T-3 were directed to participate at certain hours in briefing, flying and interrogation and these duties were promulgated by means of training schedules (R. 9; Pros. Exs. 2, 3 and 4). On 5 November 1944 a class of instruction for navigators of Crew 33, Flight C was likewise indicated by a training schedule (R. 9; Pros. Ex. 5). The training schedules were posted on both the BOQ and squadron bulletin boards and officers and enlisted men were required to check the squadron board in the orderly room at least once a day (R. 16-18). The accused failed to attend any of the flights and the class so scheduled (R. 7, 8, 9; Pros. Ex. 1).

On 16 November 1944, by Training Order No. 103, the Commandant of Combat Crews relieved the accused from duty with Crew C-33, Squadron T-3 and he was placed on duty with Crew A-23, Squadron T-1, effective 18 November 1944 (R. 10; Pros. Ex. 6). Training orders were regularly posted on the squadron bulletin boards and, as stated, all officers and men were required to check the squadron board at least once a day (R. 16-18, 20). The sergeant major of Squadron T-3 testified that under a policy of the commanding officer which was posted on the BOQ bulletin board, officers were required to check the orderly room board at least twice a day (R. 21). Training Order No. 103 was so posted (R. 19) and in addition, other efforts were made to notify the accused of his change in assignment (R. 17) and the sergeant major of Squadron T-3 left a written notice on the bed in the accused's room in BOQ advising him of his transfer to Squadron T-1 and directing

him to report to Lieutenant Foley, the commanding officer (R. 19, 20).

On 18 and 20 November 1944 all of Crews 22 through 28 of Squadron I were scheduled for briefing, flying and interrogation (R. 11; Pros. Exs. 7 and 8) and on 19 November 1944, for a class in navigation (R. 11). The accused failed to attend either of the flights (R. 10) or the instruction class (R. 11, 12) (See also Pros. Ex. 1).

Accused was shown to have been absent without leave from 1300, 21 November 1944 to 1500, 24 November 1944 (R. 12, 13; Pros. Ex. 9).

On 24 November 1944 First Lieutenant David W. Foley, Commanding Officer of Squadron T-1, received information that the accused had been returned from absence without leave status to duty at March Field (R. 23). Lieutenant Foley had made several unsuccessful attempts on 20 and 21 November 1944 to have the accused report to him in the squadron orderly room through orders which he had sent to the accused's quarters by messenger (R. 22, 23). On 24 November 1944 at about 1600 or 1630, he personally went to the accused's quarters and failing to find him, left a note in his own handwriting instructing the accused to report to him at once (R. 24). This note he tied to the light cord (R. 26). He did not see the accused until 0830, 25 November 1944, when he found him in bed in his quarters (R. 24).

Thereafter the accused was, on 26 November 1944, duly placed in arrest in quarters by a written order of the commanding officer of March Field, receipt whereof the accused acknowledged thereon in writing (R. 15, 16; Pros. Ex. 11).

On 3 December 1944 a thorough search of the accused's quarters and the entire barracks was made but he was not found (R. 16). The morning report of his organization shows that he was absent without leave again as of 1600, 5 December 1944 and a thorough search of his barracks on that date failed to disclose the accused (R. 22; Pros. Ex. 10). On 9 December 1944 he was apprehended by military police while on the streets of Riverside, California, and was turned over to the officer of the day at March Field, California (R. 13, 14).

A voluntary statement made by the accused to the investigating officer was introduced in evidence without objection (R. 7; Pros. Ex. 1). In this statement the accused stated that his mother had died four years previous to his assignment to March Field and that, consequently, in his delay en route to his new station he spent most of his time with his father and brother. He suffered a grievous disappointment when he then learned that a girl whom he had known for three years and expected to marry, had married someone else. He felt very bad at the time, started drinking and "didn't care about anything

then". He continued to drink and stay out late at night. He realized it was affecting his work but it made no "difference" to him. He did not like the B-24 because he "had heard so much about them blowing up" and crashing that he was afraid of them. He thought that if he was lax and careless in his work he might be transferred. Soon he forgot about his girl friend and drank merely because he did not want to fly the B-24. The accused admitted that he knew that he was scheduled to fly with Crew 33 on 30 October 1944 but went to Riverside, California, instead. He likewise admitted that he missed all other scheduled flights subsequent thereto until 26 November 1944 when he was grounded. He did not attend the class on 5 November 1944 and he explained his derelictions on 18, 19 and 20 November 1944 by stating that he remained in BOQ on those days awaiting notification about being placed on another crew, or other action. He did not learn of his transfer to another crew until 21 November 1944. He recalled an orderly coming to his room on 20 November 1944 with a note directing him to report to the Squadron T-1 orderly room without delay, which he ignored, although he realized Private Watkins represented the commanding officer of the squadron. He also found a note on his bed the following day directing him to report to the legal office, which he likewise disregarded. He went absent without leave on 21 November 1944 and stayed in Long Beach, California, until the afternoon of 23 November 1944 when he was apprehended by military police who took him to Los Angeles and told him to report to March Field. Instead he went to a hotel and stayed there all night after which he proceeded to March Field. On the afternoon of 24 November 1944 he found a note on his bed in quarters directing him to report to Lieutenant Foley. He also ignored this note because he had been drinking, was tired, and so went to bed. He acknowledged receipt of the order of arrest and admitted that he broke his arrest on 3 December 1944 by going to Riverside, California, where he was apprehended by military police on 9 December 1944 (Pros. Ex. 1).

For the Defense:

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

He reiterated much of what he had said in his sworn statement commencing with his disappointment because of the marriage of his girl friend and his dislike of B-24 planes, in view of which he took to excessive drinking (R. 30). As a result of his mediocre work he was recommended for reclassification by an Evaluation Board. He also submitted his resignation on 4 December 1944 knowing that his separation from the service would be without honor (R. 31). He is still willing to resign his commission, as he had been requested to do by the commanding officer (R. 38), believing that he would be drafted back into the Army as a private and that in this manner he could be punished for what he had done and get a new start (R. 31).

With regard to his failure to repair for flights and a class scheduled for 18, 19 and 20 November 1944, he stated that he had been grounded and told by the navigation instructor and the adjutant not to make any more flights or attend ground school with Crew 33 (R. 31, 34, 37, 39). He had no knowledge of his transfer from Squadron T-3 to Squadron T-1, with which the flights and the class were scheduled and, after being removed from one crew, was awaiting information and instructions which the adjutant had promised to give him as soon as he was placed on another crew or other action was taken. He received no such instructions in any manner although he read the bulletin board at the Squadron T-3 orderly room and the BOQ (R. 33, 34, 37). His reading of the board was, however, casual as he only "glanced" at training orders appearing thereon (R. 37), and he did not learn of his transfer to a new crew nor see Training Order No. 103 until the early morning of 25 November 1944 (R. 32, 33). He denied ever receiving the note which the sergeant major of Squadron T-3 said he left in the accused's quarters and in which he was advised of the change of crews and he did not, therefore, know that Lieutenant Foley was his new commanding officer (R. 34, 39).

He also denied having received, on 20 November 1944, the note which purported to contain the order which is the basis of Specification 1, Charge III, and corrected what he claimed was an error in his extra-judicial statement, saying that the date to which he referred in the latter should be "21 November 1944", on which day he did receive from an orderly a note signed "Pvt. Watkins" advising him to report to T-1 orderly room without delay (R. 32). He did not, however, deny his knowledge of the fact that Private Watkins represented the commanding officer of the squadron (R. 36). He admitted receiving the note from Lieutenant Foley late in the evening of 24 November 1944 directing him to report to the squadron commander. Because it was late and "after dark" he thought there was no use in going down to report until morning and this he was prevented from doing because Lieutenant Foley came to his quarters in the morning (R. 32, 33, 37-39). He also directed attention to an error in his extra-judicial statement in which he said that "on the afternoon of the 24th I found a note on my bed that said report to Lt. Foley." The word "afternoon" should be "evening" because he knew he did not arrive at March Field on 24 November 1944 until about 8:30 or 9 p.m. (R. 35).

He "didn't think of those notes as being orders" but only as "more or less information that (he) was wanted at a certain place" and although he did not feel at liberty to disobey them, he nevertheless admitted doing so (R. 36).

He further admitted that he wanted to "get on a medium bomber, a C-26 or 25" and imagined that if he "goofed off" he would be transferred (R. 38).

Rebuttal by Prosecution:

The adjutant to the commandant of crews testified that during November 1944 the accused came into his office and during conversation was told that the adjutant was relieving him from his crew and placing him in the Squadron T-3 pool, which meant that he would be available for replacement. He further told him that he would have to check the orderly room and bulletin boards of Squadron T-3 to see what his new assignment would be. He did not remember telling the accused that he would be notified of any further duties (R. 40).

4. By his pleas of guilty the accused admitted the commission of the offenses alleged in Specifications 1, 2, 3, 4, 8 and 9 of Charge I and Specifications 1 and 2 of Charge II and the evidence of record clearly supports the findings as to each of these Specifications and the Charges to which they are directed.

As a defense to the allegations of Specifications 5, 6 and 7 of Charge I, the accused attempted to show that he was ignorant of a transfer from one squadron to another and, as a consequence, was unaware of the designated places of duty to which, it is alleged, he was required to repair at fixed times. The court placed little credence in this explanation of the accused's dereliction of duties and, in view of the testimony, was justified in doing so.

It was shown that orders of transfer from one training crew to another were customarily contained in training orders which were posted on a bulletin board in the orderly room of the squadron affected. A directive of the commanding officer required all officers to inspect this board twice a day. The order transferring the accused to the crew with which he later failed to appear for the training as alleged in the Specifications in question was so posted. The accused does not deny that it was his duty to inspect the bulletin board. In fact he admits "glancing" at training orders appearing on the board but failed to note the one relating to him.

Article of War 61, under which the Specifications are cast, is designed to cover every case not elsewhere provided for where a person subject to military law is through his own fault not at the place where he is required to be at the time when he should be there (Par. 132, MCM 1928).

The accused pleaded guilty to four like offenses and to two absences without leave over a period of time commencing prior to and ending subsequent to the three offenses alleged in Specifications 5, 6 and 7 of Charge I. He not only offered no excuse for his conduct as to those offenses to which he pleaded guilty but frankly admitted,

in a voluntary extra-judicial statement and at the trial, that he had deliberately adopted a course of purposeful evasion of his duties in order to effect a transfer because he dreaded flying B-24 planes. With a like purpose he had taken to excessive drinking, knowing that it would interfere with the proper performance of his flying duties.

In the light of such a frank avowal of disregard of his responsibilities the court was justified in rejecting the excuse offered by the accused and in disbelieving that he was unaware of the prescribed duties. He admitted reading the bulletin board upon which the training orders and schedules were posted and it is a fair inference that he saw the order of transfer, knew the duties he was then to perform but treated them with the same disdain as he theretofore and thereafter showed to all other portions of his prescribed training.

The same may be said of the defense offered by the accused to Specification 3 of Charge III. Although the system employed at the accused's post for conveying lawful orders of superior to subordinate officers is subject to the hazards of loss of the messages transmitted by messengers or misunderstanding of their purport and significance when a notice is substituted for oral and personal delivery, it is well settled that the form of an order is immaterial, as is the method by which it is transmitted, so long as the communication amounts to an order and the recipient knows it is from an officer who is authorized to give it (Par. 134b, MCM 1928).

It should be borne in mind that the offense charged in this Specification occurred subsequent to the seven separate failures of the accused to repair to a fixed place of duty and one absence without leave, all of which are indicative of an habitual disregard and disobedience of all orders, rules and regulations to which he was subject.

Assuming it to be true, as he stated, that he failed through no fault of his to find certain of the written notifications which had been sent to him by Lieutenant Foley, who was, at the time, his commanding officer, the accused, nevertheless, admitted receiving one of them at the hands of a private who was acting as Lieutenant Foley's messenger and that "he realized that he represented the commanding officer of the squadron". This custom of thus communicating orders was well established and clearly understood by the accused. Furthermore, he admitted thereafter receiving the additional notice to report, written and signed in the commanding officer's own hand, but that he ignored it, because, as he said, "I had been drinking and was tired so I went to bed".

Although the accused contended that he did not know Lieutenant Foley was his commanding officer because he was not personally notified

that he had been transferred to Lieutenant Foley's squadron, all other evidence points to the contrary. Such a defense might be more plausible if the accused's conduct and behavior otherwise had been more consistent with obedience and respect for authority but, again, the court was justified in disbelieving the accused and finding that he failed to obey the order in question, knowing it to be a lawful order of his superior, and the evidence of record fully supports such a conclusion.

5. Records of the War Department disclose that the accused was born in Missouri, is 20 years and 10 months of age and unmarried. After graduation from high school he was employed as a clerk in a grocery store until he was called to active duty. He enlisted in the Enlisted Reserve Corps on 16 March 1943 and was called to active duty 24 March 1943; on 2 February 1944 he was accepted as an aviation cadet and after completing the prescribed course of training at Army Air Forces Navigation School, Hondo Army Air Field, Texas, was on 18 September 1944 commissioned as a Second Lieutenant, Army of the United States.

6. The court was legally constituted and had jurisdiction of the accused and offenses 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 as approved by the reviewing authority and to warrant confirmation of the sentence. A sentence of dismissal or such other punishment as a court-martial may direct is authorized upon conviction of a violation, by an officer, of Article of War 69, and punishment at the discretion of the court is authorized upon conviction of a violation of either Article of War 61 or Article of War 96.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

R. E. Fiske Jr., Judge Advocate.

SPJGQ - CM 276363 1st Ind

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

8 JUN 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 Second Lieutenant Emil J. Kempke (0-2072354), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of four offenses of failure to repair to a fixed place of duty (Specifications 1, 2, 3 and 4, Charge I) and of two absences without leave of three and four days, respectively (Specifications 8 and 9, Charge I), in violation of Article of War 61, and of two breaches of arrest (Specifications 1 and 2, Charge II), in violation of Article of War 69. He pleaded not guilty to all other Specifications and to Charge III and was found guilty of three offenses of failure to repair to a fixed place of duty (Specifications 5, 6 and 7, Charge I) in violation of Article of War 61, and of three offenses of failure to obey the lawful order of a superior officer (Specifications 2, 3 and 4, Charge III), in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority disapproved the findings of guilty of Specifications 2 and 4, Charge III, approved the sentence but reduced the period of confinement to one year, and forwarded the record of trial for your action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. I concur in that opinion.

This officer, after the successful completion of his pre-flight and advanced training as a navigator, was transferred to an organization where he was required to perform his duties with B-24 planes, which are very much larger and more powerful than any with which he had been trained. He dreaded his work with these planes and, by a studied course of indifference to his duties, hoped to effect a transfer. At about the same time, he was disappointed in love by the marriage of the girl he had hoped to wed. Under the dual circumstances he took to excessive drinking. However, he soon forgot about his blighted romance but, nevertheless, continued to drink and neglected

his responsibilities so that he would be relieved of them and be assigned to others more agreeable. He failed on seven occasions to report to fixed places of duty, he was twice absent without leave (for three and four days respectively), twice broke his arrest, and failed to obey the lawful order of a superior officer to report to his squadron commander. Because of undesirable habits and traits of conduct evidenced by these acts he was recommended for reclassification but, after an interview in which he was urged to submit his resignation, he tendered his resignation on 4 December 1944 and was them transferred to the separation center of the Fourth Air Force, McChord Field, Washington to await action thereon. He was, nevertheless, returned to March Field, California to be tried by court-martial for the above stated offenses and no action has as yet been taken on the resignation. These derelictions entailed a deliberate scheme of selfish and purposeful disobedience of military authority and demonstrate that he lacks the fundamental qualities of character required of an officer of the Army. In view of the youth of the accused and in order that he may be made available for enlisted service, I recommend that the sentence as approved by the reviewing authority be confirmed, but that the confinement and forfeitures be remitted, and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by the reviewing authority confirmed but confinement and forfeitures remitted. G.C.M.O. 240, 19 Jun 1945)

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

SPJGH-CM 276374

28 MAR 1945

UNITED STATES v. Second Lieutenant MILTON A. BECK (0-1288165), Infantry	THIRD SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort George G. Meade, Maryland, 15 February 1945. Dismissal and confinement for five (5) years.

OPINION of the BOARD OF REVIEW
TAPPY, CAMBRELL 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. On a rehearing of this case ordered by the appointing authority the accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 96th Article of War

Specification 1: In that 2nd Lieutenant Milton A. Beck, Infantry, Detachment of Patients, Valley Forge General Hospital, did, at Philadelphia, Pennsylvania, on or about 27 October 1944, wrongfully appear in public wearing the uniform and insignia of a Major, United States Army Air Forces, and the insignia of a member of the Eighth Air Force.

Specification 2: In that 2nd Lieutenant Milton A. Beck, * * *, did, at Philadelphia, Pennsylvania, on or about 27 October 1944 with intent to deceive Captain Earl S. Dudley, Provost Marshal pf Philadelphia, Pennsylvania, officially state to the said Captain Earl S. Dudley that he was Major Ralph Engle which statement was known by the said 2nd Lieutenant Milton A. Beck to be untrue.

Specification 3: In that 2nd Lieutenant Milton A. Beck, * * *, did in public at Philadelphia, Pennsylvania on or about 27 October 1944 wrongfully and unlawfully wear the Distinguished Flying Cross ribbon, the Silver Star ribbon, the Air Medal ribbon, and the Purple Heart ribbon on his uniform.

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

Specification: In that Second Lieutenant Milton A. Beck, * * *, did, without proper leave, absent himself from his organization and station at Valley Forge General Hospital, Phoenixville, Pennsylvania from about 15 January 1945 to about 17 January 1945.

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

Specification 1: In that Second Lieutenant Milton A. Beck, * * *, did, at Washington, D. C., on or about 17 January 1945, wrongfully appear in public wearing the uniform and insignia of a Major, United States Army Air Forces.

Specification 2: In that Second Lieutenant Milton A. Beck, * * *, did, in public at Washington, D. C., on or about 17 January 1945, wrongfully and unlawfully wear the Distinguished Flying Cross ribbon, the Silver Star ribbon, the Air Medal ribbon and the Purple Heart ribbon on his uniform.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of any previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for five years. The reviewing authority approved only so much of the sentence as provides for dismissal and confinement for five years, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution is substantially as follows:

At about 7:30 on the evening of 27 October 1944 Captain Earl S. Dudley, Provost Marshal for Philadelphia, Pennsylvania, entered Ciro's Bar, a public drinking place in Philadelphia and there saw accused sitting at the bar with two Air Corps lieutenants. Accused was wearing a battle jacket bearing Air Corps insignia, major's leaves, five or six service ribbons and the shoulder patch of the Eighth Air Force. When accused was unable to produce his AGO card or any other means of identification Captain Dudley brought him to the Provost Marshal's Headquarters. Accused told Captain Dudley that he was Major Ralph Engle (R. 8, 9).

Unable to confirm this Captain Dudley finally communicated with the Federal Bureau of Investigation and two of their special agents, Charles H. Tappan and Delbert L. Christensen, assumed custody of accused (R. 9). At that time he was wearing the same uniform, insignia and decorations which he had worn in Ciro's Bar (R. 10). Both special agents testified that accused was wearing major's leaves, the shoulder patch of the Eighth Air Force, and the service ribbons for the Silver Star, the Distinguished Flying Cross, the Purple Heart, and the Air Medal with three Oak Leaf Clusters, together with three campaign ribbons (R. 12, 16). Accused continued to insist he was a major in the Eighth Air Force and brought the two special agents to his hotel room where he produced one dog tag bearing the name "Ralph Engle O-12563-T43." He suggested several individuals who could establish his identity, among whom were Lieutenant Colonel James I. Gibbons, a retired Intelligence officer, who had served in England, and Captain Cyril S. Lawrence, an Air Force Intelligence officer on duty in Philadelphia. The three went to Lieutenant Colonel Gibbons' hotel room where, with accused's permission, the colonel questioned him on his career in the Air Force. Accused claimed to have been a "mission command pilot" stationed in England and to have taken part in 67 missions against Germany. He had been awarded the Silver Star for participating in the raids on the Ploesti Oil Fields. He exhibited a certain amount of technical knowledge about bombing raids, so much so that Lieutenant Colonel Gibbons would not declare him to be an imposter but refused to vouch for him (R. 12, 13). He persisted in his claim that he was a major in the Air Force when he talked to Captain Lawrence but that officer likewise refused to guarantee his identity and, because of certain inconsistencies in his story, the two special agents told him that they were going to return him to the custody of the Military Police until such time as the records of the War Department could be checked. Accused then admitted that he was not Ralph Engle, nor a major, but Milton Allan Beck, a second lieutenant in the Infantry, assigned to the Valley Forge General Hospital as a patient. He now claimed to have fought with the First Division in North Africa, Sicily and Anzio and stated that with the exception of the Silver Star and the Air Medal he had been awarded all the decorations he was wearing (R. 14). He stated that his reason for the masquerade was to attract women (R. 9, 18).

On 15 January 1945 accused absented himself without leave from the Valley Forge General Hospital, Phoenixville, Pennsylvania (R. 18; Pros. Ex. A). About 12:30 a.m. on 17 January 1945 he appeared at the Hotel Roosevelt in Washington, D. C., wearing major's leaves and registered under the name of Major Beck (R. 19). About 6:30 a.m. Second Lieutenant Elliott B. Hill, Corps of Military Police, in response to a report, went to accused's room at the Hotel Roosevelt. Accused readily admitted that he was a second lieutenant, Infantry, and not a major in the Air Force. He was wearing major's leaves, pilot's wings,

the service ribbon for the Silver Star, the Distinguished Flying Cross, the Purple Heart, and the Air Medal with two oak leaf and one silver cluster, together with three campaign ribbons (R. 22). Accused gave as a reason for his imposture that he was having a "last fling" and wanted to be "impressive" (R. 22). Accused was interviewed later that same morning at the Military Police Cell Block, in Washington, by First Lieutenant John J. Long, Corps of Military Police, who first warned accused of his rights under Article of War 24 (R. 26). Accused admitted he wore the insignia of a major, the service ribbons for the Silver Star, the Distinguished Flying Cross, the Air Medal, and the Purple Heart. He further admitted that he was a second lieutenant and that he was not authorized to wear any of these ribbons (R. 24, 25). On this occasion he explained his impersonation on the grounds that it would enable him to associate with officers of high rank who could advise him what to do in regard to his brother's court-martial (R. 24).

4. The accused after being warned of his rights, elected to be sworn and testify. He admitted that he, a second lieutenant, appeared in Ciro's Bar in Philadelphia, Pennsylvania, wearing the insignia of a major and "several decorations" none of which he was authorized to wear (R. 28). The afternoon of the same day he had appeared before an Army Retiring Board which, despite his opposition, retired him for a physical disability. This and the recent death of his mother depressed him and he went to Philadelphia to get drunk. He met a Major Engle at a bar in the Adelphia Hotel and they struck up an acquaintance with a lieutenant and a girl. The entire party retired to the major's room in the hotel to drink. Major Engle suggested that accused and the lieutenant procure some more liquor and accused, so that he could use Major Engle's liquor ration card, borrowed the latter's combat jacket and a copy of his orders. The liquor stores were closed and the two returned to the hotel room. Major Engle would not admit them and told them to come back in an hour. Accused slipped the major's orders under the door and after the lieutenant made a telephone call, the two went to Ciro's Bar where accused was taken into custody by the Military Police. The lieutenant was disgruntled because Major Engle had remained in the room with the girl he was escorting and hoped to create difficulty for Major Engle by having the Military Police take accused into custody (R. 28). Accused was not conscious that he was doing anything improper in wearing Major Engle's jacket because it was a common practice among the officers at the hospital where he was a patient to wear one another's blouse (R. 27, 28).

As a result of this incident accused was "confined" to the post for 30 days and asked to tender his resignation, the plan to retire him having been dropped in the meantime because of his success in getting an assignment. He delayed submitting his resignation because he wanted to remain in the Army and fight but after several requests he finally

complied (R. 29). He then went to Washington to do what he could toward preventing his resignation from being accepted or, if it were accepted, to inquire about reenlisting as a soldier. He spent two or three days in a futile attempt to communicate with someone in the War Department who could help him. Thinking that he would not make any progress as a second lieutenant he donned a "blouse" with major's insignia on it and endeavored to accomplish his purpose by representing that he was inquiring about his brother's resignation (R. 30).

On cross-examination and examination by the court accused admitted that the combat jacket complete with the shoulder patch of the Eighth Air Force, major's insignia, and service ribbons which he wore in the Roosevelt Hotel in Washington, D. C., was the same jacket with the same patch, insignia, and service ribbons that he had worn in Ciro's Bar in Philadelphia, Pennsylvania. He had this jacket in his possession about three months. The service ribbons represented the Distinguished Flying Cross, the Purple Heart, the Air Medal and the Silver Star, none of which he was authorized to wear (R. 32-34).

5. a. Specifications 1 and 3 of the Charge and Specifications 1 and 2 of Additional Charge II:

Specifications 1 and 3 of the Charge deal with the accused's unauthorized wearing of insignia and service ribbons in Philadelphia, Pennsylvania, on 27 October 1944 and Specifications 1 and 2 of Additional Charge II allege that he committed the same offenses in Washington, D. C., on 17 January 1945. The evi ence, including accused's admissions, clearly establishes that accused on 27 October 1944 appeared in Ciro's Bar in Philadelphia, Pennsylvania, and on 17 January 1945 appeared in the Hotel Roosevelt, Washington, D. C., wearing major's insignia, the shoulder patch of the Eighth Air Force, and the service ribbons for the Purple Heart, the Air Medal, the Distinguished Flying Cross and the Silver Star. On both of these occasions accused was a second lieutenant, Infantry, and on neither occasion was he authorized to wear any of these ribbons. The findings of guilty of these Specifications and Charges were clearly warranted.

b. Specification 2 of the Charge:

The accused is charged herein with intending to deceive Captain Dudley, Provost Marshal of Philadelphia, Pennsylvania, by making a false official statement on 27 October 1944 to the effect that he was Major Ralph Engle. The uncontradicted evidence shows that when questioned by Captain Dudley as to his identity accused stated he was Major Engle and that he persisted in this contention until he realized that it was futile and that his real identity would be revealed. Manifestly it

was made with the intent to deceive Captain Dudley so that he would not pursue his investigation of accused any further. In inquiring into accused's identity and his right to wear the insignia and service ribbons he was wearing, Captain Dudley, the Provost Marshal for Philadelphia, was engaged in the performance of his official duties. The finding of guilty, then, of this Specification was justified.

c. Specification of Additional Charge I:

This Specification charges accused with absence without leave from on or about 15 January 1945 to on or about 17 January 1945. The uncontradicted evidence shows that accused absented himself without leave from his organization at Valley Forge General Hospital, Phoenixville, Pennsylvania, on 15 January 1945 and remained absent without leave until apprehended in Washington, D. C., on 17 January 1945. The findings of guilty of this Specification and Charge are, therefore, clearly supported by the record.

6. On 21 March 1945 Robert E. Sher, Esq., an attorney of Washington, D. C., submitted a brief and on 27 March 1945 appeared before the Board of Review and was accorded a full hearing on behalf of accused.

7. Accused is single and 29 years of age. The records of the War Department show that he is a college graduate and attended medical school for two years. A Psychiatric Report on accused, however, states that he admitted that this information respecting his education was false and that it was made by him for the purpose of enhancing his chance of obtaining a commission. He enlisted in the Army on 20 September 1940 and was discharged on 20 September 1941 at the expiration of his term of service. He voluntarily enlisted again on 20 December 1941. On graduation from The Infantry School on 18 July 1942 he was commissioned a second lieutenant, Army of the United States, and reported for active duty the same day. A Disposition Board classified him as fit for limited service only because of ulcerative colitis and on 2 July 1943 he was transferred to the Corps of Military Police.

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

Thomas N. Deppy, Judge Advocate

William H. Lambrell, Judge Advocate

Robert E. Trueblood, Judge Advocate

SPJGH-CM 276374 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 12 Apr 1945

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Milton A. Beck (0-1288165), Infantry.

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

3. Consideration has been given to the inclosed letters from Mrs. Henry Dintenfass, sister of the accused, dated 6 December 1944 and 28 March 1945 addressed to the President, and to another dated 21 March 1945 addressed to Colonel Charles M. Dickson, Staff Judge Advocate of the Third Service Command, as well as to the inclosed report from accused's commanding officer, dated 24 March 1945, relative to his attitude and conduct since the date 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

7 Incls
1. Record of trial
2. Ltr fr Mrs H Dintenfass, 6 Dec 44
3. Ltr fr Mrs H Dintenfass, 21 Mar 45
4. Ltr fr Mrs H Dintenfass, 28 Mar 45
5. Report fr accused's CO, 24 Mar 45
6. Dft ltr for sig S/W
7. Form of action

(Sentence as approved by reviewing authority confirmed but confinement remitted. G.C.M.O. 176, 6 Jun 1945)

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

SPJGK-CM 276386

15 MAR 1945

U N I T E D S T A T E S	)	TANK DESTROYER CENTER
v.	)	Trial by G.C.M., convened at Camp Hood, Texas, 20 February 1945. Dismissal, total forfeitures and confinement for five (5) years.
Second Lieutenant FREDERICK E. NEWELL (0-1826244), Infantry.	)	

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

1. The Board of Review has examined the record of trial 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 FREDERICK E. NEWELL, Tank Destroyer Officer Replacement Pool, Tank Destroyer Replacement Training Center, North Camp Hood, Texas, attached to Headquarters, Tank Destroyer Replacement Training Center, North Camp Hood, Texas, did, without proper leave, absent himself from his organization at North Camp Hood, Texas, from about 3 October 1944 to about 10 November 1944.

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

Specification: In that Second Lieutenant FREDERICK E. NEWELL, Tank Destroyer Officer Replacement Pool, Tank Destroyer Replacement Training Center, North Camp Hood, Texas, attached to Headquarters, Tank Destroyer Replacement Training Center, North Camp Hood, Texas, did, at Waco, Texas, on or about 3 October 1944, knowingly, willfully and wrongfully apply to his own use, without the consent of the owner, a certain automobile to wit: a 1941 Packard Convertible, the property of L. S. Torrence, of the value of more than Fifty ($50.00) Dollars.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 5 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: It was stipulated that the accused was in the military service of the United States at the time the offenses were alleged to have been committed and at the time of the trial (R. 6).

Charge I and its Specification

By paragraph 2 of Special Orders 231 of 7th Headquarters and Headquarters Detachment, Special Troops, Fourth Army, Camp Bowie, Texas, 26 September 1944 the accused was assigned to Tank Destroyer Replacement Training Center at Camp Hood, Texas, and ordered to report to the Commanding General of that organization upon his arrival (Pros. Ex. B). He left Camp Bowie, Texas on 2 October 1944 (Pros. Ex. C). He failed to appear at Camp Hood with the other officers transferred there with him at the same time and was entered in the Morning Report of the organization to which he was assigned at Camp Hood as "AWOL" 3 October 1944 (Pros. Ex. D; R-8). No leave was granted to the accused to be absent. The usual travel time from Camp Bowie, Texas, to Camp Hood, Texas, is one to two days. The accused arrived at Camp Hood on 10 November 1944 (R. 8-10).

Charge II and its Specification

At Waco, Texas, on the morning of 3 October 1944 the accused entered into negotiations for the purchase of a 1941 Packard Convertible Coupe with a Mr. L. S. Torrence, a used-car dealer, and owner of the automobile involved. Accused agreed to purchase the automobile for $1475. All of the papers necessary for the transfer of the title of the automobile were prepared and signed (Pros. Ex. H) but retained by Mr. Torrence pending the cashing of a check for $1000 (Pros. Ex. F) which the accused made and delivered to Mr. Torrence on account of the purchase price. It was agreed that Mr. Torrence should telegraph the First National Bank of Gardiner, Oregon — the bank upon which the check was drawn — to ascertain its validity. The accused requested permission to use the automobile while awaiting a reply to the telegram. Mr. Torrence consented to this use with the understanding that the accused would return with the car at one o'clock that day (R. 14-15).

Mr. Torrence telegraphed the bank but did not receive a reply until the next day. The reply was to the effect that the bank could not "confirm" the accused's account (R. 15, Ex. G).

The accused did not return the car at 1 o'clock as agreed but picked up two friends in Waco and drove them in the car to Fort Worth,

Texas. There they were joined by another friend and spent the night near Fort Worth. The following morning the accused loaned the car to one of his companions to drive back to Waco. He told this companion to return the car to the accused later that day. The companion and the car were picked up by the police in Waco upon entering that city (R. 11-12, 24, 43).

The fair market value of the car at the time was $1475 (R. 17).

4. For the defense Mrs. Gertrude Young, the accused's mother, testified by deposition that she saw and talked to the accused on 22 or 23 September 1944 in Denver, Colorado, where she was in business, and at that time she promised her son to deposit $1000 in the Gardiner National Bank, Gardiner, Oregon, for him and for his use. Because of her failure to receive certain anticipated income from her business she was unable to make the deposit. She could not inform her son of this prior to 3 October because she did not know where he was (R. 38; Def. Ex. 1).

On 16 August 1944 the accused made an allotment of $225.00 per month of his pay commencing 1 September 1944 to First National Bank, Gardiner, Oregon, as a deposit to the credit of the accused and the accused's wife. The allotment was paid but was cancelled on 20 October 1944 by the Government because of accused's absence without leave (R. 40-42).

The accused having been advised of his rights elected to make an unsworn statement to the court (R. 42). He stated that he was in Waco, Texas, on 3 October 1944 and at 11 o'clock in the morning arranged to purchase the automobile. He gave the check for $1000 because he felt sure that the money was in the bank as a result of his conversation with his mother. He volunteered to pay and did pay for the telegram to assure Mr. Torrence that the money was there. He asked for and obtained permission to use the car but having paid $1000 for it he felt that he was the owner of the car. When his friends asked him to drive them to Fort Worth he did so because he felt he owned the car. When he permitted one of his friends to drive the car back to Waco the next day he asked him to stop in and see Mr. Torrence. He himself then found out about the check being bad and he did not know what to do. That was his reason for leaving and not returning. He spent two years overseas "sitting" on an island and the only way he could get off was by applying for "OCS". He wanted to resign from "OCS." He claimed that he had been a good "NCO" and had tried to do his duty the best that he knew how. He did not mean to cause this trouble but just "went to pieces." He had no other explanation for his absence without leave as it was his first in the army.

His mother and father were divorced when he was three years of age. He lived with his father but he did have confidence in his mother

that she would deposit the money. When he discovered that she had not done so he did not know what to do (R. 43-44).

He and his wife, who lives in Gardiner, Oregon, arranged to open the joint account in the National Bank at that city and he had written his wife's mother at that place to notify the bank of the allotment (R. 44).

A birth certificate was admitted in evidence showing the accused to have been born on 13 February 1924 (R. 45, Def. Ex. 3).

There was also admitted in evidence the honorable discharge of the accused from the Army of the United States as an enlisted man on 16 September 1943 (Def. Ex. 4) and from the National Guard of Oregon on 9 November 1939 (Def. Ex. 5) in which his character is rated as excellent.

5. With reference to Charge I and its Specification it was clearly established by the evidence for the prosecution and admitted by the unsworn statement of the accused that he was absent without leave from his organization at Camp Hood, Texas, from 3 October 1944 to 10 November 1944 as alleged in the Specification. The record therefore legally supports the findings of guilty of the Charge and its Specification.

With reference to Charge II and its Specification, it was shown without contradiction and beyond any reasonable doubt that on 3 October 1944 at Waco, Texas, the accused borrowed an automobile worth more than $50.00 from its owner L. S. Torrence and instead of returning the automobile at the time specified in his verbal agreement to do so continued without authority to use the automobile for his own purposes. He did in this manner knowingly and willfully apply the automobile to his own use without the consent of the owner. So long as the automobile remained the property of L. S. Torrence under the circumstances appearing in the record, the unauthorized use of the vehicle by the accused was wrongful and constituted a violation of the 96th Article of War because such misconduct brings discredit upon the service. The accused did not deny the use of the vehicle nor did he claim any authority to use it beyond the few hours agreed upon but in mitigation of his misconduct claimed that he thought he was the owner of the car because of his belief in the validity of the check given in part payment. The accused must have known that he was not the owner of the vehicle as it was clear from the evidence that the sale had not been consummated. All of the papers necessary for transfer of title had been prepared, but the all important part of the transaction to the seller, namely, payment of the purchase price, had not been consummated or completely arranged for. In short, the evidence conclusively shows that there was no intention on the part of either of the parties to the transaction that title should pass until full

payment of accused's check and that accused's possession was by virtue of the verbal permission to use the vehicle for a few hours given by L. S. Torrence and not because of any sale or otherwise.

The evidence of record is therefore ample and legally sufficient to support the findings of guilty of Charge II and its Specification.

6. War Department records show the accused to be 24 years of age and married. He completed 11 grades of schooling. On 10 November 1939 he enlisted in the military service. He served in the Medical Department as a clerk for 18 months in Alaska. On 17 September 1943 he was commissioned second lieutenant, Army of the United States, at the Tank Destroyer School, Camp Hood, Texas. His permanent home address is Gardiner, Oregon.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK-CM 276386 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAR 27 1945

TO: Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Frederick E. Newell (0-1826244), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the confinement be reduced to one year; that the forfeitures be remitted; 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 it 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 of S/W
3. Form of Action

(Sentence confirmed but confinement reduced to one year and forfeitures remitted. G.C.M.O. 197, 9 Jun 1945)

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

SPJGN-CM 276435

5 MAY 1945

UNITED STATES	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND
v.	Trial by G.C.M., convened at Yuma Army Air Field, Yuma, Arizona, 5 February 1945. Dismissal, total forfeitures and confinement for five (5) years.
First Lieutenant HAROLD W. MEYER (O-1049581), 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 93rd Article of War.

Specification 1: In that 1st Lieutenant Harold W. Meyer did, at Yuma Army Air Field, Yuma, Arizona, on or about 1 July 1944, feloniously embezzle by fraudulently converting to his own use United States currency in the amount of Twenty Dollars ($20.00), the property of Corporal Harold F. Crowe, entrusted to him by the said Corporal Harold F. Crowe.

Specification 2: Identical with Specification 1 except embezzlement of $50, property of Corporal James Manolakelli.

Specification 3: Identical with Specification 1 except embezzlement of $90, property of Corporal Vernon J. Schommer.

Specification 4: Identical with Specification 1 except embezzlement of $28, property of Corporal Joel E. Glass.

Specification 5: Identical with Specification 1 except embezzlement of $40, property of Corporal William D. Prevost.

Specification 6: Identical with Specification 1 except embezzlement of $30, property of Corporal William D. Prevost.

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

Specification 1: In that 1st Lieutenant Harold W. Meyer did, at Yuma Army Air Field, Yuma, Arizona, between about 15 May 1944 and 1 July 1944, wrongfully borrow the sum of Twenty Dollars ($20.00), from funds in the total amount of Twenty Dollars ($20.00), which had been entrusted for safekeeping to the said 1st Lieutenant Harold W. Meyer by Corporal Murray W. Fisk.

Specification 2: In that 1st Lieutenant Harold W. Meyer did, at Yuma Army Air Field, Yuma, Arizona, between about 15 May 1944 and 1 July 1944, wrongfully borrow the sum of Forty Dollars ($40.00), from funds in the total amount of Forty Dollars ($40.00), which had been entrusted for safekeeping to the said 1st Lieutenant Harold W. Meyer by Corporal William D. Prevost.

Specification 3: In that 1st Lieutenant Harold W. Meyer did, at Yuma Army Air Field, Yuma, Arizona, between about 15 May 1944 and 1 July 1944, wrongfully borrow the sum of Thirty Dollars ($30.00), from funds in the total amount of Thirty Dollars ($30.00), which had been entrusted for safekeeping to the said 1st Lieutenant Harold W. Meyer by Corporal William D. Prevost.

Specification 4: In that 1st Lieutenant Harold W. Meyer did, at Yuma Army Air Field, Yuma, Arizona, on or about 16 June 1944, wrongfully convert to his own use the sum of Two Hundred Dollars ($200.00), United States currency, representing the proceeds of a check dated June 14, 1944, drawn on the Bank of Cleveland, Garfield Park Office, by David A. Rounds, payable to the order of Lieutenant Harold W. Meyer, which was entrusted to the said 1st Lieutenant Harold W. Meyer for collection.

Specification 5: In that 1st Lieutenant Harold W. Meyer, being in custody of funds entrusted to him for safekeeping by enlisted men, did, at Yuma Army Air Field, Yuma, Arizona, during the period from about 15 May 1944 to 1 July 1944, wrongfully fail to adequately safeguard said funds.

The accused pleaded guilty to, and was found guilty of, all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that, from mid-April 1944 to 6 July 1944, the accused was squadron commander of Gunnery Group 6 at Yuma Army Air Field, Yuma, Arizona (R. 10, 22). Approximately 350 enlisted men comprised the classes assigned to his squadron for a six weeks course of instruction in aerial gunnery (R. 10). In his orientation lecture to each new class accused warned that pilfering was prevalent in the squadron and suggested that the students leave their money with him for safekeeping (R. 10). Each squadron had a field safe which was available as a depository for these funds but the accused proposed to initiate a new practice of depositing the money in his personal account in the bank, drawing a check for the amount left by each student, and placing each check in an envelope in the safe. When the student requested his money, the check would be delivered to him to be cashed (R. 10-11, 20-21, 29). Pursuant to this arrangement some of the money delivered to accused was deposited in his account in the Yuma Branch of the First National Bank of Arizona, Yuma, Arizona (R. 15-16, 20-21; Pros. Ex. E). The balance, however, was placed in envelopes and retained in the squadron safe (R. 13). Both the envelopes containing checks and those containing cash bore notations reflecting the names of the individual depositors and the amounts originally entrusted by them to the accused (Pros. Exs. A, B, C, F, G, H, I, J).

On 5 July 1944, accused informed his adjutant, Second Lieutenant John S. McCollough, that he was being shipped to Orlando, Florida, the following morning and that he wished to transfer the students' funds to Lieutenant McCollough before leaving (R. 11-12). The two officers examined the envelopes in the safe and compared the amounts shown as deposited with the money and checks therein and the money which a bank statement disclosed was in the bank. The inspection revealed a shortage in the funds (R. 13-15, 19). Accused proposed that the money be taken out of the envelopes and pooled to meet demands on the fund as they arose. He further suggested that any shortages be supplied by Lieutenant McCollough and promised that he would repay any such advances. Lieutenant McCollough made a non-committal reply which apparently caused accused to assume that the matter was settled (R. 16, 19). Accused gave Lieutenant McCollough at the time a $10 bill from his wallet, "a $30 check from one student", "three certificates for the swimming pool" and five checks drawn on his own bank account. The checks were payable either in blank or to Lieutenant McCollough and were either postdated or of blank date. Two were for blank amounts, two for $150, and a fifth for $156 (R. 15; Pros. Exs. D1-D5). The balance in accused's bank account on 5 July 1944 was $44.90. On 15 July 1944, the date of one of accused's postdated checks to Lieutenant McCollough, the balance was $68.70 (Pros. Ex. E).

A few hours after the departure of the accused on 6 July 1944 Lieutenant McCollough reported the shortage to his superiors (R. 17). An investigation was conducted which revealed that, of the 53 envelopes found in the safe, three contained neither money nor checks (R. 17). On one such envelope appeared the name of "/Corporal/ James Monolakelli" and figures indicating that he was entitled to receive $50.00 (R. 14, 22-23; Pros. Ex. C). The envelope bearing the name of "/Corporal/ Vernon J. Schommer" showed that he had placed $90.00 and a wrist watch with the accused. Only the watch was found in his envelope (R. 14, 23; Pros. Ex. A). The third envelope which contained neither money nor check was in the name of "/Private/ James Perry" and indicated a deposit of $90.00 (R. 14, 22; Pros. Ex. B). A "man by the name of Crowe" was entitled to receive $100.00 but only $80.00 in currency was found in his envelope (R. 24-25). Each of the two envelopes in the name of "/Corporal/ William D. Prevost" contained a check, one for $40.00 and one for $30.00, which corresponded with the amounts indicated on the envelopes. These two checks were made to the order of Prevost and executed by the accused on his bank account (R. 25; Pros. Exs. F & G). Also drawn on the same account by the accused was a check for $20.00, naming "/Corporal/ Murray Fisk" as payee (R. 26; Pros. Ex. H). Still another such check, made to "/Private/ Joel E. Glass" for $28.00, was found in the safe (R. 25; Pros. Ex. I). Private Glass testified that about mid-June of 1944 he had left two checks, one for $3.00 and one for $25.00, with the accused to be cashed, the proceeds to be returned when Glass finished the gunnery school course (R. 32-33). Another envelope containing a check in the sum of $40.00 payable to "Walter Simonick" was found in the safe (R. 26; Pros. Ex. J).

On 14 June 1944 Private First Class David A. Round executed to the order of the accused a check for $200.00 on the Bank of Cleveland, Cleveland, Ohio, and delivered the check to the accused for collection. Round wished to have these funds available about the time of his graduation from gunnery school on 23 June 1944 but, when that date arrived, he agreed that until the time of his transfer from the post the money should remain with the accused. On 5 July 1944 Round learned that the accused was soon to leave on temporary duty and requested a return of the $200.00. Round was assured by the accused that Lieutenant McCollough, or some other person in authority, would deliver the money on request (R. 30-32). At that time there was only $44.90 in the bank account but Round was reimbursed in full on 11 August 1944 from funds furnished by the accused (R. 32; Pros. Ex. E).

On 11 July 1944 Captain Donovan W. Laurie, assistant commandant of the gunnery students, undertook to reimburse those members of the squadron whose imminent transfer was expected. The currency found in the envelopes was used as far as it would go but it was necessary for him and two other officers to advance $148.00 from their personal funds (R. 27). Among those repaid on that date were Prevost, Fisk, and Glass (R. 27; Pros. Exs. F, G, H, I).

The accused subsequently returned to his station at Yuma and, on 10 August 1944, obtained a loan from Valley National Bank in Phoenix, Arizona. With the proceeds he reimbursed Captain Laurie and the other officers who had made personal advancements and, in addition, made good the remaining deficiency in the funds still owed to the enlisted men. On 11 August 1944, Monolakelli, Schommer, and Perry, as well as Round, were repaid in full. The record does not show when Crowe recovered his money, but it clearly establishes the fact that all the men who entrusted funds to the accused were fully reimbursed and that he supplied the money which made good the shortage (R. 28; Pros. Exs. A, B, C).

Captain Laurie considered the accused one of the best squadron commanders on the Field (R. 29).

4. The accused, after he had been apprized of his rights relative to testifying or remaining silent, elected to make a sworn statement (R. 35). He testified that during the last war he enlisted in the Marines at the age of sixteen but was soon discharged because of his youth. When he became of age, he enlisted in the National Guard. He resigned from it with the rank of first lieutenant in 1926 because of the pressure of private business. At the outbreak of the present war he applied for a commission in the Army. Failing to procure a direct commission because of his age, he enlisted in the Army as a Volunteer Officer Candidate and, after basic training and Officer Candidate School, he was commissioned a second lieutenant in Anti-Aircraft, Coast Artillery (R. 36). He served as a Battery Executive Officer and Battery Commander in the Eastern Defense Command for fourteen months and was then alerted for overseas duty. Because he was overage in grade he was not allowed to go on foreign duty and was given an opportunity to return to civilian life or transfer to a branch of the Army where he could be used. He applied for transfer to the Air Corps and because of his knowledge of automatic weapons was assigned to Buckingham Field for gunnery instructor's training. After completing the course of training, he was assigned to Yuma Army Air Field where, after serving for two weeks as Adjutant of the 1st Gunnery Group, he was appointed to command the 6th Student Squadron (R. 37).

When the accused became Squadron Commander, he found that the enlisted men in the group were in the habit of bringing their money for safekeeping to the Orderly Room where it was placed in the squadron safe. He was reluctant to be responsible for this money, which often amounted to as much as $1500; for the safe was left unguarded much of the time. He suggested, and the men agreed, that he deposit the money in a bank account and represent the sums due to the men by checks on the account all of which were to be kept in the safe. The system was inaugurated and was fully explained to, and apparently understood by, each new class. It worked well for a time but became complicated when the men began to request partial payments of their money (R. 37-38). On several occasions

he advanced his own monies to the men and, while he noted these transactions on their receipts, he neglected to change the checks made to their order or make any other record of such payments from his personal funds. The accused considered that he became entitled to that portion of the bank account equal to the monies which he personally advanced to the men. He did not commingle his own funds in the account. Part of his earnings were alloted and the balance was paid to him by check which he cashed at the Post Exchange. He paid several personal obligations, chiefly medical bills incurred by his wife, by checks drawn on the bank account in amounts beyond his rightful claim on the account and for this reason he insisted that pleas of guilty be entered in this case, although this action ran counter to the judgment of the Defense Counsel. While the accused did not have their permission to use the money, he did not intend to defraud the men but expected to replace any withdrawals without difficulty (R. 38-39).

He learned of his imminent departure from the Field on the afternoon of 5 July 1944 and left by plane the next morning. During this short interval he had no time to procure funds with which to make good the deficiency (R. 41-42). He did not know the present amount of the shortage because of the "tremendously large interplay of funds and partial payments". He conferred with Lieutenant McCollough who agreed to take care of any shortage which might arise and the accused left five checks to protect McCollough against loss by reason of his personal advancements. Confident that his arrangement with Lieutenant McCollough would meet the demands of the men, the accused made no further effort to supply the funds. When, ten days after arriving at Orlando, he learned that the plan had not worked as expected, he attempted to get leave of absence to arrange for a loan. Failing in this, he was returned to Yuma and, getting leave for a single day, he borrowed sufficient funds to reimburse the officers who had made advancements as well as the enlisted men who had not yet recovered their monies. His full schedule at the field had kept him from taking this action long before (R. 39-43).

The defense offered as evidence the accused's Officer's Qualification Record, W.D. A.G.O. Form No. 66-2. The first performance rating of "Very Satisfactory" is followed by three ratings of "Excellent". As to the last two ratings of "Unsatisfactory", it appears that the second last would have been "Excellent" except for the incidents which led to the present Charges against the accused, and "the last one was put in there because [the accused] had no assignment at the time" (R. 45).

5. Each of the six Specifications of Charge I alleges that the accused on or about 1 July 1944 did "feloniously embezzle by fraudulently converting to his own use United States currency" entrusted to him by various enlisted men whose names and the amounts allegedly embezzled are, by Specifications, as follows:

	Name	Amount
Spec. 1	Corporal Harold F. Crowe	$20.00
Spec. 2	Corporal James Monolakelli	50.00
Spec. 3	Corporal Vernon J. Schommer	90.00
Spec. 4	Corporal Joel E. Glass	28.00
Spec. 5	Corporal William D. Prevost	40.00
Spec. 6	Corporal William D. Prevost	30.00

These offenses are set forth as violations of the 93rd Article of War.

A relationship of trust existed between the accused and those men in his squadron who placed money with him for safekeeping and, as a trustee, he was charged with the duty of protecting the funds and returning them upon demand. The record is not clear as to whether the funds were to be kept in the squadron safe or, as a further precaution, deposited in a bank account opened for that purpose. Apparently the accused was authorized to follow either course. The fact that he opened the bank account in his individual name with no indication of its fiduciary nature, while unwise, was not in itself a conversion to his own use of the funds therein deposited. The men apparently agreed to this procedure and, as long as the withdrawals from the account by accused were for the men entitled to receive the money, there was no breach of trust. Furthermore, the evidence does not show a commingling by the accused of his personal monies with the trust funds. When, however, he advanced certain sums from his personal resources, he considered that he became entitled to reimbursement pro tanto from the bank account. Upon this theory the accused began the practice of writing checks on the account to meet his individual obligations and in so doing asserted a claim of right to a portion of the trust funds. His claim was apparently bona fide and, if the withdrawals for his personal use had not exceeded the amount which was rightfully his, the offense of embezzlement would not have been committed.

However, as is reflected by the accused's statement that "I did pay some of my obligations through the checking account beyond the funds I had available myself", he realized that he was withdrawing from the bank account for his private uses a greater sum than he could properly claim.

At that point, since his personal use of the trust fund exceeded the amount of his bona fide claim, the conversion became fraudulent in character and the offense of embezzlement was complete.

> "The means by which fraudulent conversion is accomplished are immaterial. It may be effected by any exercise of the right of ownership inconsistent with the owner's rights, and with the nature and purposes of the trust" (29 C.J.S. 683; People v. Beale 267 N.Y.S. 575, certiorari denied 54 S.Ct. 717; Commonwealth v. Barnes (Pa.), 162 A. 670).

The fact that the accused expected at the time of such conversion to rectify his wrong by replacing the money and that he did, in fact, make full restitution does not negative the existence of fraudulent intent or make the offense any less that of embezzlement.

> "The intention of accused to restore the money or other property embezzled will not relieve the act of its criminal nature" (29 C.J.S. 689, and see Hughes v. United States, 4F (2d) 686).

> "The fact that an embezzler offers to return or does return what he had fraudulently converted, or that he or his sureties settle with the owner, does not bar a prosecution for embezzlement, the offense being complete at the time of conversion" (29 C.J.S. 702, Weinhandler v. United States, 20 F (2d) 359, certiorari denied 48 S. Ct. 116).

To the same effect is the case of Hancey v. United States, 108 F. (2d) 835, wherein the defendant, a bank employee, issued a cashier's check to meet an installment payment on his automobile. The check was paid from the bank's funds upon presentation but the accused contended that, since he had reimbursed the bank before the check was paid, he was not guilty of embezzlement. To this contention, the court said:

> "The crime of embezzlement is committed when property belonging to another, rightfully in possession of accused, is feloniously appropriated. Subsequent repayment does not vitiate the crime. The gravamen of the offense is the intent, coupled with the execution. In National Life & Accident Ins. Co. v. Gibson, 101 S.W. 895, 897, 31 Ky. Law Rep. 101, 12 L.R.A.N.S. 717, 720, the court said: 'The gravamen of the offense is intent. There must be a criminal intent, but this intent must, of necessity, be gathered from the acts of the agent and the circumstances surrounding the particular case, rather than from his express declarations, and if the agent knowingly appropriates money belonging to his principal to his own use, even though at the time he does so he intends to restore it, it is nevertheless embezzlement within

the spirit as well as the letter of the law, for when one knowingly appropriates money belonging to another to his own private use, the law presumes a criminal intent.'"

In the absence of a statute to the contrary, a demand and refusal to pay are not necessary elements of the offense of embezzlement. It was not necessary in the present case to adduce proof that the men whose funds were allegedly embezzled demanded their return and that the accused refused to comply with such demand. See Fullerton v. Government of the Canal Zone, 8F (2d) 968.

The evidence adduced at the time of trial, while revealing a course of conduct on the part of accused which amounts to embezzlement, fails to prove the specific acts alleged in the six Specifications of Charge I. His guilt of these acts, however, was admitted by his pleas, which alone were sufficient to support the conviction: 23 BR 374, CM 237326, Thompson. The evidence is entirely consistent with guilt and there is nothing in the record to indicate that the pleas were improvidently entered. It is true that the bank account showed a balance of $95.00 on 1 July 1944, the date of the alleged acts of embezzlements, and that a part or all of this amount might have been paid, if demanded that day, to the men whose funds were allegedly converted. Indeed, if Corporal Glass had presented his check that day, it apparently would have been honored. The same is true of Corporal Prevost, both of whose checks would have been good if they alone had been presented. There were, however, some 53 men who placed money with the accused and the small balance in the account might well be regarded as the property of men other than those named in the Specifications. There was no duty on the court to find arbitrarily that the funds on hand belonged to any or all of the five soldiers who were the alleged victims of the fraudulent conversions. It is believed that the availability of certain of the trust funds is not necessarily inconsistent with the accused's admission that he converted specified amounts belonging to certain particular men in the group. Coupled with the pleas of guilty, the evidence is sufficient to sustain the findings under the Specifications of Charge I.

6. Specification 1 of Charge II alleges that the accused did "between about 15 May 1944 and 1 July 1944, wrongfully borrow the sum of Twenty Dollars ($20.00), from funds in the total amount of Twenty Dollars ($20.00), which had been entrusted for safekeeping to the [accused] by Corporal Murray W. Fisk". Specifications 2 and 3 of Charge II describe identical offenses as that alleged in Specification 1, alleging that the accused wrongfully borrowed $40.00 (Specification 2) and $30.00 (Specification 3) from Corporal William D. Prevost.

Under Specifications 5 and 6 of Charge I, the accused is alleged to have embezzled certain funds belonging to Corporal Prevost, and under Specifications 2 and 3 of Charge II, the accused is charged with wrongfully borrowing the same funds. While there is no allegation of the

embezzlement of funds belonging to Corporal Fisk, it is clear that his monies were treated by the accused in the same manner as were those of Prevost, and the legal effect of the accused's handling of the funds of both men was the same. The Specifications under Charge II which allege acts of wrongful borrowing merely undertake to describe in different terms and clothe with another legal theory the same course of conduct for which the accused stands convicted under Charge I. This type of pleading, alternative in character, is not without precedent and is recognized in the Manual for Courts-Martial which, after stating the rule that one transaction should not be made the basis for an unreasonable multiplication of Charges, goes on to say 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" (MCM, 1928, par. 27).

It cannot be said, therefore, that to charge the accused with embezzlement and wrongful borrowing constituted improper pleading, even though both offenses were referable to the same transactions. It does not follow that the accused should have been convicted of both offenses for they were, in legal effect, inconsistent aspects of the same acts. The accused clearly expected to restore the funds which he converted to his own use and, to his mind, he was merely borrowing the money. Regardless of his intention to repay and the interpretation which the accused gave to the transactions, the legal effect of his conduct was not a "borrowing" but rather a fraudulent conversion amounting to embezzlement. To constitute a borrowing in the true, legal sense of the word, there must also be a lending, an agreement between the owner and recipient of property that the latter may use it for a time.

> "The idea of borrowing is not filled out unless there is an agreement therefor; a promise or understanding that what is borrowed will be repaid or returned - the thing itself, or something like it, of equal value - with or without compensation for the use of it in the meantime. To borrow is the reciprocal action with lend or to loan * * *" (Kent v. Quicksilver Min. Co., 78 N.Y. 159, 177).

There is no evidence in the present case which indicates that the enlisted men intended to lend their funds to the accused. The record, on the contrary, reveals that the money was placed with him solely for safekeeping and was to be returned upon demand. The evidence adduced not only fails to support the theory of a loan but is inconsistent with any such hypothesis. In view of this complete failure of proof to sustain the allegations of wrongful borrowing and the affirmative showing in the record that no such offenses were committed, it is believed that the pleas of guilty to Specifications 1, 2, and 3 of Charge II were improvidently entered and that the accused should not now stand convicted of such alleged acts.

7. Specification 4 of Charge II alleges that the accused did "on or about 16 June 1944, wrongfully convert to his own use the sum of Two Hundred Dollars ($200.00), United States currency, representing the proceeds of a check * * * drawn * * * by David A. Round, payable to the order of [the accused], which was entrusted to the [accused] for collection".

The evidence adduced in support of this Specification shows that Private Round executed the check, dated 14 June 1944, to the order of the accused, who agreed to cash it and deliver the proceeds to Round. The check was indorsed by the accused and deposited in his bank account which, on 16 June 1944, the date of the alleged wrongful conversion, showed a balance of $1289.96. There were not sufficient funds in the account, however, to pay Round when he requested his money on 5 July 1944. The accused subsequently reimbursed him in full.

The accused committed no breach of faith when he deposited the check in the bank, for it was contemplated that the money would be safely kept and delivered to Round at the time of his transfer to another station. When, however, the accused drew on the fund for his personal use and so depleted the bank account that there were not sufficient funds available to reimburse Round, the offense of wrongful conversion became complete. This did not occur until several days subsequent to the date mentioned in the Specification but the allegation of "on or about 16 June 1944" is sufficiently broad to negative any material variance between the allegata and the probata. The evidence is consistent with the guilt of the accused, as admitted by his plea, and the record is legally sufficient to sustain the findings of Specification 4 of Charge II.

8. Specification 5 of Charge II alleges that the accused "being in custody of funds entrusted to him for safekeeping by enlisted men, did, * * * during the period from about 15 May 1944 to 1 July 1944, wrongfully fail to adequately safeguard such funds".

The foregoing Specification, couched as it is in general and indefinite terms, might well have been the object of a motion to strike by the accused. The defense, however, instead of taking the position that the allegation was so ineptly drawn as to fail to apprize him fully of the offense charged, interposed a plea of guilty thereto. While the evidence points only to acts of embezzlement, there is nothing in the record to negative the course of conduct alleged. Although not suggested by the evidence, the accused might have failed to keep the safe locked or otherwise failed in his duty to afford adequate protection to the funds. The record is merely silent on this phase of the case. Since nothing inconsistent with guilt appears, the plea of guilty is alone sufficient to sustain the finding by the court: 22 BR 66, CM 235420, Kelly.

9. The accused is about 44 years of age and is married. He at- public school for twelve years. In high school he majored in Accounting, Law, Mathematics, and English. He then went into the sporting goods business and, because much of his merchandise was imported, went abroad to make purchases and acquired a speaking knowledge of the French and Spanish languages. He enlisted in the New York National Guard in 1920, became a second lieutenant in 1923, and was promoted to first lieutenant in 1925. The following year he resigned from the National Guard. On 24 July 1942 he enlisted in the Army as a Volunteer Officer Candidate and on 7 January 1943 was commissioned a second lieutenant, Army of the United States, and entered on active duty the same day. He was promoted to the rank of first lieutenant on 23 July 1943 and by War Department Orders dated 10 April 1944 was detailed in the Air Corps.

10. The court was legally constituted. In the opinion of the Board of Review the record of trial is not legally sufficient to support the findings of guilty of Specifications 1, 2, and 3 of Charge II, but is legally sufficient to support all of the other findings and the sentence. Dismissal is authorized upon a conviction of a violation of Article of War 93 and 96.

Abner E. Lefcomb, Judge Advocate.

Robert J. Clarner, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 276435 1st Ind
Hq ASF, JAGO, Washington 25, D. C.
TO: The Secretary of War JUN 27 1945

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 First Lieutenant Harold W. Meyer (O-1049581), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, embezzling a total of $258, the property of six enlisted men, in violation of Article of War 93 (Chg. I, Specs. 1-6); of wrongfully borrowing $90 from two enlisted men (Specs. 1, 2, 3, Chg. II); of wrongfully converting to his own use the sum of $200, which represented the proceeds of a check left with him for collection (Spec. 4, Chg. II); and of wrongfully failing to adequately safeguard certain funds intrusted to him for safekeeping by enlisted men (Spec. 5, Chg. II), all in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. 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 not legally sufficient to support the findings of guilty of Specifications 1, 2, and 3 of Charge II, but is legally sufficient to support all of the other findings and the sentence and to warrant confirmation thereof.

a. The accused was squadron commander of a gunnery group at Yuma Army Air Field, Yuma, Arizona. Several enlisted men in his squadron, including those named in the Specifications, left certain of their private funds with the accused for safekeeping. A portion of this money was retained in the squadron safe and a considerable amount was deposited by the accused in a bank account which he opened in his name as a depository for such funds. From time to time he repaid the men from his own money and then looked to the bank account for reimbursement of such personal advancements. He paid certain of his personal obligations by checks written on the account and soon realized that withdrawals for such purposes exceeded any rightful equity he could claim on the account. The day before he was to leave the the field on temporary duty he conferred with Lieutenant McCollough, his adjutant, about the students' funds. The two officers compared the money in the safe and in the bank with the amount due the men and discovered that a shortage existed in the funds. The accused suggested that Lieutenant McCollough make up the deficiency and promised to repay any such advances. As security, the accused left five checks with Lieutenant McCollough payable either to the latter's order or in blank. The checks were either postdated of of blank date. Two were for blank amounts, two for $150, and a fifth for $156. The balance in the bank account at that time was $44.90.

Soon after the accused's departure Lieutenant McCollough reported the shortage to his superiors. The currency found in the safe was used as far as it would go to reimburse the enlisted men who were presently being transferred but it became necessary for three officers at the field to personally advance $148. The accused subsequently returned and obtained a loan from a Phoenix bank. With the proceeds of this loan he reimbursed the three officers who had made personal advancements, and in addition, made good the remaining deficiency in the funds still owed to the enlisted men. The record clearly shows that all the men who intrusted their money to the accused were fully reimbursed and that he ultimately made good the shortage.

b. The record of the accused prior to the time of the offenses for which he stands convicted was highly creditable. He endeavored to serve in the Marine Corps during the last war but was rejected because of his youth. He served both as an enlisted man and officer in the National Guard for several years and, soon after the outbreak of the present war, he enlisted in the Army at the age of 41. He became an officer in the Coast Artillery Corps in January 1943. When he was subsequently rejected for overseas duty because of his age he was given an opportunity to return to civilian life. Instead, he applied for transfer to the Air Corps. After a course of instruction in aerial gunnery he was ordered to Yuma Army Air Field where he came to be known as one of the best squadron commanders. Prior to the time of the present offenses he had received one performance rating of "Very Satisfactory" and three ratings of "Excellent".

While the conduct of the accused as revealed by the record of trial is indefensible, it is clear that the accused was not motivated by any evil design to deprive the men of their money. He fell into the loose practice of repaying the men from his own pocket and reimbursing himself from the bank account. When he realized that his withdrawals for his personal use exceeded his equity he confidently expected to make good the resulting deficiency without any difficulty. At the time of his transfer of the funds to Lieutenant McCollough, the accused apparently considered that an arrangement had been made which would insure the receipt by the men of their funds upon demand. That the accused intended to repay the money and, in fact, made full restitution, while of no avail by way of defense, should be considered on the question of punishment. I believe that a sentence of dismissal alone is sufficiently severe. I recommend, therefore, that the sentence be confirmed but that the confinement and forfeitures be remitted, and that the sentence as thus modified be ordered executed.

4. Consideration has been given to three letters and three telegrams from Mr. Harold Leddy, attorney at law, and to telegrams from Mr. O. S. Gumprich and Mr. E.J. Riehl, requesting clemency in behalf of accused.

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

10 Incls
Incl 1 - Record of trial
Incl 2 - Form of action
Incls 3,4,5 - Telegrams fr. Mr. Leddy
Incls 6,7,8 - Letters fr. Mr. Leddy
Incl 9 - Telegram fr. Mr. Riehl
Incl 10 - Telegram fr. Mr. Gumprich

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings of guilty of Specifications 1, 2, and 3, Charge II, disapproved. Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 281, 5 Jul 1945)

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

SPJGQ
CM 276461

19 APR 1945

UNITED STATES v. Second Lieutenant OTTO L. LEHMKUHL (01542696), Medical Administrative Corps.	NINTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Presidio of San Francisco, California, 15 February 1945. Dismissal, total forfeitures and confinement for five (5) years.

- - - - - - - - - - -

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

- - - - - - - - - - -

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

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

CHARGE I: Violation of the 61st Article of War

Specification 1: In that Second Lieutenant Otto L. Lehmkuhl, Medical Administrative Corps, Company "C", 371st Medical Battalion, did, without proper leave, absent himself from his station at Camp Roberts, California, from about March 17, 1944 to about March 24, 1944.

Specification 2: In that Second Lieutenant Otto L. Lehmkuhl, Medical Administrative Corps, Company "C", 371st Medical Battalion, did, without proper leave, absent himself from his station while en route from Letterman General Hospital, San Francisco, California to Camp Roberts, California, from about April 21, 1944 to about December 27, 1944.

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

Specification: (Finding of not guilty.)

He pleaded guilty to Charge I and its Specifications and not guilty to Charge II and its Specification, but changed his plea to not guilty of both Charges and their Specifications. He was found not guilty of Charge II and its Specification and guilty of Charge I and both Specifications thereof. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced in evidence an extract copy of the morning report of accused's organization for 20 March 1944 showing accused "Dy to AWOL eff 2400 17 Mar 44" (R. 7; Pros. Ex. 1). An extract copy of the morning report of the Detachment of Patients, Letterman General Hospital, San Francisco, California, for 24 March 1944, also introduced in evidence, shows accused "Cas fr Lv Pro Sta Cp Roberts, Calif. 0715" (R. 7-8; Pros. Ex. 2). Having been reported physically fit for return to duty, accused was ordered on 19 April 1944, by Special Orders of Letterman General Hospital, to proceed to and report for duty at his proper station at Camp Roberts, California (R. 8; Pros. Ex. 4). The extract copy of the morning-report of the Detachment of Patients at such hospital for 20 April 1944, shows the following entry as to accused: "Resume Lv Pro Sta Cp Roberts, Calif" (R. 7-8; Pros. Ex. 2). An extract copy of the morning report of accused's organization for 27 April 1944, also introduced in evidence, shows accused "Atchd unassigned absent sk in Letterman Gen Hosp San Francisco Calif to AWOL eff 21 Apr 44" (R. 8-9; Pros. Ex. 5).

On 27 December 1944, at approximately 5:00 p.m., accused was apprehended while in uniform at a coffee shop in San Francisco. He had been drinking at the time, and was "in a very nervous state". However, he did not stagger when he walked. Accused admitted that he was absent without leave and that he had never returned to his organization after being discharged from Letterman General Hospital in March. He said that he could not remember where he had been, what he had been doing or where he had been living. "He stated that he was in a haze about the whole thing." His uniform was "fairly neat" and he presented "a proper appearance as an officer". He had no baggage and said he had no other clothing than that which he wore. He had no AGO card, but stated that it was at "Tony's Bar" in San Francisco, where it was subsequently obtained. Information based on hearsay revealed that accused had been living with a Mrs. Corr in San Francisco (R. 9-12; 30-34).

4. After having his rights explained to him, accused elected to testify under oath (R. 16-17). Prior to 17 March 1944 his organization had been on maneuvers and on returning to his station accused

went on a "verbal leave" of three days at San Francisco. "But due to the transportation facilities, a lot of times you didn't get back in those three days, which was not held against anybody." He was drinking during this leave, during which he developed a pain in his side and went to Letterman General Hospital where he was hospitalized. He could not recall the date he went to the hospital or the date his leave became effective. When he left the hospital he had a copy of the orders directing him to return to Camp Roberts. He was sober and understood the orders. He could not get a bus until late that night so he went to a bar. "I done some drinking, and I don't recall much from then on." From that time until he was apprehended in December he "was continuously drinking," and he could not recall any of the places where he actually lived or any of the details of his life. He "lived in various places, hotels and everywhere else." He did not know what happened to his grip or clothes, which were lost. He received no pay after March 1944 and had no recollection as to the source from which he obtained money to live on during his eight months' absence. He "had a lot of people buy liquor. I don't — as far as I know, I don't know how I secured it. * * * I were absolutely drunk for eight months. * * * it is all a haze as far as that's concerned." He knew a Mrs. Corr, but "I don't have no recollection what time I met her." He "evidently" met her between the time he left the hospital and the time he was apprehended. He did not form any conscious intent to desert or leave the service without permission on either 17 March or 21 April. His failure to return was "partly due to the fact that I was drinking." He felt "quite much better physically and mentally" since he had been hospitalized, and did not feel any craving for drink (R. 17-30).

Accused further testified that he enlisted in the Army in November 1937, and after serving in Hawaii he was discharged with an excellent character rating in July 1940. He re-enlisted the same month and went back to Hawaii, returning in September 1942 to attend officer candidate school. After being commissioned in December 1942 he went overseas in January 1943, returning in June 1943 (R. 22-23).

5. The morning report entries introduced into evidence, aside from the admissions of accused, clearly establish the alleged absences without leave both on 17 March and 21 April. The lengths of the absences are also clearly shown by the evidence. It does appear that the respective entries from the morning report of the Detachment of Patients, Letterman General Hospital, for 24 March and 20 April, show that accused entered the hospital "from leave" and that he resumed leave on leaving the hospital. Such entries probably resulted from self-serving declarations made at the hospital by accused as to his status. Clearly they could have had no effect upon the entries effective 17 March and 21 April made by accused's own organization which showed him in a status of absent without leave as of such dates.

The condition of absence without leave, having once begun, is presumed to continue until accused's return to military control (MCM 1928, par. 130a). Accused's own testimony leaves no doubt as to his unauthorized absences, although it lacks definiteness with regard to specific dates.

6. It appears that during closing argument the prosecution made the following statements:

> "Now, gentlemen, this Lieutenant is nothing but a liar, in plain, ordinary English. * * * Mitigating circumstances? This man's unit is overseas, the 371st Medical Battalion. He ought to be there with them. * * * he is here and they are overseas" (R. 48-49).

This argument was improper and unwarranted. However, since the evidence is compelling as to accused's guilt of the unauthorized absences charged, such argument could not have been prejudicial to his substantial rights so as to require disapproval of the findings and sentence.

7. After the defense had rested, the president inquired whether the defense contended that accused was not mentally responsible, whereupon defense counsel stated that in view of the evidence and observation made by counsel, the defense maintained that accused "is not in the possession of his normal faculties, due to the impaired mentality which is a result of excessive and prolonged drinking" (R. 36). The prosecution then called Major Clarence H. Goddard, Chief of the Neuropsychiatric Branch, Letterman General Hospital, who testified that he had made a mental and physical examination of accused on 28 December 1944 and on 10 January 1945, and after several days of observation had made a diagnosis of chronic alcoholism. In his opinion accused was sane and responsible for his acts and knows the difference between right and wrong. Accused was "sane at the time covered by these questions" (R. 36-38, 42). A medical report prepared by the witness, dated 26 January 1945, was introduced in evidence over objection of the defense. This report recites that accused's "actions are the result of misconduct rather than the result of mental defect, derangement or marked abnormality." The report further shows that accused was found to be suffering from chronic alcoholism and not to have mental deficiency, psychoneurotic disorder, prepsychotic, postpsychotic or schizophrenic personality, or other named disorders (R. 39; Pros. Ex. 8).

On cross-examination the witness identified a status report on accused, also from Letterman General Hospital, dated 8 January 1945, which was introduced in evidence and showed the following:

> "Psychosis, alcoholic, delirium tremens, mild. Disease was the result of patient's own misconduct" (R. 40-41; Def. Ex. A).

Major Goddard stated that this diagnosis was initially made, but that subsequent examination and observation resulted in the final diagnosis given in his previous testimony (R. 41). Accused has improved since his first examination in that he has better judgment and can refuse a drink,

> "but I do not think his basic thinking has changed. * * * It was because he wanted to drink; it was not because he was abnormal or psychotic, but that he had not the judgment, the willpower or the desire to control his actions" (R. 43-44).

Upon the conclusion of Major Goddard's testimony the court was closed, and upon being opened the president announced:

> "The court in closed session has found that Lieutenant Lehmkuhl was sane during the period encompassed by these charges and is now sane" (R. 44).

It is noted that the defense did not expressly contend, and there is no testimony showing, that accused was insane at any time to such extent that he was incapable of distinguishing right from wrong or adhering to the right. It is therefore doubtful whether any issue of insanity was raised at all (See CM 231963, Hatteberg, 18 BR 349). The court had the opportunity to observe the accused and hear him testify, and was empowered to constitute itself the judge of the extent to which substantial justice necessitated an inquiry into the mental condition of the accused (See CM 193543; Dig. Op. JAG, 1912-40, sec. 395(36), p. 227). While the evidence indicates that accused drank to an excessive degree during his unauthorized absence, it is inconceivable that he could have been "absolutely drunk" or in a state of fixed mental derangement or delirium during the entire period of eight months. To the contrary, his admission of having met a Mrs. Corr, his knowledge that he had drawn no pay, and his recollection of the place where he had left his AGO card, are circumstances tending to show a mind capable of some rationalization during the period. Under the circumstances the action taken by the court was proper.

The admission in evidence of the written medical report of the witness Major Goddard, over objection that his own testimony was the best evidence, even if erroneous, could not have prejudiced accused's substantial rights, since the report contained no significant additions to, or variations from, the testimony previously given by the witness upon direct examination.

8. War Department records show that accused is 34 years of age and is married. He is a native and resident of North Dakota. After

graduation from high school in 1929 he worked for seven years for his father, a general contractor, and for approximately one year as clerk in a dry goods store. He enlisted in the Army in November 1937 and was discharged 10 July 1940 as a Private First Class. He re-enlisted on 16 July 1940 and was commissioned a second lieutenant in the Army of the United States on 19 December 1942 upon graduation from the Medical Administrative Corps Officer Candidate School at Camp Barkeley, Texas.

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

Fletcher R. Andrews, Judge Advocate

Herbert B. Frederick, Judge Advocate

[illegible], Judge Advocate

SPJGQ-CM 276461 1st Ind

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

TO: The Secretary of War 4 JUN 1945

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Otto L. Lehmkuhl (0-1542696), Medical Administrative Corps.

2. Upon trial by general court-martial, this officer was found guilty of absence without leave for one period of seven days and for another period of eight months and six days, in violation of Article of War 61. 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. A summary of the evidence will be found in the accompanying opinion of the Board of Review. The Board 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. I concur in that opinion.

On March 17, 1944, the accused absented himself without leave from his station at Camp Roberts, California, and did not return to military control until he was hospitalized at the Letterman General Hospital, San Francisco, California, on March 24, 1944. On April 19, 1944, he was released by the hospital and ordered to return to duty at his station at Camp Roberts. While en route to his station he again absented himself without leave on April 21, 1944, and remained absent without leave until December 27, 1944, when he was apprehended while in proper uniform by military authorities in San Francisco. At the time of his apprehension he had been drinking and was "in a very nervous state." He stated to military authorities, and subsequently testified at the trial, that he could not remember where he had been living or what he had been doing, and denied having any other clothing than that which he wore. He also testified that he did not form any conscious intent to desert or leave the service, and that "I were absolutely drunk for eight months." At the trial the defense counsel contended that accused was "not in the possession of his normal faculties, due to impaired mentality which is a result of excessive and prolonged drinking." Thereupon the prosecution called as a witness the Chief of the Neuropsychiatric Branch, Letterman General Hospital, who testified that upon examination of accused he had made a diagnosis of chronic alcoholism. This witness further testified that the accused was sane during the periods covered by the charges and at the time of trial, and the court made separate findings to that effect. The evidence clearly warrants the conclusions reached by the court.

I recommend that the sentence be confirmed and carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

Myron C. Cramer

2 Incls
Record of trial
Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed. G.C.M.O. 244, 19 Jun 1945)

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

SPJGH-CM 276481

22 MAR 1945

UNITED STATES	FOURTH AIR FORCE
v.	Trial by G.C.M., convened at McChord Field, Washington, 14 February 1945. Dismissal, total forfeitures and confinement for five (5) years. Disciplinary Barracks.
First Lieutenant GEORGE W. AREY (0-660443), Air Corps.	

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

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

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

CHARGE I: Violation of the 61st Article of War

Specification 1: In that First Lieutenant George W. Arey, Squadron "V", 464th AAF Base Unit, then attached unassigned, Detachment of Patients, Army Air Forces Convalescent Hospital, Fort George Wright, Washington, did, without proper leave, absent himself from his command and station at Army Air Forces Convalescent Hospital, Fort George Wright, Washington, from about 10 September 1944 to about 4 November 1944.

Specification 2: In that First Lieutenant George W. Arey, * * *, did, without proper leave, absent himself from his command and station at Army Air Forces Convalescent Hospital, Fort George Wright, Washington, from about 7 November 1944 to about 15 December 1944.

CHARGE II: Violation of the 96th Article of War

Specification 1: In that First Lieutenant George W. Arey, * * *, did, at Spokane, Washington, on or about

14 September 1944, with intent to defraud, wrongfully and unlawfully make and utter to H. A. P. Frederick, operator of The Hub, Spokane, Washington, a certain check, in words and figures substantially as follows, to wit:

SAN ANTONIO, TEXAS Sept 14 1944 No. _____

30-65
NATIONAL BANK OF FORT SAM HOUSTON
at San Antonio

PAY TO THE ORDER OF The Hub $15.00

Fifteen and no/xx - - - - - - - - - - - - - - - -DOLLARS

1st Lt A.C. O-660443
Ft Geo. Wright
General Hospital /s/ George W. Arey

and by means thereof did fraudulently obtain from H. A. P. Frederick, operator of The Hub, Spokane, Washington, Fifteen Dollars ($15.00), lawful money of the United States, he, the said First Lieutenant George W. Arey, then and there well knowing that he did not have and not intending that he should have sufficient funds in or credit with the said bank for the payment of said check in full upon its presentation and that said check would not be paid by said bank upon presentation for payment.

Specification 2: In substantially same form as Specification 1 except that check drawn on the same bank was dated 16 September 1944 and was payable to Hub Cafe in the amount of $20.

Specification 3: In substantially same form as Specification 1 except that check drawn on the same bank was dated 20 September 1944, was payable to cash in the amount of $20 and was negotiated to The Old National Bank of Spokane, Spokane, Washington.

Specification 4: In substantially same form as Specification 1 except that check drawn on the same bank was dated 22 September 1944, was payable to The Crescent in the amount of $20 and was negotiated to The Crescent, owned and operated by the Spokane Dry Goods Company, Inc., Spokane, Washington.

Specification 5: In substantially same form as Specification 1 except that check drawn on the same bank was dated 16 October 1944, was payable to cash in the amount of $25 and was negotiated to Spokane and Eastern, Branch of Seattle-First National Bank, Spokane, Washington.

Specification 6: In substantially same form as Specification 1 except that check drawn on the same bank was dated 18 October 1944, was payable to Hendrens Grocery in the amount of $10 and was negotiated to L. E. Hendren and Gene Nesbett, doing business as Hendrens Grocery, Spokane, Washington.

Specification 7: In substantially same form as Specification 1 except that check drawn on the same bank was dated 25 October 1944, was payable to The First National Bank of Missoula, Montana, in the amount of $10 and was negotiated to The First National Bank of Missoula, Montana.

Specification 8: In substantially same form as Specification 1 except that check drawn on the same bank was dated 27 October 1944, was payable to The New Finlen Hotel Company and was negotiated to The New Finlen Hotel Company of Butte, Montana.

Specification 9: In substantially same form as Specification 1 except that check drawn on the same bank was dated 28 October 1944, was payable to The New Finlen Hotel Company in the amount of $20 and was negotiated to The New Finlen Hotel Company of Butte, Montana.

Specification 10: In substantially same form as Specification 1 except that check drawn on the same bank was dated 29 October 1944, was payable to The New Finlen Hotel Company in the amount of $10 and was negotiated to The New Finlen Hotel Company of Butte, Montana.

Specification 11: In substantially same form as Specification 1 except that check drawn on the same bank was dated 31 October 1944, was payable to The New Finlen Hotel Company in the amount of $10 and was negotiated to The New Finlen Hotel Company of Butte, Montana.

Specification 12: In substantially same form as Specification 1 except that check drawn on the same bank was dated 12 November 1944, was payable to Grand Hotel and was negotiated to The Grand Hotel, Billings, Montana.

Specification 13: In substantially same form as Specification 1 except that check drawn on the same bank was dated 14 November 1944, was payable to Grand Hotel and was negotiated to The Grand Hotel, Billings, Montana.

Specification 14: In substantially same form as Specification 1 except that check drawn on the same bank was dated 17 November 1944, was payable to Strain Bros., Inc. in the amount of $20 and was negotiated to Strain Bros., Inc., of Billings, Montana.

Specification 15: In substantially same form as Specification 1 except that check drawn on the same bank was dated 27 November 1944, was payable to The Albany Hotel and was negotiated to The Albany Hotel, Denver, Colorado.

Specification 16: In substantially same form as Specification 1 except that check drawn on the same bank was dated 28 November 1944, was payable to The Albany Hotel and was negotiated to The Albany Hotel, Denver, Colorado.

Specification 17: In substantially same form as Specification 1 except that check drawn on the same bank was dated 29 November 1944, was payable to The Albany Hotel and was negotiated to The Albany Hotel, Denver, Colorado.

Specification 18: In substantially same form as Specification 1 except that check drawn on the same bank was dated 2 December 1944, was payable to cash and was negotiated to the Brown Palace Hotel, Denver, Colorado.

He pleaded guilty to, and was found guilty of, all Charges and Specifications. No evidence of any previous conviction was introduced. He was sentenced to dismissal, total forfeitures, and confinement for nine (9) years. The reviewing authority approved the sentence, reduced the period of confinement to five (5) years, and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced an extract copy of the morning report for Detachment of Patients, Army Air Forces Convalescent Hospital, Fort George Wright, Washington, with an entry carrying accused from attached unassigned to AWOL 10 September 1944; an entry carrying accused AWOL to attached unassigned 6 November 1944; and an entry carrying accused attached unassigned to AWOL 7 November 1944. It was stipulated by and between the prosecution, the defense and the accused that accused while under orders to proceed from the Barnes General Hospital, Vancouver, Washington, to the Army Air Forces Convalescent Hospital, Fort George Wright, Washington, on 10 September 1944, absented himself without leave from the latter station and remained absent without leave until apprehended in Butte, Montana, on 4 November 1944; that accused on 7 November

1944 absented himself without leave from the same station and remained absent without leave until apprehended at Denver, Colorado, on 13 December 1944.

4. The accused, after his rights were explained to him, elected to make an unsworn statement through defense counsel. In explanation of his conduct his counsel stated that for five months prior to committing the offenses charged accused had not had any military duties to perform and this, in part at least, was responsible for accused's moral deterioration. Accused desired to make reparation for the wrongs he had done by repaying those persons who had cashed his checks. He had done everything he could to that end and hoped that the punishment he would receive would not hamper him in discharging his remaining obligations.

Accused's counsel then gave to the trial judge advocate a number of United States Postal Money Orders totaling $248.70 to be mailed to the people who had cashed accused's checks. This left a balance not repaid of $36.30.

5. The accused's pleas of guilty, the extract copy of the morning report and the stipulation received by the court are ample to support the findings of guilty of Specifications 1 and 2 of Charge I and Charge I. While it would have been preferable for the prosecution to have introduced some evidence tending to show the commission by accused of the offenses alleged in Specifications 1-18 of Charge II, accused's pleas of guilty, entered after a full explanation of their effect was made to accused, and the admissions contained in his unsworn statement justify the findings of guilty of those Specifications and the Charge.

6. The accused's 201 file is not available. The record of trial shows that accused is 29 years of age. He enlisted as an aviation cadet on 1 November 1941 and was commissioned a second lieutenant, Air Corps Reserve, on 23 May 1942. He was appointed a first lieutenant, Army of the United States, on 26 July 1943.

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

On Leave, Judge Advocate

William H. Bamberger, Judge Advocate

Robert E. Trevethan, Judge Advocate

SPJGH-CM 276481 1st Ind

MAR 31 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 George W. Arey (0-660443), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence. By absenting himself without leave on two occasions for a period totaling approximately three months, both of which absences were terminated by apprehension, and by fraudulently cashing 18 checks aggregating $285 during these absences, accused has demonstrated that he is morally unfit to remain an officer. There appear to be no mitigating or extenuating circumstances. I recommend that the sentence, as approved by the reviewing authority, be confirmed but that the forfeitures be remitted and that as thus modified 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. Consideration has been given to the inclosed letter from accused dated 28 February 1945.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

4 Incls
1. Record of trial
2. Ltr fr accused 28 Feb 45
3. Dft ltr for sig S/W
4. Form of action

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 171, 6 Jun 1945)

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

SPJGK - CM 276559

21 MAY 1945

UNITED STATES v. Second Lieutenant LORAN T. FRANCIS (0-680428), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Fort Worth Army Air Field, Fort Worth, Texas, 16 February 1945. Dismissal.

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

---

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Loran T. Francis, Air Corps, did, on or about 17 December 1944, wrongfully permit a passenger not a crew member to be carried in an Army aircraft which he commanded while on a student training mission from Fairfax Field, Kansas City, Kansas, to Lowry Field, Denver, Colorado, in violation of Training Command Memorandum No. 62-10.

Specification 2: In that Second Lieutenant Loran T. Francis, Air Corps, did, on or about 18 December 1944, wrongfully permit about six passengers not crew members to be carried in an Army aircraft which he commanded while on a student training mission from Lowry Field, Denver, Colorado, to Mines Field, Los Angeles, California, in violation of Training Command Memorandum No. 62-10.

Specification 3: In that Second Lieutenant Loran T. Francis, Air Corps, a married man, did, at Fort Worth, Texas, on or about 12 January 1945, wrongfully have sexual intercourse with Dorothy Elaine Benson, a woman not his wife.

He pleaded not guilty to Specifications 1 and 2 of the Charge, and guilty to Specification 3 of the Charge, and the Charge. He was found guilty of the Charge and all of the Specifications. No evidence was introduced of

any previous conviction. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of evidence.

a. Specifications 1 and 2 (violations of training memorandum).

For the prosecution.

On 14 December 1944, the accused, who was an "unlimited instructor" at Fort Worth Army Air Field (R. 14,15), made written application for a B-24 student navigation training flight for himself and certain of his students, this flight to start from Fort Worth Field at 0100 16 December 1944 and to proceed first to Lowry Field, Denver, Colorado, and then to Los Angeles, California, from which point it was proposed to return direct to Fort Worth. It was contemplated that the round trip would be completed by 2100 on 17 December. Accused listed himself as "Pilot-Instructor" and Captain R. E. Trappe, Second Lieutenant T. P. Culp, Second Lieutenant N. B. Hemmingway, and Flight Officer R. E. McAndrews as "Student Pilots," adding, "Other crew will be added later." The flight was duly authorized, and accused was placed in command. First Lieutenant P. A. Toomey, who was at that time a "limited instructor," was authorized to accompany accused on this mission as an assistant instructor (R. 12,13,14; Pros. Ex. 3). No one other than these six officers and the assigned engineer, radio operator, and their assistants were given permission to make the trip, and they were the sole occupants of the "B-24" when it took off on the flight to Los Angeles (R. 7,13,14). Accused's squadron commander, Major Linton B. Carney, Jr., made no comment to accused before his departure as to whether accused "could or could not" pick up passengers (R. 14).

Under date of 15 November 1944 there was issued by Army Air Forces Training Command, Fort Worth, Texas, Training Memorandum Number 62-10, of which the court was requested to take and, without objection by the defense, did take judicial cognizance (R. 18). Reference to this memorandum (a copy of which was not actually introduced) discloses that it contains the following pertinent instructions and information:

"T. C. MEMORANDUM
NUMBER 62-10

HEADQUARTERS
ARMY AIR FORCES TRAINING COMMAND
FORT WORTH 2, TEXAS 15 Nov 1944

FLYING SAFETY

Passengers in Aircraft Assigned AFTRC

(This Memorandum supersedes TC Memorandum 62-10, 15 May 44.)

1. The increasing number of personnel, non-essential to successful flight operations, who are involved in aircraft accidents, makes it necessary to define certain rules as to personnel, and numbers thereof, who may be carried in aircraft assigned to this Command.

2. The provisions of this memorandum are in addition to pertinent Army and Air Forces Regulations; and this memorandum will be prominently posted in all Operations and Engineering Offices and pilot and student ready rooms. It will be the direct responsibility of commanders to insure that all pilots read and certify that they understand the contents of this Memorandum.

3. The following will apply to student training missions:

a. Aircraft schedules for student training missions will carry only crew members necessary and essential for the successful performance of student training.

b. It is considered that radio operators, flight engineers, flight surgeons, and aircrew members that are qualified or in training may be essential crew members necessary in the performance of the mission.

c. Ground crew members not essential in the performance of the mission will not be carried.

4. The following will apply to flights other than student training flights:

a. Pilots who have flown in excess of seven hundred and fifty hours as pilots may be permitted to carry passengers authorized by pertinent regulations. On cross-country flights such passengers will be under competent travel orders, or on leave or furlough, and traveling between their assigned station and destination.

b. Pilots with less than seven hundred and fifty hours of flying time may be permitted to carry authorized passengers only when such personnel are essential to operations or administration."

Major Carney, who had assumed command of the squadron on 20 November 1944, testified that at the time of the trial a copy of this training memorandum was posted on the squadron bulletin board, but he could not state definitely whether a copy of it was posted on 17 December, although he felt that it had "been posted and brought home to his instructors" at the time accused started on his cross-country mission. He further testified:

> "* * * The regulations are evident in the files and if the Lieutenant [accused] has not made himself aware of the facts, then I have no way of knowing" (R. 17).

He stated that this regulation against carrying passengers did not establish a new rule, as this prohibition had been in effect "quite some time prior to

the time that [he] reported to this station" (R. 18). Accused was already a member of the squadron when Major Carney assumed command (R. 17). According to Major Carney, requests are frequently made at stations other than the home station of a plane engaged in a cross-country flight that passengers be accepted, but no one at such other stations has the right to compel the acceptance of passengers, and the students are instructed "to refuse to take any persons aboard other than essential members of the crew" (R. 15).

The first stop made by the plane, commanded by accused, was Kansas City, Kansas. When the plane left from Fairfax Field, in that city, First Lieutenant H. G. Denner was aboard, in addition to the original occupants who had left from Fort Worth (R. 5,10; Pros. Ex. 1). Three more officers and two more enlisted men were in the plane when it departed from Lowry Field, Denver, Colorado. These six passengers, none of whom was a member of the crew, and none of whom was essential and necessary to the flight, completed the trip to Los Angeles with the original authorized occupants who had started from Fort Worth (R. 5,7,8,9-11,14: Pros. Ex.2). Their presence had not been authorized by Major Carney. Permission to ride as passengers was granted them solely by accused.

For the defense.

After an explanation of his rights, accused elected to testify under oath as a witness in his own behalf. He stated that he had been stationed for about a year at the Army Air Forces Bombardier School at Midland, Texas, and had reported for duty at the Fort Worth Army Air Field about 8 July 1944. Each set of students was required to have one cross-country flight of approximately 20 hours duration. On or about 17 December 1944 accused made an application for such a flight for certain of his students. He had made quite a few "cross-countries" at Midland but, except as a student, had made none from the Fort Worth Field. He had about 1400 hours of flying time (R. 21-22).

Accused stated that he was in command of the airplane but had First Lieutenant Toomey as a co-instructor "to help him out on the trip." Major Carney gave him no instructions as to whether he could or could not pick up passengers en route. Because of engine trouble it was necessary to make an unanticipated landing at Kansas City. The engine having been repaired, accused and his crew went out to the field the next morning "ready to take off." "The Operations Officer or some one behind the counter" brought a First Lieutenant up to accused and said, "Here's a passenger for you to Los Angeles." This officer, who was stationed at Kansas City and who stated to accused that he was on emergency leave and that his wife was ill in Los Angeles, was allowed by accused to ride in the plane to Los Angeles (R. 22). Engine trouble was experienced again upon arrival of the plane at Denver, where the personnel in the flight remained overnight. When accused reported

at the Operations Office the following morning there were between 15 and 20 officers and enlisted men in the office as well as a large number at the Red Cross canteen. Accused filed his clearance, showing his intention to go from Denver to Los Angeles. Thereupon some one in the Operations Office put this information on the bulletin board and called down to the Red Cross canteen that there was a "cross country" to Los Angeles. Several men approached accused and asked permission to accompany him on the flight to Los Angeles. Accused was unable to accommodate all who wanted to go, and accepted only the ones that had emergency leaves or whose trips seemed most important, limiting the number to the parachutes available. Those who did accompany him were listed on the clearance (R. 23; Pros. Ex. 2).

Accused testified that he had never seen Training Memorandum 62-10 until his return from this cross-country flight on 6 or 7 January 1945, nor had he been apprised of its contents before leaving on his flight. When asked whether he picked up passengers at Midland Field, his previous station, he replied:

> "Yes, sir. Out there it was pretty common practice to carry other people aboard your ship. Nothing was ever said about it. They didn't apparently object to it because even on our routine bombing missions around the field, which were definitely student training missions, we took fellows along with us just for flying time. We had overseas men there and they were way behind on flying time. We took them on local bombing missions to let them get in flying time. We also took enlisted men along for the same reason. On lots of missions when students would go solo, that was the time we would take the other bombers or enlisted men along for the ride so they could watch the bombing" (R. 24).

On cross-examination and examination by the court the following pertinent testimony was developed (R. 25,26):

> "Q. What was your understanding before you left here on the 16th as to whether you were authorized to carry passengers who were not necessary and essential to the student training mission?
>
> A. Well, sir, the understanding that I had and the only thing I knew about it was just hearsay, that I have heard from the men I've been flying with and I don't know exactly how it all came up, but I heard that it was not the policy from this field to carry passengers, but that most of the instructors who flew on cross countries did take passengers and would enter them on the Form 23 and then not put them on the Form 1.
>
> Q. Did you list any of these passengers that you carried and who you showed on the Form 23, did you show them on the Form 1?
>
> A. No, sir. I had Lt. Denner on the Form 1 and then I took him off of it. I put them on the Form 23 though."

* * * *

"Q. You did, however, notwithstanding the fact that you say you never saw this memorandum 62-10, you did know or have some reason to suspect that there was a regulation at this field, or from some higher headquarters, in existence relative to taking on passengers on a student training flight?

A. Sir, I didn't know that there was any definite regulations. I didn't know if it was verbal or written.

Q. You heard that there was some such regulation and you didn't bother to find out about it?

A. I have never had any occasion to think otherwise that there might be one. It was never brought to my attention.

Q. But you heard rumors about it enough to put you on notice?

A. Well, I believe it probably should have put me on notice to dig more deeply on it, but I didn't."

Accused likewise stated, on examination by the court, that no one had given him orders to take the passengers aboard, that as the pilot he considered himself in command of the ship "regardless of what anyone else said," and that he took it upon himself to take the additional officers and enlisted men aboard the ship (R. 26).

b. Specification 3, Charge I (adultery).

Accused pleaded guilty to this specification and did not testify, offer any witnesses, or make an unsworn statement with regard thereto. Testifying as a witness for the prosecution, Captain Virgel E. Pecor, Assistant Provost Marshal, Fort Worth, Texas, stated that in the morning of 12 January 1945, he entered a bedroom in the Westbrook Hotel, Fort Worth, Texas, with two police officers, and "found" accused in bed with a young woman. The visit to the room was the result of "trouble" reported by the "hotel," the nature of which was not disclosed to the witness. There was another officer in the room when they arrived, and he was "the one they went over to talk to first." Captain Pecor stated that he first saw accused with a sheet over him. After the discovery of "more clothing" in the room, one of the police officers "locked the door, pulled the sheet back and a young lady's head appeared." Neither accused nor his female companion was fully dressed, and witness testified that he noticed "clothing pertaining to both of them in the room" (R. 20).

It was stipulated that if Dorothy Elaine Benson were present in court she would testify that she was a married woman, 22 years of age, that she had never been married to the accused, and that she was with the accused at the Westbrook Hotel, Fort Worth, Texas, and had sexual intercourse with him in one of the rooms of that hotel on the night of 11 January and morning of 12 January 1945 (Pros. Ex. 5). It was further stipulated that the accused was a married man on 11 and 12 January 1945 (Pros. Ex. 4).

5. Training Memorandum No. 62-10, issued by Army Air Forces Training Command under date of 15 November 1944, provisions of which accused was found guilty of violating, carefully defined and stressed the rules governing personnel "and members thereof" to be carried in aircraft assigned to that command, and emphasized the distinction between the rules applicable to student training missions and those applicable to flights other than such missions. With regard to student training missions the training memorandum provides in pertinent part that:

> "3. * * *
>
> "a. Aircraft schedules for student training missions will carry only crew members necessary and essential for the successful performance of student training.
>
> * * *
>
> "e. Ground crew members not essential in the performance of the mission will not be carried."

On motion of the trial judge advocate and without objection by the defense, the court properly took judicial cognizance of this training memorandum under the provisions of the Manual for Courts-Martial, which specifically authorize a court to take judicial notice without proof of "general orders, bulletins, circulars and general court-martial orders of the authority appointing the court and of all higher authority" (MCM, 1928, par. 125, p. 135; CM 207523, 8 B.R. 347). Since the memorandum is, in effect, an order of general application, issued by the Army Air Forces Training Command, and since the appointing authority is the Army Air Forces Central Flying Training Command, an inferior command, it necessarily follows that the memorandum falls within the latter category.

As testified to by accused's squadron commander, Major Carney, and as pointed out by the trial judge advocate in his request that the court take judicial cognizance of the memorandum, this Training Memorandum, although dated 15 November 1944, does not purport to establish new rules, applicable to student training cross-country missions. Reference to the memorandum of 15 May 1944, which it superseded, shows that it is merely a reaffirmation of the prior regulations. The regulations, which are declared to be in addition to Army Air Forces Regulations, are of general application, governing the operation of all military aircraft assigned to the Army Air Forces Training Command, wherever located, and were adopted for the express purpose of reducing "the increasing number of personnel, nonessential to successful flight operations, who are involved in aircraft accidents." Even assuming that they were new regulations, effective only on 15 November 1944, accused, a military pilot, serving as an instructor and responsible for students and others carried by him on cross-country flights, must be presumed to have had both actual and constructive knowledge thereof on 17 December, when he undertook to command a student training cross-country mission authorized on an application which he personally made. It has been held on several occasions by the Board of

Review that there exists a presumption of knowledge of Air Forces Regulations by a military pilot (CM 256709, Griffitts, 26 B.R. 349; CM 249704, Freuder, 33 B.R. 165). There appears to be no sound reason, legal or equitable, why this presumption should not apply with equal force to a military pilot, serving as an instructor, with respect to a training memorandum of the command to which he is assigned, dealing with the very duties and obligations of such an officer.

In the case presently under consideration, the accused, a member of the command issuing the memorandum, was an instructor of military personnel training to be pilots, and, as such was one of the very class of persons to whom the memorandum was primarily directed. Training flights, of necessity, entail operation by inexperienced pilots. The memorandum specifically prohibited the carrying of non-essential passengers so as not to subject them to this unnecessary or added risk, a prohibition founded on common sense which it was deemed necessary to emphasize because of the increasing number of accidents arising in training flights. Even assuming that the memorandum in question was not one of long standing and had gone into effect only on 15 November 1944, there was ample opportunity prior to 17 December, the date of commencement of the flight, for the accused to have familiarized himself with its provisions. As pointed out by Major Carney, the memorandum was in the files, and if accused failed to read it, the fault lies solely with him.

In addition, it appears conclusively from the record that accused at least was aware of the fact that there was some form of regulation at the Fort Worth Air Field which prohibited him from taking non-essential and unnecessary passengers on a cross-country training mission, although he expressed ignorance of the actual existence of written regulations. Located at this field for more than five months preceding his flight, and aware of the fact that he was in command of a student training flight for which he personally made application, it was his duty to ascertain the nature of this regulation or, as he termed it, "policy," before his departure. Ignorance due to failure to confirm the existence of a rule which an officer of the Army of the United States has reason to believe is operative should not be allowed to serve as an excuse where the officer is under an obligation, as was accused, to perform a duty which involved the application of the rule. It was clearly established, and admitted by the accused, that as commander of an Army aircraft, engaged in a student training cross-country mission, he carried a passenger, not a crew member, from Fairfax Field, Kansas City, to Lowry Field, Denver, Colorado, and six passengers, not crew members, from the latter field to Mines Field, Los Angeles, California, as charged in Specifications 1 and 2, respectively. The findings of guilty of these specifications, therefore, should be sustained.

6. Accused, a married man, was in Specification 3 charged with and pleaded guilty to having committed adultery with one Dorothy Elaine Benson

on or about 12 January 1945, in Fort Worth, Texas. The commission of the act was further established by the stipulation that if Dorothy Elaine Benson were present she would testify that she was a married woman, that she had never been married to accused, and that she and accused indulged in sexual intercourse in a room at the Westbrook Hotel, Fort Worth, Texas, on 11 and 12 January 1945. They were discovered, partly undressed, in a bed in a room at that hotel in the morning of 12 January 1945 by an Assistant Provost Marshal and two members of the police force of the City of Fort Worth, when they repaired to the hotel in response to a call from its manager. Another Army officer was in the room at the time of their arrival. While the record is indefinite on this point, it appears that the "trouble" reported by the manager was occasioned by this latter officer rather than by accused.

The Board of Review concurs in the findings of the court-martial that accused's conduct constitutes a violation of Article of War 96. He unquestionably committed an act of adultery in a room in a public hotel, and in doing so was guilty of misconduct that has been denounced since the proclamation of the Ten Commandments. That adultery offends the public morals is probably best indicated by the fact that in almost every state in the Union it affords grounds for divorce to the spouse who has been sinned against, and that in many of the states a single act of marital infidelity is made a criminal offense. So serious is this transgression considered by the Congress of the United States that it has made the commission of adultery punishable by imprisonment for a period not in excess of three years when committed within any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States (18 U.S.C. 516), and has provided in the Code of the District of Columbia (Sec. 22-301) that any one committing adultery in the District shall be punished by a fine not exceeding $500 or by imprisonment not exceeding one year or by both.

The fact that the State of Texas does not make an isolated act of adultery a criminal offense does not in any way alter the seriousness of accused's offense against good morals, public decency and propriety. In upholding a finding of guilty of an attempt to commit adultery, in violation of Article of War 95, The Board of Review in CM 263562, Schultz, properly disposed of the legal situation presented, although adultery is not an offense in the State of Louisiana, where the act was committed:

> "The accused in Specification 1 is charged with an attempt to commit adultery. Counsel for the defense has argued that such misconduct was not indictable either at common law or under the statutory law of Louisiana. Whether his contention be correct or not is immaterial, for it overlooks the true nature of the offense alleged. The accused has been tried not for a violation of common law or of the statutory law of Louisiana, but for 'conduct unbecoming an officer and a gentleman'. The officer who attempts to commit

adultery not only offends against his wife but infringes upon that code of honor by which gentlemen are expected to abide."

The office of The Judge Advocate General has in the past approved without question findings of guilty of adultery as violations of Article of War 96 where the accused were enlisted men (for example, see CM 277151, Hinterberger, 274918, Broadwater). The Board of Review sees no reason for not following the precedent thus set where the accused is a commissioned officer of the Army of the United States.

6. War Department records show that accused is about 23 years and eight months of age and married. He enlisted in the Army on 12 September 1940, attaining the grade of private first class, and became an aviation cadet on 9 September 1942. He was commissioned a temporary second lieutenant, Air Corps, in the Army of the United States, on 24 May 1943. He graduated from high school and attended the University of Texas for one year. For four years prior to entering the Army he served as a life guard for the Baker Hotel at Mineral Wells, Texas.

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

_____, Judge Advocate.

(Dissent) _____, Judge Advocate.

_____, Judge Advocate.

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

SPJGK - CM 276559

21 MAY 1945

UNITED STATES	)	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND
v.	)	
Second Lieutenant LORAN T. FRANCIS (O-680428), Air Corps.	)	Trial by g.c.m., convened at Fort Worth, Texas, 16 February 1945. Dismissal.

DISSENTING OPINION of HEPBURN, Judge Advocate

I do not concur with the decision of the majority members of the Board that the record of trial is legally sufficient to support the finding of guilty of Specification 3 of the Charge. In my opinion the conviction of this Specification should not be susatined for the following reasons:

The accused has been found guilty of a specification that alleges that he, a married man, at Fort Worth, Texas, did on a certain date "wrongfully have sexual intercourse with * * * a woman not his wife", in violation of the 96th Article of War. The proof of the act was clear and convincing. It was stipulated that if a certain woman were called as a witness she would testify that she and the accused did at the time and place alleged in the Specification engage in sexual intercourse. The accused by his plea of guilty admitted it. The testimony of the military policeman who accompanied a local policeman into the hotel bedroom of the accused and observed the local policeman pull down the sheet covering the accused so as to disclose the head of a woman in the same bed was unnecessary in the proof of the offense charged and should not play any part in the legal question herein presented. The accused was not charged with disorderly conduct in being found in bed with a woman who was not his wife. The charge here is the act of sexual intercourse that took place some time before they were discovered in the room.

It should also be borne in mind that the accused has been convited of a violation of the 96th Article of War and not the 95th Article of War, and that therefore the question of whether his conduct was unbecoming that of an officer and a gentleman does not enter into the issue involved. Nor does the fact that the accused has pleaded guilty prevent the Board from holding that he is not guilty, because the plea admits only what is precisely charged, and, if the Specification does not set forth an offense, the plea cannot make it an offense, and it follows that there can be no lawful conviction thereon (CM 248032, 31 BR 95).

The question presented is whether a male in the military service, who is married, violates the 96th Article of War by privately having sexual intercourse with a woman who is not his wife in the State of Texas. Neither sexual intercourse, fornication, or adultery is expressly prohibited by any of the Articles of War. Nor do any of these acts constitute a common law offense. Adultery and fornication become criminal offenses only when made so by statute.

> Bishop's New Criminal Law, par. 38: "Fornication and adultery though in England cognizable criminally under the ecclesiastical law, are, in the absence of legislation, not crimes with us, unless, indeed, they are open and notorious, amounting to a public nuisance."
>
> and in par. 501: "Adultery and fornication x x x done in a more private manner, are not punishable criminally, except under statutes. - - - (It) may be so continuous and public, or open and notorious, as to constitute an indictable nuisance at the common law."
>
> Clark and Marshall on Crimes, par. 462: "Fornication and adultery were not common law crimes in England, nor, by the weight of authority, are they so in this country, unless committed openly and notoriously, so as to constitute a public nuisance. In many states, however, they are now punished by statute."

Adultery was not a common law crime when privately committed because, although immoral and a violation of the marriage vow, it did not affect the morals of the public. It affected only the other person involved, or his or her spouse, who, if injured had his or her civil remedies at law. It was therefore not considered an offense against the "Crown", or "The Commonwealth", or "The State".

The act of sexual intercourse in the case under discussion took place in the State of Texas. The record and the papers attached thereto show that the accused and the woman involved were residents of that State. The isolated act of sexual intercourse by or with a married person is not a criminal offense in the State of Texas. In order to be such habitual carnal intercourse must be shown. (Vernon's Penal Code of Texas, Chapter 3, page 421, and the authorities therein cited.)

Article 499 of the Penal Code of Texas provides:

> "Adultery is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and a woman when either is lawfully married to some other person."

Nevertheless, notwithstanding the fact that the act was neither a common law, nor a statutory offense, not expressly prohibited by the Articles of War, it has been held that, if the accused was in the military service at the time of the commission of the act, and if the act was committed under circumstances constituting either (1) a "disorder and neglect to the prejudice of good order and military discipline", or (2) "conduct of a nature to bring discredit upon the military service" and he is so charged, a conviction may be sustained as a violation of the 96th Article of War without reference to the local or federal statutory law (SPJGJ 1944/11061, 18 Jan 1945, Bull. Jag, Jan 1945, pp. 13-14).

In order that a court-martial may legally punish one subject to its jurisdiction for an offense under Article of War 96 one of the following conditions must be present:

The act must constitute either

(1) A crime or offense not capital:

(2) A disorder or neglect to the prejudice of good order and military discipline: or,

(3) Conduct of a nature to bring discredit upon the military service.

One (1) does not apply because that clause embraces only those crimes committed in violation of the laws of Congress in a place subject to the sole jurisdiction of the United States (MCM 1928, par. 152c, page 188). Although adultery is denounced by 18 USC 516 and also by the Code of the District of Columbia those statutes do not apply to offenses of that nature in the State of Texas where the United States does not have exclusive jurisdiction.

Nor does two (2) apply. The accused's act could not have constituted a "disorder or neglect to the prejudice of good order and military discipline" because it had no connection whatever with military discipline. In order that a disorder or neglect may violate this Article it must be prejudicial to good order and military discipline. Even if the accused's act constituted a common law or state statutory offense known as adultery or fornication that is not sufficient to bring it within the meaning of this clause of the Article. This clause formerly appeared in similar terms in the 62d Article of War. A reading of the Digest of Opinions of the JAG for 1912, 1912-30, 1912-40, and the exhaustive collection of cases listed in Winthrop's Military Law and Precedents (Reprint 1920) fails to

disclose that the offense of adultery or fornication was ever considered a violation of either the 62nd or 96th Article of War during the period of time covered by these publications. Nor do either of these offenses appear in the list of offenses in the Table of Maximum Punishments, (MCM 1928, par. 104c) nor elsewhere in the Manual for Courts-Martial.

Winthrop (page 723) stated:

> "It is now the accepted construction that the words, 'to the prejudice of good order and military discipline', are of general application, and qualify not only the term 'disorders and neglects' but the designation 'crimes' as well. A crime, therefore, to be congizable by a court-martial under this Article must have been committed under such circumstances as to have directly offended against the government and discipline of the military state. Thus x x x where such crimes are committed upon or against civilians, and not at or near a military camp or post, or in breach or violation of a military duty or order, they are not in general to be regarded as within the description of the Article, but are to be treated as a civil rather than military offenses."

The legality of the conviction in this case must, therefore, rest upon the remaining clause (3) - "conduct of a nature to bring discredit upon the military service."

The history of this clause is not only interesting but may throw some light upon its proper construction.

General Enoch Crowder, then Judge Advocate General, in 1912 was its author and appeared before the Military Affairs Committee urging its inclusion in this article of war. When asked by one of the members of that committee the purpose of this "vague language", he answered as follows:

> "I want to explain that. That was inserted for a single purpose. We have a great many retired noncommissioned officers and soldiers distributed throughout the body of our population and a great many retired officers. If the retired officer does anything discreditable to the service or to his official position, we can try him under the sixty-first article of war for conduct 'unbecoming an officer and a gentleman'. We cannot try the noncommissioned officer or soldier under that article, nor can we try him for conduct prejudicial to the good order and military discipline; because the act of a man on the retired list, away from any military post, cannot reasonably be said to affect military discipline. I threw in that language to cover the cases of those men." (Revision of the Articles of War 1912-1920, p. 83)

By judicial interpretation these "vague words" have since been expanded from the narrow construction placed upon them by their author to the point where they have been used as the legal justification to sustain practically all convictions where the offense was committed by one in the military service and was not either specifically denounced by some other Article of War, or a purely military offense [covered by clause (2) above], or a violation of a Federal statute [covered by clause (1) above].

Thus it has been used to sustain convictions under this Article where one in the military service has committed any recognized common law crime or any offense that has violated any state penal statute. Such common law offenses as assault, assault and battery, disorderly conduct, etc., and such state statutory offenses as bigamy and statutory rape have been made punishable under this clause.

It has also been used to sustain convictions under this Article where one in the military service has committed any offense of a disorderly, dishonest or indecent nature that is not a common law crime, and does not violate any state statute, provided the act was committed under such circumstances as to bring discredit upon the military service.

Thus, it has been held that an officer or soldier in uniform who is drunk, or who uses profane language in the presence of others, or who commits a lewd or indecent act, or who associates with prostitutes in public, or who openly cohabits with a woman not his wife - thereby brings discredit on the military service and violates this Article of War. So, too, does one who is known to be in military service and who dishonorably but without fraud issues worthless checks, or who dishonorably fails to pay his obligations, or who accepts gifts from government contractors, bring discredit upon the military service.

When interpreted in the manner indicated by the foregoing such is a reasonable, understandable and commendable interpretation. The acts committed by the one in military service clearly injured the reputation or credit of the military service. If the act was a crime or violated a state statute and involved a disorder or moral turpitude no further proof of bringing discredit upon the service than that the accused was obviously or known to be in the military service should be required. But where the act complained of is not a criminal offense and did not violate a state penal statute of the nature described, then, in my opinion, it should be incumbent upon the prosecution not only to show that the accused was obviously (in uniform) or known to be in the military service at the time he committed the act but that the act itself because of its nature and the circumstances under which it was committed directly affected the reputation or credit of the military service.

Manual for Courts-Martial, 1928, paragraph 152a, page 187, reads:

> "By the term 'to the prejudice,' etc., is to be understood directly prejudicial, not indirectly or remotely, merely. An irregular or improper act on the part of an officer or soldier can scarcely be conceived which may not be regarded as in some indirect or remote sense prejudicing military discipline; but it is hardly to be supposed that the article contemplated such distant effects, and the same is, therefore, confined to cases in which the prejudice is reasonably direct and palpable. (Winthrop.)"

By analogy the term "to the discredit of" should mean to the direct discredit and not indirectly or remotely.

In the instant case the accused's act was wrongful not because it was sexual intercourse but because he was not married to the woman. The act was committed in private and so far as the record shows no one knew about it but this paramour. There was no proof that even she knew the accused to be in the military service when the act was committed. The only person wronged was the accused's wife. It did not appear that she ever learned of the episode. It is difficult to perceive in what manner the reputation of the military service was injured even remotely.

The 96th Article of War is, after all, a penal or criminal statute. As such it must be construed with such strictness as to safeguard the rights of the defendant, and, if ambiguous, it should be construed in favor of the defendant.

> "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department. It is the legislature not the court which is to define a crime, and ordain its punishment". (Chief Justice Marshall in U.S. v. Wiltberger, 15 Wheat 76, 95-96.)

Having in mind this well-known but often forgotten rule of statutory construction, a reading of the 96th Article of War cannot fairly be construed as a prohibition against adultery unless it was committed in such a manner as to have some prejudicial effect upon either military discipline or military reputation. I am therefore of the opinion that the Specification has failed to allege an offense under the 96th Article of War. The act described was neither a common law offense, a military offense, nor a statutory offense in the place where it was committed. In order to make an otherwise offenseless act the basis of a

Charge under the 96th Article of War it should be alleged and proved that it did in some clear and substantial manner bring discredit upon the military service or was prejudicial to good order and military discipline.

In the case under discussion the accused was a citizen of the State of Texas. As such he should be entitled to an equal protection of the laws of that state with other citizens in matters not affecting the military. If the act committed by the accused was not considered by the citizens of that state to be sufficiently wrong to declare it to be criminal, it would be an erroneous conclusion to say that the reputation of the Army of the United States suffered because the accused was in the military service at the time. In whose mind did it suffer? The record does not disclose. The reason is obvious; no such result took place.

If the Judge Advocate General should sustain this conviction it will mean that any one in military service who commits any immoral act thereby violates the 96th Article of War. For the purposes of conducting the present war over 8,000,000 men have been inducted into the service. Being humans they have their share of human weaknesses and faults. The prime purpose of military justice is military discipline and not to reform all military personnel so as to make each soldier morally perfect. Such a task would be impossible. The effort toward that end, as evidenced by this case, merely results in punishing only those few who get caught, or who have the misfortune of associating with a woman who through revenge, remorse, or failure at blackmail, informs the military authorities. It opens the door for the unscrupulous to prey upon the military and will likely do more harm to the reputation of the military service than will the refusal to take jurisdiction over such offenses.

It is submitted that the cases cited by the Board as sustaining its conclusion contrary to this opinion are not in point. CM 263562, Schultz, involved a violation of the 95th Article of War and not the 96th Article of War. In CM 277151, Hinterberger, and CM 274918, Broadwater, the offense was adultery under the local statutes where committed; the accused was single, but the woman was married; the charge was accompanied by a charge of rape of which the accused was acquitted, and the circumstances surrounding the act involved force and violence by a soldier in uniform that would have brought discredit upon the service whether the act of adultery had been consummated or not. In other words the wrongful act was committed under such circumstances as to clearly bring discredit upon the service, and therefore is in keeping with the principles of law announced in this dissenting opinion.

Paul W. Blum, Judge Advocate.

SPJGK - CM 276559 1st Ind.

Hq ASF, JAGO, Washington 25, D. C. JUN 22 1945

TO: The Secretary of War.

1. Pursuant to Executive Order No. 9556 dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review (one member dissenting as to one Specification only) in the case of Second Lieutenant Loran T. Francis (O-680428), Air Corps.

2. Upon trial by general court-martial accused pleaded guilty to and was found guilty of adultery in violation of Article of War 96 (Specification 3 of the Charge), and pleaded not guilty to and was found guilty, as violations of the same Article, of two specifications charging him with having transported unauthorized passengers on a student training mission in an Army aircraft in violation of a training command memorandum (Specifications 1 and 2 of the Charge). 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. 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 and sentence and to warrant confirmation thereof.

On December 14, 1944, accused, a pilot-instructor, stationed at Fort Worth Air Field, made application and obtained authority for a student-training cross-country mission for certain of his students. Under date of 15 November 1944 Army Air Forces Training Command, which was a superior authority to the command with which accused was serving, issued a training memorandum, which merely affirmed existing regulations of long standing, that in view of the increasing number of non-essential personnel injured in aircraft accidents, only absolutely essential and necessary personnel were to be permitted on student training missions. While accused contended that he had not seen these regulations, although he had been at the field since July 1944, he stated that he had heard that there was some such policy at the field, but had made no investigation to ascertain just what the policy or rule was. No specific instructions as to his right to carry passengers were given him prior to his departure from Fort Worth. At Kansas City, Kansas, he permitted an officer, who was on an emergency leave, and at Denver three additional officers and two enlisted men to board the plane and make the flight to Los Angeles. His defense was his lack of knowledge of the Training Memorandum and the existence of the policy at his former station of allowing pilots to carry additional passengers (Specifications 1 and 2 of the Charge). In addition to accused's plea of guilty of the charge of adultery (Specification 3 of the Charge), it was stipulated that on the date of the commission of the

offense in a room in a public hotel in Fort Worth, Texas, accused was a married man and the young woman with whom he had the illicit relations a married woman, and that they were not married to each other. The dissenting opinion is limited to the finding of guilty of adultery.

While accused is presumed to have known so important a regulation as that which he violated, particularly in view of the fact that as an instructor it was his duty to ascertain all rules adopted for the safety of those for whom he was responsible, and further appears to have been aware of the existence of a policy prohibiting the carrying of non-essential passengers, I am of the opinion that his violation of the regulations was not due to any willful intent on his part. His act of adultery appears to have been an isolated instance of marital infidelity, brought to light as the result of a disorder created by another officer. Under these circumstances, and in view of accused's past good record in the military service, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $50 of his pay per month for six months and that the sentence as thus modified be ordered executed.

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

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but commuted to reprimand and forfeiture of $50 per month for six months. G.C.M.O. 295, 7 Jul 1945)

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

SPJGN-CM 276576

23 MAR 1945

UNITED STATES	)	NEW YORK PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at Brooklyn, New York, 1 March 1945. Dismissal.
	)	
Second Lieutenant FREDERICK H. B. PILGER (0-1302875), Infantry.	)	

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 96th Article of War.

Specification: In that Second Lieutenant Frederick H. B. Pilger, Infantry, Attached Unassigned, Disposition Detachment, Fort Hamilton, New York, formerly Qualified Parachute Battalion, Airborne Training Center, Army Post Office No. 512, United States Army, did, at York, South Carolina, on or about 28 August 1943, wrongfully and unlawfully contract a bigamous marriage with one Inez Hoyle, of Cherryville, North Carolina, while he was legally married to Genevieve C. (Barrett) Pilger, who presently resides at Brooklyn, New York, and from whom he had obtained neither a divorce nor an annulment at the time he contracted the said bigamous marriage.

The accused pleaded not guilty to, and was found guilty of, both the Charge and the Specification thereunder. After evidence had been introduced of one previous conviction by general court-martial for being in an off-limits establishment in violation of Article of War 96, he was sentenced to be dismissed the service and to pay to the United States a fine of five hundred dollars. The reviewing authority approved the sentence but remitted the fine imposed and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused married Genevieve Catherine Barrett on 8 May 1938 in Brooklyn, New York (R. 7, 10; Pros. Ex. 1-d). Subsequently, on 28 August 1943, he purported to wed Bessie Inez Hoyle in York, South Carolina (R. 11-12; Pros. Exs. 3, 4-a, 4-b). This second ceremony was performed by a notary public who, as an officer authorized "to administer oaths," was empowered under a peculiar statute of that state to solemnize marriages (R. 13). One child was bor of the union with Bessie Inez Hoyle (Pros. Ex. 3). At the time of the trial the accused was still the husband of Genevieve Catherine Barrett Pilger (R. 7).

4. After being apprised of his rights relative to testifying or remaining silent, the accused elected to take the stand on his own behalf. He had served creditably overseas in Italy and had earned the Bronze star and the ETO star. Two of the ratings on his AGO card, Form 66-1, were "satisfactory" and a third was "excellent" (R. 26-27). His return to the United States was for the purpose of standing trial in the instant case (R. 20).

While still the husband of "Mrs. Genevieve C. Pilger," he went through a wedding ceremony with Inez Hoyle whom he had known for only about a month. He had been drinking and, in his own words,

> "* * * we were all out on a party, three or four couples, and someone suggested that we get married. I do not know who it was, but someone suggested that we get married. I went ahead and got married" (R. 21-23).

He had had sexual intercourse with Inez Hoyle on numerous occasions both before and after the wedding (R. 23-24). Shortly after the ceremony, upon being alerted for overseas duty, he volunteered for service with a parachute unit. It is now his desire to return to combat (R. 22, 25).

5. The Specification of the Charge alleges that the accused "did, at York, South Carolina, on or about 28 August 1943, wrongfully and unlawfully contract a bigamous marriage with one Inez Hoyle * * * while he was legally married to Genevieve C. (Barrett) Pilger * * *". This was set forth as a violation of Article of War 96.

The prosecution has established and the accused has admitted

that he contracted a bigamous marriage with Inez Hoyle. The birth of a child as a result of the illicit union substantially aggravated his offense. In response to defense counsel's insistence that the prosecution was under the burden of proving that bigamy was a crime under the law of South Carolina an extract copy of section 1434 of the Code of that state, reading as follows, was introduced into evidence:

> "Whoever, being married and whose husband or wife has not remained continually for seven years beyond the sea, or continually absented himself or herself the one from the other, for the space of seven years together, the one of them not knowing the other to be living within that time, or who were not married before the age of consent, or where neither husband nor wife is under sentence of imprisonment for life, or whose marriage has not been annulled by decree of a competent tribunal having jurisdiction both of the cause and the parties, shall marry another person, the former husband or wife being alive, shall on conviction, be punished by imprisonment in the penetentiary for not more than five years nor less than six months, or by imprisonment in the jail for six months and by a fine of not less than five hundred dollars" (R. 17-18; Pros. Ex. 5).

This statute was not determinative of the issue before the court. As was said in III Bull. JAG, April 1944, p. 150, section 454 (18):

> "Accused was found guilty of bigamy in violation of A. W. 96. At the beginning of the trial a stipulation stating the law of bigamy of the State in which the bigamous marriage took place was read to the court, and the record discloses that the case was tried on the theory that the law of that State applied. Held: The record is legally sufficient to support the findings and sentence. Bigamy has long been recognized as an offense under the 95th and 96th Articles of War, without reference to State laws. The erroneous consideration of the State statute did not injuriously affect the substantial rights of accused since he was clearly shown to be guilty of bigamy in violation of A. W. 96. CM 245278 (1944)."

Since the bigamy committed by the accused was conduct of a nature to bring discredit upon the military service and hence violative of Article of War 96 without reference to state law, the South Carolina statute need not have been offered or received in evidence.

6. The accused, who is married, is about 27 years old. After being graduated from high school, he had enlisted service from 30

January 1936 to 25 April 1939 when he was assigned to the Enlisted Reserve Corps. From March of 1940 to February of 1941 he was employed as a guard by Carrier Corporation. He was recalled to active duty as an enlisted man on 6 February 1941 and was commissioned as a second lieutenant on 7 December 1942. While an enlisted man, he was tried by special court-martial on 17 November 1941 for failure to repair to his properly appointed place of duty and was reduced from the grade of Sergeant to that of Private. While overseas as an officer, he was convicted on 4 December 1943 by a general court-martial at Oran, Algeria, for "wrongfully and knowingly" entering "a known house of prostitution * * * in violation of standing orders". He was sentenced to be reprimanded and to forfeit the sum of $25 per month for 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 and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Robert J. Homer, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 276576 1st Ind
Hq ASF, JAGO, Washington 25, D. C. 4 JUN 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 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 Second Lieutenant Frederick H. B. Pilger (0-1302875), Infantry.

2. Upon trial by general court-martial this officer was found guilty of wrongfully and unlawfully contracting a bigamous marriage, in violation of Article of War 96. After evidence had been introduced of one previous conviction by general court-martial for being in an off-limits establishment in violation of Article of War 96, he was sentenced to be dismissed the service and to pay to the United States a fine of five hundred dollars. The reviewing authority approved the sentence but remitted the fine imposed 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 and the sentence as approved by the reviewing authority and to warrant confirmation thereof.

While lawfully married to Genevieve Catherine Barrett Pilger, who had borne him three children, the accused purported to wed Bessie Inez Hoyle. One child was born of this second union. This was not the first offense committed by the accused. While an enlisted man, he was tried by special court-martial for failure to repair to his properly appointed place of duty and was reduced from the grade of sergeant to that of private. While overseas as an officer, he was convicted of wrongfully and knowingly entering a house of prostitution, in violation of standing orders, and was sentenced to be reprimanded and to forfeit the sum of $25 per month for six months. In contracting his bigamous marriage in violation of his moral and legal obligations to his lawful wife and his three minor children, he has demonstrated a complete lack of appreciation of his duties both as a husband and as an officer.

Subsequent to the present conviction of the accused, information has been received that he has been punished under Article of War 104 for failing to repair at the fixed time to his properly appointed place of duty and for failing to comply with certain orders of his then commanding officer.

Although fully cognizant of the arguments presented by all of the members of the court in a recommendation for clemency attached to the record, I believe that the dereliction is too serious to warrant any

reduction in the relatively mild punishment imposed and accordingly recommend that the sentence as approved by the reviewing authority be confirmed and ordered executed.

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

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed.
G.C.M.O. 223, 13 Jun 1945)

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

SPJGN - CM 276617

20 APR 1945

UNITED STATES v. Private HINTON C. INGLETT (14028380), Squadron E, 1030th Army Air Forces Base Unit.	ARMY AIR FORCES PERSONNEL DISTRIBUTION COMMAND Trial by G.C.M., convened at Santa Monica, California, 1 February 1945. Dishonorable discharge and confinement for four (4) years. Federal Reformatory, El Reno, Oklahoma.

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

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

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

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

Specification: In that Private Hinton C. Inglett, E Squadron, 1030th AAF Base Unit, did, without proper leave, absent himself from his station at AAF Redistribution Station No. 3, Santa Monica, California from about 8 December 1944 to about 14 December 1944.

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

Specification 1: In that Private Hinton C. Inglett, E Squadron, 1030th AAF Base Unit, Santa Monica, California, did, at San Bernardino, California, on or about 18 August 1944, with intent to defraud wrongfully and unlawfully make and utter to the Victory Market, San Bernardino, California, a certain check in words and figures as follows, to wit:

San Bernardino, Cal. August 18 1944 No._____

AMERICAN NATIONAL BANK 90-134

Pay to the Order of _____ Cash _____ $20.00

Twenty and 00/100 _____ Dollars

ASN 14028380 /s/ Hinton C. Inglett
1044 Twin Creek Rd.

and by means thereof, did fraudulently obtain from the said Victory Market the sum of Twenty Dollars ($20.00), lawful currency of the United States in payment of the said check, he the said Private Hinton C. Inglett, then well knowing that he did not have and not intending that he should have any account with the American National Bank of San Bernardino for the payment of said check.

Specifications 2-9 inclusive and the Specification of the Additional Charge are identical except as to places, dates, and amounts. Amounts alleged are $25, $20, $20, $10, $30, $48.10, and $84.98.

3. Since the record is legally sufficient to sustain the findings of guilty and the period of confinement imposed by the court, the only question requiring discussion involves the legality of that part of the action of the Reviewing Authority which designates the Federal Reformatory as the place of confinement. Article of War 42 states that:

"Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or ommission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, * * *".

Since there is no Federal statute of general application covering the offense of fraudulently making and uttering a worthless check, the law of the District of Columbia must be looked to in order to determine whether penitentiary confinement is authorized in the present case. There are two statutes in the Code of the District of Columbia providing punishment for the offense of fraudulently making and uttering a worthless check. The first and oldest of these punishes this offense as a felony, is general in character, and covers a number of related offenses. It provides in part as follows:

"Whoever, by any false pretense, with intent to defraud, obtains from any person anything of value, or procures the execution and delivery of any instrument of writing or conveyance of real or personal property, or the signature of any person, as maker, indorser, or guarantor, to or upon any bond, bill, receipt, promissory note, draft, or check, or any other evidence of indebtedness, and whoever fraudulently sells, barters, <u>or disposes of any bond, bill, receipt, promissory note, draft, or check, or other evidence of indebtedness, for value, knowing the same to be worthless,</u> or knowing the signature of the maker, indorser, or guarantor thereof to have been obtained by any false pretense, shall, if the value of the property or the sum or value of the money or property so obtained, procured, sold, bartered, or disposed of is $50 or upward, be imprisoned not less than one year nor more than three

years; or, if less than that sum, shall be fined not more than $200 or imprisoned for not more than one year, or both.* * * (underscoring supplied; Title 22, sec. 1301, D. C. Code,1940).

The second, and more recently adopted of the two statutes, which deals exclusively with the offense of fraudulently making and uttering a worthless check, makes the offense punishable as a misdemeanor only. It provides in part as follows:

"Any person within the District of Columbia, who, with intent to defraud, shall make, draw, utter, or deliver any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, or order in full upon its presentation, shall be guilty of a misdemeanor and punishable by imprisonment for not more than one year, or be fined not more than $1,000, or both. * * *" (Title 22, sec. 1410, D.C. Code, 1940).

Since these two statutes both cover the offense of fraudulently making and uttering worthless checks and since they are repugnant to each other in the punishment which they provide for that offense, we must examine each statute in the light of its legislative history and the orthodox methods provided for statutory interpretation. Crawford in his treatise on statutory construction states that:

"It is not uncommon to find one statute treating a subject in general terms and another treating only a part of the same subject matter in a more minute manner. Where this situation exists, the two statutes should be read together and harmonized. This is especially true where the two statutes are in pari materia. In the event of repugnancy, the special statute should prevail, in the absence of a contrary legislative intent, since the specific statute more clearly evidences the legislative intent than the general statute does. And this rule—that a statute relating to a specific subject controls a general statute which includes the specific subject—is not necessarily dependent on the time of the enactment of such statutes, although it may be a vital and important consideration." (Crawford's Statutory Construction, sec. 230).

The Congressional debates on the passage of the specific fraudulent check law show that it was enacted because most of the states had enacted similar statutes and because it was believed that such a statute would facilitate the prosecution and proof of fraudulent check transactions.

During the course of the debates the old false pretense statute of the District of Columbia was read into the record and it was argued that the old law was entirely adequate. On the other hand, the fraudulent check statutes of Arkansas, Missouri, and Utah, were also copied verbatim into the record. The Congressional debates resulted in the adoption of a statute which made the offense of fraudulently making and uttering a check more easily provable and which reduced the penalty to that of a misdemeanor.

In view of the legislative history of the fraudulent check law of the District of Columbia and since there has been no Federal appellate court decision interpreting this law, it is appropriate to examine the decisions interpreting the effect of similar laws in the various states. In the case of State v. Marshall, 211 N.W. 252 (1926), the Supreme Court of Iowa, in considering the repugnancy between the punishment provided under a general law of that State and under a more recently enacted specific law of that State, stated that:

> "We must presume that by such enactment the Legislature intended to change the law in some respect. * * * It may have thought that the drawing of checks upon depleted bank accounts was a sin so nearly universal, and which carried so many gradations of moral turpitude, that, even though fraudulent, a seven-year term in the penitentiary was too severe punishment therefor. * * * It is our conclusion that the case made by the evidence brings it within section 13047 (bad check statute) and excludes it from the operation of section 13045 (false pretense statute). This being so, the case should have been prosecuted as a misdemeanor and not by indictment in the district court."

In considering the same general problem the Supreme Court of Kentucky in Tartar v. Commonwealth, 102 S.W. 2d. 971, stated that:

> "While the offense defined in section 1213a (Cold Check Law) is a degree of the offense defined in section 1208 (false pretense statute), it must not be overlooked that section 1213a deals with that class of fraud or obtention of property by false pretenses committed by giving a worthless check and fixes the penalty therefor, which is a different penalty than prescribed in section 1208. * * * Section 1213a deals with the whole subject of giving a worthless check and necessarily repeals section 1208 to the extent of the conflict, but no further."

In the recent case of State v. Richman, 148 S.W. 2d. 796 (1941), the Supreme Court of Missouri interpreted a problem similar to the present one, as follows:

"Section 4095 has been on the statute books for many years. It is a general statute, covering the obtaining of property by color of any false token or writing or by any other false pretense. Section 4305 is a later statute and deals specifically with obtaining property by the giving of a 'check, draft or order, for the payment of money' when the drawer knowingly has not funds or credit with the bank sufficient to pay such 'check, draft or order.' * * * The latter is in the nature of a special rather than a general statute, as between it and Section 4095, and is a later enactment. If the giving of the check, as shown in this case, would be a violation of Section 4095, then it seems clear there would be irreconcilable conflict, so far as pertains to the giving of such check, between said two sections of the statute, in which situation the special (and in this instance the later)statute must govern."

The same interpretation was made in State v. Harris, 337 Mo. 1052, 87 S.W. 2d. 1026, and in State v. Moore, 122 S.E. 672, 128 S.C. 192.

In view of the persuasive character of the above precedents the Board of Review is compelled to the conclusion that the fraudulent check law was designed to supersede the false pretenses statute in prosecutions for the fraudulent issuing of checks. In other words, the specific act was intended to control to the exclusion of the older general law. Since the specific statute makes the uttering of a worthless check a misdemeanor only, and since the Specifications in the present case both in form and in substance come within the purview of that statute, penitentiary confinement is not authorized for the offenses involved in the present case.

4. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and legally sufficient to support so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for four years at a place other than a penitentiary or federal reformatory.

Abner E. Lifsecomb, Judge Advocate

Robert J. Slamon, Judge Advocate

Samuel E. Morgan, Judge Advocate

SPJGQ-CM 276617 1st Ind
Hq ASF, JAGO, Washington 25, D. C.
JUN 25 1945

TO: The Secretary of War

1. Herewith transmitted for your action under Article of War 50½ is the record of trial in the case of Private Hinton C. Inglett (14028380), Squadron E, 1030th Army Air Forces Base Unit.

2. I do not concur in that part of the opinion of the Board of Review holding that confinement in a Federal Reformatory is contrary to law. In my opinion penitentiary confinement is authorized under Article of War 42 and by Title 22, Section 1301, District of Columbia Code (latter statute enacted March 3, 1901, re-enacted August 12, 1937). These statutes are set forth on pages 2 and 3 of the Board of Review's holding. Without doubt the obtaining of property by fraudulently making and uttering a check on a bank in which the drawer, as he well knows, has no account or, having an account, has insufficient funds in it to meet the check, comes within the purview of Section 1301, above, (enacted March 3, 1901, re-enacted August 12, 1937), and constitutes the crime of obtaining property by false pretense. This has been recognized by the District of Columbia courts (Clagett v. U.S., 53 App. D. C. 134, 280 Fed. 532, 1923). The offense involved in the Clagett case occurred before July 1, 1922, the date of the enactment in the District of Columbia of the so-called bad check statute (Title 22, Section 1410, D. C. Code), which statute is quoted on page 3 of the Board of Review's holding. Penitentiary confinement is not authorized under Title 22, Section 1410, District of Columbia Code. No decision of the District of Columbia courts has been found on the question whether the enactment of Section 1410 was intended to remove from the false pretense statute all cases included in the language of Section 1410. However, the practice in the District is to permit prosecution of "bad check" cases under <u>either</u> statute, depending upon the gravity of the particular case. In pursuance of this practice over a number of years, the District of Columbia courts have tried the more serious bad check cases under the false pretense statute (Title 22, Section 1301, District of Columbia Code, enacted March 3, 1901, re-enacted August 12, 1937), authorizing penitentiary confinement where the property obtained has a value of $50 or more. Likewise, the settled practice in military courts has been to permit penitentiary confinement in bad check cases where the amount involved is more than $50. In the absence of a District of Columbia decision to the contrary, and in view of the established practice, it is my opinion that penitentiary confinement is authorized by the law of the District of Columbia and consequently by Article of War 42.

3. I recommend that the action of the reviewing authority, including the designation of the Federal Reformatory, El Reno, Oklahoma, as the place of confinement, be confirmed and carried into execution.

4. Inclosed is a form of action designed to carry my recommendation into effect should it meet with your approval.

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence, including designation of Federal reformatory as place of confinement, confirmed, by order of the Acting Secretary of War, 27 Jun 1945)

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

SPJGQ
CM 276673

30 MAR 1945

UNITED STATES v. Private WALTER J. HOFFMAN (14104518), Squadron A, 339th AAF Base Unit (CCTS F)	)))))))	THIRD AIR FORCE Trial by G.C.M., convened at Thomasville Army Air Field, Ga. 2 February 1945. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

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

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

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

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

Specification: In that Private Walter J. Hoffman, Squadron A, 339th AAF Base Unit, then Private Walter J. Hoffman, Squadron D, 339th Base Unit, did, without proper leave, absent himself from his organization at Thomasville Army Air Field, Thomasville, Georgia, on or about 2 December 1944, and did remain so absent until he was apprehended at Roanoke, Virginia, on or about 29 December 1944, and returned to Military control at Richmond, Virginia, on or about 31 December 1944.

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

Specification: In that Private Walter J. Hoffman, Squadron A, 339th AAF Base Unit, then Private Walter J. Hoffman, Squadron D, 339th AAF Base Unit, did at Columbus, Georgia, on or about 5 December 1944, with intent to defraud, wrongfully, unlawfully and without authority, make and utter to the Martin Furniture Co. a certain draft, in words and figures as follows:

MERCHANTS & MECHANICS BANK

64-57
6

NO._____

COLUMBUS, GA., Dec - 5 1944

PAY
TO THE
ORDER OF Martin Furniture Co. $5.00
Five & No/100 ——————————DOLLARS

To J. T. Knight & Son
Columbus, Ga.

Chg to acct of
Walter J. Hoffman
339th Base Unit Thomasville, Ga. Sqad. D.

and by means whereof did fraudulently receive five dollars ($5.00) in cash in payment of the said draft, he, the said Private Walter J. Hoffman, then well knowing that he did not have an account with or authority to draw on J. T. Knight & Son, Columbus, Georgia, for payment of said draft.

He pleaded not guilty to and was found guilty of both Charges and their Specifications. Evidence of one previous conviction by special court-martial for absences without leave for 8 days and 15 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 or to become due and to be confined at hard labor, at such place as the reviewing authority might direct, for three (3) years and three (3) months. The reviewing authority approved the sentence, but remitted three (3) months of the confinement, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The record of trial is legally sufficient to support the finding of guilty of the Specification of Charge I and Charge I, and no discussion of the evidence relating thereto is necessary.

The only evidence with respect to the Specification of Charge II is substantially as follows: The prosecution introduced a draft dated 5 December 1944 in the amount of $5.00, signed by the accused, payable to Martin Furniture Company and drawn on J. T. Knight & Son, Columbus, Georgia (R. 8; Pros. Ex.5). By deposition the secretary of J. T. Knight & Son, in charge of the books of the company, testified that accused had no account with or authority to draw on J. T. Knight & Son during the month of December 1944 (R. 8; Pros. Ex. 7). Miss Lucile Ray, office manager for Martin Furniture Company, in answer to questions regarding the cashing of the draft, testified by deposition as follows:

> "I did not cash the draft for him myself but Mrs. J. C. Martin, President of Martin Furniture, acting for the company, cashed the draft while I was out to lunch. The draft was cashed on 5 December 1944. The amount of the draft was $5.00."

Miss Ray also testified that the draft was not honored when it was presented for payment (R.8; Pros. Ex. 6).

4. The accused, after being advised of his rights as a witness, elected to remain silent (R. 13). The only witness for the defense testified at length regarding accused's mental condition, concluding that the accused was sane and capable of cooperating in his defense (R. 9-13).

5. In order to prove accused guilty of the Specification of Charge II as alleged, it was necessary for the prosecution to show by competent evidence that accused, with intent to defraud, made and uttered the draft in question and received five dollars in payment for it, knowing that he had no account with or authority to draw on the drawee firm. The only evidence showing that accused uttered or passed the draft and received money for it was the testimony of the witness Miss Ray to the effect that she did not cash the draft for accused herself, but that Mrs. Martin cashed it while the witness was out to lunch. Since this witness was not present at the time the draft was cashed, her testimony is obviously based on what Mrs. Martin or some other person told her. Such testimony therefore constituted hearsay and was incompetent (See CM 254940, Holden, et al, 36 BR 1). Failure of the defense to object to the testimony does not amount to a waiver (MCM, 1928, par. 126c). Mere proof that accused signed the draft and that he had no account with or authority to draw on J. T. Knight & Son was not sufficient to show that accused committed an offense (See CM 243091, McCarthy, 27 BR 273).

6. For the reason stated, the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Charge II and the Specification thereof, but legally sufficient to support the finding of guilty of Charge I and the Specification thereof and the sentence.

Walter R. Andrews, Judge Advocate

Herbert B. Fredericks, Judge Advocate

[illegible], Judge Advocate

SPJGQ - CM 276673 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 31 MAR 1945

TO: Commanding General
Third Air Force
Tampa, Florida

1. In the case of Private Walter J. Hoffman (14104518), Squadron A, 339th AAF Base Unit (CCTS F), I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that the findings of guilty of Charge II and the Specification thereof be disapproved. Upon compliance with this recommendation, under the provisions of Article of War 50½ you will have authority to order the execution of the sentence.

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

(CM 276673)

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

SPJGN - CM 276696

5 MAY 1945

UNITED STATES	)	I TROOP CARRIER COMMAND
v.	)	Trial by G.C.M., convened at Sedalia Army Air Field, Warrensburg, Missouri, 21 February 1945. Dismissal, total forfeitures and confinement for five (5) years.
Second Lieutenant RAYMOND F. CLARK (O-774029), 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 93rd Article of War.

Specification 1: In that Raymond F. Clark, Second Lieutenant, Air Corps, 813th Army Air Forces Base Unit, Squadron T, did, at Kansas City, Missouri, on or about 4 December 1944, with intent to defraud, wilfully, unlawfully and feloniously forge an indorsement on a certain check in substantially the following words and figures, to wit: "War Finance, Warrensburg, Mo., Nov. 30, 1944, 61, 827, Treasurer of the United States, 15-51, Pay**Four hundred fifty two and 80/100 *****Dollars $452.80, to the order of **Charles H. Storms, Jr., 2nd Lt.**Sq G, George R. Toye, Finance Officer, U.S.A. 212,571", by falsely writing on the back thereof, without authority, the name of Charles H. Storms, Jr., in the following words, to wit: "Charles H. Storms, Jr.,", which said indorsement was a writing of a private nature which might operate to the prejudice of another.

Specification 2: Identical with Specification 1 except forgery of indorsement of Charles M. Schwartz, 2nd Lt., to check in the amount of $170.50

Specification 3: Identical with Specification 1 except forgery of indorsement of Richard B. Williams to check in the amount of $314.40.

Specification 4: Identical with Specification 1 except forgery of indorsement of Lester W. Snediker to check in the amount of $120.75.

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

Specification 1: In that Raymond F. Clark, Second Lieutenant, Air Corps, 813th Army Air Forces Base Unit, Squadron T, did, at Kansas City, Missouri, on or about 4 December 1944, with intent to defraud, wilfully, unlawfully and feloniously pass as true and genuine a certain check in words and figures substantially as follows, to wit: "War Finance, Warrensburg, Missouri, Nov. 30, 1944, 61,827, Treasurer of the United States, 15-51, Pay**Four hundred fifty two and 80/100 *****Dollars $452.80, to the order of **Charles H. Storms, Jr., 2nd Lt.**Sq G, George R. Toye, Finance Officer, U. S. A. 212,571", bearing on the back thereof an indorsement in words substantially as follows, to wit: "Charles H. Storms, Jr.," a writing of a private nature which might operate to the prejudice of another, which said indorsement was, as he the said, Raymond F. Clark, Second Lieutenant, Air Corps, then well knew, falsely made and forged.

Specification 2: Identical with Specification 1 except uttering check in the amount of $170.50 with forged indorsement of Charles M. Schwartz.

Specification 3: Identical with Specification 1 except uttering check in the amount of $314.40 with forged indorsement of Richard B. Williams.

Specification4: Identical with Specification 1 except uttering check in the amount of $120.75 with the forged indorsement of Lester W. Snediker.

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

Specification 1: In that Raymond F. Clark, Second Lieutenant, Air Corps, 813th Army Air Forces Base Unit, Squadron T, did, without proper leave, absent himself from his station at Sedalia Army Air Field, Warrensburg, Missouri, from about 6 January 1945 to about 8 January 1945.

Specification 2: In that Raymond F. Clark, Second Lieutenant, Air Corps, 813th Army Air Forces Base Unit, Squadron T, did, without proper leave, absent himself from his station at Sedalia Army Air Field, Warrensburg, Missouri, from about 9 January to about 19 January 1945.

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

Specification: In that Raymond F. Clark, Second Lieutenant, Air Corps, 813th Army Air Forces Base Unit, Squadron T, having been placed in arrest at Sedalia Army Air Field, Warrensburg, Missouri, on or about 8 January 1945, did, at Sedalia Army Air Field, Warrensburg, Missouri, on or about 9 January 1945, break his said arrest before he was set at liberty by proper authority.

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

3. The evidence for the prosecution shows that during December of 1944 and January of 1945, the accused was stationed at Sedalia Army Air Base, Warrensburg, Missouri, and was attached to Squadron T for administrative purposes (R. 19,23,26, Pros. Exs. A,C). On the morning of 2 December 1944, the accused went to the squadron orderly room to read the bulletin board and decided, while there, to get his November pay check. Finding the orderly room empty, he opened the desk drawer where the checks were usually kept and removed not only his check but "about fifteen" others made payable to various officers. He took the checks to his quarters where he burned all except the four made payable, respectively, to Charles H. Storms, Jr., Charles M. Schwartz, Richard B. Williams, and Lester W. Snediker, all second lieutenants. The accused then prepared four sets of typewritten orders, each of which purported to grant leave of absence to one of the aforesaid payees named in the four checks (Pros. Exs. C and E).

Armed with these fictitious orders as means of indentification, the accused set about to have the checks cashed. On 4 December 1944 he went to Woolf Brothers Department Store in Kansas City, Missouri, and there represented himself to be Second Lieutenant Charles H. Storms, Jr. He purchased a fur coat for $427.00 and paid the purchase price with the check made payable to Storms, which he indorsed in the latter's name. The check was for the sum of $452.80 and the accused received cash for the balance over and above the cost of the coat (R. 9-12, 26, 27; Pros. Exs. C and E). He then went, on 6 December 1944, to Helzberg's Diamond Shop in Kansas City and, identifying himself as Second Lieutenant Lester W. Snediker, he indorsed, in the name of the payee, the check made to the order of Snediker and gave it as payment for a Parker "51" fountain pen and pencil set which he purchased for $33.00. He took currency for the balance of Snediker's check, the face amount of which was $120.75 (R. 15,16,26,27; Pros. Exs. C andE)

On the same day the accused visited the store of J. C. Penny & Company, Sedalia, Missouri, and cashed the check made to Charles M. Schwartz after indorsing it in the name of the payee. This check was for the sum of $170.50 (R. 16-18, 26, Pros. Ex. C; R. 27, Pros Ex. E). Following the same pattern of conduct the accused cashed the check made to Richard B. Williams at the Jewelry Store of Henry Hakan, in Kansas City, where he purchased a diamond ring for $245.00. The face amount of the check was $314.40 (R. 13, 14, 16, Pros. Ex. C; R. 27, Pros Ex. E). The face value of the four checks so negotiated by the accused aggregated $1058.45. He was unknown to the true owners of the checks and had no authority to make the indorsements (R. 8, 9). He presented the fur coat, the diamond ring, and the pen and pencil set which he had obtained, to his inamorata, a Miss Mae Thomas of Oakland, California.

The accused went on leave of absence in late December 1944 and failed to report for duty upon the expiration of his leave on 6 January 1945. He attributed his tardy return on 8 January to transportation difficulties. He was confined to his quarters under a formal order of arrest on 9 January 1945 but in the late afternoon of that day, in violation of the terms of the arrest order and without permission, he left the Field. He traveled to Oakland, California, where he consulted with Mrs. Ruth Landry, sister of Miss Mae Thomas, about a "personal matter" which to him was "vitally important". The accused had decided to turn himself in to the military authorities but, before the opportunity presented itself, he was taken into custody by agents of the United States Secret Service and returned to military control on 19 January 1945 (R. 19-22, 26; Pros. Ex. A, C).

Accused was interviewed, on 2 February 1945, by Major Beverly H. Tucker, Jr., the investigating officer in the case, and, after being warned of his rights, gave a statement detailing his acquisition and negotiation of the checks in question and also admitting the other offenses charged (R. 23-26, Pros. Ex.C).

4. The accused, after his rights relative to testifying or remaining silent had been explained to him, elected to make an unsworn statement respecting his pre-trial confession. He asserted that he understood a sworn pre-trial statement would be to his advantage but he received this impression from a Secret Service Agent who interviewed him in the city of San Francisco, and not from Major Tucker, the officer appointed to investigate the charges (R. 28).

The accused elected to make a sworn statement on all other aspects of the case (R. 28). He testified that he went to the orderly room on the morning of 2 December 1944 for the purpose of reading the bulletin board but decided while there to pick up his November pay check. It was the practice to get checks from the Charge of Quarters or other person in authority, but in the absence of such person it was customary for officers to open the desk drawer and remove their checks. The orderly room was empty

that morning, so the accused took his check and, at the same time, removed others. He decided to cash the four checks made payable to second lieutenants and, in order to provide means of identification, he typed four sets of orders, each of which named one of the payees designated in the four checks (R. 28, 32). He endorsed each of the checks in the name of the payee appearing on the face thereof and cashed them at four different stores. With the proceeds, he purchased a fur coat, a diamond ring, and a pen and pencil set, all of which he presented to Miss Thomas. He had asked her hand in marriage and in view of her indecision the accused thought that these gifts "would hurry things along" (R. 19, 30-31). He did not know the payees named in the checks and the indorsements were made without their authority. The plan to appropriate the checks and to obtain merchandise or money for them was in his mind when he took them, and he knew then that he was doing wrong (R. 31). Late in December 1944 the accused went on leave to Portland, Oregon, where he saw his father, Miss Thomas, and other friends. His leave expired at midnight on 6 January 1945 but, because of transportation difficulties, he did not return to duty until the morning of 8 January 1945 (R. 29). He was thereupon placed in arrest and confined to his quarters but, because of "a lot of mixed up emotions", he again left the post. He had caused Miss Thomas considerable trouble and embarrassment by sending her gifts which had to be returned, and realizing that she might be pregnant, he felt it necessary to talk with her or her sister. The accused did not break his arrest and leave the post to avoid punishment. The items which he gave to Miss Thomas have been returned and full restitution of the money received, over and above the value of the merchandise, has been made (R. 29-30).

It was stipulated that Miss Thomas would, if called as a witness, testify that she, in fact, returned the fur coat and diamond ring (R. 32, Def. Ex. 2). It was also stipulated that if Mrs. Virginia Clark Hamilton, the accused's sister, were called as a witness, she would testify that Miss Mae Thomas had been requested to return the Parker pen and pencil set (R. 32; Def. Ex. 3).

Mr. Rex Putnam, Superintendent of Public Instruction for the State of Oregon, stated that he had known the accused and his family for many years, that the accused has an excellent background and has always been industrious, thoroughly dependable, and honest. Mr. Putnam feels that the good qualities of the accused will reassert themselves if an opportunity is provided (R. 33, Def. Ex. 5). Mr. Willard L. Marks, prosecuting attorney of Albany, Oregon, knows that the accused and his family have enjoyed a good reputation in their community for many years (R. 33, Def. Ex. 6). The accused's father stated that his son by nature is not possessed of criminal motives or inclinations and, if given a chance to do his part in the war, would "reaffirm every hope I have held for him since the time he was a little boy" (R. 33, Def. Ex. 4).

5. Each of the four Specifications of Charge I alleges that the accused did "with intent to defraud, willfully, unlawfully and feloniously forge an indorsement on a certain check" by signing without authority the name of the payee on the back thereof "which said indorsement was a writing of a private nature which might operate to the prejudice of another." These offenses are set forth as violations of the 93rd Article of War.

Forgery is defined as "the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice", and among those "instruments" which may be the subjects of forgery are "checks" and "indorsements". Par. 149j, MCM 1928. The four acts of forgery with which the accused is charged were conclusively established by the evidence. Indeed, the material facts were not controverted. The accused surreptitiously took the checks with the avowed purpose of obtaining the money which they represented for his personal use. Pursuant to this criminal design, he fabricated four sets of leave orders which he used for identification purposes and, holding himself out as the payees, he indorsed and negotiated the checks and obtained their face value aggregating $1058.45, either in money or merchandise. That the possession, indorsement, and negotiation of the checks was unknown to, and without the authority of, the officers named as payees, was established by their testimony and readily admitted by the accused. His entire course of conduct and his own candid statements revealed, beyond any reasonable doubt, the intent to defraud, which is an element of proof necessary to support the convictions of forgery. See 7 BR 326, CM 204227, Merchant. The evidence is uncontradicted and compelling and is legally sufficient to sustain the findings of guilty of Charge I and its Specifications.

6. Each of the four Specifications of Charge II alleges that the accused did "with intent to defraud, wilfully, unlawfully and feloniously pass as true and genuine a certain check.....bearing on the back thereof an indorsement.....[which was] a writing of a private nature which might operate to the prejudice of another, which said indorsement was, as he the said [accused] then well knew, falsely made and forged". These offenses are set forth as violations of the 95th Article of War.

In the foregoing Specifications the accused allegedly passed and uttered the same four checks on which he is alleged, in the Specifications of Charge I, to have placed forged indorsements. The evidence shows that the accused indorsed and immediately negotiated each check. While the acts of forgery and uttering were practically simultaneous as to each check, they constituted two separate and distinct offenses, and the accused was properly charged with both. Pars. 149j and 152c, MCM, 1928. Passing or uttering a forged instrument is made a felony by the laws of the District of Columbia (sec. 1401, Title 22, D.C. Code), and Winthrop (Military Law and Precedents, Reprint, p. 718) cites the commission of a felony as illustrative of conduct unbecoming an officer and a gentleman. 22 BR 91, CM 235496, Arnold. The cogent and uncontroverted evidence is legally sufficient to sustain the findings of guilty of Charge II and its Specifications.

7. Specification 1 of Charge III alleges that the accused did "without proper leave, absent himself from his station.....from about 6 January 1945 to about 8 January 1945". Specification 2 of Charge III alleges that the

accused was absent without leave "from about 9 January 1945 to about 19 January 1945". These offenses are set forth as violations of the 61st Article of War. The Specification of Charge IV alleges that the accused "having been placed in arrest at Sedalia Army Air Field, Warrensburg, Missouri, on or about 8 January 1945, did.....on or about 9 January 1945, break his said arrest before he was set at liberty by proper authority". This Specification is laid under Article of War 69.

The accused entered pleas of guilty to the foregoing Specifications and Charges. The first unauthorized absence resulted from an overstay of leave, which the accused attributed to delays in transportation. In the second instance he violated his order of arrest and embarked on a period of unauthorized absence because of a "lot of mixed up emotions". The record indicates no circumstances which justify the conduct of the accused and the evidence, coupled with the pleas of guilty, is sufficient to sustain the findings of the court.

8. The accused is about 23 years of age and is unmarried. War Department records disclose that the accused was graduated from high school and for one year attended Oregon State College where he studied Civil Engineering. He worked as an electric welder in Portland, Oregon, for several months before enlisting in the army on 22 October 1942. He began his training as an aviation cadet on 16 February 1943 and was commissioned a temporary second lieutenant, Army of the United States, on 15 April 1944. He has been on active duty as an officer since the last date.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Articles of War 61, 69, or 93, and is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate

Robert J. O'Connor, Judge Advocate

Samuel Morgan, Judge Advocate

SPJGN-CM 276696 1st Ind.
Hq ASF, JAGO, Washington 25, D. C. 19 JUN 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 Second Lieutenant Raymond F. Clark (0-774029), Air Corps.

2. Upon trial by general court-martial this officer pleaded not guilty to and was found guilty of forging indorsements on four government checks of a total face value of $1058.45, in violation of Article of War 93; and of uttering and passing the same four checks, in violation of Article of War 95. He pleaded guilty to and was found guilty of absenting himself without leave for a period of fourteen days, in violation of Article of War 61; and of breaking arrest, in violation of Article of War 69. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for twenty years. The reviewing authority approved the sentence but reduced the period of confinement to five years and forwarded the record of trial for action under Article of War 48.

3. 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 and the sentence as approved by the reviewing authority and to warrant confirmation thereof.

On 2 December 1944 the accused surreptitiously removed from the squadron orderly room a number of monthly pay checks made to the order of various officers. He burned all of the checks except four which were payable to second lieutenants. He then fabricated four sets of orders, each of which purported to grant a leave of absence to one of the payees named in the checks. Using these orders as a means of identification, the accused negotiated the checks after indorsing each of them in the name of the payee. He received the face value of the checks either in money or merchandise. He went on leave of absence in late December 1944 and failed to return upon the expiration of his leave on 6 January 1945. He reported to his organization on 8 January 1945 and on the next day was confined to his quarters under an order of arrest. He violated the arrest order by leaving the field in the late afternoon of 9 January 1945 and remained absent from military control until 19 January 1945.

The actions of the accused in taking, indorsing, and negotiating the pay checks of other officers reveal a course of conduct which was

highly criminal in character and which showed a shocking disregard for the rights and property of his fellow officers. The only explanation for such reprehensible acts suggested by the record is that the accused was enamored of a young lady and wanted money with which to buy gifts for her. In reducing the period of confinement from 20 to 5 years the reviewing authority apparently considered the former good character of the accused as evidenced by letters admitted into evidence, the fact that the items which accused purchased with the checks had been returned, and letters from members of the court recommending clemency. In view of the serious character of the offenses and the high degree of moral turpitude involved in the forgery and negotiation of the checks, I believe that the five year period of confinement is appropriate. I recommend, therefore, that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted, that the sentence as thus modified be ordered executed, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

4. Consideration has been given to a letter from Honorable Guy Cordon, United States Senator from California, suggesting that attention be given to letters from Honorable Earl Snell, Governor of Oregon, Mr. Rex Putnam, Superintendent of Public Instruction for the State of Oregon, and Mr. Minor T. Clark, father of the accused, recommending clemency in behalf of the accused.

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

Myron C. Cramer

3 Incls
Incl 1 - Record of trial
Incl 2 - Form of action
Incl 3 - Ltr. fr. Hon. Guy Cordon, w/incls.

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 265, 3 Jul 1945)

vol 48 Army JAG Bd. Rev.

vol 48 Army JAG Bd. Rev.

TITLE

DATE	BORROWER'S NAME	EXT.
15 Nov	Cdr. Brown	32230

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT